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Overview of the GMA Process

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THE GMA PROCESS: WHAT HAVE WE GOT OURSELVES INTO?

I. INTRODUCTION

With a deadline of September 1, 2010, groundwater conservation districts in Texas are scrambling to comply with the "joint planning" requirements of Tex. Water Code Sec. 36.108. Sixteen Groundwater Management Areas ("GMAs") have been established, and many have adopted the statutorily mandated "desired future conditions" (or "DFCs"). Others have yet to complete the task.

What is this GMA process, and where will it lead? So far, the process brings to mind the oft-repeated line from *O Brother Where Art Thou?*: "Damn, we're in a tight spot."

II. WHY GMAs?

A quick history lesson is required to understand why we have GMAs in the first place.

The Early Regulation of Groundwater. The people of Texas amended its constitution in 1916 to include the "conservation amendment," which directed the state to take appropriate steps to conserve the natural resources of the state, including both oil and gas and groundwater.[1] In 1925, the Legislature passed Chapter 25, which provided for the creation of water control and improvement districts by landowner petition.[2] In 1949, the Legislature authorized the creation of Underground Water Conservation Districts.[3] This Act defined "reservoir" as follows:

> (4) "Underground Water Reservoir" is a specific subsurface water bearing reservoir having ascertainable boundaries and containing underground water capable of being produced from a well at the rate of not less than one hundred fifty thousand (150,000) gallons per day.

The term "subdivision of an underground water reservoir" was defined as:

> (5) "Subdivision of an underground water reservoir" is that definable part of an underground water reservoir from which withdrawal of waters cannot measurably affect the underground water of any other part of such reservoir, based upon existing conditions and reasonably foreseeable conditions, at the time of the designation or alteration of such subdivision.

Importantly, Subsection C of Chapter 306 placed limitations on the creation of underground water conservation districts:

> C. No petition for the creation of a District to exercise the powers and functions set forth in Subsection B of this Section 3c shall be considered by a Commissioners Court or the Board, as the case may be, unless the area to be included therein is coterminus with an underground water reservoir or subdivision thereof which theretofore has been defined and designated by the Board as an underground water reservoir or subdivision thereof. Such district, in conforming to a defined reservoir or subdivision, may include all or parts of a county or counties, municipal corporations or other political subdivisions, including but not limited to Water Control and Improvement Districts.

Thus, the early legislation recognized the imperative that regulation must be based on hydrological units. Central to the thesis was the idea that a proper management unit should be defined by the impact that withdrawal of water within the unit would produce elsewhere; if withdrawal within a management area could impact water outside the management area, the management area was too narrowly drawn.

Chapter 306 was later codified into Texas Water Code Chapter 52.[4] As of 1971, Section 52.001 defined "underground water reservoir" and "subdivision of an underground water reservoir" as follows:

> (4) "Underground water reservoir" means a specific subsurface water-bearing reservoir having ascertainable boundaries and containing underground water that can be produced from a well at a rate of 150,000 gallons or more a day.
>
> (5) "Subdivision of an underground water reservoir" means a reasonably definable part of an underground water reservoir in which the underground water supply will not be unreasonably affected by withdrawing water from any

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[1] TEX. CONST. art. XVI, § 59.

[2] Acts 1925, 39th Leg., ch. 25, s 1.

[3] Acts 1949, 51st Leg., ch. 306, s 1.

[4] *See* Op. Tex. Att'y Gen. No. JM-1024 (1989).

> part of the reservoir, as indicated by known geological and hydrological conditions and relationships and on foreseeable economic development at the time the subdivision is designated or altered.

Section 52.023 remained steadfast as to the hydrological basis for creating groundwater conservation districts, but note the subtle change in wording with respect to "subdivisions." Definitionally, the concept of hydrological units began to give way to other factors such as "foreseeable economic development."

The First Groundwater Conservation Districts. Starting in 1955, three groundwater districts were formed over the massive Ogallala Aquifer in West Texas and the Panhandle. These initial districts, while over the same aquifer, were actually in hydrologically distinct subdivisions of that reservoir: the High Plains Underground Water Conservation District was located south of a neck of the aquifer near Amarillo; the Panhandle Groundwater Conservation District was located in a subdivision of the aquifer north of Amarillo and south of the Canadian River, and the North Plains Groundwater Conversation District was located in the hydrologically distinct subdivision north of the Canadian River. None of these districts encompassed the entire subdivision of their respective areas, yet each encompassed areas such that withdrawal of groundwater would not affect other subdivisions, and each was based on existing conditions or reasonably foreseeable conditions of the era. Unfortunately, however, the Legislature did not demand that these early districts fully encompass the subdivisions over which they were created.

In 1985, the Legislature altered groundwater statutes to allow further "slippage" in the definition and, accordingly, in the creation of groundwater conservation districts. In particular, Section 52.023 was amended to read:

> (c) The boundaries of a district created under this subchapter must be coterminous with or inside the boundaries of a management area designated by the commission pursuant to this subchapter or the boundaries of a critical area designated by the commission pursuant to Subchapter C of this chapter.

Section 52.024 was amended to read:

> On its own motion from time to time, or on receiving a petition, the commission may designate underground water management areas. Each management area shall be designated with the objective of providing the most suitable area for the management of the underground water resources of the part of the state in which the district is to be located. To the extent feasible, the management area shall coincide with the boundaries of an underground water reservoir or a subdivision of an underground water reservoir. However, the commission also may consider other factors, including the boundaries of political subdivisions….

More recently, creation of districts is governed by Chapter 36 of the Water Code. In Section 36.012, the Legislature has mandated that a new district may not include territory located in more than one county except on a majority vote of the voters residing within the territory of each county sought to be included. Thus, new districts will by necessity be formed along county lines rather than on hydrological principles. In that same section, it is provided that districts may include territories that do not connect physically as long as the land in between is in the district.

Accordingly, groundwater conservation district boundaries no longer have to conform to hydrological boundaries. Political boundaries now trump aquifer boundaries in most instances. This has opened the door to the creation of multiple groundwater conservation districts overlying a single aquifer.

The Creation of Groundwater Management Areas. In 1995, Section 35.004 was added to the Water Code, requiring the TWDB to designate "groundwater management areas covering all major and minor aquifers in the state," with the requirement that:

> [e]ach groundwater management area shall be designated with the objective of providing the most suitable area for the management of the groundwater resources. To the extent feasible, the groundwater management area shall coincide with the boundaries of a groundwater reservoir or a subdivision of a groundwater reservoir.

While the legislation strained to get back to hydrologically based management, the Legislature added a final sentence to Section 35.004: "The Texas Water Development Board also may consider other factors, including the boundaries of political subdivisions." Nevertheless, the sixteen groundwater management areas created under Section 35.004 adhered closely to aquifer boundaries, demonstrating

an intent to drive management in the direction of science and hydrology rather than politics.

The Addition of "Desired Future Conditions." In 2005, the Legislature still recognized that coordination between districts overlying the same aquifer or subdivision of an aquifer was nonexistent. House Bill 1763 therefore created a new approach: joint planning. Section 36.108 was added to the Water Code to provide:

> Sec. 36.108. JOINT PLANNING IN MANAGEMENT AREA. (a) In this section, "development board" means the Texas Water Development Board.
> …
> (d) Not later than September 1, 2010, and every five years thereafter, the districts shall consider groundwater availability models and other data or information for the management area and shall establish desired future conditions for the relevant aquifers within the management area. In establishing the desired future conditions of the aquifers under this section, the districts shall consider uses or conditions of an aquifer within the management area that differ substantially from one geographic area to another.
>
> The districts may establish different desired future conditions for:
> (1) each aquifer, subdivision of an aquifer, or geologic strata located in whole or in part within the boundaries of the management area; or
> (2) each geographic area overlying an aquifer in whole or in part or subdivision of an aquifer within the boundaries of the management area.
>
> …
>
> (d-2) Each district in the management area shall ensure that its management plan contains goals and objectives consistent with achieving the desired future conditions of the relevant aquifers as adopted during the joint planning process.

The Process Plays Out. Based on the above, the "GMA Process" is therefore the process of establishing DFCs in each GMA area. How has this process played out across the state? Some GMAs, like GMA 1, have formed loose associations and passed bylaws for the conduct of their business. Others, like GMA 8, have been less formal, meeting as and where they could, without good funding and with little professional assistance. Several GMAs have finished their business, adopting DFCs and sending those on to the TWDB.

III. THE APPEALS PROCESS

Once the GMAs adopt their respective DFCs, the process may end if everyone is happy with the results. In the event that someone is unhappy, however, Sec. 36.108 provides two appeals processes. Section 36.108(l) establishes a mechanism for appeals to the Texas Water Development Board. Section 36.108(f) establishes a mechanism for appeals to the Texas Natural Resources Conservation Commission ("TNRCC").

Texas Natural Resources Commission Appeal. If a district has refused to engage in joint planning or the process failed to result in adequate planning, including the establishment of reasonable desired future conditions of the aquifers, Section 36.108(f) provides a district or person with a legally defined interest in groundwater[5] may file a petition with the Commission requesting an inquiry. The petitioner must assert one of several bases for the complaint to the Commission:

1. a district in the groundwater management area has failed to adopt rules;
2. the rules adopted by a district are not designed to achieve the desired future condition of the groundwater resources in the groundwater management area established during the joint planning process;
3. the groundwater in the management area is not adequately protected by the rules adopted by a district; or
4. the groundwater in the groundwater management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules.

As of this writing, there have been no challenges leveled under Subsection (f), likely because the DFC process has not yet matured to the point that districts have actually had time to review and revise their individual rules. Note that the first three potential challenges relate to the adoption of rules. The first ground challenges the district or districts that have not adopted any rules at all, which is unlikely to exist in today's districts. The second ground is a challenge based on the failure of each district in a GMA to adopt rules that are designed to achieve the DFCs of the groundwater resources in the GMA as a whole. Some districts appear to believe that their rules only need to

[5] "Legally defined interest" is not a defined term under the Water Code. It probably refers to any type of ownership recognized under Texas law.

be designed to achieve their individual DFC where multiple DFCs exist in a GMA, but the language of this section does not support that narrow view. To be interpreted that narrowly, the language would have to read "the rules adopted by a district are not designed to achieve the desired future condition of the groundwater resources in the groundwater district established during the joint planning process." But the language used by the Legislature is "in the groundwater management area," expanding the scope of each district's responsibility for the DFCs selected across a much broader area. In GMAs where multiple districts exist over a single aquifer, and the districts have adopted different DFCs for each county or groundwater district, it will be interesting to watch each district try to fashion new rules that are designed to achieve each DFC in every area of the GMA. Because no district has extra-territorial jurisdiction, it is arguable that each district will have to do whatever is necessary to its own rules to assure that every DFC is achieved across the GMA.

The fourth basis for challenge addresses the situation where a district has adopted rules but failed to enforce compliance with those rules. Examples could be a district that passes a production limit on a per acre basis but fails to require metering to determine compliance, fails to require producers to report what required meters show, or fails to take action against those who violate the production limits.

If the Commission finds evidence adequate to show one of the alleged conditions exist, the Commission appoints a review panel. Section 36.108(h). The review panel submits a report and the Commission can ultimately take a number of actions. *See* Section 36.108(k), 36.3011, 36.303. These actions include ordering the district to take certain actions, dissolving the board of the district, or dissolving the district.

Texas Water Development Board Appeal. The second method for challenging DFCs is set forth in Section 36.108(l), which provides that a person with a legally defined interest in groundwater in a GMA can bring a petition before the Board asserting that the districts in a GMA did not establish "a reasonable desired future condition" for the groundwater resources in the GMA.[6] Section 36.108(l) does not further suggest the scope of inquiry regarding the reasonableness of DFCs. However, Texas Administrative Code Section 356.45 sets forth several factors that the Board "shall" consider:

> The board shall consider the following criteria when determining whether a desired future condition is reasonable:
>
> (1) the adopted desired future conditions are physically possible and the consideration given groundwater use;[7]
>
> (2) the socio-economic impacts reasonably expected to occur;
>
> (3) the environmental impacts including, but not limited to, impacts to spring flow or other interaction between groundwater and surface water;
>
> (4) the state's policy and legislative directives;
>
> (5) the impact on private property rights;
>
> (6) the reasonable and prudent development of the state's groundwater resources; and
>
> (7) any other information relevant to the specific desired future condition.

Given this laundry list of factors that the Board must consider in reviewing "reasonableness," a petition challenging DFCs should be couched in the exact words of the Administrative Code to the extent applicable. Board staff believes that the evidence adduced at a hearing under Section 36.108(l) is limited to the issues asserted in the petition;[8] therefore, a challenge to the reasonableness of a DFC should include as many of these factors as are applicable.

The first factor that must be considered, that the "adopted desired future conditions are physically possible and the consideration given groundwater use," offers an opportunity for successful challenges to DFCs. This is particularly true where the districts in a GMA have adopted disparate DFCs in adjoining political subdivisions overlying the same aquifer. GMA 8 offers an excellent illustration of this problem. That particular GMA consists of 41 counties and 8 groundwater districts. Not all counties are included in groundwater districts. Nevertheless, the districts of GMA 8 established DFCs for every county in the management area, including those counties that are not under the jurisdiction of any district. In many instances, adjoining counties have DFCs that differ substantially. Exhibit 2 illustrates the situation that now exists. Although the Board staff theoretically ran pumping models that showed these different adjacent

[6] Note that the Code refers to a single DFC for groundwater resources in a GMA; various districts assert that the language of Section 36.108(d) allows multiple DFCs for an homogenous aquifer within a GMA.

[7] The quoted language of subsection 1 is copied verbatim from the language found in the Code.

[8] Correspondence from Joe Reynolds to Marvin W. Jones, October 16, 2009, attached as Exhibit 1.

DFCs were "physically possible," the reality is that if any landowner in any unregulated county drills a big enough well, he can affect not only the adjacent counties but also counties as far away as 100 miles. Exhibit 3 shows the results over 60 years of pumping a 3 well field at 2,000 gallons per minute per well. The field is located in an unregulated county adjacent to a groundwater district. This type of pumping was not modeled and cannot be predicted, but it will cause the DFCs to be adversely affected and will prove that the DFCs are not really "physically possible"—they are merely potentially possible. Given the absence of rules governing most of GMA 8, it is left to the districts of the area to devise rules that achieve all of the DFCs adopted for the whole management area. Because no district has jurisdiction over the whole aquifer, and because groundwater will flow according to immutable laws of physics, these disparate DFCs will prove practically, if not physically, impossible.

The "impact on private property rights" factor requires a legal analysis concerning (1) what property rights exist and (2) how those rights are legally impacted by the DFCs adopted. This criteria provides fertile ground for successful attacks against DFCs because virtually every GMA has adopted different DFCs based on political subdivisions such as county lines, even though the political subdivisions overlie the same aquifer. Generally, each district in a GMA has different rules and procedures related to groundwater permitting and production. To the extent these rules vary from district to district overlying the same aquifer, owners in these districts are certain to be subject to rules that will prevent some from producing as much groundwater as their neighbors. It is this differential treatment that leads to "impact on private property rights."

To understand the potential impact on private property rights posited by the different rules of districts over the same aquifer, it is necessary to understand ownership of private property and its implications. It is now well established that groundwater belongs to the surface owner. Because landowners have a vested property right in groundwater in place, constitutional protections attach, reigning in unbridled regulation of groundwater. In 1916, the people of the State of Texas amended its constitution to require the Legislature to pass laws for the preservation and conservation of the natural resources of the State.[9] Thus, while ownership of the groundwater is clearly vested in the owner of the surface, that ownership is nevertheless subject to the police power of the State. Such police power is exercised, in the instance of groundwater, through Chapter 36 of the Texas Water Code. This being true, the question becomes what limitations, if any, apply to the exercise of the police power of the State through its groundwater districts? As with any exercise of the police power of a state, a natural tension exists between lawful exercise of the police power and impermissible interference with private property.

While Texas courts are still grappling with the limits of the application of the police power through groundwater districts, considerable guidance can be gleaned from well-established case law relating to oil and gas.[10] From the early part of the last century, Texas courts have been called upon to determine the limits of the lawful exercise of authority by the Texas Railroad Commission, the entity that exercises regulatory authority under the same constitutional amendment as groundwater districts. These cases are instructive regarding the nature of the correlative rights of adjoining owners of groundwater (the "fair chance doctrine") and the implications for both the State and the landowner when regulations unnecessarily abridge the rights of groundwater owners.

A seminal discussion of the fundamental constitutional issues at play here is found in *Marrs v. Railroad Commission*.[11] There, certain mineral rights owners challenged a ruling by the Texas Railroad Commission concerning production allowances in a field long shown to be productive of oil.[12] 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 the area.[13] 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.[14] Before the regulatory action in question, the owners in this 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.[15] The Railroad Commission then established field rules which prevented this line of "shield" wells from producing

[9] TEX. CONST. art. XVI, § 59.

[10] Some have suggested that oil and gas cases cannot be applied to groundwater because groundwater is not a mineral. While it is true that groundwater has not been legally defined as a "mineral," the legal analysis cannot end at an examination of molecular makeup. Like oil and gas, groundwater is fugacious. It often exists in the same formation as oil and gas, and moves according to the same principles, articulated in 1856 by Henry Darcy. It is this tendency to move underground that leads to the application of the "rule of capture" with respect to groundwater as well as oil and gas. It is this characteristic that mandates the application of oil and gas cases to groundwater issues.

[11] 177 S.W.2d 941, 948 (Tex. 1944).

[12] *Id.* at 943.

[13] *Id.* at 943-45.

[14] *Id.*

[15] *Id.* at 949.

their maximum capacity.[16] The effect of this was to permit oil from the southern area to once again migrate toward the pressure sink in the north area.[17] 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 section to the north.[18]

The questions presented were whether the Commission's orders were subject to judicial review, and if so, whether the actions of the Railroad Commission were arbitrary, unjust and discriminatory, and deprived plaintiffs of their just property rights. Answering those questions in the affirmative, the Texas Supreme Court stated:

> Under the settled law of this State oil and gas form a part and parcel of the land wherein they tarry and belong to the owner 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.[19]

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.[20]

The Supreme Court then elaborated at length concerning the legal implications of this "taking:"

> Our Constitution authorizes the conservation of our natural resources. The authority to execute this constitutional provision in so far as it applies to oil and gas has been vested by the Legislature in the Railroad Commission of the State. Undoubtedly, in carrying out this constitutional purpose, the Commission must, as far as possible, act in consonance with the vested property rights of the individual. While our Constitution thus provides for the conservation of our natural resources for the benefit of the public, there are other constitutional provisions for the protection of the property rights of the individual.

What are these countervailing constitutional provisions? The Court identified Article I, Section 17, which prohibits the taking of one's property for public use without adequate compensation, and Article I, Section 3, which provides for equal rights for all men. Further, the Court pointed to Article I, Section 19, which provides that no citizen shall be deprived of his property except by the due course of the law of the land. Finally, the Court identified the Fourteenth Amendment to the United States Constitution, which provides that no State shall deprive any citizen of his property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[21]

The Court concluded: "This Court has many times said that the Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different***305** oil fields, or between different owners in the same field."[22]

Applying the above legal principles to the issue presented by disparate DFCs in the same aquifer, it is readily apparent what the problem is. If regulations are crafted that fail to apply to the entire field being managed, any line drawn inside that field will be arbitrary, and will result in restricting property rights of some owners while giving an arbitrary advantage to others. Worse, different DFCs (and ensuing obligatory rules) actually amount to a state endorsed plan to take water from owners in one DFC area (district/county) and give it to owners in an adjacent area. Indeed, many of the Groundwater Availability Model runs performed by the Board staff as part of the DFC process actually plan for some districts to achieve their DFC goals by taking water from adjacent districts. Therefore, groundwater belonging to private individuals and entities is assigned to the managed available groundwater totals in adjacent groundwater districts, without compensation to those from whom it is taken.

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16 *Id.* at 946.
17 *Id.* at 945.
18 *Id.* at 946.
19 *Id.* at 948 (citations omitted) (emphasis added).
20 *Id.*
21 *Id.* at 949.
22 *Id.*

Similarly, any regulation by groundwater districts (or groups of groundwater districts) that treats owners in the same field differently is suspect and likely results in deprivation of private property rights. For example, if a groundwater district arbitrarily draws a line across a single aquifer and allows production of 1 acre foot per acre per year on Side A, but 2 acre feet per year on Side B, the owners on Side B have been advantaged by governmental action while those on Side A have been disadvantaged—they are no longer able to protect themselves against drainage. At the GMA level, if different DFCs are established over a single aquifer based on political subdivisions, those on one side of a county line will be denied a fair chance to produce as compared to their neighbors across the line.[23] The Railroad Commission cannot base different production allowable on the existence of a county line, and neither can groundwater districts. Accordingly, the different DFCs being established across the state in the name of "joint planning" probably violate constitutional rights.

Note that the seventh factor is basically a "Mother Hubbard" clause—the Board may consider "any other information relevant to the hearing." However, §356.45(c) specifies that the Board shall base recommended revisions only on evidence in the hearing record. This implies that the parties can adduce evidence at the hearing that goes beyond the six listed factors, subject to the limitation that the evidence must be relevant to issues raised in the petition. Again, it would be wise to track the language of §356.44(g) in the petition to the greatest extent possible, but the final criteria allows petitioners to deviate from this listing in order to plead and prove any other theory for why a DFC is not reasonable.

The Hearing Process. Once a petition is received, the Board determines if it is "reviewable" under the standards set forth in Texas Administrative Code Section 356.43(a). A petition is reviewable if:

> (1) the petition conforms to the requirements of this subchapter;
> (2) the districts have adopted their desired future conditions;
> (3) the petitioner has provided the districts, whose adopted desired future condition is being appealed, with a copy of the petition and supporting evidence that meets the requirements of subsection (b) of this section, at least thirty (30) days prior to filing an appeal with the board;
> (4) the substantive issues raised in the petition have not been previously reviewed by the board; and
> (5) no more than one year has passed since the districts' adoption of the desired future condition.

Note that the petitioner must provide a copy of the petition to the affected districts at least 30 days before filing it with the Board,[24] and the petition must be filed within one year of the adoption of the challenged DFC.[25] The Board staff has determined that the 30 day requirement does not extend the one year deadline for filing a petition.[26] Thus, prudence dictates that the petitioner send a copy of the proposed petition to the relevant districts well in advance of the one year deadline. The Board may, however waive any of these provisions upon a showing of good cause. Section 356.43(a)(6).

Section 356.43(b) establishes requirements for the form and content of the petition. For example, the petition must be addressed to the executive administrator and must be sworn to before a notary public. Beyond these matters of form, the petition contains documents proving the petitioner's legally defined interest in groundwater, and must include "a certified copy of a resolution or other official document describing the extent and nature of the authority of the representative of the petitioner."[27] Section 356.43(b) requires a summary of the evidence upon which petitioner relies in asserting that the DFC is not reasonable, and also requires petitioner to set forth the evidence that petitioner will rely on at the hearing.[28]

Once the petition is received, the Board has business 10 days to acknowledge receipt. Once that

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[23] Assuming, of course, that the groundwater conservation districts follow through on the statutory mandate that their management plans and rules must be designed to achieve the desired future conditions set at the GMA level. *See* TEX. WATER CODE §§ 36.108(d)(2), 36.108(f)(1) and 36.108(f)(2). To the extent that such rules impact neighboring areas with different DFCs, it is clear that each district in a GMA must "tune" its rules to achieve the DFC of its neighbors in the GMA.

[24] No explanation is given for the requirement that the petition be delivered to the districts at least 30 days before filing with the Board. There is no requirement that the districts review and respond to the petition.

[25] The Board staff appears to believe that the one year deadline is a complete bar to filing a petition.

[26] Correspondence from Kenneth Peterson to Ronald Fieseler, dated September 11, 2009, attached as Exhibit 7.

[27] Again, no suggestion is made regarding the type of documentation that will be acceptable to prove the nature and extent of the representative's authority to represent the petitioner. If the petition is filed by an attorney, for example, is the attorney required to demonstrate more authority than he or she would if filing a petition in a state district court?

[28] This requirement is not viewed as an impediment to the introduction of other evidence relevant to the issues raised in the petition. See, for example, correspondence from Joe Reynolds, dated October 16, 2009, attached as Exhibit 1 and October 30, 2009, attached as Exhibit 4.

acknowledgement is received, the districts may, within 10 days of their receipt of Board acknowledgement, request postponement of the proceedings for 60 days to "encourage consultation and resolution of the petition." However, no provision is made to mandate any actual dispute resolution procedures.

Under Section 356.43(d), the petition must be presented to the Board within 120 days after the expiration of the 60 day postponement.[29] Section 36.108(l) requires a hearing be held by the executive administrator or his designee before the petition is presented to the Board, which means that the evidence gathering hearing must be held sometime after the expiration of the 60 day postponement and before the expiration of 120 days. As a practical matter, the hearing must take place early enough in the 120 day period to allow the staff to digest the evidence and make recommendations to the Board. Thus, the parties will almost necessarily have to begin preparation for the evidentiary hearing while engaged in "consultation and resolution."

The Evidentiary Hearing. While the Water Code requires an evidentiary hearing before the Board hears the petition, it is silent as to the nature of that hearing. The Administrative Code, however, sets forth certain parameters for this evidence gathering hearing. Section 356.44 reiterates that the executive administrator shall hold at least one hearing "to take testimony on the petition from the petitioner and respondents." The hearing must be at a central location in the GMA.

The nature of the evidentiary hearing is important. Section 356.44(d) explicitly states that the hearing is not a "contested case" hearing. Further, the Board staff has made it abundantly clear that the evidentiary hearing will not in fact be a contested case hearing.[30] This invokes a phrase with specific meaning and import: the hearing is not of the type required to invoke the substantial evidence rule upon any subsequent suit challenging the DFC. Note that nothing in the Water Code or the rules of the Board requires or even mentions an obligation to adhere to the Texas Administrative Procedure Act in terms of the joint planning required by §36.108. Similarly, the Board has stated that "it decided when it developed the petition process that the Rules of Evidence and Rules of Civil Procedure would not apply to these proceedings."[31] It can therefore be assumed that the appeal procedure outlined in § 36.108(l) is not intended to provide the type of hearing in which the legal rights, duties or privileges of a party will be determined.[32] Instead, the procedure outlined more resembles rule making than the adjudication of rights. This is reinforced by the fact that the Water Code does not give the Board the authority to issue process (or cause it to be issued in aid of a party), nor does it give the Board the power to issue orders concerning the rights of the parties that are enforceable.

It is also noteworthy that § 356.44(f) provides for taking "written evidence in any form" from "other interested persons" after the close of the hearing, which becomes part of the record to be considered by the Board under § 346.44(g)(3). TEX. GOV'T CODE 2001 (the Administrative Procedures Act) "[d]oes not support the practice of allowing unsworn public comment that is not subject to cross-examination in an adjudicative proceeding…"[33]

Given the clear proclamation that the hearing is not a contested case hearing, it becomes important to understand just what type of proceeding this is. Clearly, the proceeding is not "litigation." It is likewise not an adjudicative hearing as that term is generally understood. This is true because the hearing does not contemplate cross examination and does not permit evidentiary objections. No provision is made to subpoena witnesses or compel discovery of any kind. Therefore, if the Board's action on DFCs is meant to affect the individual rights of the parties, the procedure would violate procedural due process.[34] In fact, even the GMA process itself cannot be characterized as adjudicative in nature because the districts in the GMAs are not statutorily required to hold contested case hearings before adopting DFCs. At most, the opportunity for meaningful input from any private party is limited to making "public comments" at GMA meetings. The districts, individually and acting collectively as GMAs, are loath to permit cross examination of their consultants or members.

Because the proceeding is not a contested case, is not litigation and is not adjudicatory in nature, a party should be able to challenge DFCs through the judiciary, and should not face the substantial evidence rule. Again, any other result would result in a deprivation of procedural due process. Further, the litigation exception to TOMA does not apply to this procedure, and the districts cannot go into closed session to discuss the petition or the hearing. Likewise, the districts meeting as members of the

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[29] No provision requires that the petition be presented within 120 days of the Board acknowledgement of receipt of the petition if the districts do not request postponement, apparently recognizing that the districts will always request postponement.

[30] Correspondence from Joe Reynolds attached as Exhibit 4.

[31] Correspondence from Joe Reynolds dated November 16, 2009, attached as Exhibit 6.

[32] *See, generally,* Beal, *Texas Administrative Practice and Procedure,* Vol 1, §5.6 et seq.

[33] *City of Arlington*, 232 S.W.3d at 254; *see also Railroad Commission of Texas v. WBD Oil & Gas Co. and WBD Oil & Gas Co., Inc.*, 104 S.W.3d 69 (Tex. 2003).

[34] *Bi-Metallic Investment Co. v. State Bd of Equalization,* 239 U.S. 441 (1915).

GMA cannot go into closed session to discuss the proceedings or the hearing.

Ultimately, Section 356.44(e) of the Administrative Code gives the executive administrator the power to create procedures for the hearing as he might deem appropriate to ensure a fair and just hearing, either at the request of the parties or on his own initiative. Otherwise, the Administrative Code sets forth that the petitioner and respondents shall have equal time at the hearing, and requires that the testimony be sworn.

Evidentiary Considerations. As noted above, the Administrative Code provides that testimony at the hearing will be sworn. Section 356.42 defines "evidence" as "information, consisting of testimony, written materials, material objects, or in any other form, that is relevant to the reasonableness of the desired future conditions." Few other guidelines are provided. Because no objections will be entertained, the Rules of Evidence should not be a consideration. If testimony proceeds by question and answer, there should be no issue with leading questions or narrative answers. Authentication of documents should likewise not present an issue. Evidence in the form of affidavits (i.e. "sworn testimony") may be introduced with or without a sponsoring witness. While no provision is made for discovery, sworn testimony in the form of a deposition may be useful. Given the lack of discovery tools, such a deposition need not involve both parties; sworn testimony before a court reporter and/or videographer should have no different status than an affidavit. One witness should be able to introduce this type of sworn evidence as an exhibit at the hearing, effectively extending the time allowed for each side. In essence, the nature of the evidence adduced should be limited only by the imagination of the parties and the issues raised in the petition or by any responses filed by the districts.

As noted above, §356.44(f) provides that the record will remain open for 10 days after the hearing for the purpose of receiving additional evidence from "other interested persons." Note that this particular section does not require that these "other" persons have a legally defined interest in groundwater in the GMA, nor does it contemplate any sort of examination, cross-examination or other testing of the evidence offered by such persons. Such evidence must be written, but otherwise may be "in any form." Again, as long as the "interested person" offers evidence through a written instrument, the evidence offered may be "in any form."

Consideration By The Board. Once the hearing is concluded, the staff is charged with the responsibility of sorting through all the evidence and making findings. Under §356.45(a) the staff is required to "prepare a list of findings based on evidence received at the hearing." While the wording of §356.45(a) seems to restrict these findings to the evidence produced at the hearing, it is arguable that the staff may also consider evidence tendered by "interested persons" during the 10 day period following the hearing. Otherwise such evidence would have to be ignored as a basis for making any findings. This conclusion is buttressed by §356.44(g), which includes written public comments in its definition of materials making up the "record" that the Board is required to consider. It would be anomalous to say that the staff had to confine its findings to evidence produced at the hearing, while the Board itself is required to consider additional evidence produced after the hearing.

Under §356.45(a), the staff may (but is not required to) "provide a summary, analysis, and recommendations relating to revisions to districts' plans and desired future conditions." It is not clear what "plans" are referenced here, but given the context, the reference is most likely to the districts' management plans.

The mandatory findings and permissive summaries, analyses and recommendations are then presented the Board within 120 days of the expiration of the "consultation and resolution" period, if invoked by the districts. Presumably, the staff work product must be presented to the Board within 120 days of the staff's acknowledgment of the receipt of the petition if the districts do not invoke their right to a 60 day delay period. Pursuant to §356.45(c), the Board "shall" base any recommended revisions only on evidence in the hearing record, which consists of:

1. the petition and the respondent's rebuttal;
2. the testimony and evidence presented at the hearing;
3. the written comments submitted by other interested persons;
4. the list of findings, the summary and analysis of the evidence, and any recommendations prepared by board staff;
5. the minutes of the board's public deliberation on the petition;
6. the board's report containing recommended revisions transmitted to the districts; and
7. any other information relevant to the particular hearing.

As noted previously, §356.44(g) states that the Board "shall" evaluate and consider specific criteria:

> (1) the adopted desired future conditions are physically possible and the consideration given groundwater use;

> (2) the socio-economic impacts reasonably expected to occur;
> (3) the environmental impacts including, but not limited to, impacts to spring flow or other interaction between groundwater and surface water;
> (4) the state's policy and legislative directives;
> (5) the impact on private property rights;
> (6) the reasonable and prudent development of the state's groundwater resources; and
> (7) any other information relevant to the specific desired future condition.

Board Hearing. Neither the Water Code nor the Administrative Code makes any provision for the nature and procedure for the actual Board hearing. The staff has indicated that it will make and publish its recommendations seven days prior to the actual hearing so that the parties will have prior knowledge of those recommendations.[35] At the hearing, the staff will give a 15 minute presentation, followed by 15 minute presentations from both petitioners and respondents. The Board will then deliberate and render a decision.[36]

Board Action. Following the hearing, the Board can either hold that the DFCs are reasonable or unreasonable. If the Board holds that the DFCs are reasonable, the administrative issue ends. If the Board finds the DFCs to be unreasonable, the process proceeds to an uncertain finish. Both the Water Code and the Administrative Code provide for the process that must be followed in the event the DFCs are held to be unreasonable. Some have suggested that the process is pointless because the districts have the power to simply go back and affirm their previously adopted DFCs, and that the Board does not have "the last word." A fair reading of both the Water Code and the Administrative Code, however, contradicts that notion.

Section §36.108(n) of the Water Code states that if the Board finds DFCs to be unreasonable, it will make recommendations. That section goes on to state that the districts shall prepare revised plans in accordance with the Board's recommendations. The districts must then revise the DFCs and submit to Board for review. Therefore, the districts cannot ignore the recommendations but must revise the DFCs in accordance with the recommendations. Merely re-adopting the DFCs that the Board has said are unreasonable would not comport with the clear meaning of the word "revise."

Section 356.46 of the Administrative Code further defines the respective roles of the districts and the Board where the Board has determined the DFCs to be unreasonable. Under that section, the Board is then required to prepare a report with a list of findings and recommended revisions. At that point, the districts "shall" prepare revised plans and revised DFCs in accordance with the Board's recommendations. Note that the districts are not given discretion to adopt DFCs that are not in accordance with the Board's recommendations. Instead, the districts must revise (i.e., change) the DFCs and must do so in accordance with what the Board recommended.

After the districts have revised their management plans and the DFCs, they must submit the revised DFCs to the Board. If they want, they can request an opinion of the Board regarding the revisions. The districts then must hold public hearings on the revisions. Then, the districts "shall" consider public comments and Board comments, revise the DFCs and submit revised DFCs to the Board, along with their reasoning. After receiving the revised DFCs, the Board provides public notice of the revisions and "may" hold a public hearing.

Based on the above, it appears that the districts cannot merely re-adopt the "unreasonable" DFCs. To do so would not be a "revision" and would not be "in accordance with Board recommendations." Therefore, it is arguable that the Board's recommendations become the de facto DFCs and the Board gets the last word. To assume otherwise is to assume that the Legislature designed a process without a purpose.

The Ultimate Challenge To DFCs. Given the nature of the proceeding designed under the Water Code and the Administrative Code, it is clear that no private property rights are adjudicated as a result of the challenge to DFCs. The proceeding is more akin to rule making than to the resolution of individual rights. This being true, the procedure does not affect or touch upon the actual private property rights of the petitioner. No other procedure is provided for resolving specific private rights. Accordingly, the petitioners should be free to pursue litigation in normal venues to address actual damage to their property rights that flow from unreasonable DFCs, whether the Board has declared such DFCs to be unreasonable or not. In other words, an adverse Board result should have no preclusive effect in subsequent litigation because the proceeding from which such result arose was not a contested case hearing and had no indicia of the type of hearing from which a preclusive effect would ordinarily arise. Therefore, where DFCs result in a taking, a petitioner should face no bar to filing suit in state or federal court for redress due to deprivation of private property rights, even if the Board has opined that the DFCs in question are "reasonable."

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[35] Correspondence from Joe Reynolds dated October 5, 2009, attached as Exhibit 5.

[36] Memorandum from Robert Mace dated January 13, 2010, attached as Exhibit 6.

IV. CONCLUSION

The GMA process is designed to encourage coordination between groundwater districts that are located over hydrologically similar areas. The type of coordination is manifested by the requirement of establishing DFCs. Many groundwater districts argue that they are not required to adopt the same DFC for each aquifer or subdivision of an aquifer, citing the "geographic area" language of Sec. 36.108(d), and claiming that "local control" is the Legislature's preferred method of regulating groundwater. Yet it is hard to imagine why the Legislature adopted the GMA or DFC processes at all if the idea was that groundwater districts could do whatever they pleased on an individual basis, turning joint planning into jointly meeting together annually and nothing more. It will be interesting to watch the process play out to the endgame, whatever it may be. At a minimum, the current process places the districts, GMAs, TWDB and legally interested owners in a tight spot because the stakeholders do not yet know what they have gotten themselves into.