Text of Jack Hunt's comments made to the Texas Alliance of Groundwater Districts in Corpus Christi on July 28, 2009

Good morning. I appreciate the opportunity to speak to you today.

I have often felt that perhaps the toughest job in public service is serving on a school board. But after having served as a board member/president of both surface and groundwater districts in California for over 10 years, it occurs to me today that your jobs as an officer or board member of a groundwater district in Texas may be almost as tough as serving on that school board. From the perspective of a two-term member of the Texas Water Development Board, I appreciate what you do and the complexity of the issues you must deal with every day.

My comments today are not meant to reflect any position taken by the Water Development Board, its staff, or other individual board members except for me. These comments are based only upon my perception of these issues.

The title for this talk is: "The SB1 Water Planning Process—Has It Gone Wrong?" The subheading for this talk is: "Desired Future Conditions/Managed Available Groundwater—Full Employment for Water Lawyers?" I want to spend a little time on my perception of the history of the water planning process—how we got to where we are today, or, as I said at the outset: Has the SB1 water planning process gone wrong?

As you know, SB 1 (passed in 1997) put into place an unprecedented approach to regional water planning. This process, of course, was designed to attack the many challenges ahead in meeting Texas' water needs over the next 50 years. I assume many of you serve or have served on one of the regional water planning groups. I commend you for doing so. This planning effort has gained national recognition as the right way to do water planning in any state, particularly a state as diversified as Texas with a strong culture of decentralized local control and support for private property rights.

There was one problem with SB 1, however. That was the "junior rights" provision which essentially "turned off" the spigot for surface water. While 190 inter-basin surface water transfers occurred before SB 1, only 3 small non-controversial transfers have occurred since SB1's passage. Thus, many water providers and marketers looking for new supplies became focused on groundwater to meet those needs. This situation, along with court decisions, has resulted in heightened local concerns about the use of groundwater. These concerns were among the drivers for the creation of many more groundwater conservation districts. We had 20 districts in 1990, now we are at 99 and growing.

In order to coordinate the efforts of all these new districts and also to improve the planning effort, SB 2 was passed in 2001. This bill included language directing the Texas Water Development Board to delineate groundwater management areas that covered all the major and minor aquifers in the state. Meanwhile, the first statewide 50 year water plan based on the SB 1 regional planning process was published by the Texas Water

Development Board in January 2002. As we all know, this is an iterative process with the water plan being updated every five years.

At that time, groundwater management plans were required to, at a minimum, meet the water requirements set forth for each region by the regional water planning groups. In other words, if a regional water plan said that it needed a certain amount of groundwater to meet future demands, a groundwater district's management plan was required to conform to or match up with implementation of the regional water plan. Presumably, of course, the groundwater volumes available in these regional plans had some basis in an understanding by the regional water planning groups of the groundwater that the various aquifers were capable of producing in that region.

Apparently, however, some folks, perhaps including some of you in this room, did not like this process. These folks wanted to flip the process around, and they were successful—much to the detriment of water planning, in my opinion. Thus we have Robby Cook's legislation, HB 1763, passed in 2005. Or, as I like to call it: The full employment act for water lawyers.

I believe that HB 1763 has changed the intent and original purpose of the SB1 water planning process. This legislation has turned what was a water planning and water supply strategy or development process into a water allocation process, at least for groundwater. One could say that with HB 1763 we decided to fix the size of the water pie and then decide who gets what piece.

As you know, HB 1763 required joint planning by ground water districts in groundwater management areas, or GMAs for short. The act goes further, however. It requires that that each groundwater district in each management area agrees to a groundwater condition 50 years out underlying the aquifers these districts share. This was called the desired future condition, or DFC for short. Then TWDB scientists take these future conditions and calculate something called the managed available groundwater or MAG. MAGs then become "magic numbers" that the groundwater districts are required to manage or permit to. I call them "magic" because the MAG is potentially the result of a highly subjective political process—the determination of the desired future condition—that may have no basis in reality or science. Some of the desired future conditions are being driven by fear of water loss, a desire to hoard water for no particular reason, or a fundamental misunderstanding of how groundwater aquifers behave—or all of the above. Some desired future conditions may be being driven by an overt desire to protect the current water users.

Whatever the motivations, groundwater districts now have the power to enforce the resulting managed available groundwater determination that may, in effect, ignore the capability of the aquifer to produce water. This situation then effectively could deny access to groundwater by landowners in the district. Indeed, some of these desired future conditions now being proposed have resulted in managed available groundwater numbers which are less than is currently already being produced in the groundwater district.

Now, this situation gets to be more interesting because according to HB 1763, all the groundwater districts within the groundwater management area are supposed to agree on these desired future conditions despite their different demographics and political agendas. Also, as you all know, the hydrogeology within some groundwater management areas may be quite variable. At this point it is not clear to me whether all the future conditions within a management area have to be consistent with one another. The Texas Water Development Board requires that desired future conditions within a management area be physically possible and that the desired future conditions of aquifers that affect each other be considered together. Nonetheless, we are already seeing clashes among groundwater districts within groundwater management areas These clashes are caused by differing water availability outcomes based upon the differing desired future conditions.

I am not sure how all of this is going to work out. With the passage of HB 1763, however, the legislature has decided that a groundwater district's determination concerning groundwater availability will trump the regional water planning process—a big mistake, I think. If this is the case, and if this process restricts water use, water availability in the state water plan will likely decline—at least on paper. Stated another way, regional water planning groups are now obligated to use groundwater district decisions–decisions that may not reflect the capacity of the aquifer underlying that water district to produce water.

By making this change, then, the legislature, whether it meant to or not, has profoundly changed the planning process for groundwater use in the future. In my opinion, the legislature has created a new category of "junior rights" in groundwater. That is, groundwater that can't be used, that may be "locked up" for political or defensive reasons just as surface water is "locked up" by junior rights, often for the same reasons—not because the water isn't there or available to meet legitimate needs; someone just wants to keep it.

This new category of "junior" groundwater rights could then result in the creation of new and certainly more expensive or even more environmentally destructive, water management strategies to meet the future needs of the state—just like we are seeing as a result of the limits on inter-basin transfers of surface water. I think it is possible or even probably that the DFC/MAG process is going to produce clear winners and losers. The result then could be litigation based upon water takings from landowners and others whose rights are diminished by this process.

Clearly, I disagree with this approach. I believe that desired future conditions should not be about keeping a water user out of a district; it should be an honest, scientifically-based representation of what an aquifer can provide for the water users. Said another way, preventing access to producible groundwater, or available surface water for that matter, should be justified by more than a desire to protect existing users or protect the resource an unknown future.

For example, setting a desired future condition at a drawdown of 10 feet when the aquifer can easily handle much more than that with minimal consequences is, in my opinion, bad

for the State of Texas. It's bad for water planning, it's bad for the economy and, quite frankly, it's bad for local control of groundwater. Why do I say it is bad for local control? Because we live in a rapidly urbanizing state that is slated to nearly double in population over the next 30 years. Where will an urban center go for water if it can't build lakes and can't bring in additional surface water or groundwater? Apparently, even the spigot for brackish groundwater can be shut off by groundwater districts as we have seen recently near San Antonio.

While there is an appeal process challenging the reasonableness of desired future conditions, the process has no teeth. Sure, the Texas Water Development Board gets to gum the issue for a while. But at the end of the day, the groundwater districts are in control. GCDs, with no limits on their actions could, as columnist George Will said in another context, become political entities with a "metabolic urge" to "boss people around". Some have already done so.

Quite frankly, I don't think that, over time, the evolving demographics of Texas will tolerate the hoarding of groundwater, or surface water for that matter, by certain interests, to the detriment of a majority of the population. At some point, the legislature is going to change this regime to serve urban interests where most of the voters are. Indeed, in my view, this fear of state control over local water supplies was at the very foundation of the SB 1 planning process—that is, to plan water use regionally to reflect local conditions, but do that planning in the context of an overall state plan. It strikes me that we have ended up in a situation where groundwater districts have the potential to not only impede the state's planning process but, in doing so, trample over the rights of individual landowners throughout the state. This is one of the very outcomes that SB 1 was written to prevent. Add to this the constitutional or legal issues currently in play regarding groundwater rights before the courts, and we have the makings of a real train wreck for groundwater management and long-term water planning under the current laws. Indeed, such turmoil in a rapidly urbanizing state may result in legal and legislative outcomes that no one in this room would like.

The potential for conflict between landowners and groundwater districts is quite clear. Political pressures may make groundwater districts inclined to be ultra conservative in their determination of desired future conditions, particularly since it appears to me that some districts had little scientific guidance in setting these conditions. Certainly, I have expressed my concern to Water Development Board staff as to whether we are doing enough to engage with these districts when board staff are asked to do groundwater runs—particularly if it is clear that these desired future conditions are based mostly on politics or other unscientific grounds. In any event, I believe the current DFC process could inevitably lead to pumping limits or "caps" on groundwater production—and many of these could be unrealistic or unfair. Since these caps could be overly conservative or bluntly designed to protect existing interests, they will only serve to hasten litigation by other landowners who are denied access to their groundwater.

Basically, these pumping limits or caps will look very much like the adjudication of water rights but without the full legal process to protect landowners. Thus, the GCD will

determine how much individual landowners and water users can produce and who can and can't produce water. If we continue down this road, I fear some GCDs could be managing teams of lawyers and consulting hydrologists, not acre feet of groundwater. Smaller and poorer landowners will be particularly at risk since they may not have the resources to litigate to protect their rights—as we all know water litigation is ungodly expensive.

This situation gets even more complex when you add the joint GMA process to the mix. What sort of legal entity is a GMA? What happens when a GCD is outvoted within a GMA? Who defines what is unreasonable? Does science matter? What does this mean to landowners whose groundwater rights are affected by this process? What are their legal rights? Can a GMA be sued? Is there a public hearing and comment process for GMAs? How much does the public even understand about the GMA process? While there is an appeal process through the Texas Commission on Environmental Quality, I am not sure I really understand how it will work or whether that appeal process is practical. My experience tells me that the TCEQ is not equipped with the resources or the expertise to resolve these appeals. The end result is that the current GMA process could become a hammer to force districts to engage in a joint planning process and then knuckle under to meet the goals of the majority of GMA members whether or not these goals reflect good water planning and are scientifically justified regardless of whether they violate property rights of landowners.

So where are we now? Because of the junior surface water rights and the potential for the creation of desired future condition-derived junior groundwater rights, the state legislature has turned its much-admired water planning process into something that may become unworkable—at least in some regions. This situation has the potential to undo much of the good work originally done with the development of the state water planning process. While this outcome might make lobbyists, lawyers, and consulting water engineers and hydrologists happy, it is truly unfortunate for the water planning process in Texas that began so well. I was involved in SB 1 from the beginning as part of the Texas and Southwestern Cattle Raisers Association workgroup that commented on that legislation. Shortly after SB 1 was passed, then Governor Bush appointed me to the Texas Water Development Board. I watched with pride and admiration as the members of regional planning groups came together along with the dedicated staff of the Water Development Board to make that process work. It distresses me to see artificial constraints driven by fear or politics with regard to both surface and groundwater jeopardize a process so important to meeting the future water needs of this state.

What would I like to see now? To put it bluntly: legislative repeal of junior rights provisions for both surface water and groundwater. Importantly, correcting the surface junior rights issue, allowing more inter-basin transfers, would likely take some pressure and paranoia out of the current groundwater situation.

In the case of groundwater, repeal means either dumping or completely revamping the DFC/MAG process. The role of a groundwater district should be to manage the aquifer based on good science for the benefit of all. The groundwater district should start by

assuming that access to groundwater is a right. Limits on that right must be justified by more than fear or a vague desire to protect the resource for the future. The district must understand how much water is stored in the resource. What is the total available supply? How much is being added? Can the aquifer be operated sustainably or will it be mined? If mined, over what period and how is that process made equitable? To repeat, I believe a groundwater district should maximize water availability, not minimize available water in order to prevent export, or to protect a select few water users, or to cater to unscientifically-based fears. So how we do this? Who controls the throttle to keep GCDs from over-regulating? How do we manage the "metabolic urge" of public entities "to boss people around"?

Besides dumping junior rights and the desired future condition process, I would like to see a legislative recognition or reaffirmation, if you will, of the property right of a landowner to access his groundwater; assuming, of course, he is not wasting it or causing harm. Regardless of the outcome of court cases currently in play, I think the legislature needs to engage on this and reverse the tendency of some groundwater districts to assume nearly unlimited control over the water within their boundaries. While the courts have deferred to local groundwater districts in various cases, that does not mean that groundwater districts should have unlimited power to manage the water. It seems entirely appropriate to me, for example, that the legislature should ensure that the groundwater district suffers the full cost of the litigation for itself and the landowner if the court or any other government agency rules in the landowner's favor when he challenges the groundwater district. I think this threat alone might tame some of the "metabolic urges" of GCDs to order people around.

Some people have argued for "adult supervision" over this whole process at the state level. I don't like this idea. Those who do should move to Colorado. Every drop of water in that state is managed by the state. Rather, I think we must find "adult supervision" in two areas. First, we need to return to the original intent of SB 1 which was to approach these issues on a regional basis. I think we need to flip the planning process back to where it was before HB 1763. That means that the regional water planning group, properly informed, should determine water availability. Second, I believe that the legislature needs to reaffirm the groundwater property right that distinguishes Texas from so many other states. This to me means a fair and easily accessible legal process for landowners to assert their water rights to reasonably use their groundwater. I think directors and officers of GCDs need to be just as afraid of property rights litigation as they are afraid of losing unused water that may be available. I know there is a case pending right now before the Texas Supreme Court that may affect this situation, but for now it seems to me the deal based on current law (HB 1763) is stacked against landowners.

While legislation was introduced in the last session in an attempt to sort through all of this, none of the bills passed into law. While some of these bills may have been well-intentioned, I never could figure out whether they were an improvement or just added more complexity to an already unwieldy and potentially unfair DFC/MAG process.

While I am not at all happy with the current situation, I certainly do not want to default to state control of groundwater. I suspect just about everyone in this room agrees with me on this issue. Yet, at the state and local level, we are facing some complex issues about how we allocate water. The SB 1 process was created to deal with some of these issues in the context of meeting our growing needs for more water. But right now we have some imbalances both with regards to surface and groundwater that need to be re-evaluated if the statewide planning process that started out so well is going to work to meet the water supply needs of all Texans.

When you don't have state control or ownership of all groundwater it seems to me that the groundwater management situation will always be a little "fuzzy". California, for example, is the other major western state that has avoided state control or ownership of groundwater. But most of the time the process seems to work there. Where it hasn't, there have been formal adjudications of water rights. Essentially, that is what we have right now with the Edwards Aquifer. To the extent "fuzzy" both recognizes the rights of landowners to access their water but is in the context of a regionally based statewide planning process, I think "fuzzy" is a good thing—particularly if there is some balance between the powers of groundwater districts to manage and the rights of landowners to access the water.

Again, these are my thoughts, and they do not represent a position of the Texas Water Development Board. I will also add that I don't think it is a good idea for the Texas Water Development Board to become a regulatory agency to resolve these issues as suggested by some. Frankly, it is a lot more fun to hand out money to build water projects, collect the data, do the science, and oversee the planning process aimed at ensuring that Texas has enough water to continue to grow and improve the standard of living of all Texans. They don't pay the Texas Water Development Board members enough to be "adult supervisors".

Thank you for allowing me to speak with you today, and I appreciate what all of you do for your neighbors and the State of Texas.