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News

Attorneys Advised Of Pitfalls In Groundwater's DFC Process

By Colleen Schreiber

AUSTIN — By September 2010, groundwater conservation districts in the state are charged with developing the "desired future conditions" for every major and minor aquifer in their predefined groundwater management area.

In the broad sense of the definition, if there is such a thing, a DFC is a number which depicts how the managers of an aquifer want it to look at some point in the future. DFCs are the work of HB 1763, passed during the 2005 legislative session. While legislators obviously thought they were doing a good thing for the state of Texas in terms of groundwater planning and policy, the DFC process has instead created more controversy.

There are plenty who disagree with this latest tweaking of the groundwater management process. Jack Hunt is one. He views it as much more than tweaking the system. Instead, he says, it is a complete reversal of the approach and intent outlined in Senate Bill 1.

Hunt, who is the vice chairman of the Texas Water Development Board and president and CEO of King Ranch, voiced his opinions during the recent CLE International Texas Water Law Conference here.

"HB 1763, which I refer to as the full employment act for water lawyers, has changed the intent and original purpose of the SB 1 water planning process," Hunt told listeners. "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."

HB 1763, Hunt added, gives groundwater districts the final say in determining water availability for their area by "trumping" the regional water planning process — "a big mistake, I think," Hunt opined.

"If this process restricts water use, water availability in the state water plan will likely decline, at least on paper."

Setting DFC levels well below what an aquifer can handle, he added, is "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."

DFCs, he opined, are nothing more than junior rights provisions for groundwater, something that Hunt clearly does not see as a positive for those who depend on groundwater. Such a category, he insisted, "locks up groundwater 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.

"We live in a rapidly urbanizing state that is slated to nearly double in population over the next 30 years," he reminded. "Where will an urban center go for water if it can't build lakes and can't bring in additional surface water or groundwater?"

Hunt hasn't just watched the groundwater management process from the sidelines. He's been in the trenches from the beginning, and his experience as a two-term member of the Texas Water Development Board makes Hunt particularly astute on the process. It was from that perspective that he offered the keynote address, entitled, "SB 1 and the water planning process — has it gone wrong?"

"A more appropriate sub-heading might be 'Desired Future Conditions and Managed Available Groundwater — full employment for water lawyers," Hunt quipped, though he wasn't joking.

Hunt was deadly serious about his comment, but he quickly qualified that his comments are his opinions alone and in no way are meant to reflect the thoughts of TWDB in general.

"My bottom line is to make sure there is enough water for all Texans, now and in the future," he told listeners.

With that, Hunt started at the beginning and walked listeners through the groundwater management process and how it came to be, starting with Senate Bill 1.

Referring to SB 1 as an "unprecedented approach" to state water planning, Hunt reminded listeners that the ultimate goal of this legislation, which became law in 1997, was to have a defined process for meeting the state's water needs for the next 50 years. That process entailed regional planning groups made up of local stakeholders who were charged with developing a water plan for their local groundwater districts. These regional plans, which are to be reviewed every five years, ultimately became part of the statewide water plan, the first of which was published in 2002.

"SB 1 gained national recognition as the right way to do water planning in any state, particularly in a state as diverse as Texas with a strong culture of decentralized local control and support for private property rights," Hunt said.

There was one problem with SB 1, and according to Hunt, it was a

big one as it ultimately put more emphasis on groundwater. The problem Hunt was referring to was that there was language in SB 1 which indirectly stopped the interbasin transfer of surface water. Before SB 1, 190 inter-basin surface water transfers had occurred, he pointed out. Since SB 1 only three "inconsequential" transfers have occurred.

"The junior rights provision says that if you buy a water right in one basin and move it into another basin, that water right, no matter how senior it is, becomes the most junior water right in the sending basin, essentially making it very low in value," Hunt explained. "In many basins, especially under drouth conditions, that is equivalent to taking a reliable water right and turning it into an unreliable water right."

Recognizing that the water had to come from somewhere, the focus was redirected to groundwater, and as a consequence there was almost an immediate heightened concern that the water-thirsty cities in search of alternative means would come after the groundwater in the water-rich rural areas. That concern reached crescendo levels when the term "water marketer" was spoken. Up to that point there hadn't really been much talk about the viability of a groundwater market. Hunt also noted that the more recent court decisions relating to groundwater, many of which came about in the 1990s, added to the uncertainty.

Those fears spawned the development of new groundwater conservation districts all over the state. In no time the number grew from 20 in 1990 to 98, which is the count today, though the number continues to grow.

Some of these new groundwater districts have little background in the science involved with aquifer management, and the rulemaking process in these respective new districts reflected as much. In some cases, fear and politics, not science, drives the process. Thus what started out as a well thought-out, well-intentioned statewide water plan for the future could turn into a chaotic, uncoordinated mess.

In 2001 the legislature, in Senate Bill 2, attempted to rectify some of the problems by offering more guidance and direction to the planning effort, particularly as it related to these fledgling groundwater districts. While SB 2 gave further credence to "local" control, it also directed TWDB to delineate groundwater management areas covering all the major and minor aquifers in the state, and to that end TWDB decided on 16 "groundwater management areas." Furthermore, each groundwater conservation district's plan was required, at a minimum, to meet the water requirements set forth 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," Hunt explained.

Not surprisingly, this led to conflict between some of the local districts and the regional planners, and true to form, that led those who were unhappy with the process back to the legislature to ask that the process be, as Hunt put it, "flipped around."

The end result was the passage of HB 1763 in 2005. HB 1763 requires joint planning by groundwater conservation districts within their defined groundwater management areas, but as Hunt explained, it goes a step further in that it requires that a majority of groundwater districts in each GMA agree to a number that depicts what they want each of the aquifers in their region to look like in 50 years, i.e. the desired future condition.

TWDB scientists then use the DFCs for each of the aquifers to calculate still another number known as the "managed available groundwater." Unlike DFCs, a MAG is defined in the Water Code as "The amount of water that may be permitted by a district for beneficial use in accordance with the desired future condition of the aquifer." The districts are required to incorporate the MAG into their management plans and to utilize it in the permitting process. However, even though the definition of MAG is clearly defined in Chapter 36, groundwater districts are interpreting that definition differently.

In fact, Hunt referred to DFCs and MAGs as "magic numbers," because the DFCs, which are used to determine the MAGs, are derived by a "highly subjective political process which 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 DFCs may be derived from an overt desire to protect the current water users."

Whatever the motivations, the end result, Hunt said, is that landowners in these various groundwater districts could be denied access to their groundwater. In fact, some DFCs have resulted in MAGs which are less than the amount of water that is currently being produced in a particular groundwater district.

"DFCs 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," Hunt reiterated.

Part of the problem that makes coming up with these DFCs so difficult is that almost all groundwater districts were developed along political boundaries, not aquifer boundaries. Therefore, mustering a majority vote by groundwater districts within their GMA for passage of a DFC, as required by HB 1763, is difficult.

"We are already seeing clashes among groundwater districts within groundwater management areas," Hunt told listeners. "These clashes are caused by differing water availability outcomes based upon the differing DFCs, which are based on differing management goals."

While there is an appeal process through TWDB for districts who disagree with the GMA agreed upon DFCs, Hunt insisted that it has no teeth.

"TWDB can comment back to the district that it disagrees with their management goals, but the board can't make them change those goals. The districts have the final say," Hunt told listeners.

The long and the short is that the pumping limits imposed by the DFC/MAG process raise the potential for still more conflict between landowners and groundwater districts and could result in still more "takings" litigation. It might also mean that water districts within a GMA could end up suing each other.

"If we continue down this road, I fear some GCDs could be managing teams of lawyers and consulting hydrologists, not acre-feet of groundwater," Hunt remarked.

"Clearly, I disagree with this approach. 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 and undefined future," he reiterated.

So what's the solution?

"Legislative repeal of junior rights provisions for both surface water and groundwater," Hunt opined.

For groundwater, that means abolishing the DFC/MAG process or at minimum significantly revamping it. To get the process pointed in the right direction again, Hunt said, the first step is for groundwater districts to recognize that access to groundwater is a landowner's right. But even that, he opined, is not likely enough to keep overzealous regulators in check. Most likely what ultimately is needed, he added, is for legislative recognition or reaffirmation of a landowner's right to access his groundwater so long as he is not wasting it or causing harm to his neighbor.

"Regardless of the outcome of court cases currently in play, the legislature needs to engage on this," Hunt insisted.

Furthermore, he said, the legislature should ensure that when landowners prevail in groundwater litigation, it is the groundwater district's responsibility to pay all court costs — including the landowner's costs.

Hunt concluded his remarks by adding one caveat, that despite his

dissatisfaction with the current process, defaulting to state control of groundwater is certainly not the answer.

In saying that, Hunt also admitted that without full state control of groundwater, management of the groundwater resource will always be "a little fuzzy."

He noted that California is essentially the only other major western state that hasn't resorted to full state ownership of its groundwater, and as he pointed out, they've managed to make it work. Where it hasn't worked, there have been formal adjudications of water rights.

"Essentially, that is what we have right now with the Edwards Aquifer," Hunt reminded. "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."

Hunt said that it should not be the responsibility of TWDB to resolve the issues brought on by the DFC process.

"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 for all Texans. They don't pay the TWDB members enough to control groundwater," he concluded.

Questions? Comments? Suggestions?
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