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Austin, Texas**WHY THE DFC PROCESS IS FAILING
*WHAT CAN BE DONE TO FIX IT*****Marvin W. Jones**Marvin W. Jones
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WHY THE DFC PROCESS IS FAILING *WHAT CAN BE DONE TO FIX IT*

I. INTRODUCTION

With a looming 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. Enormous amounts of time, effort, energy and money have gone into establishing “desired future conditions” (or “DFCs”) for the sixteen groundwater management areas (“GMAs”). As we approach the deadline, the failure of the DFC process is becoming increasingly evident. What caused the process to fail, and what can be done to fix it?

The failure of the DFC process arises from and is the result of the same factors that drove its creation in the first place: the Legislature failed to ensure that every groundwater conservation district fully encompassed the aquifer or subdivision of an aquifer it would manage. In turn, this failure led to a proliferation of districts that manage only part of a given aquifer. When the Legislature realized its mistake and mandated joint planning, it failed to “close the loop” by requiring that such joint planning had to be hydrologically, rather than politically, driven.

II. HISTORY OF GROUNDWATER REGULATION

Understanding why the DFC process has failed and will fail requires an understanding of the history of groundwater regulation in Texas and a grasp of the property law principles that are increasingly lost in the regulatory process.

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.

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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.

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. This makes sense because of the constitutionally protected rights of owners in the same aquifer—as noted below, any regulatory unit that encompasses less than the full aquifer under management will inherently tread on those rights.

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

⁴ See Op. Tex. Att’y Gen. No. JM-1024 (1989).

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 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 Conservation 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, leaving room for later mischief.

The Later Mischief.

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:

- (a) 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, we find 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.

Thus, 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, and has lead directly to the recent unpleasantness with desired future conditions.

III. DESIRED FUTURE CONDITIONS

Against this backdrop of historical development, the Legislature apparently realized that the creation and proliferation of groundwater conservation districts had gone amuck. 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 apparently could not cross that goal line completely, adding a final sentence to Section 35.004, to wit: “The Texas Water Development Board also may consider other factors, including the boundaries of political subdivisions.” Nevertheless, the 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 and chicanery.

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.

Note that the mandate of 36.108(d)(1) is hydrologically based: joint planning should provide for a single desired future condition for each aquifer or subdivision of an aquifer or geological strata. Somehow, however, the Legislature again lost sight of that thought by adding Section 36.108(d)(2), introducing the notion that different desired future conditions could be articulated for "geographic areas." While the terms

“reservoir” and “subdivision of a reservoir” are defined in Section 36.001, the term “geographic areas” is not.⁵ By elimination, geographic area is not an aquifer, subdivision of an aquifer or geologic strata. Can a geographic area be a political subdivision? The term “political subdivision” is defined in both Section 35.001 and Section 36.001, but is omitted from Section 36.108(d). In terms of statutory construction, then, a political subdivision is not a proper basis for differential desired future conditions.

Given the serious lack of direction about “geographic areas” in Section 36.108, what has been the experience to date in designating desired future conditions? Not surprisingly, groundwater conservation districts have construed the term “geographic area” to mean that political subdivisions, whether districts as a whole or counties within districts, can be the basis for different DFCs. By seizing upon the “geographic area” language, the districts continue the pattern of attempting to regulate something less than the entire aquifer over which they lie.

GMA 1 is an example. Made up of three of the oldest groundwater conservation districts and one of the newest, the districts of GMA 1 endorsed three different DFCs. See Figure 1.

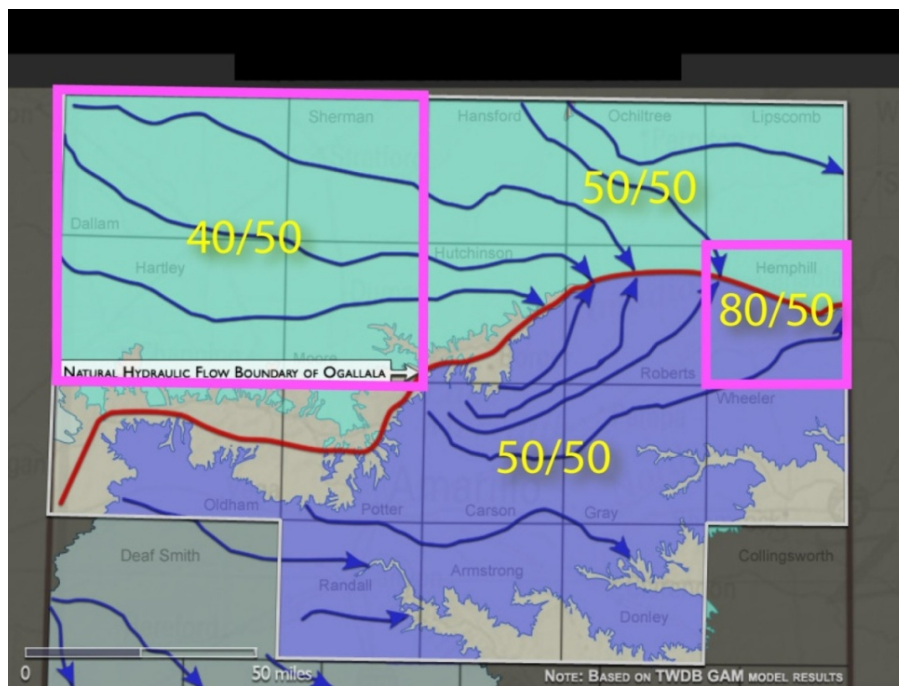


Figure 1

As to the area north of the Canadian River, covered almost entirely by a single groundwater conservation district, the DFC is 40% of today’s level of water remaining in

⁵ Interestingly, the terms “aquifer” and “subdivision of an aquifer” are also not defined in Chapter 36, even though both are used in Section 36.108(d)(1).

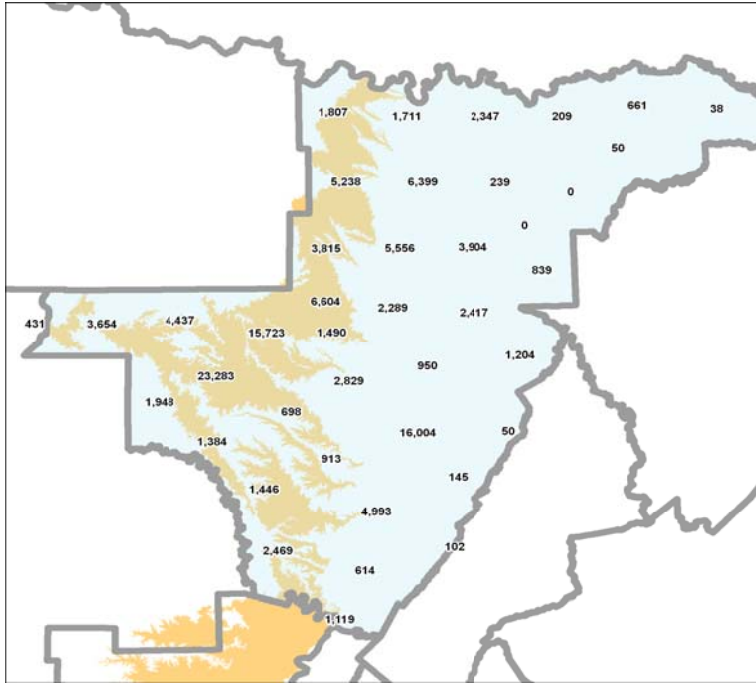


Figure 3

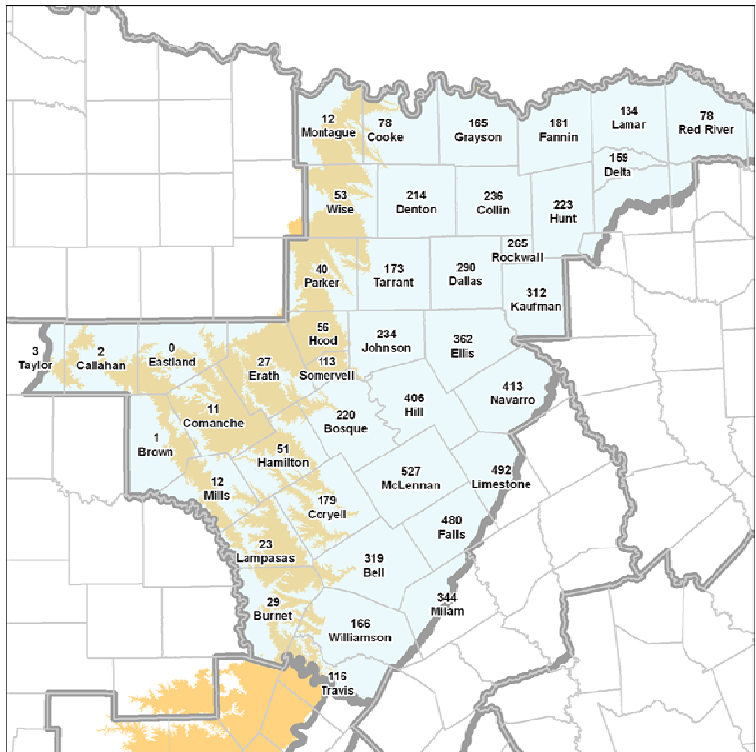


Figure 4

IV. THE PROBLEM WITH CURRENT DFCS

So what is the problem with the way groundwater conservation districts are approaching “joint planning?” Why can’t different political subdivisions decide for themselves what desired future condition they want, without regard for their more wasteful (or frugal) neighbors? Isn’t that the essence of “local control?” To fully understand why the current approach to desired future conditions will fail, one must consider the issue of whether it is permissible to treat different owners in the same reservoir (aquifer) differently—or whether owners in the same aquifer must be treated equally. And to understand that issue, one needs to explore the rights of groundwater owners in general.

Ownership of Groundwater: A landowner's ownership of groundwater in place has been recognized in Texas since at least 1904, when the Texas Supreme Court handed down its decision in *Houston & T.C. Ry Co. v. East*.⁶ After analyzing holdings from around the country dealing with the right of a landowner to make use of water under his land, the *East* Court concluded:

An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of the land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.

Id. at 150 (emphasis added).

This rule of ownership springs from antiquity, specifically the doctrine of *ad coelum*,⁷ which says that a property owner is vested with property rights in all of the sky above his property up to the heavens and everything beneath his property to the center of the earth. (See H. Williams & C. Meyers, *Manual of Oil and Gas Terms* 19 (7th ed. 1987).)

Recently, a small cabal of lawyers representing regulatory entities has advocated that groundwater is not owned by a landowner until it is reduced to possession at the surface, conflating the rule of capture (a tort rule of non-liability) with the property concept of ownership. The argument is specious. It is not even original. It was rejected

⁶ 98 Tex. 146, 81 S.W. 279 (Tex. 1904).

⁷ *Cuius est solum, eius est usque ad caelum et ad inferos* (in English, *for whoever owns the soil, it is theirs up to the sky and down to the depths*) is a Roman legal principle of property law that was passed down to common law and civil law systems. BLACK’S LAW DICTIONARY 40 (8th ed. 2004).

in the oil and gas context in 1915 in *Texas Co. v. Daugherty*,⁸ where the Texas Supreme Court reasoned:

Because of the fugitive nature of oil and gas, some courts, emphasizing the doctrine that they are incapable of absolute ownership until captured and reduced to possession and analogizing their ownership to that of things *ferae naturae*, have made a distinction between their conveyance while in place and that of other minerals, holding that it created no interest in the realty. But it is difficult to perceive a substantial ground for the distinction. A purchaser of them within the ground assumes the hazard of their absence through the possibility of their escape from beneath the particular tract of land, and, of course, if they are not discovered, the conveyance is of no effect, just as the purchaser of solid mineral within the ground incurs the risk of its absence, and therefore a futile venture. But let it be supposed that they have not escaped, and are in repose within the strata beneath the particular tract and capable of possession by appropriation from it. There they clearly constitute a part of the realty. Is the possibility of their escape to render them while in place incapable of conveyance, or is their ownership while in that condition, with the exclusive right to take them from the land, anything less than ownership of an interest in the land? Conceding that they are fluent in their nature and may depart from the land before brought into absolute possession, will it be denied that, so long as they have not departed, they are a part of the land? Or when conveyed in their natural state, and they are in fact beneath the particular tract, that their grant amounts to an interest in the land? The opposing argument is founded entirely upon their peculiar property, and therefore the risk of their escape. But how does that possibility alter the character of the property interest which they constitute while in place beneath the land? The argument ignores the equal possibility of their presence, and that the parties have contracted upon the latter assumption; that, if they are in place beneath the tract, they are essentially a part of the realty, and their grant, therefore, while in that condition, if effectual at all, is a grant of an interest in the realty.⁹

⁸ 176 S.W. 717 (Tex. 1915).

⁹ *Id.* at 719, 720.

Significant to the discussion of groundwater, the Court did not regard as dispositive the fact that oil and gas are “fugitive” and may flow from one parcel to the next while underground. The fluidity of the substance, in other words, did not alter the absolute ownership in place. Concluding, the Court held that a Texas oil and gas lease conveyed a “vested interest in the minerals in the ground, forming in their natural state a part of the land, with absolute dominion over them while in that state . . .”¹⁰

The Rule of Capture and its Implications: As noted above, some representatives of groundwater regulators have advocated that groundwater is not owned in place, but only at the time it is reduced to possession at the surface, relying on a distorted argument centered on the rule of capture. But the rule of capture is a rule of non-liability for drainage, not a rule of property ownership, a distinction long recognized in Texas jurisprudence. Recently, in *City of Del Rio v. Clayton Sam Colt Hamilton Trust*,¹¹ the San Antonio Court of Appeals noted:

A corollary to this absolute ownership theory is the rule of capture. See *City of Sherman*, 643 S.W.2d at 686 (“A corollary to absolute ownership of groundwater is the right of the landowner to capture such water.”). The rule of capture, a doctrine in both oil and gas law and water law in Texas, was first adopted by the supreme court in *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 281 (1904). See *Friendswood*, 576 S.W.2d at 25-27. “Under the rule of capture a person owns all of the [water or] oil and gas produced by a well bottomed on his own land, even though the well may be draining the substances from beneath other property.” 1 Ernest E. Smith & Jacqueline Lang Weaver, *Texas Law of Oil & Gas* § 1.1(A) (2d ed. 2007). Further, the rule of capture denies the landowner whose property is being drained any judicial remedy; he can neither enjoin production from the draining well, nor obtain an accounting, nor obtain other equitable relief. *Id.* This rule probably arose out of practical necessity - the inability of courts to determine the source of a well's production. *Id.* Thus, the rule as developed was “a doctrine of nonliability for drainage, not a rule of property.” *Id.*; see also *Riley v. Riley*, 972 S.W.2d 149 (Tex. App.--Texarkana 1998, no pet.) (“The rule of capture is a doctrine of nonliability for drainage.”). “It did not give an operator the ‘right’ to drain his neighbor's tract but merely refused to impose liability for doing so.” 1 Ernest E. Smith &

¹⁰ *Id.* at 720. (Emphasis added).

¹¹ 269 S.W.3d 613, 617-18 (Tex. App.—San Antonio 2008, pet. denied).

Jacqueline Lang Weaver, Texas Law of Oil & Gas § 1.1(A)
(2d ed. 2007).¹²

Thus, the rule of capture merely prevents a landowner from bringing suit against his neighbor for drainage—it is literally a rule of non-liability. It does not mean that the landowner does not own groundwater until it is produced at the surface; it means that the one producing water at the surface cannot be sued for draining water from beneath the surface of his neighbor. Importantly, the result of the rule is that the only remedy a landowner has for drainage is an equal right to produce.

The Implications of Ownership: Ownership is not a mere academic issue. Because landowners have a vested property right in groundwater in place, constitutional protections attach, reigning in unbridled regulation of groundwater. As noted above, 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.¹³ 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 the other famous fugacious substances: oil and gas. 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 similar to (but not nearly as fractured 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*.¹⁴ 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.¹⁵ 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

¹² *Id.*

¹³ TEX. CONST. art. XVI, § 59.

¹⁴ 177 S.W.2d 941, 948 (Tex. 1944).

¹⁵ *Id.* at 943.

toward the area.¹⁶ 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.¹⁷ 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.¹⁸ The Railroad Commission then established field rules which prevented this line of "shield" wells from producing their maximum capacity.¹⁹ The effect of this was to permit oil from the southern area to once again migrate toward the pressure sink in the north area.²⁰ 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.²¹

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.²²

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

¹⁶ *Id.* at 943-45.

¹⁷ *Id.*

¹⁸ *Id.* at 949.

¹⁹ *Id.* at 946.

²⁰ *Id.* at 945.

²¹ *Id.* at 946.

²² *Id.* at 948 (citations omitted) (emphasis added).

of their property. It is the taking of one man's property and the giving it to another.²³

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. Article I, Section 17, of our State Constitution prohibits the taking of one's property for public use without adequate compensation therefor. Article I, Section 3, provides for equal rights for all men, and Article I, Section 19, provides that no citizen shall be deprived of his property except by the due course of the law of the land. The Fourteenth Amendment to our Federal Constitution 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. We need not here determine to what extent the State may confiscate one's property, or deprive him of the use thereof, without compensation, where this is necessary in order to conserve the natural resources of the State. See in this connection *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321; *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 83 S.W.2d 935, 87 S.W.2d 1069, 99 A.L.R. 1107, 101 A.L.R. 1393, and authorities there cited. It is sufficient to point out that the trial court here found that the drainage complained of was not necessary in order to avoid waste, and that finding is supported by the evidence. It was further found that the orders of the Railroad Commission were unreasonable, unjust, and discriminatory. This Court has many times said that the Railroad Commission cannot indulge in unjust, unreasonable, or

²³ *Id.*

arbitrary discrimination between different oil fields, or between different owners in the same field.²⁴

The “take away point” for groundwater regulation is this: because groundwater is owned by the landowner, groundwater regulators must treat all owners in the same aquifer equally. The failure to do so may amount to an unconstitutional exercise of the police power, a taking a private property. This bears repeating: groundwater regulation must treat all persons in the same aquifer equally.

Applying the above legal principles to the issue presented by disparate DFCs in the same aquifer, it is readily apparent what the problem is. In fact, it is readily apparent that the problem extends beyond the invalidity of the DFC efforts of today and into the very validity of the existence of multiple groundwater conservation districts overlying the same aquifer. It is the problem presented by the facts of *Marrs v. Railroad Commission*.²⁵ 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 TWDB 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.

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.²⁶ The Railroad Commission cannot base different production allowable on the existence of a county line, and neither can groundwater districts.

²⁴ *Id.* at 949.

²⁵ 177 S.W.2d 941, 948 (Tex. 1944).

²⁶ 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.

Accordingly, the different DFCs being established across the state in the name of “joint planning” probably violate constitutional rights. But the DFC scheme is not the only culprit. Arguably, the existence of more than one groundwater conservation district over a single aquifer sets up a violation of private property rights if the districts fail to provide equal treatment to every owner in the same aquifer. This is the result of the failure of the legislature to insist at the outset that all groundwater conservation districts encompass the entire aquifer or subdivision being managed. Permitting multiple districts to exercise jurisdiction over a single aquifer invites differential regulation based on local political considerations, and likewise invites the violation of private property rights.

V. THE SOLUTION

The immediate problem lies in the DFC process, which is clearly broken. Joint planning has been hijacked by the whims of local groundwater conservation districts, each refusing to compromise with or concede to the others. Under Section 36.108, the Texas Water Development Board has the first opportunity to restore integrity to the groundwater management process by rejecting DFCs that fail to honor principles of hydrology and private ownership. If the TWDB fails in this critical arena, the Legislature must either repeal Section 36.108 altogether or change Section 36.108(d) to eliminate any reference to “geographic areas” and thus force joint planning based on aquifer-wide concepts. This would also tend to solve the problem of multiple groundwater conservation districts overlying a single aquifer because it would begin to equalize the treatment of owners across the aquifer.

On a broader scale, the legislature must mandate that if separate groundwater conservation districts exist over a single aquifer, their rules cannot differ in ways that cause substantive differences in the rights of those who own the groundwater in that aquifer. Any other result will deprive owners of constitutionally protected property rights, and will ultimately cause the failure of the locally controlled groundwater conservation district scheme. The alternative, state control of groundwater, is not desired or desirable, but seems to be the inevitable destination of today’s system if the groundwater conservation districts across the state continue down their current path.

By embracing proper management areas, groundwater districts can truly joint plan and jointly regulate. A DFC applied to the aquifer, or aquifer subdivision, requires the district(s) to pass fair and impartial rules and regulations that apply to all owners of groundwater in the aquifer, or aquifer subdivision. Texas will gain the ability to manage aquifers to whatever state is jointly desired as well as conform to protection of private property rights. Real aquifer management can finally be achieved and many decades of mischief finally put to rest.