

# WALKING ON WATER

A Judge's Guide to the  
Coming Contentious Issues in  
Groundwater



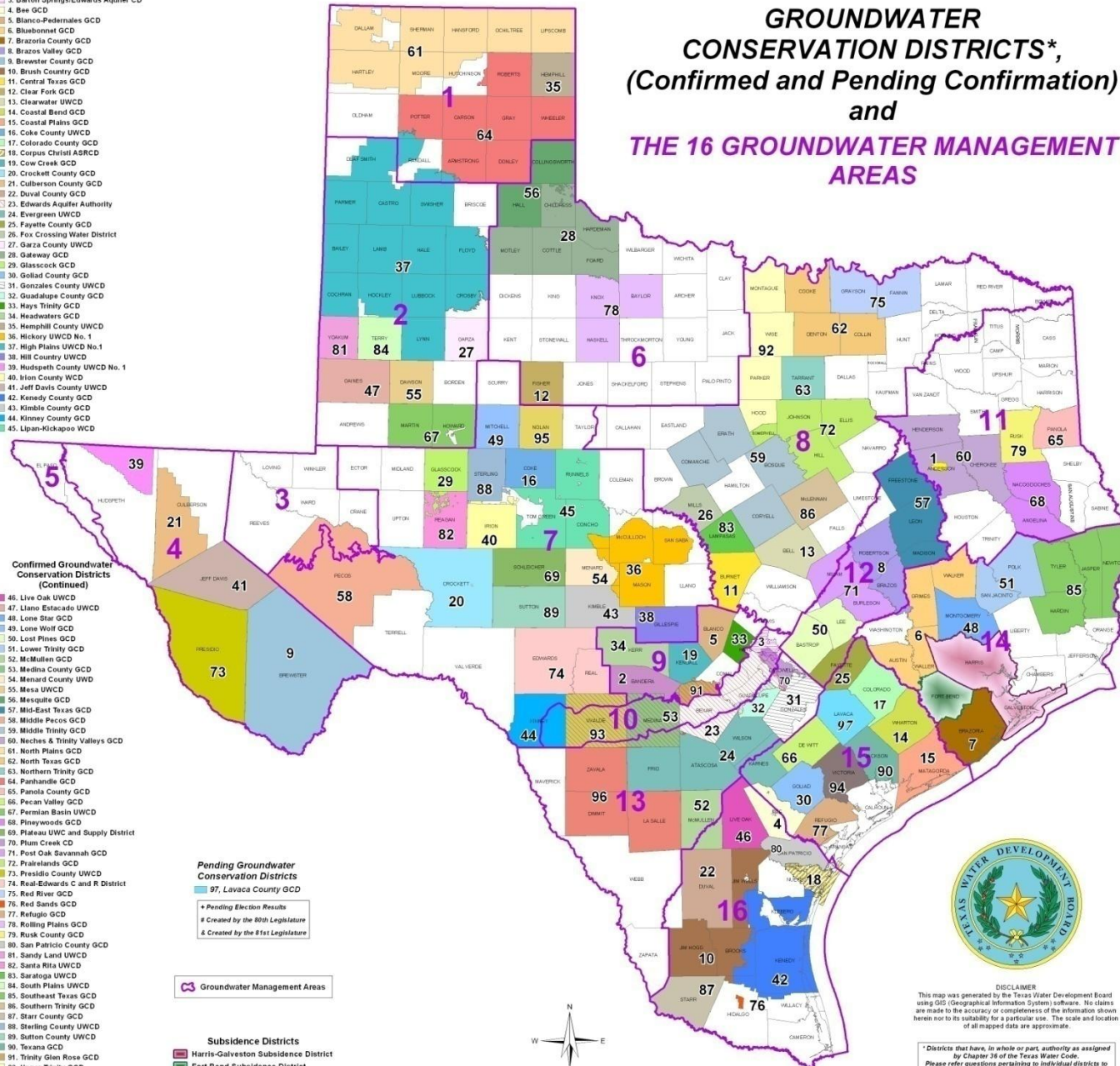
# SOME BASIC TERMS

- GCD: groundwater conservation district
- GMA: groundwater management area



# GROUNDWATER CONSERVATION DISTRICTS\*, (Confirmed and Pending Confirmation) and THE 16 GROUNDWATER MANAGEMENT AREAS

- Confirmed Groundwater Conservation Districts**
1. Anderson County UWCD
  2. Bandera County River Authority & Ground Water District
  3. Barton Springs/Edwards Aquifer CD
  4. Bexar GCD
  5. Blanco-Pedernales GCD
  6. Bluebonnet GCD
  7. Brazoria County GCD
  8. Brazos Valley GCD
  9. Brewster County GCD
  10. Brush County GCD
  11. Central Texas GCD
  12. Clear Fork GCD
  13. Clearwater UWCD
  14. Coastal Bend GCD
  15. Coastal Plains GCD
  16. Coke County UWCD
  17. Colorado County GCD
  18. Corpus Christi ASRCD
  19. Cow Creek GCD
  20. Crockett County GCD
  21. Cullerson County GCD
  22. DeVal County GCD
  23. Edwards Aquifer Authority
  24. Evergreen UWCD
  25. Fayette County GCD
  26. Fox Crossing Water District
  27. Garza County UWCD
  28. Gateway GCD
  29. Glasscock GCD
  30. Goliad County GCD
  31. Gonzales County UWCD
  32. Guadalupe County GCD
  33. Hays Trinity GCD
  34. Headwaters GCD
  35. Hemphill County UWCD
  36. Hickory UWCD No. 1
  37. High Plains UWCD No. 1
  38. Hill Country UWCD
  39. Hudspeeth County UWCD No. 1
  40. Irion County WCD
  41. Jeff Davis County UWCD
  42. Kersey County GCD
  43. Kimble County GCD
  44. Kinney County GCD
  45. Lipan-Kickapoo WCD
- Confirmed Groundwater Conservation Districts (Continued)**
46. Live Oak UWCD
  47. Llano Estacado UWCD
  48. Lone Star GCD
  49. Lone Wolf GCD
  50. Lost Pines GCD
  51. Lower Trinity GCD
  52. McMullen GCD
  53. Medina County GCD
  54. Menard County UWCD
  55. Mesa UWCD
  56. Mesquite GCD
  57. Mid-East Texas GCD
  58. Middle Pecos GCD
  59. Middle Trinity GCD
  60. Neches & Trinity Valleys GCD
  61. North Plains GCD
  62. North Texas GCD
  63. Northern Trinity GCD
  64. Panhandle GCD
  65. Panola County GCD
  66. Pecan Valley GCD
  67. Permian Basin UWCD
  68. Pinewoods GCD
  69. Plateau UWC and Supply District
  70. Plum Creek CD
  71. Post Oak Savannah GCD
  72. Praterlands GCD
  73. Presidio County UWCD
  74. Real-Edwards C and R District
  75. Red River GCD
  76. Red Sands GCD
  77. Refugio GCD
  78. Rolling Plains GCD
  79. Rusk County GCD
  80. San Patricio County GCD
  81. Sandy Land UWCD
  82. Santa Rita UWCD
  83. Saratoga UWCD
  84. South Plains GCD
  85. Southeast Texas GCD
  86. Southern Trinity GCD
  87. Starr County GCD
  88. Sterling County UWCD
  89. Sutton County UWCD
  90. Texana GCD
  91. Trinity Glen Rose GCD
  92. Upper Trinity GCD
  93. Uvalde County UWCD
  94. Victoria County GCD
  95. Wes-Tex GCD
  96. Wintergarden GCD
- Pending Groundwater Conservation Districts**
97. Lavaca County GCD
- Subsidence Districts**
- Harris-Galveston Subsidence District
  - Fort Bend Subsidence District
- Groundwater Management Areas**
- Legend:**
- + Pending Election Results
  - \* Created by the 80th Legislature
  - & Created by the 81st Legislature
- NOTE: These subsidence districts are not Groundwater Conservation Districts as defined under Chapter 38 of the Texas Water Code, but have the ability to regulate groundwater production to prevent land subsidence. (Refer to Senate Bill 1517 of the 76th Legislature Session)



**DISCLAIMER**  
This map was generated by the Texas Water Development Board using GIS (Geographical Information System) software. No claims are made to the accuracy or completeness of the information shown herein nor to its suitability for a particular use. The scale and location of all mapped data are approximate.

\* Districts that have, in whole or part, authority as assigned by Chapter 38 of the Texas Water Code. Please refer questions pertaining to individual districts to the district themselves.

Map updated by Erik O'Brien  
Interim TWDB GIS Mapping Coordinator  
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# SOME BASIC TERMS

- GCD: groundwater conservation district
- GMA: groundwater management area
- DFC: desired future condition
- MAG: managed available groundwater



# SOME AREAS OF CONTENTION

- CHALLENGES TO RULE MAKING PROCEDURES
- CHALLENGES TO PERMIT DENIALS
- ENFORCEMENT OF RULES BY GCDS
- DFC APPEALS
- TAKINGS CLAIMS



# RULE MAKING PROCEDURES

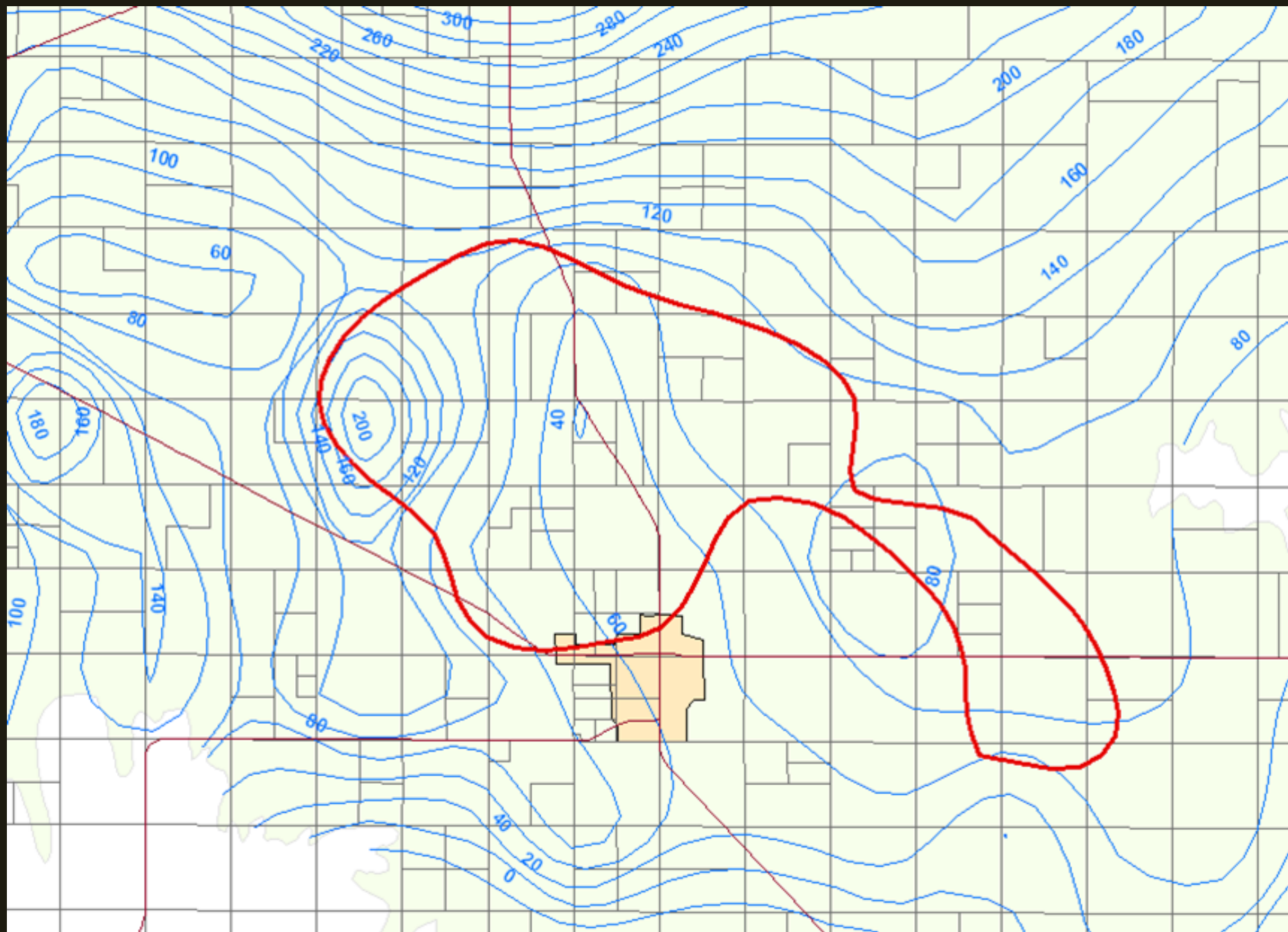
- Challenges based on procedural defects
  - Lack of proper notice
  - Comment period too short
- Substantive challenges to rules
  - Validity challenge
  - Applicability challenge



# Validity Challenges

- Rule exceeds statutory authority
- Chapter 36: management by well spacing or production limits
- An example—rules based on declines in saturated thickness







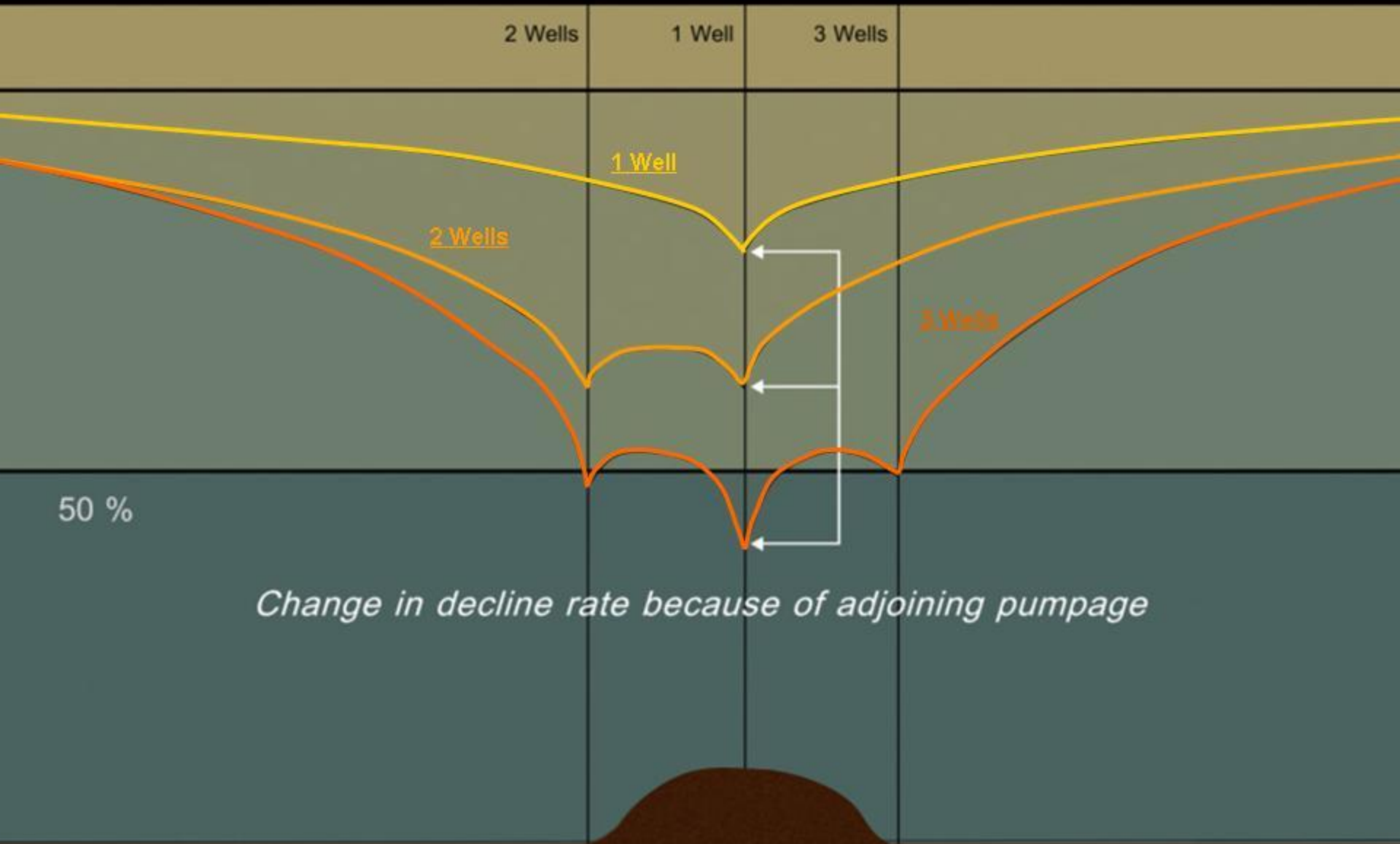
# Applicability Challenges

- Same example
- If statute permits this regulatory scheme, then may be subject to challenge when applied to specific landowners, i.e., Well No. 1





# Effect of Adjoining Pumpage



# PERMIT DENIALS

- § 36.113: A GCD shall require a permit...
  - Drilling wells
  - Equipping wells
  - Completing wells
  - Operating wells
- GCDs therefore have rules for issuing permits



# PERMIT DENIALS

- § 36.113:
  - 7 things that may be required in permit application
  - 7 things that may be considered by GCD in granting or denying permit
- Most GCDs: more than 7 on each



# PERMIT DENIALS

- Examples of “additional” considerations:
- District may consider...
  - the activities of the applicant constituting the purpose of use for which the groundwater will be beneficially used will be managed to preserve, protect, prevent the pollution, degradation, or harmful alteration of, control and prevent the waste of, prevent the escape of groundwater from, and achieve the conservation of groundwater in and produced from, the aquifer



# PERMIT DENIALS

- § 36.122(f) Transporting out of district (exporting)
- Water Code: 3 things the GCD may consider
- Most GCDs: many more
  - Example: whether there is an existing contract at the receiving end to take the groundwater
- Water Code: can't impose more restrictive requirements on exporters than on others



# PERMIT DENIALS

- Examples: District may consider...
  - the proposed production of water does not unreasonably affect existing groundwater or surface water resources or existing holders of permits issued by the District
- A de facto historic rights situation



# Contested Case Hearings

- § 36.114: Hearings
- Not mandatory, but most GCD rules include hearings for permits of specific types
  - i.e., export permits
- Hearings for denial of permits



# Contested Case Hearings

- DUE PROCESS
  - Evidence: relevance/admissibility
  - Right to cross examine
  - Right to introduce witnesses



# Appeals from Contested Case Hearings

- GCD Rules may specifically provide for appeal from contested case hearing
- Either way: § 36.251
  - A person ... affected by and dissatisfied with any provision or with any rule or order made by a district is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order.



# Appeals from Contested Case Hearings

- § 36.253: The burden of proof is on the petitioner, and the challenged law, rule, order, or act shall be deemed prima facie valid. The review on appeal is governed by the substantial evidence rule as defined by Section 2001.174, Government Code.



# Substantial Evidence Rule

- Trial Court shall reverse or remand if decision is:
  - (A) in violation of a constitutional or statutory provision;
  - (B) in excess of the agency 's statutory authority;
  - (C) made through unlawful procedure;
  - (D) affected by other error of law;
  - (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the
    - record as a whole; or
    - (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.



# Substantial Evidence?

- Record = proceedings below—theoretically filtered by rules of evidence & cross exam
- Record can be opened for good cause to receive additional evidence
- Affirmed if more than a scintilla of evidence to support
- Test: does a reasonable basis exist for the finding?



# DFC APPEALS

- § 36.108: May appeal reasonableness of DFCs to:
  - TWDB (without effect)
  - TCEQ (with caveats)

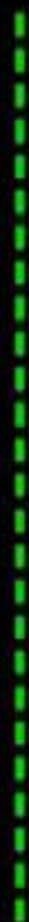


**TCEQ**

**0**

**0**

**TWDB**



# DFC APPEALS

- § 6.241 Water Code:
  - A person affected by a ruling, order, decision, or other act of the board may file a petition to review, set aside, modify, or suspend the act of the board.
- § 5.351 Water Code:
  - A person affected by a ruling, order, decision, or other act of the commission may file a petition to review, set aside, modify, or suspend the act of the commission.



# DFC APPEALS

- Standard of Review?
- Probably substantial evidence
  - § 2001.174 Gov't Code: if scope not defined, substantial evidence
- But caveat: § 36.108 does not provide for contested case hearing before TWDB or TCEQ
- TWDB rules: this is NOT a contested case hearing



# Sunset Advisory Commission View

- Because of the link between DFCs and district permitting decisions, the DFC can directly affect the amount of groundwater available for use by landowners, current and potential permit holders, RWPGs, and other districts beyond the GMA. Those affected risk being deprived of basic due process protections for harm they may suffer as a result of the desired future condition. These protections are standard in other administrative processes.



# Future of DFC Appeals

- SB 660: trial court for substantial evidence review
  - But no contested case provisions built in
- HB 2166: trial court for de novo review
- SB 1306: appeals to TCEQ with SOAH hearing
- No bill yet to leave it with TWDB
- District courts likely to get DFC appeals one way or the other

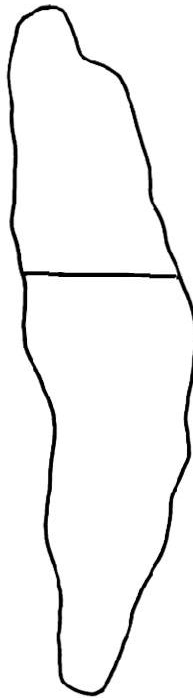


# TAKINGS CLAIMS

- *EAA v. Day*: Texas Supreme Court
  - *EAA*: Day can't state takings claim because he does not have a vested ownership interest in groundwater in place
- The ownership fight
- The proposed legislation
  - SB 332 and HB 1730
  - SB 667 and HB 1731



# Marrs v. RRC



# Implications of Marrs

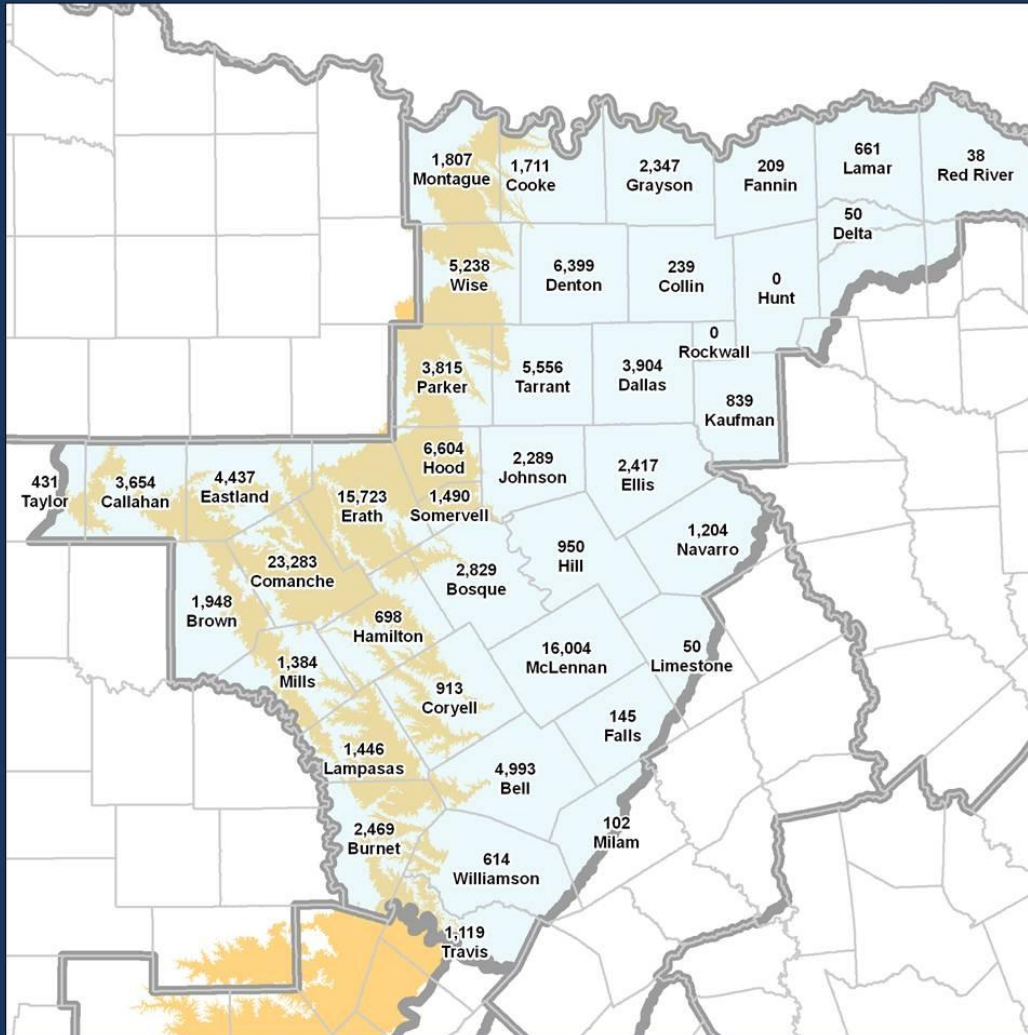
- GMA 8

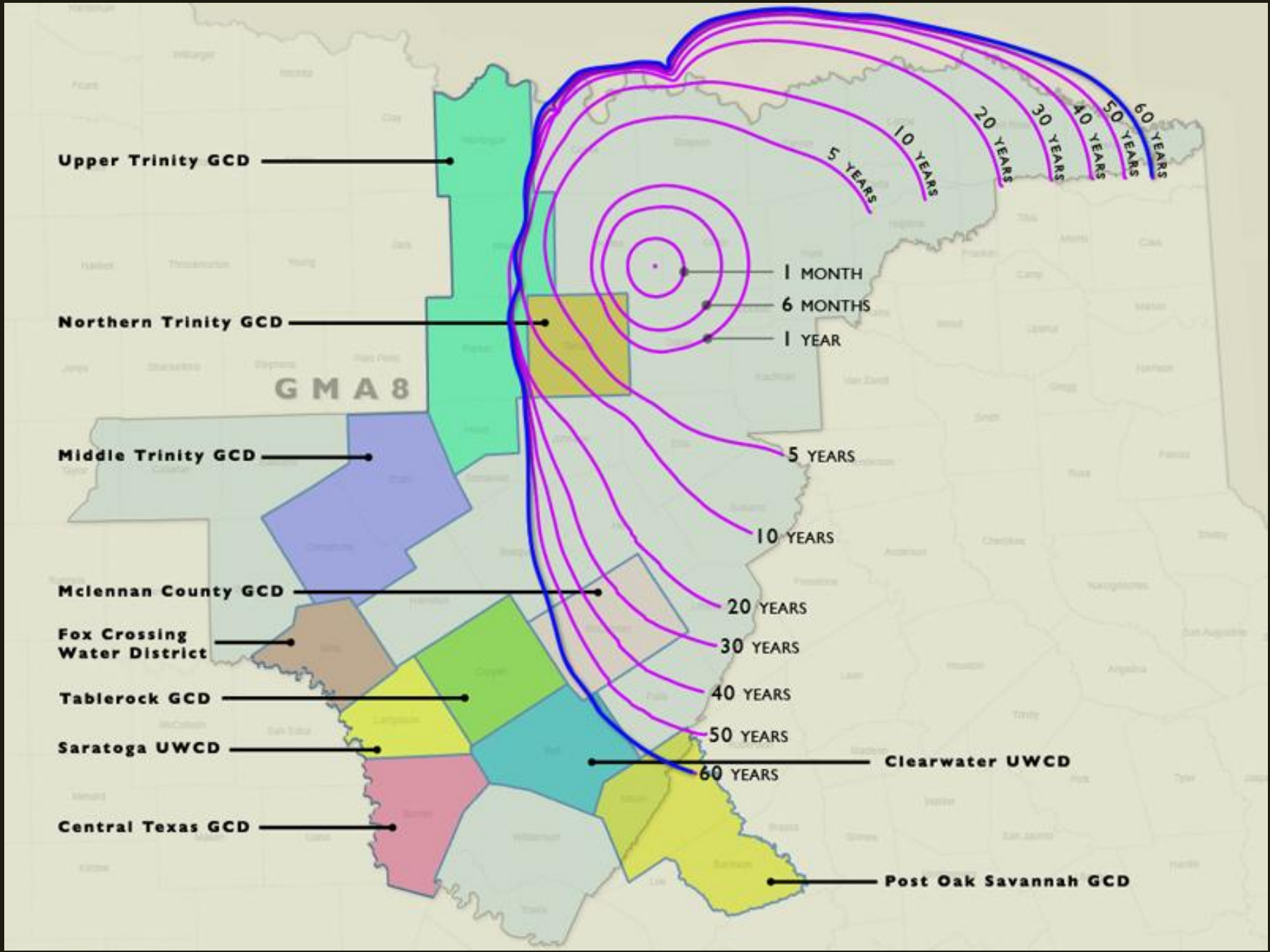




# GMA – 8 – Hosston

## Managed Available Groundwater (ac-ft/yr)

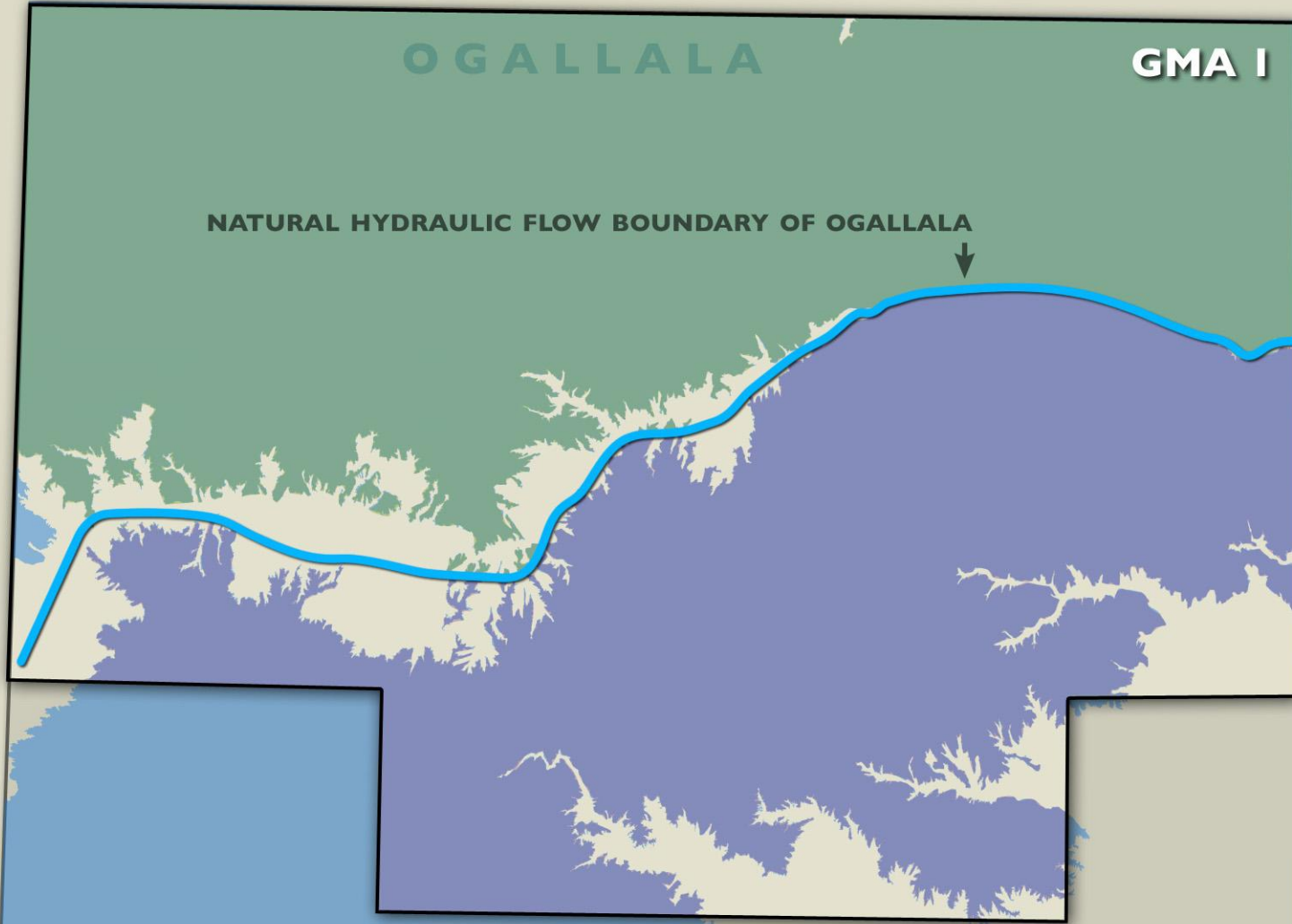




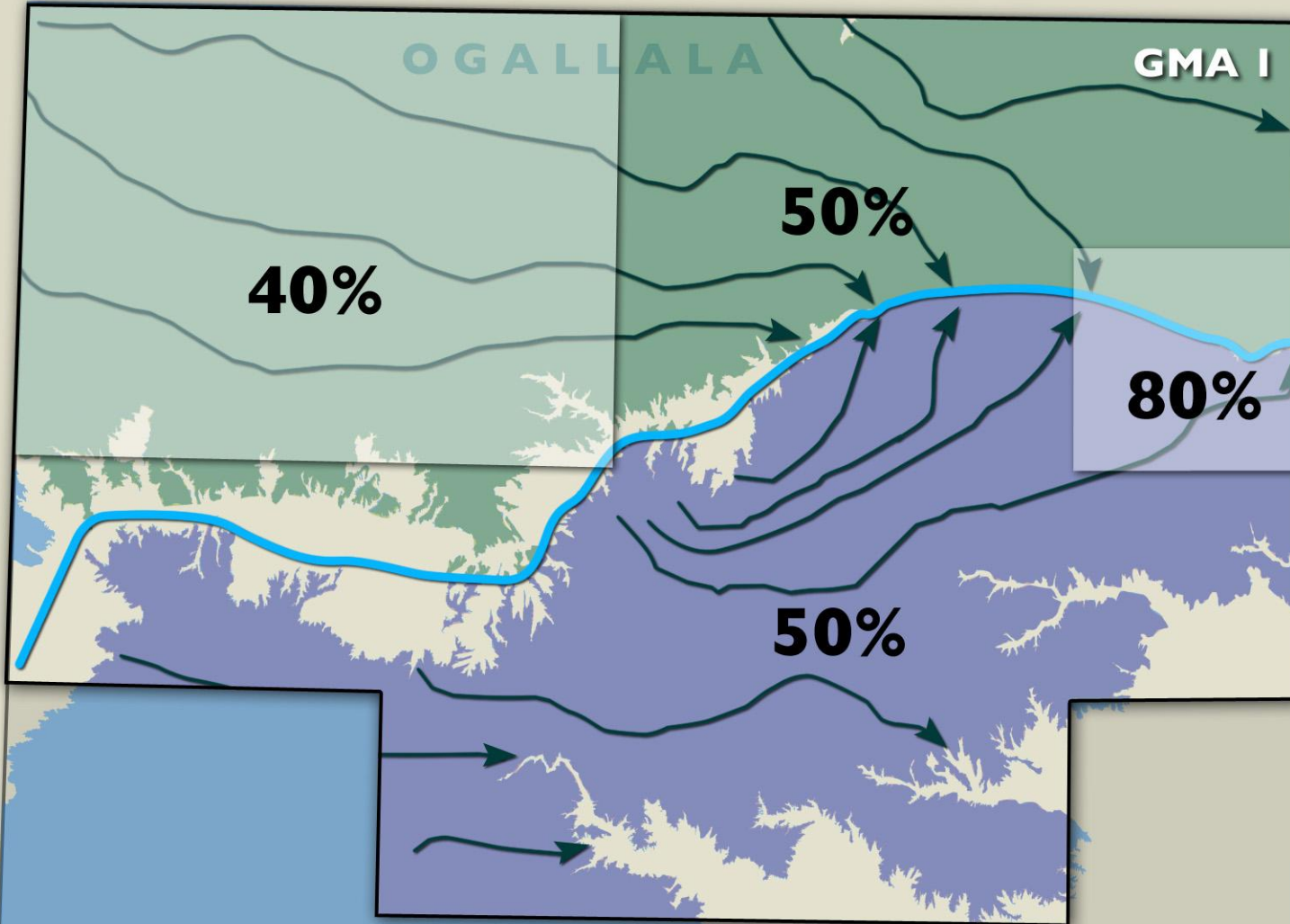
# GMA 1



# AQUIFER SUBDIVISIONS IN GMA I



**DFC IN GMA I**



50%



80%

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