

**GROUNDWATER DISTRICTS –**

**A NEW DAY IN TEXAS**

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**THE CHANGING FACE OF WATER RIGHTS IN TEXAS**

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**CHAPTER 5**

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## **GROUNDWATER DISTRICTS – A NEW DAY IN TEXAS**

### **I. Introduction**

In 1997 the Texas Legislature, in passing Senate Bill 1, expressly recognized groundwater conservation districts as the state's preferred method of groundwater management. Over sixty (60) districts have been created to date (see Attachment A). The role of groundwater conservation districts in the management of privately owned groundwater resources and in the development and implementation of programs on groundwater conservation, education and research continues to evolve and expand.

### **II. Groundwater Facts**

(1) Groundwater accounts for ninety-five percent (95%) of the world's fresh water supply (excluding glaciers).

(2) Approximately eighty-one percent (81%) of the State of Texas overlies groundwater.

(3) According to the Texas Water Development Board, nine (9) major and twenty (20) minor aquifers have been identified in the State of Texas.

(4) According to the Texas Water Development Board, the nine (9) major aquifers supply ninety-seven percent (97%) of the groundwater used in the State of Texas.

(5) Approximately sixty percent (60%) of the water needs of the State of Texas is supplied by groundwater.

(6) Groundwater is considered the property of the owner of the surface estate and treated much like a mineral or oil and gas.

### **III. Groundwater Conservation Districts – Historical Perspective**

#### **A. Post-World War II**

In 1949, the Texas Legislature authorized the voluntary creation of groundwater conservation districts (originally called underground water conservation districts). The initial legislation, found in House Bill 162, 51st Legislature, gave groundwater conservation districts discretionary and limited power to regulate groundwater pumping as long as the landowners did not lose their "ownership" of groundwater. This basic principal continues to be fostered and currently is codified in Chapter 36, Texas Water Code.<sup>1</sup>

The first groundwater conservation district was created in 1951. For the next thirty (30) years no more than ten (10) groundwater conservation districts were created. Most of these districts were created during the 1950's drought in the northwest and western portions of the State of Texas.

#### **B. 1980's Boom**

The 1980's saw a rapid growth in population throughout the State of Texas with a corresponding rapid increase in water demand. Likewise the 1980's saw a rapid proliferation of groundwater conservation districts being authorized for creation. During the 1980's decade more than twenty (20) such districts were authorized for creation. The majority of these districts were authorized through special legislation passed by the Texas Legislature. Additionally the majority of these districts have boundaries that coincide with single-county political boundaries and not aquifer boundaries.

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<sup>1</sup> §§36.002, TEXAS WATER CODE – The ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized and nothing in this code (Texas Water Code) shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, subject to rules promulgated by a district (groundwater conservation district).

### C. 1990's Accelerated Boom

The rapid population increase and increased water demand experienced in the 1980's in Texas was only a prelude of what was to come to Texas in the decade of the 1990's. The creation of single-county groundwater conservation districts became the norm rather than the exception. Prior to the passage of Senate Bill 1 in 1997, an additional ten (10) groundwater conservation districts were authorized to be created.

Spurred by the severe drought in the 1995-1996 period, the Texas Legislature passed Senate Bill 1 which was comprehensive legislation addressing a multitude of water related issues facing the State of Texas. Included in these issues was the management of groundwater in the State of Texas. The Texas Legislature expressly recognized that groundwater conservation districts are the state's preferred method of groundwater management.<sup>2</sup>

### D. Senate Bill 1911

After the passage of Senate Bill 1, which included the so-called "junior rights provision," and out of fear of how the Texas Supreme Court might rule in the *Sipriano v. Great Spring Water of America* case,<sup>3</sup> legislation was filed during the 76th Legislative Session to create twenty-three (23) new groundwater conservation districts. Many believe that this increased effort to create groundwater conservation districts was caused by the "junior rights provision" on interbasin transfers of surface water which forces those seeking water to turn their efforts towards groundwater instead of surface water. Consistent with the established trend in the prior fifteen (15) year period, most of the proposed districts were along single-county lines with no identifiable relationship to the underlying aquifer. In some instances, counties

were seeking means to prevent increased or continued drawdown of groundwater supplies as a result of rapid growth and development within unincorporated areas. In many cases, people were seeking to create groundwater districts primarily to prevent export of groundwater from rural areas to large metropolitan areas. In a few instances, districts were sought as a vehicle for marketing excess groundwater supplies to urban areas.<sup>4</sup>

The passage of Senate Bill 1911, allowed the creation of thirteen (13) new districts, covering seventeen (17) counties on a temporary basis. These thirteen new districts will not achieve permanent status unless ratified by a positive act of the 77<sup>th</sup> Texas Legislature.

One of the reasons the 76<sup>th</sup> Legislature chose to delay the creation of this multitude of new groundwater conservation districts was the schedule for development and adoption of the regional water plans under the state water planning process set in motion by Senate Bill 1. Senate Bill 1 required the initial round of regional water plans to be filed with the Texas Water Development Board by January 5, 2001. These plans were to "consider" the certified district management plans of any groundwater conservation district within the respective water planning region. Thereafter, groundwater conservation district management plans must be "consistent" with the approved regional water plans. One concern raised during the 76<sup>th</sup> Session was that a proliferation of new districts (all of which would then be developing district management plans) could unnecessarily complicate the planning efforts already in progress.<sup>5</sup>

Whether future groundwater conservation districts area created along single-or-multi-county boundaries, or some other boundary, it is indisputable that they should be structured so as to

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<sup>2</sup> §§36.0015, TEXAS WATER CODE.

<sup>3</sup> *Sipriano v. Great Spring Waters of America*, 1 SW3d 75 (Tex. 1999).

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<sup>4</sup> The Senate Interim Committee on Natural Resources, Interim Report to the 77<sup>th</sup> Legislature, Texas Groundwater Resources, Nov. 2000 pp. 29-30.

<sup>5</sup> *Ibid.* pp. 31-32.

be able to support themselves financially and to optimally manage the underlying aquifer.<sup>6</sup>

#### **IV. Groundwater Conservation Districts – Creation Processes**

##### **A. Texas Legislature**

Groundwater conservation districts can be established by the Texas Legislature through the passage of special (local) district-creation legislation. Typical district-creation legislation follows a consistent framework for authorizing district powers and duties, appointing temporary directors, and establishing procedures for confirmation and subsequent directors' elections. However, each individual piece of special (local) legislation may differ in certain ways. District creation legislation may enable a district with additional authorities such as water control and improvement; or may limit the powers available to a district, such as the power of eminent domain.<sup>7</sup>

##### **B. Landowner Petitions.**

Pursuant to § 36.013, Texas Water Code, a petition requesting the creation of a groundwater conservation district must be filed with the executive director of the Texas Natural Resource Conservation Commission (TNRCC) for review and submission to the TNRCC. Such a petition must be signed by a majority of the landowners within the proposed district or if there are more than fifty (50) landowners in the proposed district, at least fifty (50) of those landowners.

The contents of such a petition must include the name of the proposed district, boundaries of the proposed district, purposes of the proposed district and statement of the general nature of any proposed projects, necessity and feasibility of such projects, and the estimated costs and funding of such projects. TNRCC gives notice of the possible

creation of a groundwater conservation district and may conduct public hearings.<sup>8</sup>

If the TNRCC finds that the creation of a groundwater conservation district is feasible and practicable, a benefit to the land in the district and would be a public benefit or utility, TNRCC shall issue an order containing these findings and grant the petition. Such order shall also order that an election be called by the temporary directors to confirm the creation of the district and to elect permanent directors.<sup>9</sup>

##### **C. Priority Groundwater Management Area (PGMA) Process**

A priority groundwater management area (PGMA) is an area which the TNRCC has determined, after a study with consultation from the Texas Water Development Board and the Texas Parks and Wildlife Department, is likely to experience critical groundwater problems within the next 25 years. Groundwater conservation districts can be created by the TNRCC, on its own motion, as part of the PGMA process, in a procedure similar to the landowner petition process. The TNRCC may only initiate a district creation in a PGMA if, and after, local officials have failed to take action in response to the TNRCC's PGMA designation. If the voters act favorably on the proposed creation, temporary directors are named and a district confirmation election is held.<sup>10</sup>

At the time of the writing of this paper, issuance of a proposal for decision by a SOAH Administrative Law Judge was pending regarding the creation of a PGMA in northern Bexar County, as well as the creation of a groundwater conservation district for that area. It is anticipated

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<sup>6</sup> Ibid. p. 33.

<sup>7</sup> Ibid. p. 21.

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<sup>8</sup> § 36.014, Texas Water Code.

<sup>9</sup> § 36.015, Texas Water Code.

<sup>10</sup> § 36.0151, Texas Water Code and the Senate Interim Committee on Natural Resources, Interim Report to the 77<sup>th</sup> Legislature, Texas Groundwater Resources, Nov. 2000 p. 22.

that the TNRCC will act on this matter before the end of January 2001. Assuming that TNRCC will designate this area as a PGMA and recommend the creation of a groundwater conservation district, and should the landowners fail to create such a district, the TNRCC may do so on its own notion.

## V. Groundwater Conservation Districts – Powers & Duties

### A. Required Duties

The duties of a groundwater conservation district can be generally found in Chapter 36, Texas Water Code. Examples of such duties include:

1. Develop and adopt a comprehensive management plan for the most efficient use of groundwater, for controlling and preventing waste of groundwater, and for controlling and preventing subsidence, specifying in the management plan the acts, procedures, performance, and avoidance measures to effect the plans; adopt amendments as necessary; readopt the plan at least every five years (management plans and amendments must be submitted and certified by the TWDB and filed with other districts in a common management area).
2. Adopt necessary rules to implement the management plan.
3. Require permits for drilling, equipping, or completing wells which produce more than 25,000 gallons per day or for alterations to well size or well pumps (districts must promptly consider and pass on permit applications; all wells producing at least 25,000 gallons per day in existence prior to the district's creation must be granted a permit).
4. Require records to be kept of the drilling, equipping, and completion of water wells and the production and use of groundwater.

5. Require that water well driller's logs and electric logs be kept and filed with the district.
6. Make information on groundwater resources available to the TNRCC and the TWDB upon request.
7. Operate on the basis of a fiscal year.
8. Hold regular board meetings at least quarterly.
9. Prepare and approve an annual budget.
10. Name one or more banks to serve as the depository for district funds.
11. Have an audit of financial accounts prepared annually.
12. Keep a complete account of all meetings and proceedings and preserve minutes, contracts, records, notices, accounts, receipts and other records.
13. Submit bonds and notes issued by the district to the Attorney General for examination.
14. Register board members with the TNRCC.<sup>11</sup>

### B. Powers

The authorized powers of a groundwater conservation district likewise are generally codified in Chapter 36, Texas Water Code. A sample listing of such powers include:

1. Adopt rules to conserve, preserve, protect, recharge, and prevent waste of groundwater and control land subsidence.

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<sup>11</sup> Interim Committee on Water Resources Development and Management, Report to the 76<sup>th</sup> Legislature, Implementation of Senate Bill 1, Jan. 1999 p. 108.

2. Provide for the spacing of water wells and regulate the production of wells.
3. Enforce rules by injunction, mandatory injunction, or other appropriate remedy in a court of competent jurisdiction.
4. Acquire land to erect dams or drain lakes, draws, and depressions; construct dams, drain lakes, depressions, draws, and creeks; install pumps and other equipment necessary to recharge the groundwater reservoir; and provide facilities for the purchase, sale, transportation and distribution of water.
5. Make surveys of the groundwater reservoir or subdivision and facilities for development, production, transportation, distribution, and use of groundwater.
6. Purchase, sell, transport, and distribute surface water or groundwater for any purpose.
7. Exercise the power of eminent domain to acquire by condemnation a fee simple or other interest in property located inside the district if the property interest is necessary to the exercise of the authority conferred by Chapter 36.
8. Carry out research projects and collect information regarding the use of groundwater, water conservation, and the practicability of recharging a groundwater reservoir.
9. Promulgate rules to require permits for transferring groundwater out of the district.
10. Require the owner or lessee of land on which an open or uncovered well is located to keep the well permanently closed or capped.
11. Levy taxes on an annual basis to pay bonds, operation and maintenance

expenses.

12. Set fees for administrative acts of the district and services provided outside of the district.
13. Apply for and receive grants or donations from local, state, or federal agencies, private individuals, companies, or corporations for specific projects or research.
14. Issue and sell bonds and notes in the name of the district.<sup>12</sup>

The factors that a groundwater conservation district must consider before approving a sale of groundwater outside the district mirror the factors that TNRCC must review in granting an interbasin transfer of surface water. If a district approves an application for an out-of-district transfer, then the district must specify the amount of water that may be transferred and the period for which the water may be transferred.<sup>13</sup>

## **VI. Groundwater Conservation Districts - Funding**

Groundwater conservation districts may levy ad valorem taxes at a rate not to exceed 50 cents per \$100 assessed valuation, in order to pay for maintenance and operating expenses. Further, districts may assess fees for administrative services such as permit application fees or water analysis fees, and districts may receive grants and/or donations from local, state, or federal agencies, private individuals, companies, or corporations for specific projects or research. Finally, districts may issue and sell bonds for capital improvements such as building dams (for recharge), installing pumps and equipment, and providing facilities for aquifer recharge or the transportation and sale of water.<sup>14</sup>

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<sup>12</sup> Ibid p. 109.

<sup>13</sup> § 36.122, Texas Water Code.

<sup>14</sup> The Senate Interim Committee on Natural Resources Interim Report to the 77<sup>th</sup> Legislature, Texas

**VII. Groundwater Conservation Districts -  
Improvements for the 21<sup>st</sup> Century.**

During calendar year 2000, the Senate Interim Committee on Natural Resources worked with a consensus stakeholder group to identify the most pressing and challenging groundwater management issues facing the State of Texas and to develop consensus policy recommendations to resolve those challenges.<sup>15</sup> Issue areas were identified to include science; groundwater conservation district boundaries; joint planning; permit exemptions; funding; water marketing and exports; and conservation and drought conditions planning. The consensus stakeholder group's complete report can be found on the Texas Water Development Board's webpage. A brief summary of the group's conclusions and recommendations that were submitted to the Senate Interim Committee on Natural Resources follows.

**A. Science Recommendations:**

1. (Amend §16.012, Water Code)
2. Continue and expand the TWDB's Grants for Conservation Equipment Purchases program to include an increase in legislative appropriations and conservation-related equipment such as meters and data collection equipment. (amend §15.434 and 15.471, Water Code)
3. Require the TWDB's currently voluntary water use survey to become mandatory, in order to improve its effectiveness in projecting future water use. (amend §16.012, Water Code)
4. Expand the state's real-time monitoring network for groundwater level measurements.

(§16.012(b)(8) - (10), Water Code, authorizes current sampling. This recommendation would require additional appropriation to expand sampling program to include up to 400 monitoring wells.)

5. Provide additional appropriations and pay flexibility for the TWDB's staff for conducting groundwater modeling and data collection efforts – due to private sector competition for technical positions.<sup>16</sup>

The goal of these recommendations is to improve groundwater availability data to be used by the state's groundwater managers and planners.

**B. Management Areas and Priority  
Groundwater Management Areas  
(PGMAs) Recommendations:**

1. Streamline the process for designating management areas, and direct the TWDB, with assistance from the TNRCC, to complete, by September 1, 2003, the designation of management areas so as to cover all major and minor aquifers. (amend Chapter 35, Water Code)
2. Streamline the process for designating PGMAs, and direct the TNRCC, with assistance from the TWDB, to complete, by September 1, 2005, the designation of PGMAs where needed across all major and minor aquifers. Also, increase the study period for designating PGMAs from 25 to 50 years to be consistent with Senate Bill 1 regional water planning provisions. (amend Chapter 35, Water Code)
3. Direct the TNRCC to create district in PGMAs within a specific time

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Groundwater Resources. Nov 2000 pp. 26-27.

<sup>15</sup> Ibid p. 35.

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<sup>16</sup> Ibid pp. 36-37.

period of designating the PGMA. (amend Chapters 35 and 36, Water Code)

4. Encourage the TNRCC creation of districts by streamlining the process for landowner-petition creation and TNRCC creation. (amend Chapter 36, Water Code)
5. Encourage the boundaries of new districts to be based on designated management areas or PGMA's. (amend Chapter 36, Water Code) Increase TNRCC flexibility in district creation. (amend Chapter 36, Water Code)
6. Authorize the TNRCC to recommend to the legislature the creation of a special district or amendment of an existing district, if the TNRCC determines that a pure Chapter 36 district is not appropriate for a certain management area or that territory should be added to an existing district. (amend Chapter 36, Water Code)<sup>17</sup>

The goal of the above recommendations is to create a system whereby locally-controlled groundwater conservation districts can effectively manage a regional resource.<sup>18</sup>

#### **C. Joint Planning Recommendations:**

1. Require the coordinated development of consistent management plans by districts that share a management area. Authorize the TNRCC, in cases where no plan is submitted or when another district requests state action, to enforce the joint

management of groundwater in designated management areas. (amend §§36.108 and 36.303, Water Code)

2. Delete provision related to removal of a district's taxing authority and replace it with language allowing the TNRCC to place a non-performing district into receivership. (amend §36.303, Water Code)
3. Amend Chapter 36, Water Code, to allow districts within the same management area, and possibly with adjoining management areas, to pool financial resources on an equitable basis to allow for joint aquifer modeling and studies, education programs, equipment, brush control projects, weather modification, etc.<sup>19</sup>

The goal of the above recommendations is to provide greater accountability for groundwater conservation districts.<sup>20</sup>

#### **D. Permit Exemptions Recommendations:**

1. Limit oil and gas production exemptions to only water supply wells that are
  - (a) on the drilling rig site;
  - (b) supplying a rig that is currently drilling or exploring; and
  - (c) the responsibility of the person holding the drilling permit.
2. Mining operations exemptions would not apply to any water

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<sup>17</sup> Ibid p. 39.

<sup>18</sup> Ibid p. 38.

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<sup>19</sup> Ibid p. 40.

<sup>20</sup> Ibid p. 40.

provided in addition to the water withdrawn for mining purposes.

3. Limit the exemptions for wells less than 25,000 gallons per day used for domestic, livestock or poultry uses to wells on tracts of land larger than ten (10) acres.<sup>21</sup>

The goal of the above recommendations is to curb the abuses of the current statutory exemptions.

#### **E. Funding Recommendations:**

1. Production fee authority should be explicitly provided in Chapter 36, but only to newly created districts, and should include reasonable caps on the amount of fees that may be charged. Existing tax-funded districts that desire production fee authority should seek such authorization from the legislature. Districts that require fee authority exceeding the proposed caps should seek authorization from the legislature. The legislature should enable a district to ensure revenue adequate to support the districts' activities. (amend §36.205, Water Code)
2. District production fees should be statutorily capped so that districts may assess an annual production fee of no more than one dollar per acre foot for water produced for use in irrigating agricultural crops or raising livestock and no more than ten dollars per acre foot for water produced for other purposes. (amend §36.205, Water Code)
3. Groundwater districts should be

allowed to charge production fees on exempt users if the water is being sold. (amend §36.205, Water Code)

4. Groundwater districts should be authorized to charge production fees on groundwater used for secondary recovery of oil and gas, as such water is permanently lost from the hydrologic cycle. (amend §36.205, Water Code)
5. Support additional general revenue appropriations for Texas Water Development Board (TWDB) programs related to groundwater district funding and operations, including loans for district start-up costs and equipment utilized by districts, as well as additional appropriations to the TWDB for technical assistance to districts and to provide substantive review of groundwater management plans.
6. Support the legislative creation of a state fund for plugging abandoned and deteriorated water wells.<sup>22</sup>

The goal of the above recommendations is to provide groundwater conservation districts with adequate funding. Additionally, clarification of districts ability to assess production fees is sought.

#### **F. Water Marketing and Exports Recommendations:**

1. Remove "junior rights provision" on interbasin transfers of surface water due to extensive balancing test in §11.085, Water Code and to attempt to equalize the pressure on both surface water and groundwater resources of the state. (amend §11.085, Water Code)

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<sup>21</sup> Ibid pp. 41-42.

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<sup>22</sup> Ibid pp. 43-44.

2. Repeal export limitations and state that any movement of water outside of district boundaries would be subject to an export/transfer fee with some limitations to clarify that exports outside of district boundaries can not be prohibited and to provide the district with compensation for exporting a resource outside of their boundaries. (amend §§36.121 and 36.122, Water Code)
3. Support existing state policy that groundwater conservation districts are the appropriate body to manage and regulate groundwater withdrawals in the state.
4. All groundwater production should be managed, regulated or limited based on a balance of right to use and the goals and objectives of management plans and on a rational, defensible, science-based district management plan. In addition, water produced for use outside of a district's boundaries should be managed, regulated, or limited based on these factors the same as in-district use. (amend §36.122, Water Code)
5. Authorize groundwater districts to assess an export fee or surcharge for water used outside of a district's boundaries with specific limitations. Authorize a district to assess an export fee not to exceed: (1) a fee negotiated by the district and the transporter; (2) the equivalent of the district's tax rate per hundred dollars of valuation for each thousand gallons of water transferred, or \$0.025 per thousand gallons if the tax rate is less than \$0.025 per hundred dollars of valuation; or (3) an additional 50 percent export surcharge in addition

to their production fee, for water transferred. (amend §36.122, Water Code)<sup>23</sup>

The goal of the above recommendations is to reduce roadblocks to water marketing.

#### **G. Water Conservation and Drought Conditions Planning Recommendations:**

1. Include conservation and drought contingencies as management goals in district management plans. (amend §36.1071, Water Code)<sup>24</sup>

The goal of this recommendation is to provide districts with the authority to include water conservation and drought contingency as goals in a district's management plan.

### **VIII. CONCLUSION**

The vision for the future of groundwater conservation districts in the State of Texas is quite clear. Groundwater conservation districts must effectively manage this State's groundwater. With the state's growing population and increases in water demands, it will be imperative that citizens of this great State demand and the Texas Legislature enact legislation to increase the powers of groundwater conservation districts to enable such districts to accomplish their duties and responsibilities of protecting, conserving, and managing groundwater use.

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<sup>23</sup> Ibid pp. 44-45.

<sup>24</sup> Ibid p. 46.

**ATTACHMENT A**

**Map of Groundwater Districts**