

THE EVOLVING LEGACY OF *EAA v. DAY*: TOWARD AN EFFECTIVE
STATE WATER PLAN

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INTRODUCTION

A capstone paper from the Bush School of Government and Public Service poses this provocative question: “The Texas Water Development Board’s (TWDB) 2012 State Water Plan paints a pessimistic picture of

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future availability of groundwater. Is this due to the physical limitations of the resource or a regulation-induced shortage?”¹ The 2012 State Water Plan is not the first to adopt a pessimistic tone. Texas has promulgated State Water Plans since 1961.² Every one of these plans sounds a dire warning about water shortages in Texas. Each lays out an aggressive strategy for conserving this critical substance. Yet none of these plans has resulted in a degree of certainty that the State’s water needs will be met.

A close scrutiny of groundwater regulation in Texas affirms the conclusion reached in the Bush School paper: any shortage of water in Texas is a “regulatory-induced” shortage of water. This regulatory conundrum was legislatively created, and the Legislature seems loath to correct it. However, given the holdings in *Edwards Aquifer Authority v. Day*³ and *Coyote Lake Ranch v. City of Lubbock*,⁴ it now appears that effective and workable regional and state water planning is possible. This paper will explore the development of and impediments to state water planning and will highlight the judicial path toward an effective plan.

I. AN HISTORIC PERSPECTIVE OF THE STATE WATER PLAN

A letter from the Texas Board of Water Engineers, dated May 31, 1961, transmitting the 1961 State Water Plan, begins with these words:

Water is fundamental to sustaining our people and our economy. Additional development of our water resources will be essential to provide for a rapidly expanding population and an accompanying expansion of industrial capacity.

The plan presented herein provides a guide for orderly and economic development of the water resources of the State to meet the needs that can be estimated at this time with reasonable accuracy, and the projects suggested will be the basic components of any plans devised to meet the water needs beyond 1980. . . .

¹ROSS BRADY ET AL., BUSH SCH. OF GOV’T & PUB. SERV., TEX. A&M UNIV., REORGANIZING GROUNDWATER REGULATION IN TEXAS 2 (2016).

²TEX. BD. OF WATER ENG’RS, A PLAN FOR MEETING THE 1980 WATER REQUIREMENTS OF TEXAS (1961) [hereinafter “1961 SWP”].

³369 S.W.3d 814 (Tex. 2012).

⁴498 S.W.3d 53 (Tex. 2016).

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. . . Studies made during the preparation of this report indicate that continuous planning and increasingly comprehensive studies will be essential to bring about the development of the State's water resources necessary to meet its needs beyond the year 1980.⁵

The 1961 State Water Plan describes the period between 1950 and 1960 as "a disheartening pattern of extremes," with areas of the State being either too wet or too dry.⁶ The introduction then noted that most of the water projects developed in Texas had been planned from a local viewpoint to satisfy the then-present and immediate local demands.⁷ The introduction outlines a plan utilizing existing facilities as a foundation and providing for the orderly development of water resources to meet projected 1980 water demands, all under the umbrella of the 1957 Planning Act.⁸ However, as noted later in the Plan:

The plan presented in this report for meeting the municipal and industrial water needs in 1980 is concerned primarily with the development of surface water. Although large amounts of ground water are available in many parts of Texas, any planning for the orderly development of these underground supplies is limited by the fact that ground water has not been subjected to State control.⁹

From the first efforts at a State Water Plan, the focus has been directed away from groundwater and towards surface water—even surface water from other states. In 1968, a second State Water Plan was formulated by the Texas Water Development Board. In its letter transmitting the new Plan, the Board noted:

Since Texas does not have enough water within its boundaries to meet all its needs beyond 1985 it will be necessary to seek supplementary water from outside its borders. The Plan includes the possibility of importation of large quantities of surplus water from the lower reaches of

⁵ 1961 SWP, *supra* note 2, at iii.

⁶ *Id.* at 5.

⁷ *Id.*

⁸ The Texas Water Planning Act of 1957, 55th Leg., 1st C.S., ch. 11, § 3, 1957 Tex. Gen. Laws 23, 24 (repealed 1971).

⁹ 1961 SWP, *supra* note 2, at 7.

the Mississippi River to areas of greatest need in Texas, in order to meet our requirements after 1985.¹⁰

Many of this State's reservoirs were both planned and built during this early phase in water resource planning. More recent droughts have dangerously depleted these reservoirs, and in some cases have rendered the reservoirs useless. To make matters more difficult for water planning, in 1997 the Legislature passed laws that effectively stopped the inter-basin transfer of surface water, putting surface water off the table for consideration in regional planning.¹¹

In the meantime, groundwater resource planning was left to local groundwater conservation districts. In 1961, only three groundwater conservation districts existed, all centered over the important Ogallala Aquifer.¹² However, the number of local groundwater conservation districts exploded after 2000. There are, at present, ninety-nine groundwater conservation districts, sixty-one of which are single-county districts.¹³ Recognizing the importance of groundwater to a State Water Plan, the Legislature in 2001 provided a mechanism for the local groundwater conservation districts to engage in "joint planning" that would theoretically result in realistic estimates of the availability of groundwater in various areas of the State.¹⁴ However, as noted below, provincial concerns at the local level have created virtually insurmountable impediments to the development of regional water plans.

¹⁰TEX. WATER DEV. BD., THE TEXAS WATER PLAN SUMMARY (Nov. 1968). (In its transmittal letter, the Board concluded: "If we are to meet these responsibilities and provide the water so essential to our well-being, we must begin now. To delay the full development of our water resources will place a burden upon the future of Texas from which it might never recover.")

¹¹Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 2.08, 1997 Tex. Gen. Laws 3610, 3621 (amending TEX. WATER CODE § 11.085 to make any transferred water a "junior" water right). Senate Bill 1 also formalized the process of promulgating State Water Plans every 5 years, beginning in 2001, and created both regional and local water planning mechanisms. *Id.* § 1.01, 1.02.

¹²TEX. WATER DEV. BD., *Groundwater Conservation Districts of Texas*, GROUNDWATER CONSERVATION DISTRICTS (Nov. 2015), http://www.twdb.texas.gov/mapping/doc/maps/GCDs_8x11.pdf.

¹³TEX. WATER DEV. BD., *Groundwater Conservation District Facts*, GROUNDWATER CONSERVATION DISTRICTS (last visited Sept. 27, 2016), http://www.twdb.texas.gov/groundwater/conservation_districts/facts.asp.

¹⁴Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.48, 2001 Tex. Gen. Laws 1991, 2013–14 (codified at TEX. WATER CODE ANN. § 36.108 (West Supp. 2016)).

II. THE IMPEDIMENTS TO PLANNING: THE HISTORY OF GROUNDWATER DISTRICTS

A. *The Early Regulation of Groundwater*

The people of Texas amended their constitution in 1917 to include the “conservation amendment,” which directed the State to take appropriate steps to conserve the State’s natural resources, including both oil and gas and groundwater.¹⁵ In 1925, the Legislature passed Chapter 25, which provided for the creation of water control and improvement districts by landowner petition.¹⁶ In 1949, the Legislature passed Chapter 306, authorizing the creation of Underground Water Conservation Districts.¹⁷ Subsection C of Chapter 306, Section 1 placed key 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.¹⁸

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

¹⁵TEX. CONST. art. 16, § 59.

¹⁶Acts 1925, 39th Leg., R.S., ch. 25, §§ 1, 10, 1925 Tex. Gen. Laws 86, 86, 88 (current version at WATER §§ 51.011–013).

¹⁷Act of May 19, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559 (repealed 1995).

¹⁸*Id.* at 561.

produced from a well at the rate of not less than one hundred and fifty thousand (150,000) gallons a day.¹⁹

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.²⁰

Subsection C of Chapter 306, when read in relation to the defined terms “reservoir” and “subdivision of an underground reservoir,” evidenced a crucial limitation on the creation of groundwater districts—the area to be included in each district had to be coterminous with the reservoir or subdivision of a reservoir that the district would regulate.

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. 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 boundaries and containing underground water that can be produced from a well at a rate of 150,000 gallons or more a day.

¹⁹ *Id.* at 559.

²⁰ *Id.*

(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 other 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.²¹

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,” and the phrase “cannot measurably affect” became “will not be unreasonably affected.”

B. The First Groundwater Conservation Districts

Starting in 1955, three groundwater districts were formed over the massive Ogallala Aquifer in West Texas and the Panhandle.²² 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.²³ 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.²⁴ Unfortunately, however, the Legislature did not demand that these early

²¹ Act of Mar. 24, 1971, 62d Leg., R.S., ch. 58, 1971 Tex. Gen. Laws 388, 388 (repealed 1995).

²² BRUCE LESIKAR ET AL., QUESTIONS ABOUT GROUNDWATER CONSERVATION DISTRICTS IN TEXAS 5 (Kelly Mills et al eds., 2002).

²³ *Groundwater Conservation Districts of Texas*, *supra* note 12.

²⁴ An exception to the coterminous principle existed (and continues to exist) in the Panhandle Groundwater Conservation District in that one county on the far eastern border of the Panhandle was omitted from PGCD. *Id.*

districts fully encompass the subdivisions over which they were created, leaving room for later mischief.

C. The Later Mischief

In 1985, the Legislature altered groundwater statutes to allow further “slippage” in the definitions 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.²⁵

Section 52.024 was amended to read:

(a) On its own motion from time to time, or on receiving a petition, the commission . . . shall 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.²⁶

Today, the creation of districts is governed by Chapter 36 of the Water Code. Under Section 36.012, 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 in each county sought to be included”²⁷

²⁵ Act of May 8, 1985, 69th Leg., R.S., ch. 133, § 5.01, 1984 Tex. Gen. Laws 617, 640 (repealed 1995).

²⁶ Act of May 29, 1989, 71st Leg., R.S., ch. 936, § 3, 1989 Tex. Gen. Laws 3981, 3983 (repealed 1995).

²⁷ TEX. WATER CODE ANN. § 36.012(b) (West Supp. 2016).

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Thus, new districts will, by necessity, be formed along county lines rather than on hydrological principles. That same section provides that districts may include territories that do not connect physically as long as the land in between is in the district.²⁸

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.”²⁹

Because groundwater conservation district boundaries are no longer constrained by hydrological principles, such districts have proliferated. Today, ninety-nine local groundwater districts regulate the sixteen major aquifers of the State.³⁰ Sixty-one of these districts are single-county districts.³¹ By contrast, there are no major aquifers in Texas that are totally encompassed in a single county.³² This means that many GCDs exist over the same aquifer, applying different rules to groundwater owners based on political subdivision lines rather than aquifer boundaries.

III. DFCs: ANOTHER ATTEMPT TO REGIONALIZE GROUNDWATER PLANNING

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:

Each 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

²⁸ *Id.* § 36.012(d).

²⁹ *Id.* § 36.108(d-2).

³⁰ *Groundwater Conservation District Facts*, *supra* note 13.

³¹ *Id.*

³² TEX. WATER DEV. BD., *Texas Aquifers*, AQUIFERS, <https://www.twdb.texas.gov/groundwater/aquifer/index.asp> (last visited Sept. 27, 2016).

coincide with the boundaries of a groundwater reservoir or a subdivision of a groundwater reservoir.³³

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(a): “The Texas Water Development Board also may consider other factors, including the boundaries of political subdivisions.”³⁴ 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 scientific and hydrological reality rather than politics and chicanery.

In 2005, the Legislature again recognized that coordination between districts overlying the same aquifer or subdivision of an aquifer was lacking. House Bill 1763 strengthened the 2001 attempt to foster joint planning by amending Section 36.108 of 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

³³ WATER § 35.004(a).

³⁴ *Id.*

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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.³⁵

Acting pursuant to legislation passed in 2001,³⁶ the TWDB designated sixteen Groundwater Management Areas (“GMAs”) based generally along the lines of major aquifers.³⁷ Under the 2005 legislation, the GCDs in each GMA were to meet together and engage in joint planning for the aquifers.³⁸ Note that the initial premise of 36.108(d-1)(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.³⁹ Somehow, however, the Legislature again lost sight of that thought by adding Section 36.108(d-1)(2), introducing the notion that different desired future conditions could be articulated for “geographic areas.”⁴⁰ While the terms “reservoir” and “subdivision of a reservoir” are defined in Section 36.001, the term “geographic areas” is not.⁴¹ By elimination, a 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”

³⁵ Act of May 30, 2005, 79th Leg., R.S., ch. 970, § 8, 2005 Tex. Gen. Laws 3247, 3254–55 (codified at WATER § 36.108).

³⁶ See WATER § 35.004.

³⁷ TEX. WATER DEV. BD., *Groundwater Management Areas*, GROUNDWATER MANAGEMENT AREAS, http://www.twdb.texas.gov/groundwater/management_areas/index.asp (last visited Sept. 27, 2016).

³⁸ WATER § 36.108(d).

³⁹ *Id.* § 36.108(d-1)(1).

⁴⁰ *Id.* § 36.108(d-1)(2).

⁴¹ Interestingly, the terms “aquifer” and “subdivision of an aquifer” are also not defined in Chapter 36, even though both are used in § 36.108(d-1)(1).

is defined in both Section 35.002 and Section 36.001, but is omitted from Section 36.108(d–1).⁴² In terms of statutory construction, then, a political subdivision is not a proper basis for different desired future conditions.⁴³

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 areas encompassing less than the entire aquifer over which they exist.

IV. THE RESULTS OF THE MISCHIEF

There are two very profound results of having multiple GCDs regulating groundwater production from the same aquifer. One result is that groundwater rights owners are being deprived of the value of their groundwater resources due to disparate GCD rules. The second result is that localized GCD control is impeding the ability of groundwater rights owners to export groundwater to other areas of the State, hampering the overall regional and state planning processes.

How does disparate rule making affect groundwater rights? GMA 14 provides a typical example. In that GMA, five GCDs cover 15 of the 20 counties inside the GMA borders.⁴⁴ The Gulf Coast Aquifer system, consisting of the Chicot, Evangeline, and Jasper aquifers, exists under the 20 counties.⁴⁵ In 2010, the five GCDs adopted 15 different DFCs for the

⁴²WATER §§ 35.002(13), 36.001(15), 36.108(d).

⁴³In statutory construction, the doctrine of *noscitur a sociis* (or “it is known by its associates”) provides that “words grouped in a list should be given a related meaning.” *Third Nat’l Bank v. Impac, Ltd.*, 432 U.S. 312, 322 (1977); *see also* *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011) (defining *noscitur a sociis*); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 750–51 n.29 (Tex. 2006) (answering certified question posed by *Fiess v. State Farm Lloyds*, 392 F.3d 802 (5th Cir. 2004), *subsequent decision at* 472 F.3d 383 (5th Cir. 2006)); *Riverside Nat’l Bank v. Lewis*, 603 S.W.2d 169, 174–75 n.2 (Tex. 1980).

⁴⁴TEX. WATER DEV. BD., *Groundwater Management Area 14*, GROUNDWATER MANAGEMENT AREAS (Aug. 2015), http://www.twdb.texas.gov/groundwater/management_areas/maps/GMA14_GCD.pdf.

⁴⁵TEX. WATER DEV. BD., *Gulf Coast Aquifer: Summary*, AQUIFERS, <http://www.twdb.texas.gov/groundwater/aquifer/majors/gulf-coast.asp> (last visited Sept. 27, 2016).

Jasper aquifer alone, with each DFC based on county lines.⁴⁶ The other aquifers making up that system were treated the same way—different DFCs based on county lines.⁴⁷ The five GCDs even established DFCs for the counties that are not burdened by GCDs, even though there is no mechanism in those counties for achieving the DFCs.⁴⁸ As a practical matter, this means that a county like Montgomery, burdened by a GCD, will establish rules to achieve a DFC while neighbors in Liberty County have no rules to guide or restrain groundwater pumping. Therefore, water rights owners in Liberty County can place wells along the Montgomery County line and pump water that comes from Montgomery County. The groundwater in Montgomery County will be affected by pumping in the adjacent county, but the water rights owners in Montgomery County are constrained by the rules of Lone Star Groundwater Conservation District from exercising any effective right of offset to protect their water rights.

Of equal importance, allowing the existence of GCDs that do not encompass all of an aquifer has resulted in parochial control of groundwater, generally designed to prevent export from a GCD. Texas Water Code § 36.122(o) states that GCDs may not prohibit export of groundwater.⁴⁹ Section 36.122(c) says that a district may not impose more restrictive permit conditions on export of groundwater than on in-district use.⁵⁰ However, Section 36.122(f) allows a GCD, in reviewing a proposed transfer of water out of the district, to consider the availability of water in the district and in the proposed receiving area, and to consider the projected effect of the transfer on aquifer conditions, depletion, and effects on existing users in the district.⁵¹ Virtually all single-county GCDs have promulgated rules that require detailed information for export of water from the district, but do not require similar information for in-district use. Returning to the Montgomery County example, people in adjacent Liberty County can produce groundwater without any restrictions on amount or place of use, allowing them to export water to thirsty nearby cities. Unless

⁴⁶ GROUNDWATER MANAGEMENT AREA 14, Resolution No. 2010.01, RESOLUTION FOR THE ADOPTION OF THE DESIRED FUTURE CONDITIONS FOR ALL AQUIFERS IN GROUNDWATER MANAGEMENT AREA 14, 24–36 (Aug. 2010), http://www.twdb.texas.gov/groundwater/docs/DFC/GMA14_DFC_Adopted_2010-0825.pdf.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ TEX. WATER CODE ANN. § 36.122(o) (West 2008).

⁵⁰ *Id.* § 36.122(c).

⁵¹ *Id.* § 36.122(f).

they have a greater “total qualifying demand,” Montgomery County groundwater rights owners are constrained by the Lone Star GCD rules from pumping more than 10 million gallons (approximately 30.7 acre-feet) per year.⁵² From a market value standpoint, the groundwater rights in Montgomery County are virtually worthless as compared to the groundwater rights literally next door.

As noted below, disparate DFCs, different production rules, and different considerations for export of groundwater result in the violation of groundwater owners’ constitutional rights. But recent case developments, coupled with the application of principles from the oil and gas arena, will ultimately clear the way for expanded transfer of groundwater out of GCDs and across the State, which in turn will provide the path for effective water planning.

V. THE IMPLICATIONS OF *EAA v. DAY*

The propriety of GCD regulation based on county lines rather than aquifer boundaries has never been directly presented to a court in Texas. However, in *Edwards Aquifer Authority v. Day*, the Texas Supreme Court took an important first step toward dismantling the current patchwork quilt of regulatory impediments.⁵³ There, the court was presented with countervailing arguments about whether groundwater was owned in place or by the landowner.⁵⁴ Regulatory authorities lined up on the side of EAA, claiming that groundwater was not owned by the landowner until reduced to possession at the surface.⁵⁵ Accordingly, there could be no taking as a result of permit denials. Property rights advocates, on the other hand, argued that groundwater, like oil and gas, are owned in place and therefore subject to constitutional protection.⁵⁶

In its decision in the *Day* case, the Supreme Court’s first two sentences spread joy among landowners and shock waves among groundwater

⁵²LONE STAR GROUNDWATER CONSERVATION DISTRICT, DISTRICT REGULATORY PLAN PHASE II(B), 6 (2015), <http://lonestargcd.org/wp-content/uploads/2014/09/District-Rules-Approved.12.08.15-1.pdf>. To put the 10 million gallons per year limitation in perspective, domestic and livestock wells are exempt from regulation pursuant to WATER § 36.117(b)(1). Such wells are limited to 17.5 gallons per minute, which works out to 9,198,000 gallons annually. Therefore 10 million gallons per year is just slightly more than a good house well will produce.

⁵³369 S.W.3d 814 (Tex. 2012).

⁵⁴*Id.* at 823.

⁵⁵*Id.* at 830.

⁵⁶*Id.* at 829–830.

districts: “We decide in this case whether land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation guaranteed by article I, section 17(a) of the Texas Constitution. We hold that it does.”⁵⁷

After reciting the somewhat convoluted history of the case, the court opined that it had never decided whether groundwater can be owned in place, then noted: “we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently.”⁵⁸ Following that line of thought, the court held that the fugacious nature of groundwater did not preclude ownership in place, relying on its reasoning in *Texas Co. v. Daugherty*, an oil and gas case that noted:

The possibility of the escape of the oil and gas from beneath the land before being finally brought within actual control may be recognized, as may also their incapability of absolute ownership, in the sense of positive possession, until so subjected. But nevertheless, while they are in the ground, they constitute a property interest.⁵⁹

Rejecting another argument advanced by the EAA, the court held that landowners have “correlative” rights in groundwater.⁶⁰ Relying on its holding in *Elliff v. Texon Drilling Co.*, the court held that “‘correlative rights between the various landowners over a common reservoir of oil or gas’ have been recognized through state regulation of oil and gas production that affords each landowner ‘the opportunity to produce his fair share of the recoverable oil and gas beneath his land.’”⁶¹ Comparing groundwater to oil and gas, the court specifically adopted the “fair share” doctrine that has long been the rule in oil and gas matters.⁶²

The EAA posited that the ownership principles regarding oil and gas should not apply to groundwater because it is chemically and socially different from oil and gas.⁶³ Rejecting this argument, the court pointed out that differentiating between the two in terms of importance to modern life would be difficult, then noted: “But we see no basis in these differences to

⁵⁷ *Id.* at 817.

⁵⁸ *Id.* at 823.

⁵⁹ *Id.* at 829 (quoting *Texas Co. v. Daugherty*, 176 S.W. 717, 720 (Tex. 1915)).

⁶⁰ *Id.* at 831.

⁶¹ *Id.* at 830 (quoting *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 562 (Tex. 1948)).

⁶² *Id.* at 830, 840.

⁶³ *Id.* at 831.

conclude that the common law allows ownership of oil and gas in place but not groundwater.⁶⁴ The court then adopted the following reasoning from *Elliff* as correctly stating the law regarding ownership of groundwater:

In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value.⁶⁵

Finally, the court specifically held that the nature of groundwater ownership was such that constitutional protections attached to it: “Groundwater rights are property rights subject to constitutional protection, whatever difficulties may lie in determining adequate compensation for a taking.”⁶⁶ Outlining the nature of such constitutional protection, the court turned to its opinion in *Sheffield Development Co. v. City of Glenn Heights*:

“Government hardly could go on”, wrote Justice Holmes in the first regulatory takings case in the United States Supreme Court, “if to some extent values incident to property could not be diminished [by government regulation] without paying for every such change in the general law.” Yet, he continued, “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” “The general rule at least”, he concluded, is “that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”, adding, “this is a question of degree—and therefore cannot be disposed of by general

⁶⁴ *Id.*

⁶⁵ *Id.* at 831–32 (quoting *Elliff*, 210 S.W.2d at 561 (citations omitted)).

⁶⁶ *Id.* at 833.

propositions.” “[T]he question at bottom is upon whom the loss of the changes desired *should* fall.”⁶⁷

The court concluded that a takings analysis with respect to groundwater regulation should follow the factors set forth in *Penn Central Transp. Co. v. New York City*.⁶⁸ In that regard, the court opined that the State is “unquestionably” empowered to regulate groundwater production because such regulation is essential to its conservation and use.⁶⁹ One purpose of this regulation is “to afford each owner of water in a common, subsurface reservoir a fair share.”⁷⁰ After carefully analyzing the *Penn Central* factors in connection with the EAA authorizing statute and the ownership provisions of the Texas Water Code, the court concluded that a fact issue existed regarding whether the EAA regulations were too restrictive of Day’s groundwater rights and without justification in the overall regulatory scheme.⁷¹

VI. THE IMPLICATIONS OF *COYOTE LAKE RANCH V. CITY OF LUBBOCK*

In *Coyote Lake Ranch, LLC v. City of Lubbock*, the Supreme Court was faced with the question of whether or not common law principles from the realm of oil and gas could be applied to groundwater.⁷² That case involved a dispute between a groundwater rights owner, the City of Lubbock, and the surface owner, Coyote Lake Ranch.⁷³ In 1953, the City purchased groundwater rights from Coyote Lake Ranch’s predecessor in interest.⁷⁴ In 2012, the City sought to expand its water-extraction efforts on the Ranch.⁷⁵ The Ranch objected to the City’s proposed drilling program, arguing that it was reasonably calculated to substantially and unnecessarily interfere with the Ranch’s agricultural activities.⁷⁶ In seeking a temporary injunction

⁶⁷ *Id.* at 838 (quoting *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 670 (Tex. 2004)).

⁶⁸ *Id.* at 839–40.

⁶⁹ *Id.* at 840.

⁷⁰ *Id.*

⁷¹ *Id.* at 843.

⁷² 498 S.W.3d 53 (Tex. 2016).

⁷³ *Id.* at 57.

⁷⁴ *Id.* at 55–56.

⁷⁵ *Id.* at 57.

⁷⁶ *Id.*

against the City's activities, the Ranch relied on a well-settled concept in oil and gas law, the "accommodation doctrine," which requires that:

[W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.⁷⁷

The trial court granted the Ranch's temporary injunction, and the City appealed, arguing that the deed provided the City with the express right to conduct its proposed operations and that the accommodation doctrine did not apply to groundwater.⁷⁸ The City's opposition to the application of the accommodation doctrine rested on the premise that, unlike the mineral estate, the groundwater estate was not "dominant."⁷⁹

The Supreme Court ultimately held that the accommodation doctrine did apply to groundwater and supported its analysis by observing that Texas law has long adhered to the idea that a landowner may sever the mineral and surface estates and convey them separately.⁸⁰ This act of severance gives rise to an implied right in favor of the mineral owner to use as much of the surface estate as reasonably necessary to use, produce, and remove minerals.⁸¹ The court explained that, "[i]n the law of servitudes, the mineral estate is called 'dominant' and the surface estate 'servient', not because the mineral estate is in some sense superior, but because it receives the benefit of the implied right of use of the surface estate."⁸² Thus, the chemical composition of the severed subsurface estate was not the determinative factor in determining the rights, duties, and obligations between the owners of the surface and subsurface estates. In reaching its conclusion, the court noted that both oil and gas and groundwater are found "in subterranean reservoirs in which they are fugacious."⁸³

⁷⁷ *Id.* at 61 (quoting *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971)).

⁷⁸ *Id.* at 58.

⁷⁹ *Id.* at 64.

⁸⁰ *Id.* at 60, 64.

⁸¹ *Id.* at 60.

⁸² *Id.*

⁸³ *Id.* at 63.

Though the accommodation doctrine is applicable in only a very narrow set of circumstances, the court's decision in *Coyote Lake* carries far-reaching implications. Essentially, the court recognized that the similarities in the physical properties and legal standing of the mineral and groundwater estates require that, when applicable, concepts from oil and gas law should inform the resolution of groundwater disputes. Going forward, the application of oil and gas law to groundwater disputes will inevitably lead to challenges to groundwater regulatory regimes that afford differing treatment to groundwater owners in the same aquifer.

VII. THE IMPLICATIONS OF *MARRS V. RRC*

As noted above, the court in *Day* and *Coyote Lake* turned to Texas oil and gas law to provide the analog for groundwater rights. The importance of this reliance on oil and gas cases cannot be overlooked: Texas groundwater rights can now be examined in the light of a century of well-developed oil and gas law. The implications for groundwater regulation are huge. 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 those rights.

The fundamental constitutional issues concerned here were discussed in the oil and gas context in *Marrs v. Railroad Commission*.⁸⁴ 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.⁸⁵ 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 toward the area.⁸⁶ 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

⁸⁴ 177 S.W.2d 941 (Tex. 1944).

⁸⁵ *Id.* at 943.

⁸⁶ *Id.* at 945.

years.⁸⁷ Before the regulatory action in question, the owners in this southern area 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.⁸⁸ The Railroad Commission then established field rules which prevented this line of “shield” wells from producing their maximum capacity.⁸⁹ The effect of this was to permit oil from the southern area to once again migrate toward the pressure sink in the northern area.⁹⁰ The suit was predicated on the theory that production in the southern 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 the more densely drilled section to the north.⁹¹

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.⁹² 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.*⁹³

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

⁸⁷ *Id.* at 944–45.

⁸⁸ *Id.* at 945.

⁸⁹ *Id.* at 946.

⁹⁰ *Id.* at 945.

⁹¹ *Id.* at 946.

⁹² *Id.* at 946–47.

⁹³ *Id.* at 948 (citations omitted) (emphasis added).

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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 of their property. It is the taking of one man's property and the giving it to another.⁹⁴

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. 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

⁹⁴ *Id.*

unreasonable, unjust, and discriminatory. This Court has many times said that the Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields, or between different owners in the same field.⁹⁵

In this single passage, the Texas Supreme Court identifies a sweeping panoply of rights on which the Railroad Commission must not trample:

1. Texas Constitution, Article I, Section 17, prohibiting the taking of one's property for public use without adequate compensation;⁹⁶
2. Texas Constitution, Article I, Section 3, providing for equal rights for all men;⁹⁷
3. Texas Constitution, Article I, Section 19, providing that no citizen shall be deprived of his property except by the due course of the law;⁹⁸ and
4. U.S. Constitution, 14th Amendment, providing that no State shall deprive any person of his property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.⁹⁹

Under the holdings in *Day* and *Coyote Lake*, the same principles apply to groundwater: every owner is entitled to a fair chance to recover groundwater in or under his land, and any denial of such fair chance amounts to confiscation or, stated differently, a taking of private property that is prohibited by the United States and Texas constitutions.

In *Marrs*, the Texas Supreme Court outlined a second prong of legal considerations by which administrative agencies are bound: an agency of the state cannot promulgate rules or issue orders that are "unjust, unreasonable, or arbitrar[ily] discriminat[ory]."¹⁰⁰ The Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields or between different owners in the same field.¹⁰¹ The prohibition announced by the court could just as

⁹⁵ *Id.* at 948–49 (citations omitted).

⁹⁶ TEX. CONST. art. I, § 17.

⁹⁷ TEX. CONST. art. I, § 3.

⁹⁸ TEX. CONST. art. I, § 19.

⁹⁹ U.S. CONST. amend. XIV, § 1.

¹⁰⁰ 177 S.W.2d at 949.

¹⁰¹ *Id.*

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accurately state that groundwater conservation districts “cannot indulge in unjust, unreasonable, or arbitrary discrimination between different [aquifers], or between different owners in the same [aquifer].”

What are the limits on a groundwater conservation district under this “unreasonable regulatory discrimination” standard? Again, instruction is readily available from cases in the oil and gas arena. For example, in *Railroad Commission v. Shell Oil Co.*, the Texas Supreme Court had before it a “Rule 37” case dealing with the authority of the Railroad Commission to grant exceptions to its well spacing rules.¹⁰² The court noted:

It is a well-established principle of constitutional law that any statute or ordinance regulating the conduct of a lawful business or industry and authorizing the granting or withholding of licenses or permits as the designated officials arbitrarily choose, without setting forth any guide or standard to govern such officials in distinguishing between individuals entitled to such permits or licenses and those not so entitled, is unconstitutional and void.¹⁰³

The court explained that there must be some factual basis for classifying some applicants as subject to the general spacing provisions of the rule and other applicants as within the exception.¹⁰⁴ The grant or denial of rights cannot be made on the basis of conditions that exist equally in any other part of a field.¹⁰⁵ As the court noted:

In order to be valid a discrimination between persons must have a reasonable basis in fact. There must be some factual basis for classifying some applicants as subject to the general spacing provisions of the rule and other applicants as within the exception. This reasonable basis can only be a showing of *unusual conditions peculiar to the area* where the well is sought to be drilled—not testimony that would be equally applicable to any other part of the field.¹⁰⁶

Continuing to describe the conditions that might allow differential treatment of persons in the same field (aquifer), the court opined:

¹⁰² 161 S.W.2d 1022, 1023–24 (Tex. 1942).

¹⁰³ *Id.* at 1025.

¹⁰⁴ *Id.* at 1026.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (emphasis added).

Upon a showing that in a particular field, or in a particular section of a field, on account of the *peculiar formation of the underground structure or other unusual circumstances*, a closer spacing of the wells is essential to recover the oil, undoubtedly the Commission would have authority to grant the exception, provided that it includes all those and only those coming within the exceptional situation, and providing further that it did not unduly discriminate in any other manner against producers in other areas or fields.¹⁰⁷

Thus, a water district may justify disparate treatment of adjoining landowners in the same aquifer only if there is some rational basis in the facts that justifies different treatment. If there is no “peculiar formation of the underground structure or other unusual circumstances” affecting adjoining owners, there can be no difference in treatment without violating the equal rights and equal protection clauses of the United States and Texas Constitutions.

Or, put differently, GCDs cannot treat owners of groundwater in the same aquifer differently, even if the political reach of the GCD is limited to a single county. Where six or ten or some other number of GCDs exist over a single aquifer, every groundwater owner in that aquifer is entitled to equal treatment—to be given an opportunity to produce a fair share of the resource in the aquifer.¹⁰⁸

Many GCDs have rules that favor “historic and existing” users of groundwater. These rules provide an excellent example of the potential violation of constitutional rights. For example, in *Bragg*, the Edwards Aquifer Authority adopted a regulatory scheme under which groundwater rights owners can apply for permits to produce groundwater based on their pumping histories during a specified time period.¹⁰⁹ Those owners who

¹⁰⁷ *Id.* at 1027 (emphasis added).

¹⁰⁸ This legal principle was articulated by the legendary professor, A.W. Walker, in 1956, when he noted that “when the legislature authorizes the creation of any type of administrative control over the production and use of ground water—and this seems to be inevitable, at least, in some areas of this state—it must afford proper protection to correlative private property rights in ground water in the same manner that it is required to do so in the case of oil and gas.” A.W. WALKER, JR., *Theories of Ownership and Control of Oil and Gas Compared with Those of Ground Water*, in PROCEEDINGS, WATER LAW CONFERENCE 121, 133 (University of Texas School of Law, May 25–26, 1956).

¹⁰⁹ *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 124–25 (Tex. App.—San Antonio 2013, pet. denied).

were able to prove a production history during the relevant time were given permits generally based on the history of pumping.¹¹⁰ Owners who were unable to prove pumping during the historic period were not given permits.¹¹¹ The Braggs were among the “have-nots” in the system; the EAA denied a permit for one of their properties and substantially reduced the permit requested for another property.¹¹² The Braggs sued, and the trial court granted a motion for partial summary judgment favoring the Braggs, concluding that the EAA’s permitting actions resulted in a regulatory taking.¹¹³ The San Antonio Court of Appeals affirmed the trial court’s judgment that a regulatory taking had occurred for which the Braggs should be compensated.¹¹⁴ The Texas Supreme Court declined to review these holdings.

From the *Bragg* matter, we learn that denying a groundwater rights owner all access to his groundwater is a taking. We may also conclude that the granting a production permit for less production than other owners are allowed is also a regulatory taking, based on the holding in the *Marrs* case. Given these two realities, what can be said about the constitutionality of GCD rules that are based on historic use? The Middle Pecos Groundwater Conservation District provides an excellent (albeit very common) example of how this problem will play out. That district uses an historic use scheme. Its rules provide that if production reductions are required at some point, there is a hierarchy by which those reductions will take place.¹¹⁵ The system and its effects are described in a report tendered to the district by a consulting firm attempting to get a production permit:

The district rules relating to pumping adjustments are structured hierarchically such that, once groundwater availability has been established (consistent with the MAG), all exempt uses must be met first. Then all Historic and Existing Use Permits must be met in full before any remaining groundwater availability is distributed among the

¹¹⁰ *Id.* at 125.

¹¹¹ *Id.* at 126.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 146.

¹¹⁵ MIDDLE PECOS GROUNDWATER CONSERVATION DIST., Rule 10.4 (Proportional Adjustment), 22–23 (*effective* Jan. 20, 2016), http://www.middlepecosgcd.org/pdf/rules/2014/rules_01-20-2016.pdf.

Production Permit holders. If the available groundwater is sufficient to meet the needs of all exempt users and permit holders, only then may the district allocate any additional availability to applicants for new or amended Production Permits. Since the actual pumping under existing permits and by exempt users is significantly below the MAG, the pumping under this permit is unlikely to trigger any reductions under MPGCD rules. Further, if MPGCD were to permit additional pumping in the future up to a point that triggered reductions under MPGCD rules, it would be Production Permit holders (which Pecos SS, LLC would be if the permit is granted) that would be cut back first.¹¹⁶

Several things are noteworthy about this accurate description of the rules. First, the GCD believes it can “distribute” groundwater to users based on this hierarchical system. This ignores the fact that the users own the groundwater. GCDs do not get to distribute or allocate groundwater; they can only regulate use of groundwater by those who own it. Surface water regulators can allocate or distribute surface water because it belongs to the state of Texas. Groundwater does not.

Second, under the MPGCD scheme (and nearly every other historic use scheme in the State), if production must be reduced to meet some artificial goal (“DFC”), the district will apply reductions to a class of people who hold “production permits” before those reductions are applied to the class of people holding “historic use permits.” Obviously, this manner of applying cutbacks will discriminate against the former class of persons and effect a taking of their property without compensation for public purposes. The only solution to this conundrum is to get rid of the historic use system and treat all owners alike. This is the teaching of the *Marrs* case and its progeny.

VIII. THE IMPLICATIONS OF *BURKETT V. TEXACO*

In 1927, the Texas Supreme Court dealt with the absolute ownership theory concerning groundwater in a case involving a contract that touched on rights to flowing streams and underground water. *Texas Co. v. Burkett* involved a breach of contract action in which the plaintiff, Burkett, had contracted with Texas Company to provide water from his land for its

¹¹⁶Memorandum from Wade A. Oliver, P.G., INTERA Incorporated to Middle Pecos Groundwater Conservation District (on file with author).

operations.¹¹⁷ Plaintiff's land had multiple water sources, including a stream that often, but not always, flowed and a well.¹¹⁸ After Texas Company failed to honor a verbal renewal of the contract, Burkett sued.¹¹⁹ Defending, Texas Company claimed that the State, not Burkett, owned the water he had contracted to sell, and the contract was thus unlawful and contrary to public policy.¹²⁰ The court held that the water from flowing streams was riparian water and owned by the State, but that the groundwater was owned by the landowner, noting: "the presumption is that the sources of water supply obtained by such excavations are ordinary percolating waters, which are the exclusive property of the owner of the surface of the soil, and subject to barter and sale as any other species of property."¹²¹

Subsequent Texas cases have echoed this last statement. For example, in *City of Corpus Christi v. City of Pleasanton*, the court noted that Texas follows the "English Rule" relating to ownership of groundwater, then opined:

About the only limitations applied by those jurisdictions retaining the "English" rule are that the owner may not maliciously take water for the sole purpose of injuring his neighbor, or wantonly and willfully waste it. There certainly was no limitation that prohibited the use of the water off of the premises where it was captured. Neither was there any restriction of its use to a particular area. "Under the so-called 'common-law' or 'English' rule, which prevails in some jurisdictions, the right to extract artesian water for use outside the basin or district in which it is found would seem to be unrestricted." Moreover, by its holding in *Texas Co. v. Burkett*, decided some ten years after the adoption of the Conservation Amendment to the Constitution, Article XVI, § 59, Vernon's Ann. St., and the enactment of Articles 7602, V.A.C.S. and 846, Penal Code, this Court established that under the common-law rule there was no restriction against the sale of percolating waters for industrial uses off of the land. The Court said the waters

¹¹⁷296 S.W. 273 (Tex. 1927).

¹¹⁸*Id.* at 275.

¹¹⁹*Id.* at 273–74.

¹²⁰*Id.* at 274.

¹²¹*Id.* at 278.

“were the exclusive property of Burkett [the owner of the land on which the water was captured], who had all the rights incident to them that one might have as to any other species of property.”¹²²

The Supreme Court of Texas then concluded:

It thus appears that under the common-law rule adopted in this state an owner of land could use all of the percolating water he could capture from wells on his land for whatever beneficial purposes he needed it, on or off of the land, and could likewise sell it to others for use off of the land and outside of the basin where produced, just as he could sell any other species of property.¹²³

The *City of Corpus Christi v. Pleasanton* case was cited in a federal decision that explains the rationale behind the premise that groundwater, once produced, becomes subject to barter and sale like any other species of property. In *City of Altus v. Carr*, the City of Altus had contracted with a Texas resident to purchase groundwater from Texas soil and transport it across the Red River into Oklahoma.¹²⁴ The Texas Legislature got wind of this plan and passed legislation prohibiting the export of groundwater to other states.¹²⁵ The court found the legislation to be an unconstitutional restraint on interstate commerce.¹²⁶ In reaching that conclusion, the court turned to oil and gas law, noting that the cases in the United States have consistently held that natural gas, when reduced to possession at the surface, is a commodity.¹²⁷ “[I]t belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce.”¹²⁸ The court then compared groundwater to oil and gas, stating that the law of Texas recognizes water that has been withdrawn from the ground to be personal property subject to sale and commerce like any other species of

¹²²276 S.W.2d 798, 801–02 (Tex. 1955) (citations omitted).

¹²³*Id.* at 802.

¹²⁴255 F. Supp. 828, 831–32 (W.D. Tex.), *aff’d*, 385 U.S. 35 (1966).

¹²⁵*Id.* at 830, 832.

¹²⁶*Id.* at 840.

¹²⁷*Id.* at 839.

¹²⁸*Id.*

property.¹²⁹ That being true, the legislation prohibiting export of groundwater to other states amounted to a prohibition of interstate transportation of an article of commerce.

The implications for GCDs are clear: once groundwater has been produced, it is the personal property of the groundwater rights owner. It is subject to trade, barter, and sale just like any other personal property. No one would seriously suggest that oil, once produced, should be subject to any more stringent restrictions on transport out of a county than inside the county. Nor would anyone suggest that the producer of oil must demonstrate a need for the product outside the county in which it is produced or that a farmer must present a signed contract from a purchaser of corn before being allowed to drill a water well to irrigate the corn. Yet GCDs across the State attempt to impose precisely these types of restrictions on the transport of water out of their districts. For example, Bluebonnet GCD requires a putative transporter to provide a statement as to the feasibility of alternative water supplies before being granted a permit.¹³⁰ Like many other districts, Bluebonnet also requires the applicant to quantify the availability of water in the district and in the proposed receiving area and may require a hydrogeological report for permittees producing more than 12,000,000 gallons annually.¹³¹ There are no similar requirements for groundwater used inside the district. The Middle Pecos GCD goes farther: it requires an applicant to demonstrate a need in the receiving district, generally in the form of a signed water purchase contract, and requests information regarding the route and easements for any pipeline.¹³²

Glasscock County GCD has a very straightforward statement about exporting groundwater. It says:

In recognition of the fact that the transfer of groundwater resources from the District for use outside of the district impacts residents and property owners of the District differently than use within the District, and in order to

¹²⁹ *Id.* at 840.

¹³⁰ RULES OF THE BLUEBONNET GROUNDWATER CONSERVATION DIST., Rule 10.3 (Transfer of Groundwater out of the District: Application), 44–45 (*effective* Oct. 21, 2015), <http://www.bluebonnetgroundwater.org/wp-content/uploads/2015/12/Approved-Bluebonnet-GCD-Rules-21-105.pdf>.

¹³¹ 12,000,000 gallons annually is less than an exempt domestic well can produce free from any requirement of a permit. *Id.* at R. 8.12 J.

¹³² *See* MIDDLE PECOS GROUNDWATER CONSERVATION DIST. RULES, *supra* note 115, at R. 11.9.1(14).

manage and conserve groundwater resources within the District and provide reasonable protection of the public health and welfare of residents and property owners of the District, a groundwater transfer permit is required to produce groundwater from within the District's boundaries and to transport such groundwater for use outside the District.¹³³

Post Oak Savannah GCD goes so far as to require the applicant for an export permit to provide a description of the applicant's service area, metering, leak detection and repair program, delivery and distribution system, and "information on each subsequent customer's water demands."¹³⁴

Other examples abound. Most single-county GCDs have rules that put draconian requirements on anyone attempting to transport groundwater outside a district. But the case law is clear: once produced to the surface, groundwater becomes personal property. Restrictions on transporting or selling or beneficially using personal property that rely on political boundaries are automatically suspect.

IX. THE PATH FORWARD

What we learn from *Day*, *Coyote Lake Ranch*, *Marrs*, and *Burkett* is this: groundwater in place is the property of the landowner and subject to constitutional protection. Regulation of groundwater must, therefore, comport with both due process and equal protection, and regulatory bodies such as GCDs must treat all groundwater rights owners in the same aquifer equally, absent unusual conditions peculiar to an area. Once groundwater is produced to the surface, it is personal property and the owner may use it or sell it or transport it out of the district or the basin as he sees fit. These principles provide a path to creating effective regional water systems that move groundwater from places where it exists to places where it is needed.

How so? The best solution is for the Legislature to recognize the importance of private property rights and the applicability of oil and gas

¹³³ RULES OF THE GLASSCOCK COUNTY UNDERGROUND WATER CONSERVATION DIST., Rule 21 (Transfer of Groundwater out of the District), 14–15 (*effective* Apr. 15, 1986), http://www.glasscock-groundwater.org/rules_by-laws.

¹³⁴ RULES OF THE POST OAK SAVANNAH GROUNDWATER CONSERVATION DIST., Rule 8.2 (Application for Transport Permit), 50–51 (*effective* June 8, 2004), <http://www.posgcd.org/wp-content/uploads/2011/10/POSGCD-Rules-Amend-071216-F1.pdf>.

ownership principles to groundwater. This is best done either by creating aquifer authorities whose boundaries are coterminous with the aquifers being regulated or by mandating that the patchwork of GCDs actually work together to regulate all groundwater in their respective parts of an aquifer with an equal hand. In the latter case, the Legislature would have to mandate that the GCDs that share an aquifer have rules that provide an opportunity to produce a fair share of the resource, i.e., the GCDs would have to adopt the same production and spacing rules and limitations across the whole aquifer.

But what if the Legislature lacks the will to do either of the above? One way to prompt legislative action (or to encourage GCDs to respect private property rights) is through litigation. The following is a partial list of suggested potential claims that could be asserted against individual GCDs:

1. Texas Water Code Section 36.251 waives governmental immunity for suits against GCDs that challenge the validity of rules.¹³⁵ An affected person may bring suit against the district under Section 36.251, which arguably creates a cause of action for such purpose. Such a suit is useful where:
 - a. A GCD has promulgated rules that are an invalid exercise of governmental authority, either on their face or as applied.
 - b. A GCD has promulgated rules that exceed the authority given to it under the Texas Water Code (*ultra vires* acts).
 - c. A GCD has production limits that are substantially less favorable than those in a neighboring district (or county without a GCD) regulating the same aquifer. This amounts to a taking of property under the analysis of *Marrs v. RRC*, above, because it interferes with an owner's ability to offset drainage. A rule that results in a taking cannot be valid.
2. Suit may be brought under the Uniform Declaratory Judgments Act ("UDJA"),¹³⁶ asking for a declaration that a GCD's rules

¹³⁵ *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 212 S.W.3d 683, 698 (Tex. App.—Austin 2006), *rev'd on other grounds*, 291 S.W.3d 392 (Tex. 2009).

¹³⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (West 2015); *see* *Schrock v. City of Baytown*, No. 01-13-00618-CV, 2015 WL 8486504, at *21 (Tex. App.—Houston [1st Dist.] Dec. 10, 2015, *pet. denied*).

are invalid or result in a taking of property in violation of the Texas and U.S. Constitutions. It has expressly been held that Texas Water Code Section 36.251 does not preclude a simultaneous action under the UDJA.¹³⁷ The advantage of utilizing the UDJA is that the successful litigant may arguably recover attorneys' fees against the GCD.

3. Where GCD rules treat groundwater rights owners unequally, suit may be brought for a taking under the Fifth and Fourteenth Amendments to the U.S. Constitution,¹³⁸ and under the Texas Constitution, Article I, Section 17 (which prohibits the taking of one's property for public use without adequate compensation),¹³⁹ Article I, Section 3 (which provides for equal rights for all men),¹⁴⁰ and Article I, Section 19 (which provides that no citizen shall be deprived of his property except by the due course of the law of the land).¹⁴¹ There is no governmental immunity for a taking suit.¹⁴²
4. Where GCDs in a GMA adopt different DFCs for the same aquifer, a challenge can be filed within 120 days of the adoption of the DFCs pursuant to Texas Water Code Section 36.1083.¹⁴³

X. CONCLUSION

Through the holdings in *Day* and *Coyote Lake Ranch*, the Texas Supreme Court has signaled that it will turn to applicable oil and gas law to determine groundwater issues. Given the paradigm set forth in those cases, it is clear that the principles of *Marrs* and *Burkett* should apply. If the Legislature or the courts require equal treatment of all groundwater owners in the same aquifer and require GCDs to extend a "fair opportunity to produce a fair share" to all such owners, the parochial patchwork quilt of single county GCDs will lose the ability to hamper the transportation of groundwater to areas outside those districts. This, in turn, will promote the ability to effectively plan for the future water needs of Texas.

¹³⁷Edwards Aquifer Auth. v. Chem. Lime, Ltd., 291 S.W.3d 392, 405 (Tex. 2009).

¹³⁸U.S. CONST. amends. V, XIV.

¹³⁹TEX. CONST. art. 1, § 17(a).

¹⁴⁰*Id.* § 3.

¹⁴¹*Id.* § 19.

¹⁴²Combs v. City of Webster, 311 S.W.3d 85, 92 (Tex. App.—Austin 2009, pet. denied).

¹⁴³TEX. WATER CODE ANN. § 36.1083(b) (West Supp. 2016).