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THERE IS NO SUBSTITUTE FOR WATER!

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Ground water districts to face several issues during upcoming 79th Texas Legislative Session in Austin

EDITOR'S NOTE—As in previous years, ground water management in Texas is expected to be a major topic when the 79th Texas Legislature convenes on Jan. 11. The Texas Alliance of Ground Water Districts, of which the High Plains Underground Water Conservation District is a member, has prepared this paper outlining some of the legislative issues that water districts may face during this session--CEM.

Site-Specific Conflicts Driving State Water Policy

In each of the last three sessions since the passage of the junior water rights provision on interbasin transfers of surface water, Texas' ground water policy in general and ground water districts in particular have come under increasing legislative scrutiny, which has generally resulted from persistent lobbying by entities who are seeking to use ground water and who believe their interests are being unreasonably hindered by a local ground water district. Whether the issue is over an export project, a per-acre pumping limit, a district's method of implementing historic use, or a district's chosen level of availability for an aquifer, one common theme persists: when a site-specific conflict arises, many of the parties involved are seeking legislative remedies that impact statewide policy.

Even the entities involved in a site-specific conflict will generally admit that 99 percent of the districts in the state are managing in a reasonable manner. However, many of the remedies they promote would usurp local authority for all districts and negatively impact the ability of the 99 percent to continue managing in an effective and efficient manner.

This is not to say that the legislature is an inappropriate forum for aggrieved individuals to plead their case. Certainly, when reasonable changes can be made at the legislature, it is often more effective and less expensive than going to court. However, the remedies considered by the legislature should be tailored to the specific problem.

1. Site-specific conflicts should not drive state water policy. Decisions affecting statewide water policy should reflect the interests of all Texans and should not punish or hamper the successful efforts of the 99 percent of districts that are managing effectively and reasonably.
2. If site-specific conflicts are brought before the legislature, site-specific solutions should be considered.
3. The appropriate forum for resolving site-specific conflicts with policymaking bodies is state district court. An entire body of law exists for judicial review of district decisions. The judicial branch is constitutionally tasked with the role of ensuring that policymaking and administrative bodies do not over-step the bounds of their statutory authority. The court's decision is binding on that single entity without affecting the management efforts of other districts, except to the extent that a judicial precedent is set.

Oversight of Ground Water Districts Versus Local Control

One of the first "solutions" that is generally pitched to lawmakers by entities involved in a dispute with a ground water district is also the most onerous, severe, and unacceptable--state agency oversight of the policy



The State Capitol at Austin

decisions of a locally elected board of directors. The whole concept of local control is based on the premise that those who govern the individual, personal rights of citizens should be held closely accountable to those who are being governed, and very few individual rights are considered more personal and important than a citizen's access to the ground water under their property. For this and other reasons, ground water has traditionally been regulated by a locally elected or appointed board.

Under current law, oversight of districts is appropriately accomplished through judicial review in state district court. In addition, current law also limits local policy decisions via an oversight process through the Texas Water Development Board and the State Auditor's Office and via a performance review process through the Texas Commission on Environmental Quality.

1. Elected or appointed boards of directors set policy and rules for districts and are directly accountable to the citizens affected by their decisions. In addition, these directors are landowners within the district and are subject to all the regulations they promulgate.
2. Current statutory oversight provisions are already a significant infringement on the policy-making role of locally elected or appointed boards. The state agencies with oversight authority over districts have no direct accountability to the citizens affected by their decisions.
3. Judicial review through the state court system is the appropriate forum for oversight of ground water district decisions.
4. Regional water planning groups are the least appropriate entities to exercise any control over the policy decisions of ground water districts.
 - a. Regional planning groups are self-appointed advisory committees to the Texas Water Development Board.
 - b. Boards of regional planning groups are self-appointing; not even the Texas Water Development Board has the authority to remove a regional

79th Legislature may consider modifications to "Rule Of Capture"

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planning group member.

c. Regional planning groups have no inherent legal authority or standing, their members are accountable to no one and cannot be removed from membership except by the regional group, and their decisions are not subject to judicial, voter, or legislative review.

Rule Of Capture

The rule of capture is a judicial doctrine that simply states that a landowner is not legally liable for any damage his pumping may cause to a neighbor's well; in other words, it is a statement by the courts that they will not settle disputes between landowners related to damages caused by the use of ground water.

In recent years, the rule of capture has been increasingly criticized as being the root cause of numerous ground water management problems across the state. Such criticisms are based on a lack of understanding of the rule of capture. The rule of capture is not related to ground water management at all; it is simply a statement by the courts that the legislature is the appropriate forum for implementing ground water management. The following quotes from a paper written by the late Professor Corwin Johnson demonstrate the point:

"All of these doctrines are property and tort law doctrines. They are not ground water management laws, . . ."

"... one criticism of the rule of capture is groundless. Some have asserted that the rule of capture is a serious obstacle to effective ground water management. It is true that Texas courts are not managing ground water, but the Texas Legislature is."

A legislative change to the rule of capture would mean that the legislature wants the courts to begin settling individual disputes between landowners related to ground water pumping. Each of the judicial doctrines that are alternatives to the rule of capture are simply different theories of liability that the courts can use to assess damages in disputes between individual landowners:

Reasonable Use - not a balancing test as many think - typically, on-site = reasonable; off-site = unreasonable - would negatively impact water marketing.

Correlative Rights - fair and just share allocated to each landowner - generally based on acreage owned - off-site subordinate to on-site - would severely harm municipal and farming users.

Restatement 2d of Torts- balancing of reasonableness of each litigant's uses - many factors considered including economic and social - liability imposed for exceeding "reasonable share" - harm to neighboring wells or streams considered.

If the goal is to provide landowners with a judicial remedy for alleged damages caused by a neighboring well, then changing the rule of capture in

favor of one of the alternative liability theories is certainly an option the legislature can consider, but none of the alternative theories is without its drawbacks and limitations, and such a change should be cautiously considered.

1. Changing the rule of capture and creating legal liability for harm caused by pumping, whether inside or outside the boundaries of a ground water district, could set the stage for numerous lawsuits, harm municipalities, farmers, and other large water users, and result in substantial spending on lawyers and consultants while helping landowners very little.

2. The rule of capture is not related to ground water management, and changing the rule of capture will not impact or improve ground water management. Local management of ground water resources through elected or appointed individuals who are accountable to the citizens they regulate and familiar with the local circumstances is still the best management system for an area as geologically and socio-economically diverse as the State of Texas.

3. Those who support the creation of legal liability and a judicial remedy for harm caused by ground water pumping should be required to explain the need for this remedy and the potential benefits and negative consequences of the chosen alternative.

Due Process and Consistent Procedures

Chapter 36 provides only very basic notice and hearing requirements for districts when they are considering rulemakings, orders, resolutions, or permitting decisions. Additional guidance related to notice, hearings, and procedures could provide additional consistency among districts and ensure adequate public input into the decision-making process of districts.

1. Chapter 36 could be amended to provide more clearly defined notice, hearing, and permitting procedures, which would ensure more consistency and due process for all parties.

2. Any procedural changes considered should be reasonable and should not unduly burden districts with unnecessary procedural requirements. More often than not, permittees and other members of the public benefit from and appreciate the simple and streamlined procedures utilized by districts. A basic set of procedural rules should ensure an acceptable amount of due process and opportunities for public participation without unreasonably increasing the time or expense of participating in the process.

Joint Planning and Regional Management of Aquifers

With the recent delineation of ground water management areas by the Texas Water Development Board, ground water districts across the state have increased their already significant efforts to coordinate their management with neighboring districts. For many years ground water

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**High Plains Underground Water
Conservation District No. 1**



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Water management often coordinated with neighboring districts

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districts have used shared staff, regional alliances, joint meetings, regional aquifer studies, and other means to ensure consistent management over common aquifers. Charges that district rules or procedures are unreasonably inconsistent among neighboring districts are often a red herring argument proffered by individuals who are simply dissatisfied with a position taken by a district.

In the past five years, over 35 new districts have been created. It takes time for a district to hold its confirmation election and begin formulating its initial plans for managing an aquifer, and the joint planning provisions in Chapter 36 along with the existing coordination efforts of districts will enable these districts to develop reasonable and consistent rules for their area. Any proposed improvements in the area of joint planning should respect the local authority of elected and appointed boards.

1. Incentives could be put in place to encourage voluntary district consolidation and additional joint planning for districts in the same Ground Water Management Area. Incentives could include special consideration for state funding in areas that jointly conduct ground water studies or revise ongoing studies, or jointly monitor the same aquifer or GMA.

2. Changes in Section 36.108 to strengthen the joint planning provisions might be acceptable, such as provisions authorizing the review committee mentioned in 36.108 to assist districts in resolving disputes with third parties. For example, if a dispute arose between a district and a permit applicant or other interested person, the district could request the TCEQ to convene a review committee under Section 36.108. The review committee could mediate the dispute between the parties and ultimately provide written findings or recommendations to assist the parties in resolving their dispute. The TCEQ and TWDB could provide technical, administrative, and legal assistance to the review committee as requested.

Consistent Ground Water Definitions and Terms

Ground water obviously plays a key role in the long term water planning of this state, but provisions in Senate Bills 1 and 2 regarding ground water management planning are relatively new, and already certain terms are creating some confusion and inconsistency among local, regional, and state planning entities. It is extremely important that key ground water management terms be clearly and accurately defined so that planners at all levels can effectively communicate and planning decisions can be made on an apples to apples basis.

1. Consideration should be given to establishing clearly defined, consistent ground water terms covering concepts such as the following: the amount of ground water that can be withdrawn on a sustainable basis without resulting in significant, sustained declines; the annual amount of withdrawals authorized by a local district; projected ground water supply; total useable amount of ground water within an aquifer; total aquifer storage, recharge, inflows, discharge, outflows, and others.

Sale of Ground Water from State-Owned Lands

If properly managed, the sale of ground water from underneath state-owned lands could be a reasonable and effective means of meeting critical water supply needs. However, it would be a great disaster to harm one area of the state by irresponsibly withdrawing water from that area for the benefit of another area. The state should carefully consider any proposed ground water project involving state-owned lands and should ensure that the state is first and foremost a good neighbor to surrounding citizens before it endeavors to sell water to other areas.

1. The legislature should consider guidelines governing the sale of ground water from state-owned lands. These guidelines should establish as a first priority the protection of the long-term water needs of the area of origin.

2. Ground water production from state-owned lands within a district should be subject to district rules. Production outside of the boundaries of a district should be subject to some form of oversight such as rules set by neighboring districts in the same Ground Water Management Area.

3. Before any water is sold or leased from state-owned lands, thorough studies should be performed so that local decision makers can make informed choices on the proper rate of withdrawal.

Judicial Standard of Review

As previously explained, the appropriate forum for resolving conflicts with districts or other policymaking bodies is state district court under the substantial evidence standard of review as currently required by Section 36.253, Water Code. An entire body of law exists for judicial review of districts and other regulatory entities such as state agencies. The judicial branch is constitutionally tasked with the role of ensuring that policymaking and administrative bodies do not over-step the bounds of their statutory authority.

According to the judicial doctrines governing substantive review of decisions by districts or state agencies, the administrative entity is entitled to a certain amount of deference; that is, the court will not substitute its judgment for the judgment of the entity on matters that are within the purview of the entity as long as the entity's action is supported by substantial evidence, is not in violation of a constitutional or statutory provision, is not in excess of the entity's statutory authority, is not made through unlawful procedure, is not affected by other error of law, and is not arbitrary or capricious.

An entity's action is not arbitrary or capricious if it is reasonable, bears a logical relationship to the legislative objectives, and is based on a legitimate position. These judicially-derived standards for review of district decisions are the appropriate standards for challenges to district actions.

1. Judicial review through the state court system is the appropriate forum for oversight of ground water district decisions.

2. The substantial evidence standard of review referenced in Section 36.253 is the appropriate standard for judicial review of districts.

Protection of Regulatory Tools Available to Districts

Ground water conservation districts have been established by the legislature to allow local citizens to manage their ground water resources to protect those resources for the landowners and citizens who rely on them.

Because of the vast diversity of aquifers, hydrologic characteristics, types of uses, socioeconomic conditions, political considerations, and other important factors influencing Texas ground water, regulating ground water resources is an extremely complicated and sensitive endeavor, and Chapter 36 is therefore structured in a way that is intended to provide as much flexibility as possible to local boards while providing enough guidance and safeguards to protect the interests of the public.

Chapter 36 is a toolbox containing management and regulatory tools. Every district board that sits down to consider a regulatory or management program for its aquifer faces a unique set of circumstances, and each board must determine which tools are appropriate and how they should be applied. Very often a regulatory method that is appropriate for one district is completely inappropriate for another.

For example, while spacing is a valuable tool in the Ogallala Aquifer for preventing interference between wells and limiting the encroachment of one landowner's cone of depression onto another landowner's property, spacing would be completely inappropriate and impossible to implement in the heavily industrialized and urbanized area of Harris County.

While each regulatory tool may vary in its effectiveness or appropriateness from one area of the state to another, every regulatory tool in Chapter 36 is important because each provides unique characteristics that may be the key to allowing a particular board to solve the specific problem it faces.

For example, regulations that consider historic use have often been criticized recently, albeit unfairly, but historic use regulations can be implemented in a number of different ways, and regulating based on historic use can provide a district with management solutions that no other regulatory method can provide, especially in areas where there are

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Historic use among management solutions in Chapter 36 "toolbox"

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insufficient ground water supplies available to allocate a meaningful amount to each acre of land in the district.

In the Lone Star GCD in Montgomery County, ground water pumpage in certain areas of the district may already be exceeding safe withdrawal levels, and eventually some permittees may be required to convert to alternative sources. By issuing permits that take historic use into account and allowing those permits to be marketed to other permittees in the district, the board of the Lone Star GCD has created a potential financing mechanism to help ground water permittees located near surface water

supplies spread the cost of their conversion to surface water.

1. The regulatory tools or options contained in Chapter 36 should be kept broad and should not be unreasonably restricted because each method provides valuable flexibility to district boards who are faced with unique and difficult challenges.

2. Consideration should be given to amending Chapter 36 to add certain tools that have been restricted or removed, such as the ability to prohibit export in areas of the state that cannot meet their own water needs and the ability to regulate certain wells that have been exempted in Section 36.117.