NEEDMORE BACKUP
January 12, 2017
Item 5b.

Discussion and possible action relating to procedural matters on the permit application for conversion of a Temporary Production Permit to a Regular Historical Production Permit (Application) of Needmore Water LLC to authorize withdrawal of an annual permitted volume of approximately 289,080,000 gallons per year of groundwater from the Trinity Aquifer for agricultural use. The Board will consider the following:

i. Timeline associated with processing of application;
ii. Written comments and requests for contested case hearing;
iii. Determination to conduct a contested case hearing;
iv. Requests that contested case hearing be conducted by and referral to the State Office of Administrative Hearings (SOAH);
v. Deposit for and approval of contract with SOAH to conduct hearings;
vi. Date, time, location and who will conduct the preliminary hearing;
vii. Designation of presiding officer;
viii. Matters to be included in any referral to SOAH, including hearing location and cost allocations;
ix. Selection of special counsel; and,
x. Other matters necessary to conduct future hearings(s) in connection with the Application.

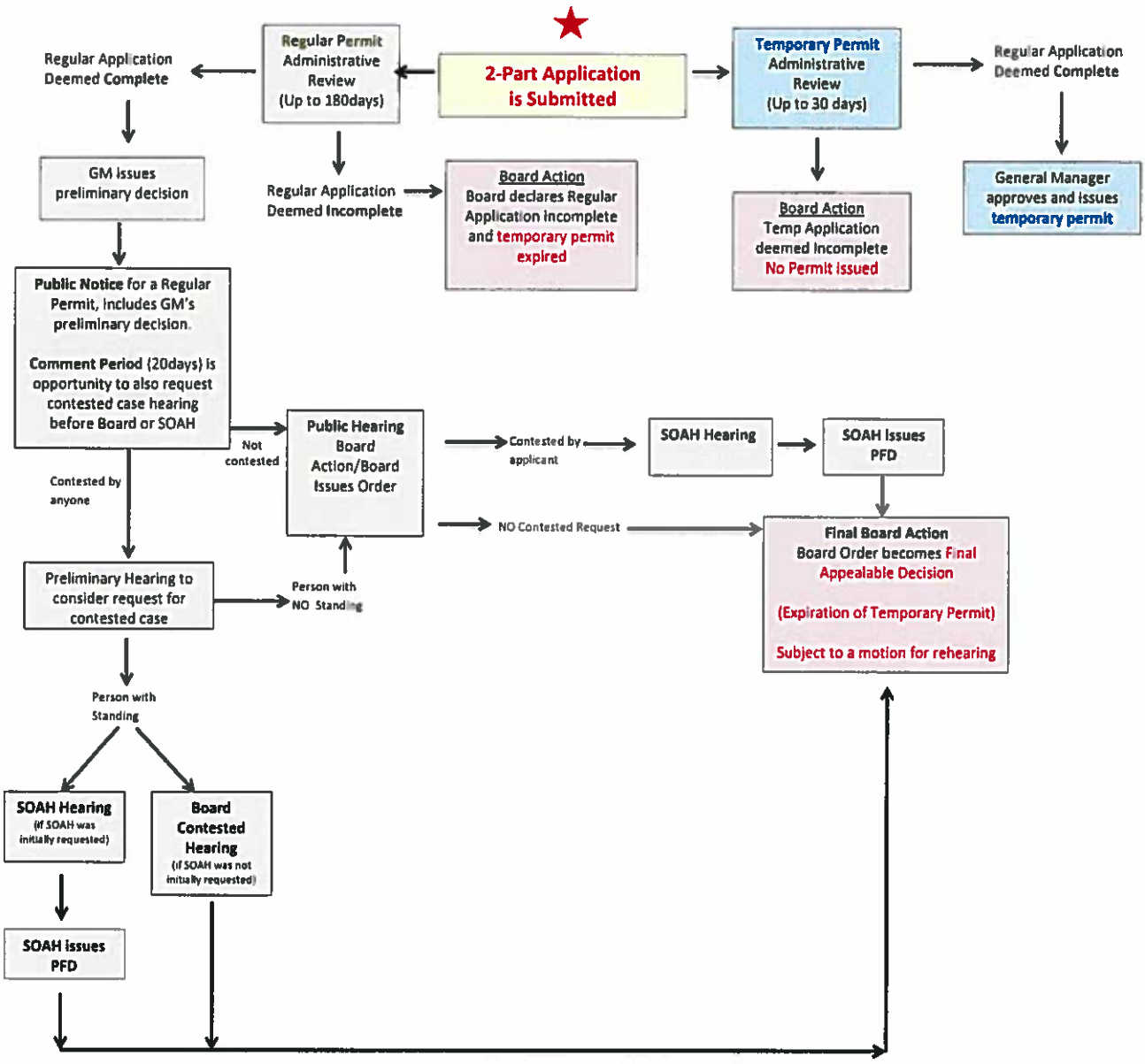
Note: At this meeting, the Board of Directors will not conduct a hearing, determine party status, nor decide whether to grant or deny, in whole or part, the Application. The Board will consider the procedural steps identified above that relate to how, when and where the future hearings will be conducted. Adequate notice of the future hearings will be provided.

Timeline for Needmore

November 15, 2016	Administrative Complete. GM's preliminary decision and special provisions available on website.
November 29, 2016	Notice published. Rule 3-1.4B(2).
December 15, 2016	Board meeting.
December 19, 2016	20th day after publication. Comment period closes. Deadline for requesting a contested case hearing. Rule 4-9.13.
January 12, 2017	Board meeting. Last Board meeting before deadline to schedule a hearing.
Friday, January 13, 2017	Last business day before deadline to schedule a hearing (see next entry).
Saturday, January 14, 2017	60th day after administrative complete. Deadline to determine whether to schedule a hearing. Rule 3-1.4C(3). A hearing is required under Rule 3-1.4C(2)(d). NOTE: This date falls on a Saturday so subsequent timeline calculations assumes hearing decision is made on *Thursday January 12, 2017*.
January 26, 2017	Board meeting.
January 30, 2017	10-day deadline for notice of a February 9, 2017 (date of Board meeting) preliminary hearing (if the preliminary hearing is not conducted by SOAH). If preliminary hearing conducted by SOAH, notice will depend on SOAH availability.
February 6, 2017	10-day deadline for notice of a February 16, 2017 preliminary hearing (if the preliminary hearing is not conducted by SOAH). If preliminary hearing conducted by SOAH, notice will depend on SOAH availability.
February 9, 2017	Board meeting. (A probable pre-hearing date without scheduling special meeting if preliminary hearing not conducted by SOAH).
February 16, 2017	Deadline to commence hearing. Rule 3-1.4C(5). (Hearing within 35 days of determination to schedule a hearing) [1]
February 23, 2017	Board meeting.

[1] Assumes hearing determination on Thursday January 12, 2017 (instead of Saturday January 14, 2017).

Process to a Final Permit



AN ACT

relating to the territory, jurisdiction, and powers of the Barton Springs-Edwards Aquifer Conservation District, including its authority to regulate certain wells for the production of groundwater; imposing a cap on certain fees.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter A, Chapter 8802, Special District Local Laws Code, is amended by adding Section 8802.0035 to read as follows:

Sec. 8802.0035. SHARED TERRITORY; JURISDICTION. (a) The territory of the district includes any territory that is:

(1) inside the boundaries of:

(A) the Edwards Aquifer Authority; and

(B) Hays County; and

(2) not within the boundaries of the Plum Creek Conservation District as those boundaries existed on February 1, 2015.

(b) The Edwards Aquifer Authority has jurisdiction over any well that is drilled to produce water from the Edwards Aquifer in the shared territory described by Subsection (a).

(c) The district has jurisdiction over groundwater and any well that is drilled to produce water from any aquifer other than the Edwards Aquifer in the shared territory described by Subsection (a).

revise the single-member districts as the board considers appropriate to reflect the changes in territory made by Section 8802.0035, Special District Local Laws Code, as added by this Act.

SECTION 4. (a) In this section:

(1) "District" means the Barton Springs-Edwards Aquifer Conservation District.

(2) "Maximum production capacity" means the maximum production capacity of a well, which may be based on a 36-hour pump test conducted at the time the well was initially constructed or placed into service.

(b) This section applies only to the shared territory added to the district by Section 8802.0035, Special District Local Laws Code, as added by this Act.

(c) A person operating a well before the effective date of this Act or who has entered into a contract before the effective date of this Act to drill or operate a well that is or will be located in the territory described by Subsection (b) of this section and subject to the jurisdiction of the district under Section 8802.0035, Special District Local Laws Code, as added by this Act, shall file an administratively complete permit application with the district not later than three months after the effective date of this Act for the drilling, equipping, completion, or operation of any well if the well requires a permit under the rules or orders of the district. The person may file the permit application for an amount of groundwater production not to exceed the maximum production capacity of the well.

(d) The district shall issue a temporary permit to a person

hearing, shall issue an order granting the regular permit authorizing groundwater production in the amount set forth in the temporary permit unless the district finds that authorizing groundwater production in the amount set forth in the temporary permit will cause:

(1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or

(2) an unreasonable impact on existing wells.

(f) In the hearing on issuance of the regular permit under Subsection (e), the permit applicant bears the burden of proof.

(g) The holder of a temporary or regular permit subject to a district order under this section to reduce the amount of groundwater production from the permitted well may contest the reduction by requesting a contested case hearing to be conducted by the State Office of Administrative Hearings in the manner provided by Sections 36.416, 36.4165, and 36.418, Water Code. The district shall contract with the State Office of Administrative Hearings to conduct the hearing as provided by those sections of the Water Code. To the extent possible, the State Office of Administrative Hearings shall expedite a hearing under this subsection. The permit applicant bears the burden of proof in the hearing.

(h) For the State Office of Administrative Hearings to recommend overturning a district order reducing the amount of groundwater authorized to be produced under a temporary permit, the permit holder must demonstrate by a preponderance of the evidence that the production of the amount of groundwater authorized based on the maximum production capacity will not cause:

SECTION 7. (a) The legal notice of the intention to introduce this Act, setting forth the general substance of this Act, has been published as provided by law, and the notice and a copy of this Act have been furnished to all persons, agencies, officials, or entities to which they are required to be furnished under Section 59, Article XVI, Texas Constitution, and Chapter 313, Government Code.

(b) The governor, one of the required recipients, has submitted the notice and Act to the Texas Commission on Environmental Quality.

(c) The Texas Commission on Environmental Quality has filed its recommendations relating to this Act with the governor, the lieutenant governor, and the speaker of the house of representatives within the required time.

(d) All requirements of the constitution and laws of this state and the rules and procedures of the legislature with respect to the notice, introduction, and passage of this Act are fulfilled and accomplished.

SECTION 8. It is the intent of the legislature that this Act apply only to the territory described by Section 8802.0035, Special District Local Laws Code, as added by this Act, and not have statewide implications.

SECTION 9. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2015.

I certify that H.B. No. 3405 was passed by the Senate, with amendments, on May 22, 2015, by the following vote: Yeas 28, Nays 3; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; that the Senate adopted the conference committee report on H.B. No. 3405 on May 30, 2015, by the following vote: Yeas 27, Nays 4, and that the Senate adopted H.C.R. No. 149 authorizing certain corrections in H.B. No. 3405 on June 1, 2015, by the following vote: Yeas 31, Nays 0.

_____

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

TESPA
Trinity Edwards Springs Protection Association

December 19, 2016

John Dupnik, P.G.
General Manager
Barton Springs Edwards Aquifer Conservation District
1124 Regal Row
Austin, Texas 78748
e-mail: john@bseacd.org

Re: BSEACD's preliminary decision to issue a Regular Production Permit to Needmore Water, LLC.

Mr. Dupnik:

The Trinity Edwards Springs Protection Association ("TESPA"), submits these comments regarding the Barton Springs Edwards Aquifer Conservation District's ("BSEACD" or "District") preliminary decision to issue a Regular Production Permit to Needmore Water, LLC ("Needmore"). Furthermore, under Rule 4-9.13 of BSEACD's rules, TESPA requests a contested case hearing related to this matter before the State Office of Administrative Hearings ("SOAH").

Background

House Bill 3405, which became effective on June 19, 2015, extended BSEACD's jurisdiction to include unregulated areas of the Trinity Aquifer in Hays County. Prior to passage of the law, Needmore Ranch, a 5,000 acre ranch along the Blanco River in Hays County, was outside BSEACD's jurisdiction. House Bill 3405 created a process where landowners operating a well prior to passage of the law, could apply to BSEACD for a production permit for the "maximum production capacity" of the well.

On September 19, 2015, Needmore applied to BSEACD for a Temporary Permit to produce 289,080,000 gallons of groundwater a year from the Trinity Aquifer. This volume of groundwater is what Needmore determined is the maximum production capacity of the well on the ranch. House Bill 3405 prohibited BSEACD from conducting a hearing on the Temporary Permit. At that time, TESPA submitted comments to BSEACD maintaining that for various reasons, BSEACD lacked authority to issue the Temporary Permit and recommending that BSEACD deny it.

BSEACD is now going through the procedural process under House Bill 3405 of converting this Temporary Permit into a Regular Permit and has issued a proposed permit to Needmore for

289,080,000 gallons a year – the maximum production capacity of the well. As described below, TESPA contends that the District lacks authority to issue a Regular Permit to Needmore, that the District should deny the permit, and that if the District issues the permit, many landowners who are members of TESPA will be adversely affected. Consequently, TESPA, on behalf of its members is requesting a contested case hearing on this matter.

Potential Injuries of Landowners

TESPA is a non profit organization founded to protect the Trinity and Edwards Aquifers and the property rights of landowners overlying these aquifers. TESPA has over one hundred members and supporters. As an association, TESPA has standing to contest DSWSC's permit amendment on behalf of its members. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Tex. Ass'n of Bus.*, 852 S.W.2d 440, 447 (Tex. 1993). Individuals who are members of TESPA own property near the proposed well described in Needmore's application. The Trinity Aquifer underlies all of these landowners' properties. The following landowners and members of TESPA listed below stand to be adversely affected by the permit for the well on Needmore Ranch:

Sheryl Davis
(Sheryl C. Davis Bypass Trust & Sheryl C. Davis Survivor's Trust, Sheryl C. Davis Trustee)
1525 Red Hawk Road
Wimberley, Texas 78676

David and Ellen Berman
1471 Red Hawk Road
Wimberley, Texas 78676

Letha Birkholtz Cole
1430 Red Hawk Rd
Wimberley, Texas 78676

David and Mary Welp
2050 Red Hawk Rd
Wimberley, TX 78676

Lloyd and Judy Provost
2000 Red Hawk Road
Wimberley, TX 78676

Scott Mitchell
300 Little Arkansas Road
Wimberley, TX 78676

Peter Way (Wimberley Point, Ltd., Way Rent, LCC)
987 Fox Road
San Marcos TX 78666

Robert and Donna Elkins
1401 Red Hawk Rd.
Wimberley, TX 78676

Wendy Phillips
2595 Flite Acres
Wimberley, TX 78676

Needmore is seeking a permit from the District to pump 289,080,000 million gallons per year of groundwater from Well D on Needmore Ranch. The District's own modeling predicts that within seven years pumping from Well D will cause 140 feet of drawdown in the Trinity Aquifer as far as two miles from Well D. The District states that pumping from Well D could lower the water level below the top of the Middle Trinity Aquifer, putting the water level within 20 feet of the District's monitoring well pump located approximately two miles west of Well D. Additionally, the aquifer test conducted by Wet Rock Groundwater Services LLC resulted in fourteen feet of drawdown from the Amos monitoring well 1.95 miles from Well D on Needmore Ranch. This is not a projected drawdown. This is actual drawdown caused by pumping from Well D. Moreover, TESPA's own hydrogeologist independently confirmed that based on BSEACD's projections, within seven years there will be fifty feet of drawdown as far as four miles from Well D. Based on these analyses and results, therefore, pumping from Well D will result in drawdown beneath the landowners' properties listed above and drainage of groundwater from beneath the landowners' land.

These landowners hold legally-protected, justiciable interests in the groundwater beneath their land. Section 36.002(a) of the Texas Water Code provides that, "[t]he legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property." Additionally, the Texas Supreme Court held in *Edwards Aquifer Authority v. Day* that, "land ownership includes an interest in groundwater in place." These interests will be adversely impacted by the pumping for which Needmore seeks authorization in the proposed permit at issue. The drainage caused by pumping from Well D will result in the diminution and potential elimination of groundwater that is a valuable asset held by Landowners.

Ms. Davis, Ms. Cole, Ms. Phillips, the Bermans, the Provosts, the Elkins, and the Welps all own property approximately two miles from Well D on the north side of Needmore Ranch. Please see Attachment A. The Trinity Aquifer underlies their property. Ms. Davis, the Bermans, and the Welps rely on groundwater wells on their property for household use. Ms. Phillips uses her well to provide water to livestock on her property. If the proposed production permit is approved by BSEACD, these landowners will be injured. Pumping from Well D on Needmore Ranch will cause the wells on these landowner's properties to cease flowing or flow less efficiently forcing them to drill deeper wells, if this is even possible, at a substantial expense. Furthermore, these landowners wish to leave some of the groundwater they own under their property in place either for use in the future or for conservation purposes but pumping from Well D under the proposed permit will result in their groundwater, which they own in place as real property, being drained from beneath their land.

Additionally, in the near future, Ms. Phillips intends to apply to the Hays Trinity GCD for a permit for an agricultural well to irrigate a small vineyard. She is concerned that pumping from Well D will drain the groundwater from beneath her land, affect her ability to drill a well, and the use and enjoyment of her property. Ms. Cole, the Provosts (on their southern property), the Bermans (on the other two properties they own), and the Elkins do not have wells on their property, but they desire to conserve the groundwater beneath their land in place. In an effort to conserve the groundwater beneath their land, Ms. Cole, the Provosts, and the Elkins rely exclusively on rainwater for their household needs. These landowners are concerned that pumping from Well D on Needmore Ranch

will result in the drainage of groundwater, a valuable asset, from beneath their land and a decrease in their property values.

Mr. Mitchell owns an approximately 225 acre farm and ranch adjacent to Needmore Ranch. The Trinity Aquifer underlies Mr. Mitchell's property. Mr. Mitchell has two wells on his property that are used for household and farming purposes, limited lodging, and ranching. One of Mr. Mitchell's wells is slightly more than one mile from Well D, closer than the Amos monitoring well, which experienced 14 feet of drawdown during aquifer testing and which BSEACD projects will experience 140 feet of drawdown in seven years as a result of pumping from Well D on Needmore Ranch. Mr. Mitchell's own hydrogeologist analyzed the data from BSEACD and Needmore and independently concluded that Mr. Mitchell's wells will be affected by pumping from Well D. Please see Attachment B. Pumping from Well D will result in the groundwater beneath Mr. Mitchell's, land, which he owns as real property and which is a valuable asset, being drained from beneath his land. Please see Attachment C. Mr. Mitchell's property is also adjacent to the Blanco River, therefore, he has riparian rights to use surface water from the Blanco River. Mr. Mitchell is concerned that pumping from the well on Needmore Ranch will decrease base flows to the Blanco River and adversely affect and interfere with his his legal rights to use this surface water.

Mr. Way owns a 457 acre ranch on the Blanco River downstream of Needmore Ranch. Mr. Way is concerned that pumping from the well on Needmore Ranch will decrease base flows to the Blanco River and adversely affect his riparian rights to use this surface water. Furthermore, the majority of Mr. Way's Ranch is under a conservation easement held by the Nature Conservancy. In addition to one mile of Blanco River frontage, several seeps are present on the ranch as well as important wildlife habitat for the golden cheek warbler. Mr. Way's intent in placing a conservation easement on his property was to conserve groundwater in the Trinity Aquifer beneath his ranch by prohibiting development on the ranch. The conservation easement recognizes the significant value that the Trinity Aquifer provides to sustaining surface water flow in the Blanco River, to contributing to spring flow, and to maintaining habitat for wildlife. If BSEACD grants Needmore's permit, not only will Mr. Way's personal property interests be adversely affected, the public interest in preserving these types of conservation lands also will be jeopardized.

All of the landowners have particularized injuries described above that will result if BSEACD approves Needmore's permit. Under state law, these landowners own the groundwater beneath their land and have property rights and interests in their groundwater. Some of the landowners also have riparian rights to surface water in the Blanco River. The proposed permit will interfere with these rights. Furthermore, these rights and interests are not common to members of the public and will be adversely affected by the proposed production from Well D on Needmore Ranch, which BSEACD has authority to regulate.

As described below, TESPA contends that BSEACD lacks authority to approve the proposed permit, and should, therefore, deny the permit.

HB 3405 is Unconstitutional and Contradicts Chapter 36 of the Water Code

TESPA contends that portions of House Bill 3405, which limit BSEACD's authority to issue a production permit to Needmore Ranch, are unconstitutional and violate Chapter 36 of the Texas Water Code. Consequently, BSEACD should deny Needmore's request for a production permit because granting it would be contrary to the law and BSEACD lacks authority to do so.

Article 16, section 59 of the Texas Constitution (the Conservation Amendment) states, "The conservation and development of all of the natural resources of this State, ... and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto."[1] Groundwater Conservation Districts in Texas have a constitutional duty to balance the conservation and development of groundwater.

BSEACD Can't Consider Impacts to Surface Water

When deciding whether to grant or deny a groundwater production permit, therefore, groundwater conservation districts must consider several factors designed to ensure that groundwater is conserved. Section 36.113(d)(2) of the Water Code states, "Before granting or denying a permit, or a permit amendment...the district shall consider whether the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders."

House Bill 3405 prohibits BSEACD from considering the impact that production from Well D on Needmore Ranch will have on surface water. The law limits BSEACD's authority to two considerations: whether the production will cause (1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or (2) an unreasonable impact on existing wells. In the technical memo analyzing the impacts of pumping from Well D, BSEACD staff states that impacts to area streams and springs were not addressed.[2]

The Trinity Aquifer provides base flow to the Blanco River, and the Blanco River is less than two miles from Well D, yet BSEACD is unable to consider any affects pumping from Well D could possibly have on the Blanco River. Furthermore, the District is unable to consider the impact the proposed permit will have on Fern Bank Springs. Fern Bank Springs is approximately two miles from Well D on Needmore Ranch and is home to a federally listed endangered specie, the Comal Springs Dryopid Beetle. In 2013, the U.S. Fish and Wildlife Service ("the Service") designated Fern Bank Springs as critical habitat.[3] The Service has stated that the Trinity Aquifer may contribute flow to Fern Bank Springs.[4] BSEACD is proposing to issue a substantial groundwater production permit in close proximity to a federally protected spring. The law, however, prohibits the District from considering the impact the proposed permit will have on spring flow and prohibits the District from reducing the permit if the District believes that spring flow will be affected. House Bill 3405, therefore, has created a situation where the District's permitting decision could potentially result in the take of an endangered species under Section 9 of the Endangered Species Act.

Because House Bill 3405 prohibits the District from considering impacts to surface water, it violates Section 36.113(d)(2) of the Water Code and the District lacks authority to issue the permit.

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[1] TEX. CONST. art. XVI, § 59(a).

[2] BSEACD Technical Memo, page 4, November 2016.

[3] 62 Fed. Reg. 66,297 (Dec. 18, 1997)

[4] U.S. Fish and Wildlife Service, News Release, SERVICE REVISES CRITICAL HABITAT FOR THREE ENDANGERED COMAL INVERTEBRATES (October 23, 2013).

Additionally, because House Bill 3405 prohibits BSEACD from considering the environmental impact and of its permitting decisions, it contradicts Article 16, Section 59 (the Conservation Amendment) of the Texas Constitution. House Bill 3405 thwarts the District's ability to fulfill its responsibilities under the Texas Constitution and Chapter 36 of the Water Code; therefore, the District lacks authority to issue the permit.

Maximum Production Capacity

Because House Bill 3405 requires BSEACD to issue the Regular Production Permit for the maximum production capacity of the well, the law restricts the District's ability to consider whether the proposed use is proportionate to the amount of groundwater Needmore has requested.

Needmore's request for 887 acre feet of groundwater a year for agricultural purposes is excessive and is a misrepresentation. This amount of water would cover the 5,000 acre ranch in about 2 inches of water. It is enough water for over 39,000 head of cattle at 20 gallons per day per head. This magnitude of withdrawal is equivalent to 792,000 gallons a day, which would provide for 5,280 households assuming a daily average household usage of 150 gallons a day.

Section 36.113(c)(3) of the Water Code permits groundwater conservation districts to require applicants to to include a statement of the nature and purpose of the proposed use and the amount of water to be used for each purpose. Under BSEACD's normal rules, before approving or denying a permit, BSEACD must consider whether "there are reasonable assurances of definite, non speculative plans and intent to use the water for specific beneficial uses during the Production Permit term." Rule 3-1.6(2). In doing so, BSEACD applies "industry and regional standards for permitted usage to assure prospective use is commensurate with reasonable, non-speculative demand." Rule 3-1.6(3).

This consideration is important because under Section 36.1132(b) of the Water Code, BSEACD must ensure that its permitting decisions are consistent with the desired future condition ("DFC") for the Trinity Aquifer in this area. To accomplish this, BSEACD uses the Texas Water Development Board's ("TWDB") modeled available groundwater ("MAG") number as a guide in permitting decisions, ideally not issuing permits beyond this number. By requiring applicants to demonstrate that the amount of groundwater requested is commensurate with its intended use, the District can ensure that groundwater is available for future users and is not over allocated. However, with respect to Needmore's application, House Bill 3405 prohibits BSEACD from making this consideration because it requires BSEACD to issue a permit for the maximum production capacity of the well. This restriction is contrary to the permitting procedures and goals established in Chapter 36 of the Water Code.

No Beneficial Use

Under Section 36.113(d)(3) of the Water Code, before granting or denying a permit, a groundwater conservation district must consider whether the proposed use of water is dedicated to any beneficial use. BSEACD's rules require this same consideration. All permit holders must demonstrate that the proposed use of water is dedicated to a beneficial use at all times. Rule 3-1.55.2(D)(7) requires applicants to demonstrate in their application for a Temporary Permit that the produced water will be dedicated to a beneficial use at all times. If a use is not beneficial, the Water Code and BSEACD

Rules consider it to be waste. Waste is defined as "the flowing or producing of wells from a groundwater reservoir if the water produced is not for a beneficial purpose."[5]

It is impossible for Needmore to beneficially use the amount of water they are requesting. Therefore, BSEACD should determine that Needmore's request is Waste under the Water Code.

Furthermore, Needmore is pumping groundwater from Well D, conveying it through a pipe into a creek on the ranch, discharging it into Sycamore Creek where it is transported about a mile down the creek into an impoundment. Under state law, to retain ownership of the groundwater it transports in a state watercourse, in this case Sycamore Creek, Needmore must obtain authorization from the TCEQ under Section 11.042 of the Water Code in the form a bed and banks permit. Because Needmore has not obtained this authorization, the water in Sycamore Creek and ultimately the water in the lake on the ranch has lost its legal status as privately owned groundwater and is considered surface water.[6] Therefore, the end use cannot be considered beneficial, as the water in the lake is actually state owned surface water and not privately owned groundwater. Consequently, pumping from Well D should be classified as Waste since the water produced is not for a beneficial purpose and BSEACD should deny the permit.

BSEACD Lacks Subject Matter Jurisdiction to Consider the Regular Permit

Evidence that Well D was not in operation on or before June 19, 2015

BSEACD lacks authority to approve the Regular Permit because the Temporary Permit should never have been granted in the first place. BSEACD's rules under 3-1.55.1(A) describe the eligibility criteria for temporary permits as follows: "(1) The person is operating an existing nonexempt well on or before June 19, 2015." According to BSEACD's Application Summary and Staff Review, the pump in the well was removed in September 2015. The District states, "A documented video log provided to the District confirms the well is currently damaged and in deteriorated condition and is therefore considered an abandoned well pursuant to State law and District rules." The District goes on to say that "the well is incapable of production in this current condition."

This past September BSEACD filed a complaint with the Texas Department of Licensing and Regulation (TDLR) maintaining that the driller had failed to properly drill, case, and cement the annular space of the well on Needmore Ranch as required by law. The well was drilled in October 2012. Downhole video footage of Well D from September 4, 2015, documented a lack of casing and significant damage of the PVC casing. Additional footage documented an obstruction in the well, which BSEACD concluded to be the lower part of the casing string that parted and fell to the bottom of the borehole. The evidence suggests that since the damage to the well was so extensive, it existed prior to June 19, 2015. In fact, BSEACD concluded that the damage to the well was attributed to improper well construction, which occurred in 2012.

Based on the facts presented by BSEACD, there is evidence that the well had been inoperable prior to passage of House Bill 3405; therefore, Needmore was not eligible to apply for a Temporary Permit, and the District should have denied their request.

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[5] Tex. Water Code 36.001(8)(B); BSEACD Rule 2-1.

[6] *See* Edwards Aquifer Authority v. Day, 369 S.W.3d 814, 823 (Tex. 2012).

Needmore Materially Misrepresented Facts

Moreover, there is evidence that Needmore misrepresented information to the District, which the District relied on in granting the Temporary Permit. On September 30, 2015, the District requested supplemental information from Needmore. Specifically, the District asked the Applicant to confirm that the well was constructed as the final completion for permanent production. In response to this request, Needmore stated in a supplemental letter dated October 9, 2015, "It is our understanding that the well is completed to final completion for the intended beneficial purposes described in the applications." The District also asked Needmore to provide information on the type of pump installed in the well. In response, Needmore stated, "the pump currently installed in the well is Grundfos 475S500-6A." Needmore did not mention that the pump had recently been removed.

The District also requested that Needmore provide more detail regarding the nature and purpose of the existing uses, which on the application Needmore claimed was agricultural irrigation. In response to this request, on October 9, 2015, Needmore described in detail the work the landowner has done to restore pastureland, including removing cattle, letting pastures remain fallow, fencing overgrazed pastures, and planting native seeds throughout the property. Nowhere, in this lengthy description did Needmore mention that the well was currently not in operation.

BSEACD Has Not Analyzed Impacts to DFC

Section 36.1132(a) of the Water Code states that groundwater conservation districts "shall issue permits up to the point that the total volume of exempt and permitted groundwater production will achieve an applicable desire future condition. Section 36.1132(b) of the Water Code states that groundwater conservation districts "shall manage total groundwater production on a long-term basis to achieve an applicable desired future condition." BSEACD Rules 3-1.55.4(B)(4)(a) states, "Before issuing a Regular Production Permit, the District shall consider whether the production volume set forth in the Temporary Production Permit will cause a failure to achieve the applicable adopted DFC for the aquifer.

In its preliminary decision, BSEACD determined that "The requested permitted pumpage volume would not exceed the Modeled Available Groundwater estimate for the Middle Trinity Aquifer and therefore, will not likely cause a failure to achieve the applicable desired future condition." In the technical memo, BSEACD states that impacts to Desired Future Conditions were not addressed" due to a lack of numerical models. Desired Future Conditions are based on total pumping from an aquifer on a regional basis. Yet based on the District's statements, it appears that it did not consider the cumulative impacts of pumping throughout the Trinity Aquifer when determining whether pumping from the Needmore well would impact the DFC. The Modeled Available Groundwater for the Trinity Aquifer in GMA 10 is 2,860 acre feet. Needmore has requested almost one third of the MAG. Although this specific amount of pumping does not exceed the MAG, when considered with pumping throughout GMA 10, there is a possibility that the DFC would not be achieved. However, the District did not make this evaluation as required by Chapter 36, and therefore, lacks authority to approve the proposed permit.

BSEACD Should Deny the Regular Permit

BSEACD has authority to deny Needmore's Regular Permit. Under Section 4(i) of House Bill 3405, "A person who relies on the temporary permit granted by this section to drill, operate, or engage in

other activities associated with a water well assumes the risk that the district may grant or deny, wholly or partly, the permit application when the district takes final action after notice and hearing to issue a regular permit pursuant to the application." BSEACD should deny the Regular Permit because as described above, it lacks authority to approve the Regular Permit.

Proposed Production Will Cause Unreasonable Impacts

BSEACD rule 3-1.55.4(B)(4) states that "Before issuing a Regular Production Permit, the District shall consider whether the production volume set forth in the Temporary Production Permit will cause an unreasonable impact on existing wells." House Bill 3405 states that the District "shall issue an order granting the regular permit authorizing groundwater production in the amount set forth in the temporary permit unless the district finds that authorizing groundwater production in the amount set forth in the temporary permit will cause: (1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or (2) an unreasonable impact on existing wells.

At a minimum, BSEACD should reduce Needmore's requested volume as staff has concluded that 289,080,000 gallons a year will cause unreasonable impacts to existing wells. According to BSEACD's preliminary decision, "After considering the findings of the evaluation of the Aquifer Science Team (see Technical Memo for further detail), the GM has determined that the modeled projections of drawdown attributed to pumping from Well D at maximum production capacity indicate that some wells will cease to yield water at the ground surface or will experience the lowering of water levels below a reasonable pump intake level. Therefore, the GM has determined that the proposed groundwater production, under modeled conditions, will cause unreasonable impacts to existing wells."

Rather than reduce the permit at the outset as contemplated by House Bill 3405, BSEACD has opted to temporarily reduce production from the well if measured impacts are observed at the monitoring well. The result is that nearby landowners may experience impacts to their wells and privately owned groundwater before Needmore will be required to cutback pumping. To sufficiently protect these landowners' interests, at the very least BSEACD should reduce Needmore's request from the outset.

Contested Case Request

For the reasons described above, TESPA submits this protest to BSEACD's preliminary decision to grant Needmore a Regular Permit and requests that SOAH conduct the contested case hearing. TESPA's mailing address is PO Box, 160971, Austin, Texas 78716.

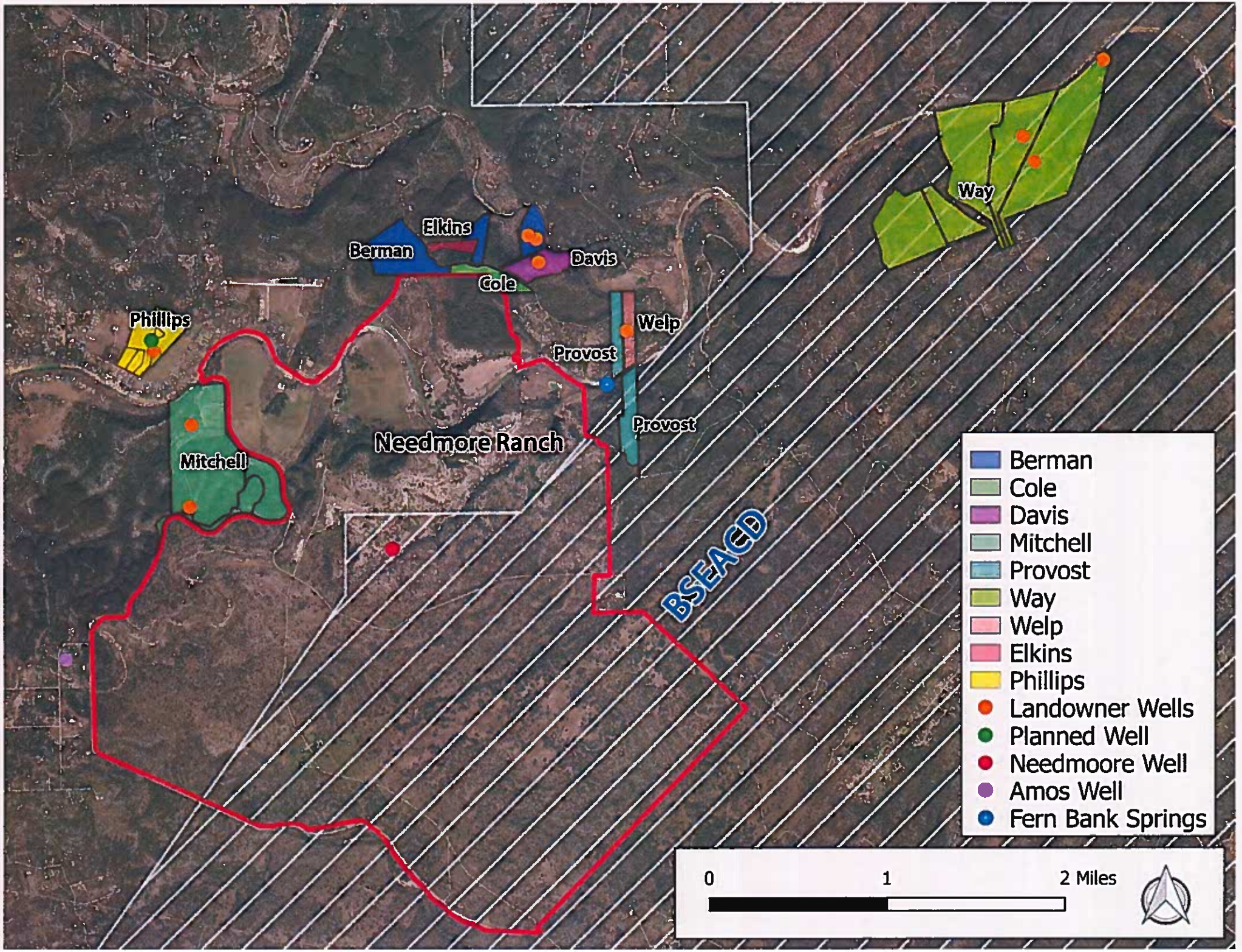
Thank you for your time and consideration of these comments, and please contact me if you need any additional information.

Respectfully,

Vanessa Puig-Williams
Executive Director and General Counsel, TESPA
www.tespatexas.org

Attachments: **A**. Map of properties and wells owned by TESPA members.
B. Blue Creek Consulting LLC report for Montesino Ranch
C. Letter from Brenda & Scott Mitchel, Montesino Ranch

ATTACHMENT A


Berman
Elkins
Davis
Cole
Phillips
Welp
Provost
Provost
Mitchell
Needmore Ranch
Way
BSEACD
Berman
Cole
Davis
Mitchell
Provost
Way
Welp
Elkins
Phillips
Landowner Wells
Planned Well
Needmoore Well
Amos Well
Fern Bank Springs
0
1
2 Miles

ATTACHMENT B

Blue Creek Consulting LLC
400 Blue Creek Ranch Road
Dripping Springs, TX 78620
Texas Geoscience Firm #50541

December 14, 2016

Mr. Scott Mitchell
Montesino Ranch
300 Little Arkansas Road
Wimberley, TX 78676

Subject: Affected Water Wells – Montesino Ranch

Dear Mr. Mitchell,

Pursuant to your request, Blue Creek Consulting LLC (BCC) has prepared this letter report to present our opinion if two water wells located at Montesino Ranch will be affected by the proposed groundwater pumping permit application under consideration by the Barton Springs Edwards Aquifer Conservation District (BSEACD) for the adjacent Needmore Ranch. The proposed permit application includes maximum annual pumpage of 289,080,000 gallons per year from the Middle Trinity Aquifer. Sources of information used in this analysis include:

- Hydrogeologic Report of Needmore Water, LLC Well D, prepared by Wet Rock Geological Services, L.L.C. (WRGS), (March, 2016),
- Staff Administrative Completeness Review – Needmore Water LLC, prepared by BSEACD, November 15, 2016)
- Texas State Well Records

The two water wells evaluated are located on the Montesino Ranch and are referred to as Well 1 (SWR #157229) and Well 2 (#157232). Well locations are shown on Figure 1. The proposed Needmore pumping permit included the pumpage of 550 gpm, 24 hours per day, 365 days per year or 289,080,000 gallons per year from Needmore Well D. Water will be withdrawn from the Middle Trinity aquifer. A pump test was performed on Well D in January, 2016 and the test documented in the previously referenced WRGS report. The lowering (drawdown) of water levels in area wells was measured. Several of those wells (Well D, Catfish Pond Well and Amos Well) are shown on Figure 1 and pertinent well information is included on Table 1. Wells 1 and 2 were not measured during the test.

There are two important factors to analyze to determine if Wells 1 and 2 will be affected by the proposed pumpage from Well D:

- Are Wells 1 and 2 completed in the same zone (Middle Trinity Aquifer) as Well D, and
- Were the wells within the cone of depression created by pumping Well D during the pump test.

According to the WRGS report, Well D is completed in the Middle Trinity Aquifer, including the Cow Creek Formation. Wells monitored during the pump test, Catfish Pond and Amos wells, are also completed in the Cow Creek Formation. A review well logs indicate all of the wells either partially or fully penetrate the Cow Creek (Table 1). The elevation of the top of the Cow Creek at each well is included on Table 1. Based on the geologic cross section (Figure 7) included in the WRGS report, the Cow Creek dips down from top of the Cow Creek at Wells 1 and 2 and Catfish wells are nearly identical, indicating all of the wells are completed within the same zone.

Table 1. Well Information

Well	Latitude	Longitude	Land Surface Elevation (ft. MSL)	Total Depth (ft. bgs)	Elevation Top of Cow Creek (ft. MSL)	Distance from Needmore Well D (ft.)	Drawdown During Pump Test (ft)**
Montesino Well 1	29* 58' 50.27 N	98* 03' 10.65 W	838	580*	288	7017	not measured
Montesino Well 2	29* 58' 25.95 N	98* 03' 11.45 W	1075	830	275	6120	not measured
Needmoore Well D	29* 58' 12.99 N	98* 02' 2.99 W	936	800	206	0	35.3
Catfish Pond Well	29* 58' 12.70 N	98*03' 7.90 W	1070	810	270	5717	15.9
Amos Well	29* 57' 41.80 N	98* 03' 55.08	1132	868	309	10313	14.2

* total drilled depth – 600 ft.

** Pump Test Performed by WRGS

Note: Data for Wells 1 and 2 obtained from State Well Reports

A review of the lithology from the State Well Reports (Attachment 1) indicates Wells 1 and 2 terminates in brown sand or brown sandstone. This is a typical description of the lithology of the upper part of the Cow Creek Formation (Wierman, et. al., 2010).

Total drawdown of water levels at the Amos Well and Catfish Pond Well during the WRGS pump test were 14.2 ft. and 15.9 ft., respectively. Water levels at these wells were still declining when the pumping portion of the test concluded. Wells 1 and 2 were not measured during the pump test. The distance from pumping Well D to the Amos Well 10,313 ft. and the distance to the Catfish Pond Well is 5,717 ft. The distance between Well D and Well 1 and Well 2 are 7,017 ft. and 6,120 ft., respectively. Both Well 1 and 2 are at a similar distance from Well D as the Catfish Pond Well and should experience similar drawdown. Wells 1 and 2 would have been within the cone of depression created by Well D.

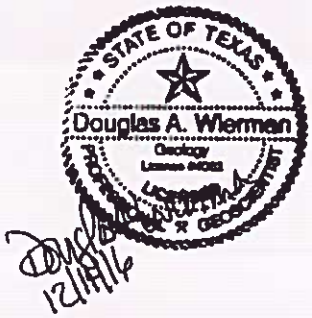
The BSEACD analyzed the data from the WRGS pump test and estimated the drawdown could be as much as 140' at the Amos Well if a longer time frame and natural fluctuations in water levels due to drought were considered.

Based on the wells formation of completion (Cow Creek member of the Middle Trinity Aquifer), distance from Well D and the drawdowns measured during the pumping test, Wells 1 and 2 will be affected by the pumpage of Well D at the rate proposed in the permit application.

If you have any questions, please contact me at 512-826-2729 or dawierman@aol.com.

Sincerely,
Blue Creek Consulting LLC
Texas Geoscience Firm #50541

Douglas A. Wierman, P.G.
Texas Professional Geoscientist #4062



Attachments:
Figure 1. Well Locations
State Well Reports
References

Figure 1. Well Locations

State Well Reports 157229 and 157232

Figure 1. Well Locations

Montesino Well 1

STATE OF TEXAS WELL REPORT for Tracking#157229

Owner:	Scott Mitchell	Owner Well #:	#1
Address:	300 Little Arkansas Road Wimberley, TX 78676	Grid #:	68-08-2
Well Location:	300 LittleArkansas Road Wimberley, TX 78676	Latitude: Longitude:	29 58 50.27 -98 03 10.65
Well County:	Hays	Elevation:	No Data
Type of Work:	New Well	Proposed Use:	Domestic

Drilling Start Date: 5/20/2006 Drilling End Date: 5/23/2006

	Diameter (in.)	*Top Depth (ft.)*	*Bottom Depth (ft.)*
Borehole:	9	0	580

Drilling Method: Air Rotary

Borehole Completion: Open Hole

	Top Depth (ft.)	*Bottom Depth (ft.)*	*Description (number of sacks & material)*
Annular Seal Data:	0	30	10
	110	140	10

Seal Method: Hand Mixed

Sealed By: Kutscher Drilling

Distance to Property Line (ft.): No Data

Distance to Septic Field or other concentrated contamination (ft.): n/a

Distance to Septic Tank (ft.): No Data

Method of Verification: No Data

Surface Completion: Surface Sleeve Installed

Water Level: 160 ft. below land surface on 2006-05-23 Measurement Method: Unknown

Packers: 2 Rubber 140',160'

Type of Pump: Submersible Pump Depth (ft.): 372

Well Tests: Estimated Yield: 15GPM with 440 ft. drawdown after .75 hours

	Strata Depth (ft.)	Water Type
Water Quality:	No Data	Good

Chemical Analysis Made: No

Did the driller knowingly penetrate any strata which contained injurious constituents?: No

Certification Data: The driller certified that the driller drilled this well (or the well was drilled under the driller's direct supervision) and that each and all of the statements herein are true and correct. The driller understood that failure to complete the required items will result in the report(s) being returned for completion and resubmittal.

Company Information: **Kutscher Drilling, LTD**

3810 Hunter Road
San Marcos, TX 78666

Driller Name: **Daniel Kutscher** License Number: **54746**

Comments: **$dfs**

Lithology:
DESCRIPTION & COLOR OF FORMATION MATERIAL

Top (ft.)	Bottom (ft.)	Description
0	10	Top Soil
10	30	Yellow/White Limestone
30	140	Blue Limestone (water @ 1 gpm)
140	400	Blue/Gray Limestone
400	550	Blue Limestone (water @4 .9Pm)
550	600	Brown Sand/Limestone-water @15gpm

Casing:
BLANK PIPE & WELL SCREEN DATA

Dia. (in.)	New/Used	Type	Setting From/To (ft.)
4.5	New	PVC SDR17	0 300

IMPORTANT NOTICE FOR PERSONS HAVING WELLS DRILLED CONCERNING CONFIDENTIALITY

TEX. OCC. CODE Title 12, Chapter 1901.251, authorizes the owner (owner or the person for whom the well was drilled) to keep information in Well Reports confidential. The Department shall hold the contents of the well log confidential and not a matter of public record if it receives, by certified mail, a written request to do so from the owner.

Please include the report's Tracking Number on your written request.

Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, TX 78711
(512) 463-7880

Montesino Well 2

STATE OF TEXAS WELL REPORT for Tracking #157232

Owner:	Scott Mitchell	Owner Well #:	#2
Address:	300 Little Arkansas Road Wimberley, TX 78676	Grid #:	68-08-2
Well Location:	300 Little Arkansas Road Wimberley, TX 78676	Latitude:	~~29 58 25.95~~
		Longitude:	-98 03 11.45
Well County:	Hays	Elevation:	[redacted] No Data
Type of Work:	New Well	Proposed Use:	Domestic

Drilling Start Date: 5/24/2006 Drilling End Date: 6/6/2006

	Diameter (in.)	Top Depth (ft.)	Bottom Depth (ft.)
Borehole:	9	0	830

Drilling Method: Air Rotary

Borehole Completion: Open Hole

	Top Depth (ft.)	Bottom Depth (ft.)	Description (number of sacks & material)
Annular Seal Data:	0	30	10
	280	300	10

Seal Method: Hand Mixed

Sealed By: Kutscher Drilling

Distance to Property Line (ft.): No Data

Distance to Septic Field or other concentrated contamination (ft.): No Data

Distance to Septic Tank (ft.): No Data

Method of Verification: No Data

Surface Completion: Surface Sleeve Installed

Water Level: 380 ft. below land surface on 2006-06-06 Measurement Method: Unknown

Packers: 2 Rubber340',360'

Type of Pump: No Data

Well Tests: Estimated Yield: 20 GPM with 450 ft. drawdown after .75 hours

	Strata Depth (ft.)	*Water Type*
Water Quality:	**No Data**	**Good**

Chemical Analysis Made: **No**

Did the driller knowingly penetrate any strata which contained injurious constituents?: **No**

Certification Data: The driller certified that the driller drilled this well (or the well was drilled under the driller's direct supervision) and that each and all of the statements herein are true and correct. The driller understood that failure to complete the required items will result in the report(s) being returned for completion and resubmittal.

Company Information: **Kutscher Drilling, LTD**

3810 Hunter Road
San Marcos, TX 78666

Driller Name: **Daniel Kutscher** License Number: **54746**

Comments: **$dfs**

Lithology:
DESCRIPTION & COLOR OF FORMATION MATERIAL

Casing:
BLANK PIPE & WELL SCREEN DATA

Top (ft.)	Bottom (ft.)	Description	Dia. (in.)	New/Used	Type	Setting From/To (ft.)
0	10	,Top Soil	4.5	New	PVC SDR17	0 380
10	30	Yellow/White Limestone				
30	320	·Blue Linmestone (water 320 ft 1 gpm)				
320	800	·Blue Limestone				
800	830	Brown Sandstone (water 800 ft 20gpm)				

IMPORTANT NOTICE FOR PERSONS HAVING WELLS DRILLED CONCERNING CONFIDENTIALITY

TEX. OCC. CODE Title 12, Chapter 1901.251, authorizes the owner (owner or the person for whom the well was drilled) to keep information in Well Reports confidential. The Department shall hold the contents of the well log confidential and not a matter of public record if it receives, by certified mail, a written request to do so from the owner.

Please include the report's Tracking Number on your written request.

Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, TX 78711
(512) 463-7880

References

References

Wet Rock Geological Services, (March, 2016) Hydrogeologic Report of Needmore Water, LLC Well D

Staff Administrative Completeness Review of a Temporary/Regular Production Permit Application – Needmore Water LLC, prepared by BSEACD, (November 15, 2016)

Wierman, D. A., Broun, A. S., Hunt, B. B., 2010, Hydrogeologic Atlas of the Hill Country Trinity Aquifer, Blanco, Hays, and Travis Counties, Central Texas. Hays-Trinity Groundwater Conservation District, United States

ATTACHMENT C

December 16, 2016

To: Barton Springs Edwards Aquifer Conservation District
1124 Regal Row,
Austin, TX 78748
(512) 282-8441
bseacd@bseacd.org

Fr: Brenda and Scott Mitchell
Montesino Ranch
Wimberley, Texas 78676
512-923-2650
info@montesinoranch.com

Re: Pumping Permit Application for Needmore Ranch

BSEACD,

My wife and I own the 225 acre, Montesino Ranch, at 300 Little Arkansas Rd., located adjacent to the Needmore Ranch in Wimberley.

We have owned our ranch for 19 years. We raise miniature Hereford cattle, we have operated a nine acre organic farm for six years that is currently being re-organized. We also lease the ranch to seasonal outdoor weddings (over the last four years - we've hosted about 12 weddings per year.) Additionally we offer five rooms for overnight "farm stays."

Water is a precious resource at the ranch especially for our farm operations. We have sprinkler and drip irrigation systems for watering a large variety of fruits and vegetables. Our produce has been distributed to several farmers markets, local restaurants and our local CSA farm basket program.

In addition to our produce, we sell grass-fed beef to the Wimberley Community. Our customers order custom packages of 1/4 or 1/2 cow, processed in Johnson City or Smithville, which the customers then store in their own freezers.

We are quite proud of our long term reputation in the community and we have enjoyed and shared the beauty of Montesino with many friends and visitors for these many years.

The Needmore application to pump such a volume of water out of the same aquifer that serves Montesino is a grave concern. The very idea of it threatens Montesino's existence. Attached is a summary illustration of our two wells and the challenge we face with this immense pumping proposition next door to us.

The intent of the Needmore proposition is not evident in the permit application. If the stated purpose is "agriculture" one could rule out farming due to the thin soil and rocky terrain. If one considers ranching cattle on the Needmore Ranch, then 550 gallons per

minute would be enough to water 40,000 cattle. The land, however, is considered *unimproved pasture* by Hays County Appraised District for purposes of qualifying for ID-1 agricultural exemption. Hill country unimproved pasture supports one cow unit per 15 acres according to Hays County guidelines. One cow unit is equal to a producing cow with a seasonal calf. On 5,600 acres, the land may support 374 cow units and more with some improved pastures in the lower valley. If a calf counts as 1/2 cow you could say Needmore could manage 560 cows and round it up to 1,000 because of some improved pasture support. At 20 gallons per day per cow, 1,000 cows would need 20,000 gallons of water per day. The cows would need a total of 14 gallon per minute across the ranch.

If the conservation district allowed one more well equivalent to this permit, the aquifer would likely be gone in 20 years. Thus, not only would we lose our water at Montesino, the pumping at Needmore would end.

In the past 10 years, the water tables in our wells have descended 25 feet. I understand the Middle Trinity is a finite reservoir with little chance of replenishment. Many small users like us are already affecting the 100 year horizon of our segment of the "cow creek" Middle Trinity.

But, this incomprehensible request sets a short course to the demise of our groundwater and that of many neighbors. To grant such a request to one user would expose the district and all of us vulnerable landowners to a precarious precedent. The futures value of our land would hinge on the next applicant in a hurry to use up our reservoir.

If I may ask, please approach this issue with caution and respect.

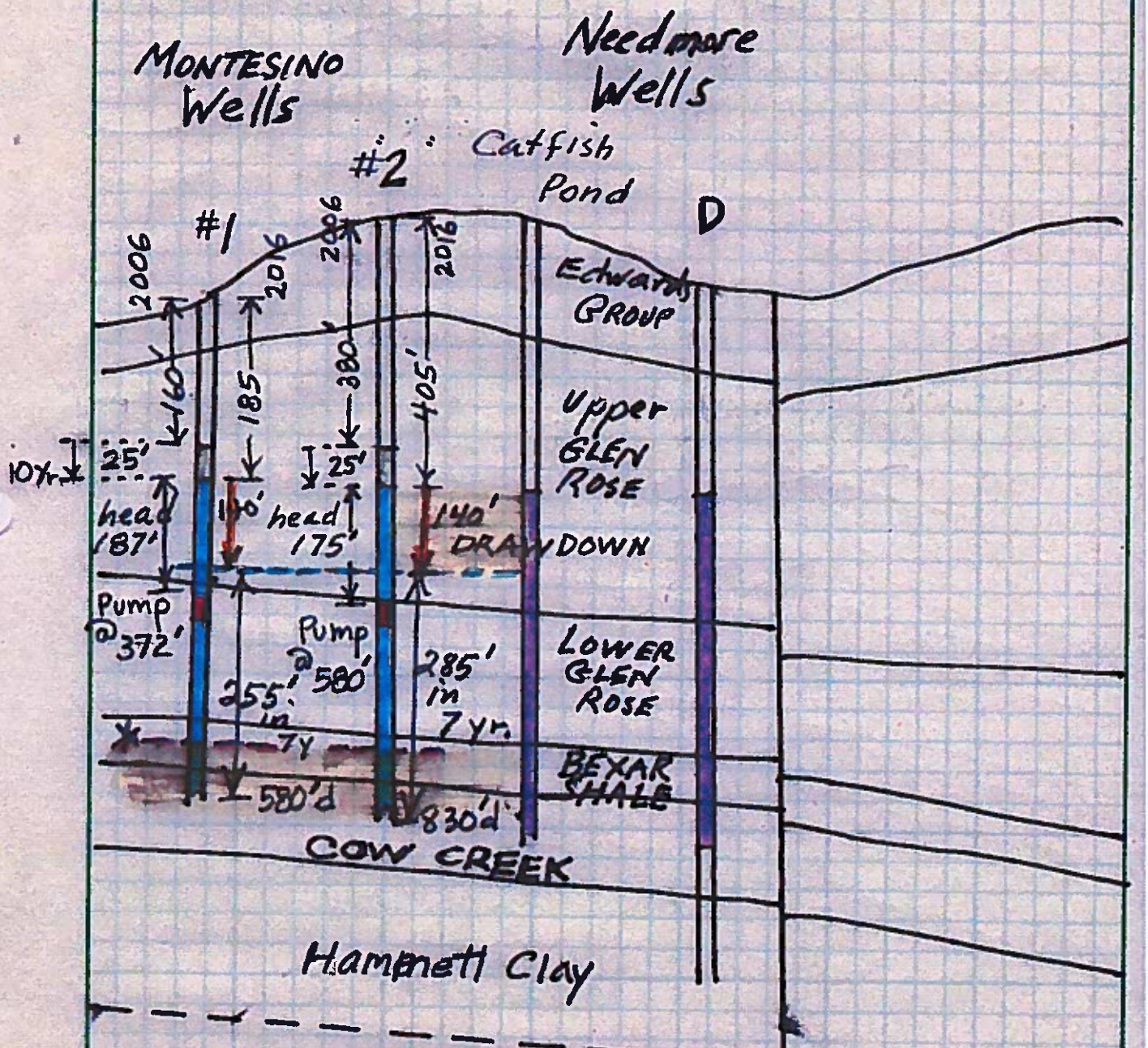
Most Sincerely,

Scott Mitchell

Scott Mitchell

Montesino Ranch

MONTESINO WELLS



* 2ND potential drawdown from future equivelent applicant 140'
plus 20 year current depletion rate = 50'
= 190' (65' Remaining in #1
95' Remaining in #2)

LAW OFFICES OF

JACKSON, SJOBERG, McCARTHY & TOWNSEND, L.L.P.

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(512) 472-7600
FAX (512) 225-5565

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DAVID E. JACKSON*
JOHN MATTHEW SJOBERG*
EDMOND R. MCCARTHY, JR.
ELIZABETH A. TOWNSEND†

*BOARD CERTIFIED IN OIL, GAS AND MINERAL LAW
**BOARD CERTIFIED IN CIVIL APPELLATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

OF COUNSEL
ROBERT C. WILSON
MARC O. KNISELY**

EDMOND R. MCCARTHY, III

†Licensed in Texas and Tennessee

December 19, 2016

Barton Springs Edwards Aquifer Conservation District
Attn: John Dupnik, General Manager
1124 Regal Row
Austin, Texas 78748

via e-mail &
Regular US Mail

Re: Needmore Water LLC's Regular Permit pursuant to HB 3405

Dear John:

I am writing in response to your letter dated November 15, 2016, declaring "administrative complete" Needmore Water LLC's application for a Regular Permit pursuant to HB 3405. In your letter, *inter alia*, you provide that "[Needmore] must comply with District Rule 4-9.13 to request a hearing on the application."

My response is intended to be responsive to your letter; however, I wish to point out the following matters based upon the plain language of HB 3405 (Act of June 19, 2016, 84th Leg. R.S. Ch. 975, 2016 Tex. Gen. Laws 3426-3429):

A. HB 3405 requires the District provide notice and conduct a hearing on the issuance of the Regular Permit. Act of June 19, 2016, 84th Leg. R.S. Ch. 975, §4(e), 2016 Tex. Gen. Laws 3427.

B. Following the hearing, HB 3405 mandates that the District:

> shall issue an order granting the regular permit authorizing groundwater production in the amount set forth in the temporary permit unless the district finds that authorizing groundwater production in the amount set forth in the temporary permit will cause:
>
> (1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or
>
> (2) an unreasonable impact on existing wells.

C. The hearing described in Section 4.(e)[1] is not a "contested case hearing." Additionally, nowhere in HB 3405 is there any authorization for any person or entity, other than the District and the Applicant, to participate as "parties" to the hearing. I would like to visit with you and Bill Dugat about this.

D. If the District's order on Needmore's Regular Permit is to grant an amount less that applied for, then Needmore's remedy is to request a hearing at SOAH to contest the District's order. That hearing does not arise until after the District acts on the application.

E. As I have previously advised the District, the rules promulgated and adopted months after the date Needmore filed is applications for Temporary and Regular Permits under HB 3405 do not apply to the Needmore application. Chapter 245, Tex. Local. Gov't Code; *see Tri-City Freshwater Supply District No. 2 v. Mann,* 142 S.W.2d. 945-948 (Tex. 1940); *South Plains La Mesa Railroad v. High Plains UWD No. 1,* 52 S.W.3d. 770, 780 (Tex. App.-Amarillo 2001, no writ). In order to save paper, I am incorporating my September 1, 2016, and all of the objections and legal arguments presented to the District therein here by reference as if the same were recited in there entirety. I am happy to provide additional copies of that letter and the referenced authorities if you like.

Notwithstanding the foregoing, and without waiving any of the objections expressed herein, including in my prior cited correspondence, or otherwise available to Needmore; in the alternative, please consider this letter as Needmore's:

(i) request that the District conduct the hearing to issue and order granting Needmore's Regular Permit in accordance with Section 4.(e)[2];

(ii) objection to the issuance of a Regular Permit for less than the full amount applied for;

(iii) objection to the issuance of a Regular Permit that includes any additional permit specific special conditions, including the proposed special conditions described in your November 15, 2016, letter;

(iv) objection to any other proposed modification of the volume of groundwater production requested by Needmore pursuant to HB 3405 and its unambiguous definition of "maximum production capacity"; and

(v) request for a contested case hearing pursuant to Section 4.(g) of HB 3405[3] in the event that the District enters an order issuing a Regular Permit for less than

---

[1] Act of June 19, 2016, 84th Leg. R.S. Ch. 975, §4(e), 2016 Tex. Gen. Laws 3427
[2] Act of June 19, 2016, 84th Leg. R.S. Ch. 975, §4(e), 2016 Tex. Gen. Laws 3427
[3] Act of June 19, 2016, 84th Leg. R.S. Ch. 975, §4(e), 2016 Tex. Gen. Laws 3427

the maximum production capacity applied for free of permit specific special conditions.

Please confirm receipt of this letter. By copy of this letter I am providing the District's General Counsel, Bill Dugat, with this response.

Best wishes.

Sincerely,

Edmond R. McCarthy, Jr.

ERM/tn

cc: Bill Dugat, General Counsel, BSEACD
Needmore Water LLC
Kaveh Khorsad, P.G.

LAW OFFICES OF

JACKSON, SJOBERG, McCARTHY & TOWNSEND, L.L.P.

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OF COUNSEL
ROBERT C. WILSON
MARC O. KNISELY**

EDMOND R. MCCARTHY, III

†Licensed in Texas and Tennessee

September 1, 2016

Barton Springs Edwards Aquifer Conservation District
Attn: John Dupnik, General Manager
1124 Regal Row
Austin, Texas 78748

via e-mail &
Regular Mail

Re: Application for a Regular Permit for "Well D" pursuant to HB 3405 on behalf of the Needmore Water LLC, Needmore River Ranch, Hays County, Texas

Dear Mr. Dupnik:

I am writing on behalf of the Applicant, Needmore Water, LLC ("Needmore") in connection with the District Staff's recommendation to grant Needmore's Application for a Regular Permit pursuant to House Bill 3405 (Act of June 19, 2015, 84th Leg., R.S., Ch. 975, 2015 Tex. Gen. Laws 3426) (hereinafter "HB 3405"), to produce 887 ac-ft/year (approximately 289,000,000 gallons/year) from the Trinity Aquifer underlying the Applicant's 5000 contiguous acre Needmore Ranch in western Hays County, Texas (the "Needmore Application), *but* with "Special Conditions." The proposed Special Conditions are described in an e-mail dated August 5, 2016, from Ms. Escobar on your staff.

The Needmore Application is based upon the statutorily prescribed definition of "maximum production capacity" intended to protect the property rights of landowners whose groundwater rights and investments in existing wells unexpectedly became subject to the District's jurisdiction on June 19, 2015. In the case of Well D on the Needmore Ranch, the maximum production capacity had been calculated in 2012-2013 at 550 gallons per minute.

Upon further review and analysis of the Special Conditions and HB 3405, the Applicant believes that the proposed "Special Conditions" are *not* applicable to "regular permits" directed to be granted by the District for such existing wells pursuant to HB 3405. For reference purposes, a copy of HB 3405, codified as Chapter 975 of the Texas General Laws (2015 Tex. Gen. Laws 3426 *et seq.*) is attached hereto as Appendix "A," and a copy of Ms. Escobar's August 5, 2016, e-mail transmitting the most current draft of the proposed "Special Conditions" is included as Appendix "B." I am also attaching a copy of the District's July 2016 Technical Memo 2016-075, entitled "Evaluation for Potential/Unreasonable Impacts: Needmore Water LLC, Well D Permit Application (Hunt & Smith) (hereinafter "Needmore Tech Memo"), as Appendix "C," which the Applicant understands is the basis for the proposed Special Conditions.

The District's proposed Special Conditions, for purposes of this letter, are characterized in two categories:

(i) "Substantive Conditions," which threaten to control the permittee's right to annually produce his groundwater at the "maximum production capacity" as prescribed by HB 3405 and contrary to the Supreme Court's ruling in *EAA v. Day*, 369 S.W.3d 814 (Tex. 2012), and the Legislature's 2011 amendments to Section 36.002, Texas Water Code;[1] and

(ii) "Fiscal Conditions," which would require the permittee to incur and pay substantial costs both of the commencement of the term of the regular permit and, continuing thereafter, for the life of the permit and any renewals thereof potentially extending the permittee's financial obligations in perpetuity.

For the reasons set forth herein, the Applicant believes (i) an HB 3405 Regular Permit and the Applicant's right to produce his groundwater should not be subject to the burden of the Special Conditions in the absence of a finding that the permit *will cause* an unreasonable impact on existing wells, and (ii) that the District lacks the authority to impose either the proposed "Substantive Conditions" or "Fiscal Conditions" described in Ms. Escobar's August 5th e-mail based upon the language of HB 3405 or the *ex post facto* rules adopted by the District in April 2016. Accordingly, the Applicant declines to accept the District's "Special Conditions" as proposed, and requests the District comply with HB 3405 mandates:

a) to move forward to publish notice of the proposed permit authorizing production at the "maximum production capacity" consistent with the requirements of HB 3405 without any of the proposed Special Conditions;

b) to conduct the hearing on the permit in front of the Board; and, thereafter,

c) to issue Applicant's Regular Permit for the full amount requested based upon the well's "maximum production capacity," *i.e.*, 550 gpm or approximately 289,000,000 gallons per year based upon staff's conclusion that production will not cause either (i) the District to fail to achieve its DFC for the Trinity Aquifer, or (ii) an unreasonable impact on existing wells.

The Applicant's decision to decline to accept the District's proposed Special Conditions is premised upon the principle of protecting his constitutionally protected property rights in his privately owned groundwater based upon Texas law in place on June 19, 2015, and the language of HB 3405 itself. The Applicant intends no disrespect to the District, or its desire to maintain the health of the Trinity Aquifer. The District's Special Conditions, however, would impose unacceptable regulatory and fiscal burdens on the Applicant's constitutionally protected groundwater rights that the District has no statutory power to impose.

The burdens of the proposed Special Conditions would not only substantially limit the Applicant's ability to put his groundwater to beneficial use, they could impair the long term availability and/or utility of those groundwater rights and the groundwater that physically would

[1] A copy of the Court's opinion in *EAA v. Day* is attached hereto as Appendix "D." Section 36.002, Texas Water Code, is attached hereto as Appendix "E."

be available to be produced and applied to beneficial purposes. The Special Conditions, however, from a regulatory perspective would render the groundwater as unavailable and its use prohibited, if not severely curtailed.

In addition to the heavy economic losses the Applicant would incur due to implementation of the proposed "Substantive Conditions," the perpetual imposition of the annual costs of the proposed "Fiscal Conditions" create an additional burden designed primarily to assuage the unfounded fears of neighbors intent on preventing the Applicant's exercise of his property rights for the "protection" of their own groundwater production – a private purpose. In part, those neighbors seek to insure that the beneficial use of the Applicant's constitutionally protected property rights can never be applied to municipal purposes to prevent growth in western Hays County in and around Wimberley, Texas. Groundwater regulation to control property development and economic growth in Central Texas is not a lawful purpose, much less the objective of Conservation Amendment (Article XV, § 59, Tex. Const.). I would also note that the pending Application is for agricultural, recreation, and livestock (domestic and wildlife) uses – not municipal. Accordingly, any concerns about municipal use of water produced pursuant to the proposed permit are unfounded.

Needmore understands that the proposed "Special Conditions" were recommended based upon District Staff's speculation that "long-term" production of groundwater from Well D on the Needmore Ranch pursuant to HB 3405 has the *potential* for impacts on neighboring wells. *See* BSEACD's Needmore Tech Memo (Appendix "C"). The speculative nature of the projections on which the conditions are recommended is highlighted by the District's description of the same as a "long term potential" – a period of time that while undefined, far exceeds the Permit's one year term. *See id.* Moreover, the District's ultra-conservative reliance upon a theoretical model (the "Theis Model") with well-known flaws in its application to karst aquifers such as the Trinity Aquifers in western Hays County, fortifies the Applicant's objection to the imposition of the Special Conditions, which are neither authorized, nor contemplated by HB 3405. This is particularly true in light of the substantial body of data and scientific analysis gathered during the 2012 and 2016 Aquifer Tests commissioned by the Applicant and documented in the Wet Rock Reports provided to the District in support of the Application. The proposed Special Conditions, at best, can be categorized as a form of "pre-mitigation." As the District is well aware, during the legislative process "mitigation" language was proposed to be included in the language of HB 3405 – the District opposed the inclusion of the mitigation authority in the legislation. Regrettably, the District prevailed on that position at the Legislature. Accordingly, the District has no authority to impose such "Special Conditions" on an HB 3405 Regular Permit.

As a creature of statute, like all groundwater and special districts, the District is limited to exercising only those powers that have been granted expressly by the Legislature or powers necessarily implied pursuant to the express powers granted by the Legislature. *See Tri-City Freshwater Supply District No. 2 v. Mann,* 142 S.W.2d. 945-948 (Tex. 1940); *South Plains La Mesa Railroad v. High Plains UWD No. 1,* 52 S.W.3d. 770, 780 (Tex. App.-Amarillo 2001, no writ).[2] The District, unlike a municipality, does not have the power to exercise general "corporate functions." *See Tri-City FWS Dist. No. 2, supra,* 142 S.W.2d at 946. Powers which are not expressly granted by the Legislature cannot be exercised by a district merely because they are "convenient or useful." *Id.* at 947; *see South Plains LaMesa Railroad, supra,* 52 S.W.3d at 719

[2] Copies of the two referenced Court decisions are attached hereto as Appendices "F" and "G," respectively.

("a district 'can exercise no authority that has not been *clearly* granted by the Legislature.'" *citing Tri-City FWS Dist. No. 2, supra,* 142 S.W.2d at 948; *Quincy Lee Co. v. Lodal & Bain Engineers,* 602 S.W.2d 262, 264 (Tex. 1980) (reaffirming the "*clearly* granted test")).

In the *South Plains LaMesa Railroad* case, the Amarillo Court of Appeals relied upon the fact that the sections of Chapter 36, Texas Water Code, at issue did *not* clearly authorize the District to exercise the powers challenged.

Even prior to the Supreme Court's clarification of landowner's constitutionally protected property rights in his groundwater, the Amarillo Court got it right when they explained:

> Because the right to withdraw underground percolating water is *not correlative, but is absolute,* and the Legislature has not enacted a "reasonable use" rule as exists in other jurisdictions, *Barshop,* S.W.2d at 625, and considering that by section 36.002, the Legislature provided that nothing in the Code shall deprive or divest the owner of groundwater of their ownership rights, [the Court] holds that the applicable Code provisions do not *clearly* authorize the District to enact a regional rule to prohibit the production of a disproportionate amount of groundwater as it relates to the size of the tract *or to implement a responsible use rule.*

South Plains LaMesa Railroad, supra, 52 S.W.3d at 779-80 (emphasis in the original & added); *see EAA v. Day, supra,* 369 S.W.3d at 828, 831-833, 838, 842; Tex. Water Code § 36.002.

In *Day,* the Supreme Court confirmed that the Texas Legislature had *not* adopted a "correlative rights" system for groundwater production, quoting from its 1904 decision in *Houston & T.C. Ry v. East*[3] as follows:

> [W]e anticipated legislative involvement in groundwater regulation in *East*: ['] *In the absence...of positive authorized legislation,* as between proprietors of adjoining lands, the *law recognizes no correlative rights* in respect to underground waters percolating, oozing, or filtrating through the earth.[']"

EAA v. Day, supra, 369 S.W.3d, at 828 n. 70 (quoting *East, supra,* 81 S.W. at 280) (emphasis in original & added).

In its 2011 amendments to Section 36.007, Texas Water Code, not only did the Legislature *not* adopt "positive authorized legislation" to create a correlative rights system, the Legislature appears to have intentionally avoided such action as evidenced by the language of subsection 36.002(d)(3):

> (d) This section does *not*:
>
> (3) require that a rule adopted by a district allocate to each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres owned by the landowners.

[3] 98 Tex. 146, 81 S.W. 297, 280 (1904).

Tex. Water Code § 36.002(d)(3) (emphasis added).

Accordingly, the District must look to its enabling legislation and the applicable general laws, *e.g.*, Chapter 36, Texas Water Code, as the source of and limitation upon its authority and power to operate, including the adoption of rules and rule amendments. *Tri-City FWS Dist. No. 2, supra,* 142 S.W.2d at 445, *South Plains LaMesa Railroad, supra,* 52 S.W.2d at 779-80. The Applicant's groundwater, however, was not subject to the District's jurisdiction under either its enabling legislation or Chapter 36, but only came under the District's regulatory umbrella on June 19, 2015, the effective date of HB 3405. Accordingly, HB 3405 is the source of the District's authority with respect to the issuance of the Applicant's Regular Permit. *See* Act of June 19, 2015, 94th Leg. R.S. Ch. 975, 2015 Tex. Gen. Laws 3426 *et seq.*; *see generally Tri-City FSWD No. 2, supra,* and *South Plains LaMesa Railroad, supra.*

Prior to June 19, 2015, the Applicant's Trinity Aquifer groundwater, now subject to the permitting jurisdiction of the District, was unregulated. In its unregulated state, the Applicant after purchasing the real property engaged Wet Rock Groundwater Services LLC ("Wet Rock") in 2012, to coordinate the drilling of multiple test wells on the property, including Well D that is the subject of the pending Regular Permit Application and, thereafter, to conduct "Aquifer Testing" or "Pump Testing," as it is frequently described, to evaluate and assess the production capacities of the wells and the aquifer underlying the applicant's 5000 acres, as well as the water quality underlying the property, and the aquifer's characteristics including transmissivity.

Upon the conclusion of the Aquifer Testing, the Applicant caused the test wells, except Well D, to be plugged and abandoned in compliance with applicable law. Well D was maintained for purposes of using the same to produce groundwater for a variety of beneficial uses and purposes on the Applicant's 5000 acres, including "D&L use" (domestic and livestock), agricultural irrigation, and recreational purposes including wildlife watering (also a livestock use) and maintaining levels in a multi-purpose stock tank on the property. At the time Well D was drilled, based upon the Aquifer Testing conducted in 2012, Wet Rock calculated the "maximum production capacity" of Well D to be 550 gallons per minute ("GPM"), or approximately 289,000,000 gallons per year ("GPY").

Based upon the unambiguous language of HB 3405, absent a scientifically supported conclusion that production from Well D at its "maximum production capacity," *will cause* one of the two prescribed events to occur, the District must grant the Applicant's Regular Permit. Act of June 19, 2015, 84th Leg. R.S. Ch. 975 § 4, 2015 Tex. Gen. Laws 3426, 3427; *see EAA v Day, supra.* HB 3405 does not authorize the imposition of the "Special Conditions" proposed by the District in this instance.

The District's jurisdiction and powers with respect to existing wells such as the Applicant's Well D, located in the so-called "shared-territory," that were drilled prior to and in existence on the effective date of the legislation, is set forth in Section 4 of HB 3405. Section 4 of the Bill, which is the section primarily prescribing the permitting process for existing wells in the new shared-territory, is very narrowly and expressly drafted. *See* Act of June 19, 2015, 84th Leg. R.S. Ch. 975 § 4, 2015 Tex. Gen. Laws 3426, 3427.

Specifically, Section 4 provides a mandatory opportunity for a person operating a well before the effective date of the Act such as the Applicant to file an application within 90 days of

the effective date of the statute and, thereafter, to receive a temporary permit in the amount of the "maximum production capacity" of the well. *Id.* The statute defines the "maximum production capacity" to mean the "maximum production capacity of a well, ..." *Id.*

The statute goes on to mandate that the District shall, without a hearing, and not later than 30 days after receipt of the application, "issue the temporary permit for the groundwater production amount set forth in the application." *See* Act of June 19, 2015, 84th Leg. R.S. Ch. 975 § 4, 2015 Tex. Gen. Laws 3426, 3427. Thereafter, the District, as it has done in the Applicant's case, is to process the application for a "regular permit" as contemplated by HB 3405.

In Subsection 4.(e), HB 3405 also mandates that *unless* the District finds that authorizing groundwater production in the amount set forth in the temporary permit:

(i) would cause the District to fail to achieve its DFC for the [Trinity] aquifer, or

(ii) would cause an "unreasonable impact on existing wells,"

the District must issue the regular permit in the amount applied for and contained in the temporary permit. *See* Act of June 19, 2015, 84th Leg. R.S. Ch. 975, § 4.(e), 2015 Tex. Gen. Laws 3427.

If the District makes the mandatory findings, then the District may reduce the amount of the regular permit below what was granted in the temporary permit thereby triggering a right of appeal by the Applicant. The District's analysis of Needmore's HB 3405 Permit, even relying upon the Theis Model, does not show that Needmore's HB 3405 Regular Permit "will cause" either criteria to be triggered. Accordingly, aside from fulfilling its obligation to publish notice of the proposed regular permit and conduct a hearing on the permit, HB 3405 requires the District to issue Needmore a HB 3405 Regular Permit. *Id.*

HB 3405, however, does not authorize the imposition of "Special Conditions" in a regular permit. Act of June 19, 2015, 84th Leg. R.S. Ch. 975, 2015 Tex. Gen. Laws 3426. Accordingly, the Legislature has not authorized the District to impose "Special Conditions" like it has proposed to impose on the Applicant's regular permit. *See Tri-City FWS Dist. No. 2, supra* and *LaMesa Railroad, supra.* Assuming that HB 3405 had a provision authorizing the District to impose Special Conditions upon the regular permits, at the time applications for regular permits were filed, the District had no Rules that prescribed or implemented any such statutory provision (again, assuming such statutory provision existed). *See generally* Tex. Local Gov't Code Ch. 245.

The District cannot rely upon the Rules it had in effect at the time the Applicant filed its application with the District (September 18, 2015). Those Rules had been adopted for purposes of implementation on its Edwards Aquifer permits. The Rules in effect on September 18, 2015, did *not* contemplate production from wells within the "shared territory" as that term is expressly defined and prescribed in HB 3405. Moreover, those Rules, with limited inapplicable exceptions, were not adopted as part of HB 3405.[4] Neither the "substantive" Special Conditions

[4] On July 16, 2015, the District adopted limited Rule amendments focused on the "process" for handling HB 3405 permit applications. These amendments did not include Rules for assessing or mitigating impacts and/or potential impacts of HB 3405 Permits.

proposed, nor the "fiscal" Special Conditions proposed were part of the District's Rules in effect on or before September 18, 2015.

As you are aware, beginning in the 4th quarter of 2015, the District's Staff worked for months to develop Rules that it believed to be appropriate for the Trinity Aquifer within the "shared territory." New Rules were conceptually presented to the Board in January 2016, and proposed in March of 2016, almost six months after the deadline for filing applications for HB 3405 Temporary and Regular Permits – the Needmore application was filed on September 18, 2015. Those New Rules were not adopted until April 28, 2016, and, therefore, cannot be applied to the Applicant's regular permit.

As the majority opinion noted in the *South Plains LaMesa Railroad* decision, *supra*:

> Although the Legislature may delegate powers to the District to carry out legislative purposes, it must establish reasonable standards to guide the District in exercising those powers.

South Plains LaMesa Railroad, *supra*, 52 S.W.2d at 779-80 (*citing FM Properties Operating*, 22 S.W.3d 868, 873 (Tex. 2000)). The Court goes on to explain:

> Because section 36.002 requires that regulation of groundwater ownership rights must be by *rule* promulgated by the District, not discretionary decisions, the District did not have the authority to implement such regulation without a rule adopted after public notice and public hearing are required by Section 36.101(b). We conclude that the action of the District cannot be supported on the ground of its alleged discretion.

Id. at 780 (emphasis in original). In his concurring opinion, Justice Quinn succinctly summarized the principle at play here:

> [A]ctions of an administrative body must be reasonable to survive judicial review. Implicit in this standard of reasonableness lies the concept of prior notice or what some would call fundamental fairness.

Id. at 782. Texas law is even clearer - Chapter 245, Texas Local Gov't Code, expressly prohibits the application of the District's April 28th Rules to the Needmore HB 3405 Regular Permit Application, or .any other HB 3405 Permit Application.[5]

In addition to the limitations on the legislatively authorized powers of the District,[6] Chapter 245, of the Texas Local Government Code, includes additional limitations on the ability of a district like BSEACD to adopt and/or impose new rules and requirements on permits *after* the permit application has been filed. The definitions of the terms "permit," "political subdivision," "project" and "regulatory agency" all fit and are applicable to the Applicant's analysis of the limitations on the District's ability to impose the proposed Special Conditions. *See* Tex. Local Gov't Code § 245.001(1)-(4).

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[5] A copy of Chapter 245 is attached hereto as Appendix "H."

[6] *Tri-City FWS Dist. No. 2*, *supra*, 142 S.W.2d at 445-46, *South Plains LaMesa Railroad*, *supra*, 52 S.W.2d at 779-80.

Pursuant to Chapter 245, an applicant for a permit is are entitled to rely upon the rules and regulations in effect as of the date the application is filed. *See* Tex. Local Gov't Code § 245.002(a), (a-1). Chapter 245 applies to the unique circumstances contemplated by HB 3405 where an applicant files a multi-part application for a "series of permits," *i.e.*, the "temporary permit" to be followed by the issuance of a "regular permit." *See id.* § 245.002(b). Specifically, Section 245.002(b) prescribes that *if* a "series of permits" is required for a project, the rules, orders, regulations, etc., controlling the processing and decision on that series of permit applications are those that are "in effect at the time the original application for the first permit in that series is filed."

While not directly pertinent to the question of the inability of the District to change the Rules after the date an application is filed, Section 245.006, entitled "Enforcement of the Chapter," evidences the Legislature's intent to make it unequivocally clear that a governmental entity could not change the rules on an applicant. Specifically, Subsection (b) of Section 245.006 expressly waives a political subdivision's immunity from suit for purposes of enforcing the Chapter.

Finally, to the extent that post-issuance of Needmore's HB 3405 Regular Permit the District seeks substantive data associated with production from the Applicant's Well D, that data will be available. The so-called "Amos Well" referenced in the proposed "Special Conditions" already exists.

The Amos Well, owned and located on the Property of a third-party about a mile from Well D, is already equipped with a transducer and monitored by the Hays Trinity Groundwater Conservation District. As the District is well aware, the Hays County GCD installed a transducer in the Amos Well in the first quarter of 2016, and has been collecting and reporting the data. In fact, Amos Well Transducer was operational and the District and evaluated the data captured by the Hays Trinity GCD during the period of the Needmore Applicant's Aquifer Testing. That testing, which exceeded the District's requirements, occurred during the more than month long period commencing on January 7, 2015, when WetRock commenced background water level monitoring at the Caboose Well, Catfish Pond Well, Top of the Hill Well and Well D on the Needmore Ranch, through the actual 5-day pump testing (January 25-30, 2015), and concluding February 16, 2016, when the last of the manual water level readings in the Wells on the Needmore Ranch were taken for purposes of completion of the Aquifer Testing prescribed by the District. Accordingly, in addition to the lack of legal authority for the proposed instantaneous reporting, there is no scientifically supportable justification for imposing Special Conditions requiring the Applicant to fund the upgrading of the Amos Well's monitoring functions to include instantaneous Internet reporting and/or on-line telemetry reporting.

As the Hays Trinity GCD already monitors the Amos Well and, thereafter, posts that data on its Internet website, making the same available to the public, there is no legitimate regulatory basis for BSEACD to impose the Special Conditions on the Needmore Ranch. The data is available to BSEACD, and the Applicant should not be asked to fund the upgrading of the existing monitoring capability to facilitate instantaneous social-media posting.

The Applicant understands that the Hays Trinity GCD also shares the data it recovers with BSEACD. Accordingly, for purposes of monitoring the effect of pumping from Well D on

the Trinity Aquifer at the Amos Well, that monitoring site and the contemplated data is already available to the District. Mere convenience does not warrant or authorize the Special Conditions.

The Applicant will, of course, meter production from the Well D and report that data to BSEACD. Additionally, the Applicant has indicated his plans to install a transducer in an additional well on the 5000 acre Needmore Ranch. Known as the "Catfish Pond Well," the well is currently used for exempt purposes.

The Catfish Pond Well is located approximately 1.1 miles from the Well D and is on the opposite side of the Well D from the Amos Well. The Applicant has also indicated a willingness to report that data to the District on a quarterly basis at no cost to the District. If the District believes it needs or desires to retrieve the Catfish Pond Well data more frequently, the Applicant is amenable to working with the District to address that goal. Accordingly, the substantive scientific data the District desires is already available and the need for that aspect of the Special Conditions is unnecessary.

Should you have any questions you can reach me here in Austin at (512) 225-5606. Thank you for your assistance in finagling the Needmore Permit. We look forward to working with you and your Staff during the life of the Permit.

Best wishes.

Sincerely,

Edmond R. McCarthy, Jr.

ERM/tn
Encl.

cc: Bill Dugat, General Counsel, BSEACD

Needmore Ranch c/o Needmore Water, LLC
Attn: Greg LaMantia

Wet Rock Groundwater Services, LLC
Attn: Kaveh Khorzad

Appendix "A"

Copy of HB 3405, codified as Chapter 875 of the Texas General Laws
(2015 Tex. Gen. Laws 3426 *et seq.*)

TERRITORY, JURISDICTION, AND POWERS OF THE BARTON SPRINGS-EDWARDS AQUIFER CONSERVATION DISTRICT, INCLUDING ITS AUTHORITY TO REGULATE CERTAIN WELLS FOR THE PRODUCTION OF GROUNDWATER; IMPOSING A CAP ON CERTAIN FEES

CHAPTER 975

H.B. No. 3405

AN ACT

relating to the territory, jurisdiction, and powers of the Barton Springs-Edwards Aquifer Conservation District, including its authority to regulate certain wells for the production of groundwater; imposing a cap on certain fees.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subchapter A, Chapter 8802, Special District Local Laws Code, is amended by adding Section 8802.0035 to read as follows:

Sec. 8802.0035. SHARED TERRITORY; JURISDICTION. (a) The territory of the district includes any territory that is:

(1) inside the boundaries of:

(A) the Edwards Aquifer Authority; and

(B) Hays County; and

(2) not within the boundaries of the Plum Creek Conservation District as those boundaries existed on February 1, 2015.

(b) The Edwards Aquifer Authority has jurisdiction over any well that is drilled to produce water from the Edwards Aquifer in the shared territory described by Subsection (a).

(c) The district has jurisdiction over groundwater and any well that is drilled to produce water from any aquifer other than the Edwards Aquifer in the shared territory described by Subsection (a).

(d) Except for the district and the Edwards Aquifer Authority, no district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, has authority in the shared territory described by Subsection (a) to regulate the spacing of water wells or the production from water wells.

(e) The district has jurisdiction over any well that is drilled to produce water from the Edwards Aquifer or any other aquifer in the territory described by Section 8802.003.

(f) The district's jurisdiction over any well that is drilled to produce water in the territory described in Section 8802.003, including a well that is used to recover water that has been injected as part of an aquifer storage and recovery project, applies to all wells for which the district has jurisdiction in the shared territory described by this section.

SECTION 2. Section 8802.1045, Special District Local Laws Code, is amended by adding Subsection (g) to read as follows:

(g) This subsection applies only to a well located in the shared territory described by Section 8802.0035. Notwithstanding Subsection (b), the district may not charge an annual production fee of more than 17 cents per thousand gallons of water authorized to be produced under a permit from a well under this subsection, if the water is permitted for any use other than agricultural use.

SECTION 3. As soon as practicable after the effective date of this Act, and in conformance with the requirements of Section 8802.053, Special District Local Laws Code, the board of directors of the Barton Springs–Edwards Aquifer Conservation District shall revise the single-member districts as the board considers appropriate to reflect the changes in territory made by Section 8802.0035, Special District Local Laws Code, as added by this Act.

SECTION 4. (a) In this section:

(1) "District" means the Barton Springs–Edwards Aquifer Conservation District.

(2) "Maximum production capacity" means the maximum production capacity of a well, which may be based on a 36-hour pump test conducted at the time the well was initially constructed or placed into service.

(b) This section applies only to the shared territory added to the district by Section 8802.0035, Special District Local Laws Code, as added by this Act.

(c) A person operating a well before the effective date of this Act or who has entered into a contract before the effective date of this Act to drill or operate a well that is or will be located in the territory described by Subsection (b) of this section and subject to the jurisdiction of the district under Section 8802.0035, Special District Local Laws Code, as added by this Act, shall file an administratively complete permit application with the district not later than three months after the effective date of this Act for the drilling, equipping, completion, or operation of any well if the well requires a permit under the rules or orders of the district. The person may file the permit application for an amount of groundwater production not to exceed the maximum production capacity of the well.

(d) The district shall issue a temporary permit to a person who files an application under Subsection (c) of this section without a hearing on the application not later than the 30th day after the date of receipt of the application. The district shall issue the temporary permit for the groundwater production amount set forth in the application. The temporary permit issued under this subsection shall provide the person with retroactive and prospective authorization to drill, operate, or perform another activity related to a well for which a permit is required by the district for the period of time between the effective date of this Act and the date that the district takes a final, appealable action on issuance of a regular permit pursuant to the permit application if:

(1) the person's drilling, operating, or other activities associated with the well are consistent with the authorization sought in the permit application;

(2) the person timely pays to the district all administrative fees and fees related to the amount of groundwater authorized to be produced pursuant to the temporary permit in the same manner as other permit holders in the district; and

(3) the person complies with other rules and orders of the district applicable to permit holders.

(e) The temporary permit issued under Subsection (d) does not confer any rights or privileges to the permit holder other than those set forth in this section. After issuing the temporary permit, the district shall process the permit application for notice, hearing, and consideration for issuance of a regular permit consistent with this section. The district, after notice and hearing, shall issue an order granting the regular permit authorizing groundwater production in the amount set forth in the temporary permit unless the district finds that authorizing groundwater production in the amount set forth in the temporary permit will cause:

(1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or

(2) an unreasonable impact on existing wells.

(f) In the hearing on issuance of the regular permit under Subsection (e), the permit applicant bears the burden of proof.

(g) The holder of a temporary or regular permit subject to a district order under this section to reduce the amount of groundwater production from the permitted well may contest the reduction by requesting a contested case hearing to be conducted by the State Office of Administrative Hearings in the manner provided by Sections 36.416, 36.4165, and 36.418, Water Code. The district shall contract with the State Office of Administrative Hearings to conduct the hearing as provided by those sections of the Water Code. To the extent possible, the State Office of Administrative Hearings shall expedite a hearing under this subsection. The permit applicant bears the burden of proof in the hearing.

(h) For the State Office of Administrative Hearings to recommend overturning a district order reducing the amount of groundwater authorized to be produced under a

temporary permit, the permit holder must demonstrate by a preponderance of the evidence that the production of the amount of groundwater authorized based on the maximum production capacity will not cause:

(1) a failure to achieve applicable adopted desired future conditions for the aquifer; or

(2) an unreasonable impact on existing wells as found in the district's order.

(i) A person who relies on the temporary permit granted by this section to drill, operate, or engage in other activities associated with a water well assumes the risk that the district may grant or deny, wholly or partly, the permit application when the district takes final action after notice and hearing to issue a regular permit pursuant to the application.

SECTION 5. If the addition of territory under Section 8802.0035, Special District Local Laws Code, as added by this Act, causes the annual water use fee in Section 8802.105 to exceed $1 million, the district shall not require an assessment of greater than $1 million annually as adjusted to reflect the percentage change during the preceding year in the Consumer Price Index.

SECTION 6. (a) The legislature validates and confirms all acts and proceedings of the board of directors of the Barton Springs–Edwards Aquifer Conservation District that were taken before the effective date of this Act.

(b) Subsection (a) of this section does not apply to any matter that on the effective date of this Act:

(1) is involved in litigation if the litigation ultimately results in the matter being held invalid by a final judgment of a court; or

(2) has been held invalid by a final judgment of a court.

SECTION 7. (a) The legal notice of the intention to introduce this Act, setting forth the general substance of this Act, has been published as provided by law, and the notice and a copy of this Act have been furnished to all persons, agencies, officials, or entities to which they are required to be furnished under Section 59, Article XVI, Texas Constitution, and Chapter 313, Government Code.

(b) The governor, one of the required recipients, has submitted the notice and Act to the Texas Commission on Environmental Quality.

(c) The Texas Commission on Environmental Quality has filed its recommendations relating to this Act with the governor, the lieutenant governor, and the speaker of the house of representatives within the required time.

(d) All requirements of the constitution and laws of this state and the rules and procedures of the legislature with respect to the notice, introduction, and passage of this Act are fulfilled and accomplished.

SECTION 8. It is the intent of the legislature that this Act apply only to the territory described by Section 8802.0035, Special District Local Laws Code, as added by this Act, and not have statewide implications.

SECTION 9. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2015.

Passed by the House on May 8, 2015: Yeas 126, Nays 15, 1 present, not voting; the House refused to concur in Senate amendments to H.B. No. 3405 on May 29, 2015, and requested the appointment of a conference committee to consider the differences between the two houses; the House adopted the conference committee report on H.B. No. 3405 on May 31, 2015: Yeas 143, Nays 1, 1 present, not voting, the House adopted H.C.R. No. 149 authorizing certain corrections in H.B. No. 3405 on June 1, 2015: Yeas 147, Nays 0, 1 present, not voting; passed by the Senate, with amendments, on May 22, 2015: Yeas 28, Nays 3; at the request of the House, the Senate appointed a conference committee to consider the differences

between the two houses; the Senate adopted the conference committee report on H.B. No. 3405 on May 30, 2015: Yeas 27, Nays 4, the Senate adopted H.C.R. No. 149 authorizing certain corrections in H.B. No. 3405 on June 1, 2015: Yeas 31, Nays 0.

Filed without signature June 19, 2015.

Effective June 19, 2015.

LOW INCOME HOUSING TAX CREDITS AWARDED FOR CERTAIN DEVELOPMENTS

CHAPTER 976

H.B. No. 3535

AN ACT

relating to low income housing tax credits awarded for certain developments.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 2306.6711, Government Code, is amended by adding Subsection (g) to read as follows:

(g) Except as necessary to comply with the nonprofit set-aside required by Section 42(h)(5), Internal Revenue Code of 1986 (26 U.S.C. Section 42(h)(5)), in an urban subregion of a uniform state service region that contains a county with a population of more than 1.7 million, the board shall allocate housing tax credits to the highest scoring development, if any, that is part of a concerted plan of revitalization and is located in that urban subregion in a municipality with a population of 500,000 or more.

SECTION 2. The change in law made by this Act applies only to the allocation of low income housing tax credits for an application cycle that begins on or after January 1, 2017. The allocation of low income housing tax credits for an application cycle that begins before January 1, 2017, is governed by the law in effect on the date the application cycle began, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2015.

Passed by the House on May 5, 2015: Yeas 130, Nays 15, 2 present, not voting; the House refused to concur in Senate amendments to H.B. No. 3535 on May 27, 2015, and requested the appointment of a conference committee to consider the differences between the two houses; the House adopted the conference committee report on H.B. No. 3535 on May 31, 2015: Yeas 79, Nays 63, 3 present, not voting; passed by the Senate, with amendments, on May 24, 2015: Yeas 19, Nays 11; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; the Senate adopted the conference committee report on H.B. No. 3535 on May 30, 2015: Yeas 23, Nays 8.

Filed without signature June 19, 2015.

Effective September 1, 2015.

Appendix "B"

Copy of Ms. Escobar's August 5, 2016, e-mail transmitting
the most current draft of the proposed "Special Conditions

Ed McCarthy

From: Vanessa Escobar <vescobar@bseacd.org>
Sent: Friday, August 05, 2016 9:06 AM
To: Kaveh Korzad; Ed McCarthy
Cc: Kendall Bell-Enders; Vanessa Escobar; John Dupnik; bdugat@bickerstaff.com; Brian Hunt; Brian Smith
Subject: Needmore Water LLC - Revised Special Provisions
Attachments: Needmore_SP_Rev5.docx

Kaveh,

As a follow-up to our meeting discussion on 7/29/16 the District has revised the special permit provisions in the specific areas of the Amos and Catfish monitoring wells. The revisions are provided as tracked changes. After further discussion and research, the District has decided that it is not preferable to have TWDB telemetry on the Amos Index Well, however it is acceptable for the Catfish Index Well. When it comes to the primary index well, it is necessary for the District to maintain as much control of over the equipment and data as possible. If this were to be an official TWDB telemetered well, the maintenance of equipment would be subject to the TWDB's time and budget availability. The data will also be in a raw format through the TWDB's database systems; therefore, the District would not be able to correct for data outliers or inaccuracies before the public sees the data. TWDB would also require an access agreement and a specific type of telemetry equipment that is considered to be larger and more complex. The Amos well owner has already expressed hesitancy and concerns with both those factors. Because the permit compliance terms are centered around the Amos Well serving as the primary index well, the District prefers to use a commercial vendor such as *Insitu* or other comparable vendors that we have had experience with in terms of proven reliability and quality. Again, a transducer will be acceptable for the Catfish Well and if you wish to pursue TWDB telemetry for that well the Permittee does have that option.
If you have any thoughts or questions, please let us know by Wed 8/10/16.

Regards,

Vanessa Escobar
Regulatory Compliance Coordinator
www.bseacd.org
512-282-8441

Barton Springs/Edwards Aquifer Conservation District
1124 Regal Row
Austin, TX 78748

SPECIAL PROVISIONS

SECTION 1. DEFINITION OF TERMS

"Baseline Curtailment Rate (BCR)" - is a calculated annual volume based on the actual metered and reported monthly pumping volumes of the previous 12 months. The previous 12-month total is used to establish an annual volume rate referred to as the Baseline Curtailment Rate (BCR). All required temporary curtailments specified in these special provisions are applied to the BCR on a monthly basis until the drawdown in the index well recovers to the specified water level threshold. The BCR is further described in Section 4 of these provisions.

"Index Well(s)" – is a designated observation or monitoring well that is used to measure the (water level) and/or quality of water within the aquifer. For the purpose of these provisions, "Amos Index Well" and "Catfish Index Well" are designated as index wells; "Amos Index Well" is the primary index well and "Catfish Index Well" is the secondary index well. Details describing these index wells are found in Section 3 of these provisions.

"Response Action(s)" – is a mandatory measure that the Permittee must comply with and implement per the terms and conditions of this permit and its special provisions. Specific response actions are described in Section 4 of these provisions.

"Trigger" – is a designated water level that prompts a response action once the measured water level is reached. For compliance purposes, the measured water level shall be calculated as a 30-day rolling average of the minimum daily water level (measured depth to water, in feet, from land surface) measurements. Once a Trigger has been reached, the Permittee must implement the appropriate response action. Specific triggers are described in Section 4 of these provisions.

"Mitigation" – for the purpose of these provisions, this term means any proactive or reactive measures taken by a designated party to prevent, reduce, or remedy actual unreasonable impacts on an operational and adequate well that are unanticipated and unavoidable through reasonable avoidance measures.

SECTION 2. GENERAL

1. In response to the District's review of the submitted Hydrogeological Report and the subsequent preliminary finding identifying a potential for unreasonable impacts resulting from permitted pumping (289,000,000 gal/yr) of Needmore Well D, the District requires permit-specific Response Actions to be implemented in order to avoid unreasonable impacts. These actions are identified in Section 4 of these provisions. The Permittee must comply with the Response Actions associated for with Permit Compliance Level (defined in Section 4 below).

2. These provisions designate the use of a primary index well for which Permit Compliance Levels, Triggers and mandatory Response Actions will be established and monitored for compliance. Section 3 of these provisions further describes the details of each index well. In the event that the primary index well is no longer an adequate well for compliance purposes, the permit may be amended to designate the secondary index well (Catfish Well) to serve as the primary index well.

3. As drawdown in the primary index well approaches each Permit Compliance Level, the District will coordinate an evaluation of the data to assess the actual impacts as compared to the modeled

impacts of pumping. The District will coordinate with the permittee to schedule a meeting and to review the data. This meeting will also serve to communicate details about the relevant Response Actions in place, as well as to communicate the need for the Permittee to prepare for the upcoming Response Actions that will be required if subsequent Compliance Levels are reached.

4. When the water level in the primary index well reaches a designated Trigger, the District will notify the Permittee via certified mail within ten business days ("Mailed Notification Letter"). This notification will include a revised pumping chart that reflects the BCR and the mandatory temporary curtailments applied to that volume. Upon receipt of the notification and the revised pumping chart, the Permittee must comply with the curtailed monthly pumping allocation to begin on the first day of the month following notification.

5. The Permittee may submit an amendment application to request revisions or modifications to the permit volume or the permit special provisions. The Board will consider such requests as major amendments and will be processed in accordance with District Rule 3-1.4 B(1) and Rule 3-1.4 C(2) related to notification, Board action, and public hearings.

6. If the District determines through its own coordinated evaluation and investigation that production from the permitted well is causing actual unreasonable impacts (as defined in District Rules) to either the index wells or any other operational well that is adequately equipped, maintained, and completed, then the District may require temporary cessation of pumping until the Board approves a staff-initiated amendment to partially reduce the full permit volume to a rate that will reasonably avoid recurrence of unreasonable impacts.

7. In lieu of permit reductions required by provision No. 6, the District may consider Mitigation measures pursuant to District rules related to Mitigation to remedy the unreasonable impacts. Such Mitigation measures shall be reserved only after all reasonable preemptive avoidance measures have been exhausted, and shall serve as a contingency for the occurrence of unreasonable impacts that were unanticipated and unavoidable through reasonable measures.

8. If the District determines that new pumping centers or large-scale groundwater production within the area of influence are significantly affecting drawdown relative to the permit Compliance Levels, then the District may consider revision of these permit provisions and permit Compliance Levels. Any permit revisions must be approved by the Board through a permit amendment.

9. Data collected from the index wells that have been determined by the District to be inaccurate shall not be used to determine compliance with these permit provisions.

SECTION 3. INDEX WELLS

The District has designated a primary index well (Amos Well) and secondary index well (Catfish Well) for the purpose of monitoring aquifer conditions in the Middle Trinity Aquifer. These provisions further define the Permit Compliance Levels, Response Actions, and Triggers specific to the primary index well. The secondary index well will be monitored to establish correlated data with the primary index well. In the event that the primary index well is no longer an adequate or accessible well for compliance purposes, the permit may be amended to designate the Catfish Well to serve as the primary index well. The District is responsible for compiling, collecting, and archiving data from the monitor wells. Table 1 describes the two index wells.

The Amos Index Well is part of the Hays Trinity Groundwater Conservation District (HTGCD) well monitoring network. It is a domestic well that is operational and in use as an exempt well. The well is completed as a Middle Trinity well located in Hays County approximately two miles from the permitted Well D. An agreement has been secured between the District and the well owner of the Amos Index well granting access and authority to utilize the well as a monitoring and index well. The Catfish Index Well is located in the HTGCD on Permittee's property referred to as Needmore Ranch. The well is operational and in use as an exempt livestock well. The well is completed to produce from the Middle Trinity Aquifer and is located in Hays County approximately one mile from the permitted Well D.

Table 1. List of index wells for the Needmore Well D production permit.

Index Well	Well Name & Well Number	Coordinates	Physical Address	Well Owner Contact
Primary Index Well	Amos Well	29.961399, -98.064977	600 Mission Trail Wimberley, TX 78676	Stephen & Sharon Amos
Secondary Index Well	Catfish Well	29.970093, -98.052253	Needmore Ranch	Needmore Water LLC

Amos Index Well Provisions

1. Within 90 days of the effective date of the permit, the District, in coordination with the Permittee and well owner, shall be responsible for purchasing and ensuring the proper installation of monitoring equipment necessary to collect and transmit water level data to a website accessible to the Permittee and the District for the purpose of evaluating compliance with the Section 4 of these Special Provisions. The District in coordination with the Permittee will select a commercial equipment vendor and web hosting service provider for the telemetry equipment to be installed at the Amos Well. The Permittee shall be solely responsible for reimbursement of any and all expenses incurred by the District for such monitoring equipment and installation. Such expenses shall be reimbursed in full by the Permittee to the District within 30 days of the District providing notice of those expenses.

~~1. Within 90 days of the effective date of the permit, the Permittee [Districtshall in coordination with the District, purchase at its own expense, telemetry equipment capable of transmitting water level data to a website.~~

2. The District shall be responsible for operating, maintaining, repairing, and replacing all monitoring equipment such as pressure transducers, related telemetry equipment, and cell/web hosting fees. All materials and equipment shall be new, free from defects, and fit for the intended purpose. Any expenses incurred by the District for the above described work shall be reimbursed in full by the Permittee to the District.

3. The well owner is solely responsible for normal wear and tear, well maintenance, pump servicing or other repairs resulting from the well owner's normal use of the well.

4. The District may consider cost sharing or incurring cost associated with repairs or replacement of any part of the index well that is reasonably necessary or convenient for the continuous and adequate performance of the well for monitoring purposes.

Catfish Index Well Provisions

1. Within 90 days of the effective date of the permit, Permittee shall convey a binding access agreement acceptable to the District for Catfish Index Well that allows the District access for equipment maintenance and repair, and data collection, if warranted.

2. Within 90 days of the effective date of the permit, Permittee shall install, at its own expense, a one-inch conductor pipe to enable the measurement of water level in the Catfish Index Well. In addition, a pressure transducer ~~and associated telemetry unit~~ capable of ~~transmitting~~ storing water level data ~~to a website~~ will be installed and data downloaded and provided to the District quarterly. Alternatively, Permittee may assume the expense for the installation of telemetry equipment hosted by the TWDB (assuming TWDB is interested and available~~).~~ If telemetry equipment is installed and hosted by the TWDB, pPrior to the telemetry installation, manually collected monthly water level data shall be provided to the District by the fifth of each month along with the required meter reading.

~~2~~ 3. The Permittee bears all responsibility and expenses associated with installation, routine maintenance, replacement, repair, or inspection of the pressure transducers ~~and~~ or any related telemetry equipment and cell/web hosting fees not covered by the TWDB. All associated work shall be completed by a contractor or contractors selected by Permittee and approved by the District. All materials and equipment shall be new, free from defects, and fit for the intended purpose.

~~3~~ 4. The Permittee shall provide notice to the District at least five days in advance of any installation, routine maintenance, replacement or repair of equipment; and shall maintain and submit, upon request by the District, copies of any or all calibration or repair logs. This notice requirement is for both the pumping well and the Catfish Index Well.

~~4~~ 5. The Permittee shall be responsible for repairing and replacing any part of the Catfish Index Well. If repairs or replacement of any part of the index well are reasonably necessary or convenient for the continuous and adequate performance of the well, the District shall provide notice and the Permittee shall make repairs and replacements as soon as practicable.

SECTION 4. PERMIT COMPLIANCE ACTIONS

The following Permit Compliance Levels, Response Actions, and Triggers apply to the Amos Index Well as the designated primary index well.

Permit Compliance Level 1 – Evaluation

Trigger 1 - A 30-day rolling average water level equal to or greater than 525 ft below land surface (bls)

Response Action – When drawdown in the Amos Index Well reaches a sustained average water level that is equal to or greater than 525 ft bls, the District will conduct an evaluation of the data to assess the actual impacts of pumping. The evaluation will utilize best available science and methods to consider factors and data including, but not limited to:

a. Manual confirmation of water level data;
b. Calibration and drift of pressure transducer;
c. Actual pumping rate and associated drawdown;
d. Drought conditions;
e. New local interference from pumping both inside and outside of District;
f. Water level trends in monitor wells; and,
g. Revised aquifer parameters (e.g. transmissivity, storativity).

Permit Compliance Level 2 – Avoidance Measures
Trigger 2 - A 30-day rolling average water level equal to or greater than 550 ft bls.

Response Action A - Establish a Baseline Curtailment Rate (BCR)
When drawdown in the Amos Index Well reaches a sustained average water level that is equal to or greater than 550 ft bls, the District will establish a BCR. The BCR is a calculated annual volume based on the actual monthly pumping volumes of the previous 12 months. The previous 12-month total is used to establish an annual volume rate referred to as the BCR. All mandatory temporary curtailments specified in these special provisions are applied to the BCR on a monthly basis.

Response Action B – When drawdown in the Amos Index Well reaches a water level that is equal to or greater than 550 ft bls, the Permittee shall comply with a mandatory temporary monthly curtailment of 20% off the BCR. When the drawdown in the Amos Index Well recovers to a 30-day rolling average water level that is less than 550 ft bls, the mandatory monthly curtailment of 20% shall be completely relaxed. Upon that recovery, authorization for the full permit volume will be restored provided that drought-triggered curtailments do not apply.

Permit Compliance Level 3 – Maximum Drawdown Allowable
Trigger 3 - A 30-day rolling average water level equal to or greater than 575 ft bls

Response Action – When drawdown in the Amos Index Well reaches a sustained average water level that is equal to or greater than 575 ft bls, the Permittee shall comply with a temporary monthly curtailment of 40% off the BCR. When the drawdown in the Amos Index Well recovers to a 30-day rolling average water level that is greater than 550 ft bls and less than 575 ft bls, the mandatory temporary monthly curtailment of 40% shall be relaxed to 20%.

Permit Compliance Level 4 – Unreasonable Impacts to Existing Wells
Trigger 4 - A 30-day rolling average water level equal to or greater than 580 ft bls

Response Action – Continued drawdown of water levels that are equal to or greater than 580 ft bls will be considered by the District as evidence of unreasonable impacts to the Amos Well. When drawdown in the Amos Index Well reaches a sustained average water level that is equal to or greater than 580 ft bls, the Permittee shall comply with a temporary cessation of pumping. When the drawdown in the Amos Index Well recovers to a 30-day rolling average water level that is greater than 575 ft bls and less than 580 ft bls the mandatory temporary cessation of pumping shall be relaxed to temporary monthly curtailment of 40%.

If the District determines through its own coordinated evaluation and investigation that production from the permitted well is causing actual unreasonable impacts to either the index wells or any other operational well that is adequately equipped, maintained, or completed, then the District may, after

notice and opportunity for hearing, require temporary cessation of pumping until a staff-initiated amendment has been approved by the Board to partially reduce the full permit volume to a rate the will reasonably avoid recurrence of unreasonable impacts.

SECTION 5. DROUGHT CHART & BCR PUMPING CHART

When drawdown in the primary index well reaches the Compliance Level 2 Trigger (550 ft bls), the District will establish a BCR reflected as an annual volume. The Permittee will be issued a revised pumping chart that reflects an annual volume referred to as the BCR. Once the Compliance Level 2 Trigger is reached, this revised pumping chart shall replace all other previous pumping charts or drought target charts in place. Upon receipt of the Mailed Notification Letter and the pumping chart, the Permittee must comply with the curtailed monthly pumping allocation to begin on the first day of the month following notification.

As the drawdown in the primary index well recovers to a water level less than 550 ft bls, the Permittee will no longer be required to comply with the revised pumping chart and may return to following the initially issued drought curtailment chart.

If at any point during the term of the permit, the water level reaches the Compliance Level 2 Trigger (550 ft bls) again after having previously recovered to less than 550 ft bls, the District will recalculate a new BCR and the Permittee will be issued a new revised pumping chart that reflects an annual volume based on a new BCR. For each occurrence of receding water levels reaching the Compliance Level 2 Trigger, a revised pumping chart reflecting a revised BCR shall replace all other previous pumping charts or drought target charts in place. Upon receipt of the Mailed Notification Letter and the pumping chart, the Permittee must comply with the curtailed monthly pumping allocation to begin on the first day of the month following notification.

Appendix "C"

BSEACD's Technical Memorandum 2016-0715 (Hunt & Smith, July 2016)

Technical Memo 2016-0715
July 2016

Evaluation for Potential Unreasonable Impacts: Needmore Water, LLC, Well D Permit Application

Brian B. Hunt, P.G., and Brian A. Smith, Ph.D., P.G.

Introduction

The Barton Springs/Edwards Aquifer Conservation District's (District) territory was expanded on June 19, 2015 through the passage of H.B. 3405. This act requires all nonexempt, non-Edwards wells to be permitted and the act provides a three-month period to apply for a Temporary Permit, which expired on September 19, 2015. The Temporary Permits provide well owners with an interim authorization to operate a well prior to conversion to a Regular Historical Production Permit. Prior to conversion, the District shall evaluate the proposed production to determine if the amount authorized will cause:

1. A failure to achieve the applicable adopted desired future conditions for the aquifer; or
2. An unreasonable impact on existing wells.

The District has developed rules and policy to address the evaluation of any proposed groundwater production and the potential for causing such impacts. Unreasonable impacts described under factor 2 above have been further defined by District rule to include:

1. well interference related to one or more water wells ceasing to yield water at the ground surface;
2. well interference related to a significant decrease in well yields that results in one or more water wells being unable to obtain either an authorized, historic, or usable volume or rate from a reasonably efficient water well;
3. well interference related to the lowering of water levels below an economically feasible pumping lift or reasonable pump intake level; and
4. the degradation of groundwater quality such that the water is unusable or requires the installation of a treatment system.

The Board-adopted rules further establish a policy related to applications found to have potential for unreasonable impacts. The policy states that:

> *The District seeks to manage total groundwater production on a long-term basis while avoiding the occurrence of unreasonable impacts. The preferred approach to achieve this objective is through an evaluation of the potential for unreasonable impacts using the best available science to anticipate such impacts, monitoring and data collection to measure the actual impacts on the aquifer(s) over time once pumping commences, and prescribed response measures to be triggered by defined aquifer conditions and implemented to avoid unreasonable impacts. Mitigation, if agreed to by the applicant, shall be reserved and implemented only after all reasonable preemptive avoidance measures have been exhausted and shall serve as a contingency for the occurrence of unreasonable impacts that are unanticipated and unavoidable through reasonable measures.*

In application of the adopted rules and policy, the District has conducted a best science evaluation of the Needmore Water, LLC permit request. As part of the evaluation, the Aquifer Science (AS) staff have reviewed the hydrogeologic report (WRGS, 2016) submitted by the applicant, the aquifer test data, and other relevant data and factors. This technical memo presents a summary of the evaluation of the aquifer test and if the potential for unreasonable impacts exists. In addition, this document established compliance levels (water levels) within an index well that will prescribe response measures to be triggered when aquifer conditions exceed those levels. Prescribed measures recommended by staff are described in the special provisions of the proposed Needmore Permit.

Needmore Water, LLC Permit Application

Needmore Water, LLC applied for, and was issued, a Temporary Permit for approximately 180,000,000 gallons per year. Under Part II of the permit application, Needmore has requested authorization for maximum production capacity of a higher volume equivalent to 289,080,000 gallons per year (approximately 887 acre-feet/year; 550 gallons per minute). An evaluation of the aquifer test and the projected potential for unreasonable impacts was performed on the basis of the requested volume.

Needmore Hydrogeologic Report

The report prepared by Wet Rock Groundwater Services, LLC (WRGS, 2016) generally satisfies the goals of the District's Aquifer Test and Hydrogeologic Report Guidelines (dated 2007) by providing data necessary to evaluate: 1) aquifer properties, 2) impacts to wells, and 3) changes in water quality. The aquifer test that was conducted was of excellent quality. **Appendix A** contains detailed technical notes by AS staff on aquifer parameters derived from the 2016 aquifer test.

However, AS staff do not agree with all aspects of the report including some technical opinions, interpretations, and assumptions. The most significant differences in opinion include:

1. **Analytical solutions (Theis).** The WRGS (2016) report generally dismisses the use of analytical solutions such as Theis for making estimates of well interference. This is a long-discussed difference of professional opinion between the WRGS and AS Staff. The Theis equation is a long-established tool within hydrogeology and is the best tool available at this time for making projections of drawdown over time. The WRGS (2016) report states:

   > "The heterogeneic (sic) character of the karst aquifer, in addition to potential disconnects between the Cow Creek Member and other formations, causes traditional methods of estimating drawdown, such as the Modified non-equilibrium equation (Theis equation), to overestimate drawdown."

   A more accurate description of analytical solution results is not that they overestimate drawdown, but that there is inherent uncertainty in the results. Drawdown can result in either an overestimate, or underestimate, of actual conditions. For example, the WRGS (2016) report underestimates drawdown at the observation wells for the test duration. While we understand that WRGS was trying to match drawdown at the pumping well, the goal of the aquifer test was to assess potential for unreasonable impacts including interference with existing wells (see item #2 below).

Repeated criticisms in the report about the use of Theis appears to be focused on the effects of recharge on the Middle Trinity, which the Theis equation does not consider. While this is true, AS staff consider the results from Theis as a scenario similar to a repeat of severe drought (such as the 7-yr drought of record) when little recharge occurs and the ability to capture is constrained. In addition, the Theis equation considers the aquifer infinite, therefore there is an infinite reservoir of water to draw from. —Aquifers are in fact not infinite but have boundaries. Therefore, during drought periods that result in limited recharge and capture constraints, the infinite extent assumption moderates the 'no recharge' assumption in our opinion. Therefore, AS staff consider the source of water as being dominated by changes in storage (depletion) for these types of relatively short-term forecasts, and not dominated by capture. The WRGS (2016) report states at some future point in time the drawdown resulting from the Needmore pumping well will effectively stabilize as a result of capture (inducing recharge, or reducing springflows). This is a true statement—indeed the source of water will change from dominated by storage to dominated by capture at some future time. However, the time period for this to occur is uncertain. AS staff believe that it is likely on the scale of years given the aquifer parameters, distance to such features it would capture (e.g. Jacob's Well), and the age of the water in the area. Indeed, during severe drought conditions, most of the streams and springs would be "capture constrained" since they are generally dry or very low flow (Konikow and Leake, 2014). A numerical model is needed to fully address this issue.

In summary, many of the assumptions listed and discussed in the report are in fact not as limiting as stated. AS staff sum it up quoting Driscoll's (1986) discussion on such assumptions of theoretical models (Theim) where he states, "these assumptions appear to limit severely the use of the equations. In reality however, they do not." AS staff view the use of analytical models (Theis) comparable to the use of numerical models in the Trinity (e.g. Mace et al., 2000; Jones et al., 2011). Results from such tools in the correct context and for certain stated purposes are useful and should be utilized in forecasting.

2. **Estimation of representative aquifer parameters for the study area and lack of evaluation of interference.** While the WRGS (2016) report determined aquifer parameters that appear suitable estimates for an evaluation of drawdown in the immediate vicinity of the pumping well, its estimates result in drawdown that do not match data at observation wells. Accordingly, the parameters are not useful for estimating drawdown at a distance where impacts could occur. The WRGS (2016) report does not explicitly attempt to estimate potential impacts to wells, but AS staff assume by the WRGS (2016) report 's assessment of the relatively minor drawdown, that the professional opinion of WRGS is that little potential exists for unreasonable impacts related to well interference.

3. **Regional Middle Trinity water level trends.** The stability and quick recovery of water levels in the Middle Trinity, including the Cow Creek, as described in the WRGS (2016) report, ignores studies that indicate the contrary. Although no long-term data are available for the immediate vicinity of the Needmore area, numerous studies to the west of Needmore (and where the Trinity is recharged) indicate the Middle Trinity is under stress as a whole. Long-term data indicate the aquifer does not fully recover during wet periods (Hunt and Smith, 2016; Hunt, 2014; Wierman et al., 2010). Indeed, long-term cones of depression are observable on water levels maps for the

Middle Trinity (Hunt and Smith, 2016; Hunt and Smith, 2010) and are precisely the potential impact groundwater conservation districts and groundwater management areas are trying to avoid.

Potential Unreasonable Impacts

The primary goal of this evaluation is to forecast drawdown attributed to the proposed production and associated potential unreasonable impacts related to well interference for existing wells. The impact from pumping on the Desired Future Conditions (DFC) is not addressed in this evaluation, nor are the impacts to springs such as Jacob's Well. Numerical models would be the best tool for such an evaluation, but are not available at this time.

The WRGS (2016) report suggests minimal drawdown over time based on the applicant's analysis of the Needmore Well D pumping data. AS staff estimated aquifer parameters from the data (**Table 1**; **Appendix A**) and present a range of drawdown from the pumping of Needmore Well D on nearby domestic-supply wells. The focus of this evaluation is on the potential drawdown to a domestic-supply well and a Hays Trinity Groundwater Conservation District monitor well known as the Amos Well. The well is located the Saddle Ridge subdivision located about 2 miles southwest of Needmore Well D (see map **Appendix A**). The Amos Well had a measureable response with recorded drawdown during the aquifer test of about 12 ft. AS staff reasonably assume that the water level response to pumping in the Amos Well is representative of wells in the northern area of Saddle Ridge subdivision.

Using the aquifer parameters derived from the aquifer test (**Table 1**; **Appendix A**), the AS staff estimate the additional drawdown from the Needmore pumping over time in **Figure 1**. For the evaluation, AS staff choose drawdown from pumping during a 7-year period. This period was chosen to be representative of a severe drought when little recharge occurs, and capture is constrained. The results of the estimated drawdown at the Amos Well due to Needmore pumping is about 75 ft after 7 years (**Figure 1**).

In order to estimate the potential for unreasonable impact from the Needmore pumping, the full range of water-level variability in the area of influence must be considered and accounted for in the evaluation (**Table 2**). This includes an accounting of projected drawdown attributed to factors independent of the proposed production including drought variability and existing and future local pumping (**Table 2**). Combined with this existing water level variability of 50 ft (**Table 2**), the total projected drawdown (76 ft) is about 126 ft. The estimated additional drawdown from the Needmore pumping could lower the water level (heads) below the top of the Middle Trinity Aquifer in the Saddle Ridge area. The additional drawdown also puts the water level within 20 feet of the pump in the Amos well.

Table 1. Parameter estimates used in drawdown scenarios

Parameter	*Value*	*Comment*
Transmissivity	814 ft2/d	average for Amos
Storativity	2.6e-5	average for Amos
Thickness	350 ft	Cow Creek and Lower Glen Rose
Distance	10,300 ft	From pumping to Amos Well
Pumping	540 gpm	Assumes 24/7

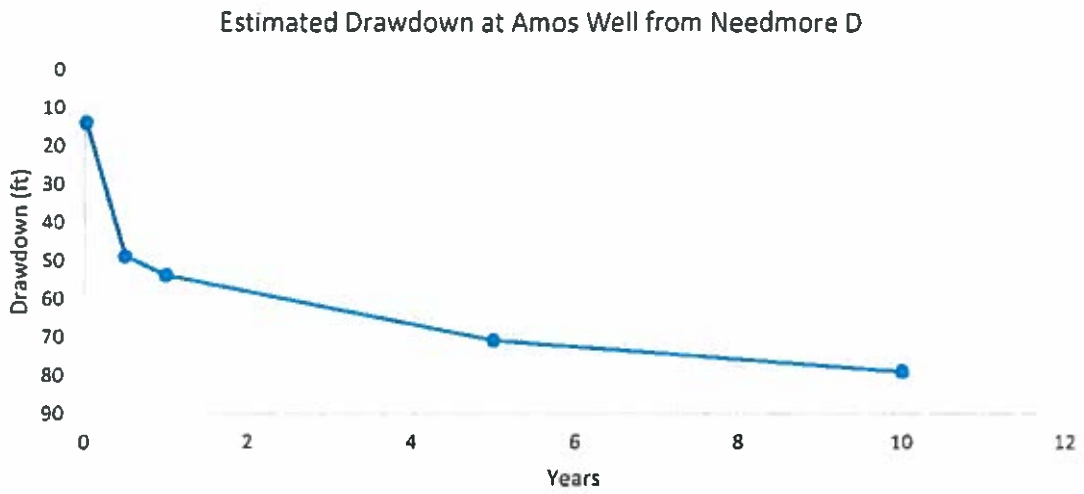

Figure 1. Graphical presentation of drawdown versus time from the Needmore pumping alone at the Amos observation well (assuming Table 1 parameters). Note most of the drawdown occurs within the first year.

Table 2. Existing drawdown or water level variability estimates in the vicinity of the Amos well prior to Needmore pumping

Source	*Value (ft)*	*Comment*
Drought	42	Derived from the Ruby Ranch Westbay Well (Cow Creek Zone)
Present local interference	4	Nearby domestic and the Amos well
Future local interference	2	Domestic wells
Uncertainty	2	Buffer for estimates above
Total:	50	

Findings: Potential Unreasonable Impacts

After considering existing water level variability, the projected effects of drawdown from the Needmore pumping would cause some wells to cease to yield water at the ground surface or cause the lowering of water levels below a reasonable pump intake level.

A conservative assessment of the data, and using the best available science and methods, leads us to conclude that there is a potential for unreasonable impacts due to the full production of this permit over time.

Proposed Compliance Levels and Potential Permit Conditions

Although AS staff determine that there is the potential for unreasonable impacts, there is always uncertainty with any forecasting or modeling. AS staff fully recognize and appreciate uncertainties in using analytical models for forecasting, and accordingly, our approach is to constrain model results with data moving forward. Pursuant to District policy, AS staff recommends special provisions to the permit requiring 1) ongoing monitoring and data collection to measure the actual impacts to the aquifer over time once pumping commences and, 2) prescribed response measures indexed to defined compliance levels and a dedicated index well.

Table 3 presents a summary of the specific compliance levels derived for the Amos Well. **Figure 2** is a graphical representation of the Amos Index Well and the corresponding compliance levels. Compliance levels were set after considering natural water level variability (Table 2; 50 ft) and also the observed short-term operational effects of pumping from the Needmore Well (~15 ft). Thus, this allows for up to about 65 ft of variability below the average water level before crossing the first compliance level threshold. **Figure 3** is a conceptual diagram showing how each compliance level is distributed over depth and time.

Recommended special provisions to the permit will reference the compliance levels established in this document and are only briefly presented in Table 3.

Table 3: Summary of specific compliance levels in the Amos monitor well

Compliance Level	Description	depth to water (ft)	Note	Permit Action
1	Evaluation	525	Approximate top of Middle Trinity Aquifer as determined from geophysical logs.	District will conduct an evaluation of data to assess the actual impacts of pumping.
2	Avoidance Measures	550	This level is the mid-point between level 1 and 3 and is a sentinel level to begin curtailment measures in order to delay or abate further drawdown.	Temporary curtailment of 20% off the baseline curtailment rate (BCR).
3	Maximum Drawdown Allowable	575	This level accounts for the drawdown from the Needmore Well D pumping for 1 year (~50 ft), after accounting for 65 feet of variability	Temporary curtailment of 40% off the baseline curtailment rate (BCR).
4	Unreasonable Impact to Existing Wells	580	This level is deemed a reasonable pump intake level and below this level an unreasonable impact occurs to the Amos Well, and likely surrounding wells.	Temporary curtailment of 100% off the baseline curtailment rate (BCR)

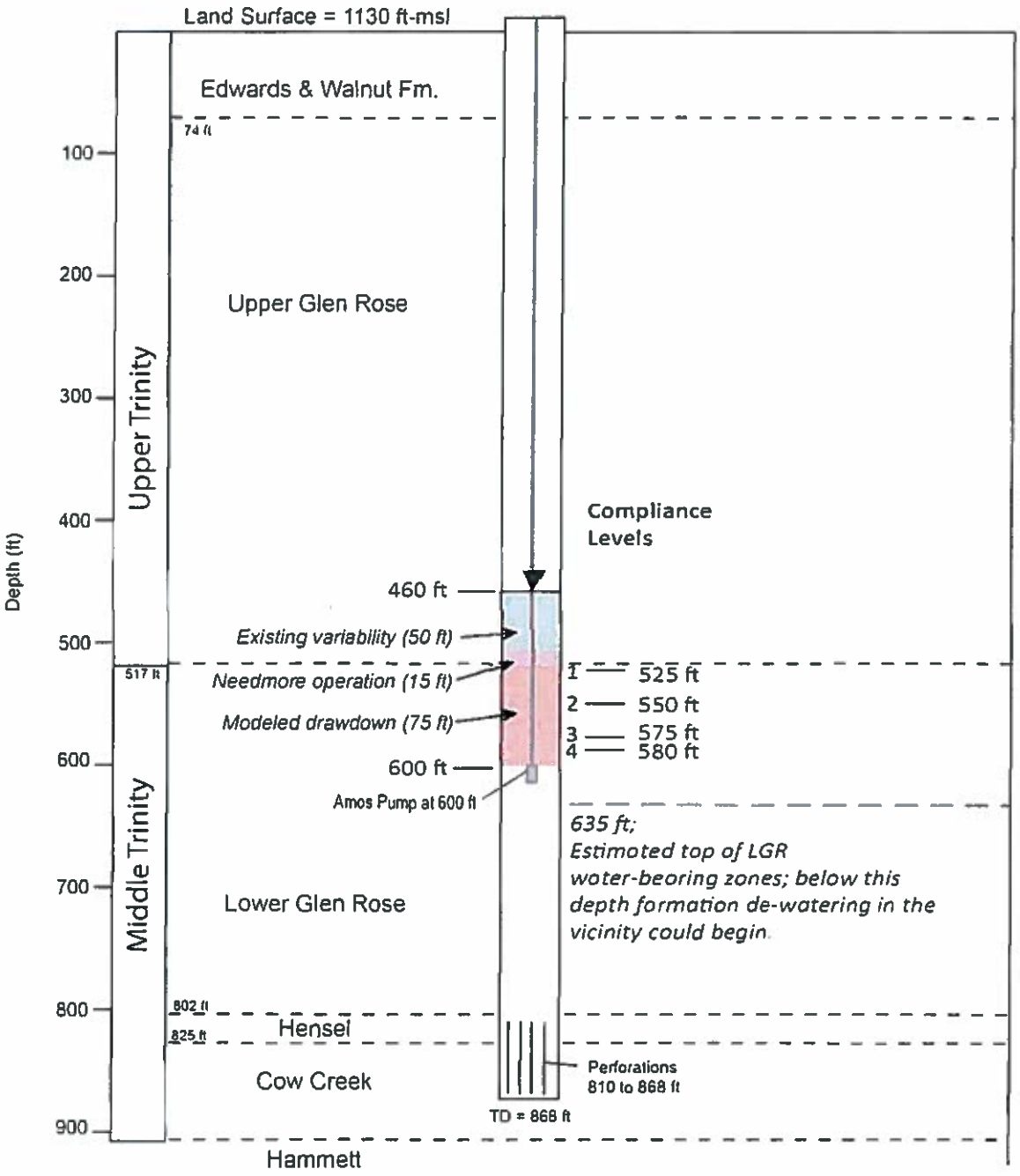

Figure 2. Potential Index Well Diagram and Compliance Levels

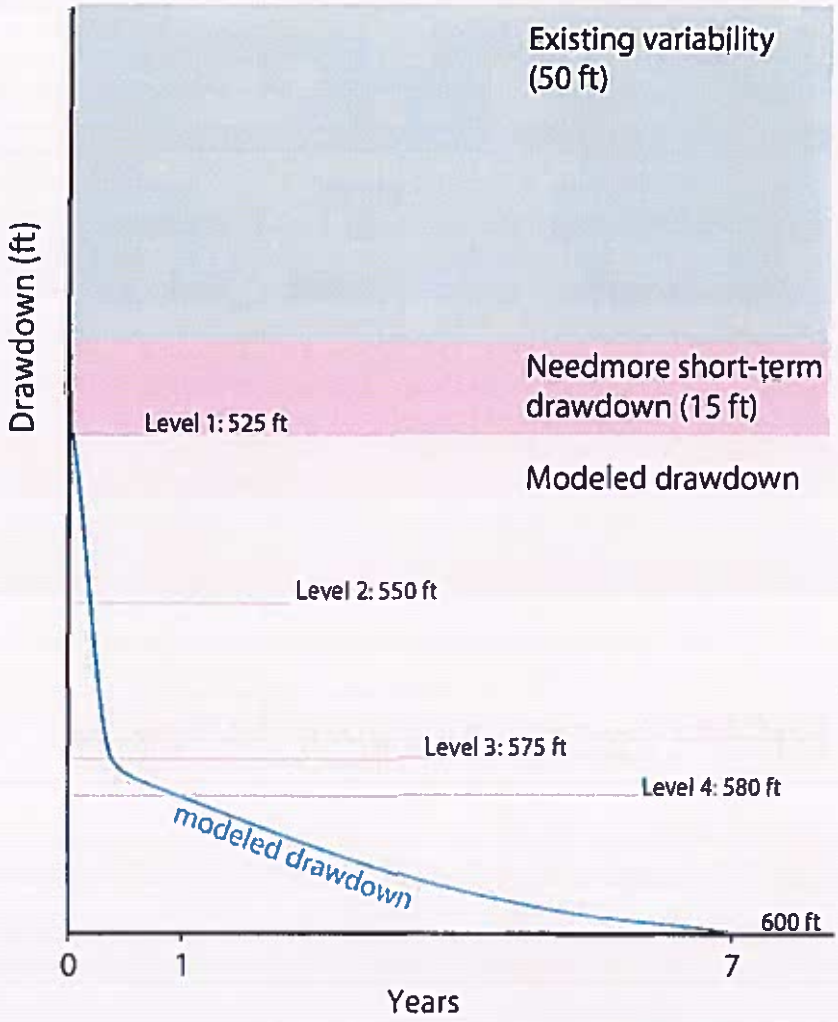

Figure 3. Drawdown vs Time indicating compliance levels.

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Appendix A

Summary Notes of January 2016 Aquifer Test and Parameter Estimation, Needmore Water LLC, Well D, Hays County

Aquifer Science Staff

2/23/16

Summary of Aquifer Test

WRGS conducted an aquifer test for the Needmore Ranch "Well D" in January 2015 according to District rules and guidelines. Under H.B. 3405, Needmore Water LLC are asking for (887 ac-ft/yr) 289 MGY for agricultural use. The purpose of this document is to summarize the aquifer test and the estimation of aquifer parameters.

Table 1 summarizes the wells in the study completed in the Middle Trinity (including the Cow Creek). Another shallow Upper Glen Rose well (Caboose observation well) was monitored and showed no response to the pumping, and is not included herein.

Table A-1. Aquifer Test Summary

Well Name	*Type*	*Pump depth*	*Date Aquifer Test*	*Static WL used in Eval (DTW-ft)*	*Duration*	*Yield (gpm)*	*Max. drawdown (ft)**
Needmore D_PW	Pumping		1/25/16 10:20 AM	272.91	Pumping: 5.03 days (120.7 hrs) Recovery:	544	35.3
Catfish Pond_OW	Needmore Observation			407.13			15.8
Amos_OW	HTGCD Observation	600		459.70			14.4
Top of Hill_OW	Needmore Observation			319.78			6.1

**Per WRGS*

Table A-2. Well Information

Well Name	*Tracking No.*	*Ddlat*	*Ddlong*	*Distance (mi) from PW*	*Radial Distance (ft)*	*Date drilled*	*MP*	*LSD (ft-msl)*	*Borehole dia (in)*	*Depth_total ft*	*Casing dia (in)*	*Depth casing (ft)*	*completion*
Needmore D_PW		29.970225	-98.034223	0	0	01-Jan-16	2.5	936	9.875	800	8.63	600	open
Catfish Pond_OW		29.970017	-98.052244	1.1	5808		1.8	1070			6.25	475	open
Amos_OW		29.961129	-98.065213	1.95	10296			1132			5		
Top of Hill_OW	148941	29.990911	-98.033147	1.43	7550	02-Dec-05	2.0	995	8	1100	5	700	open

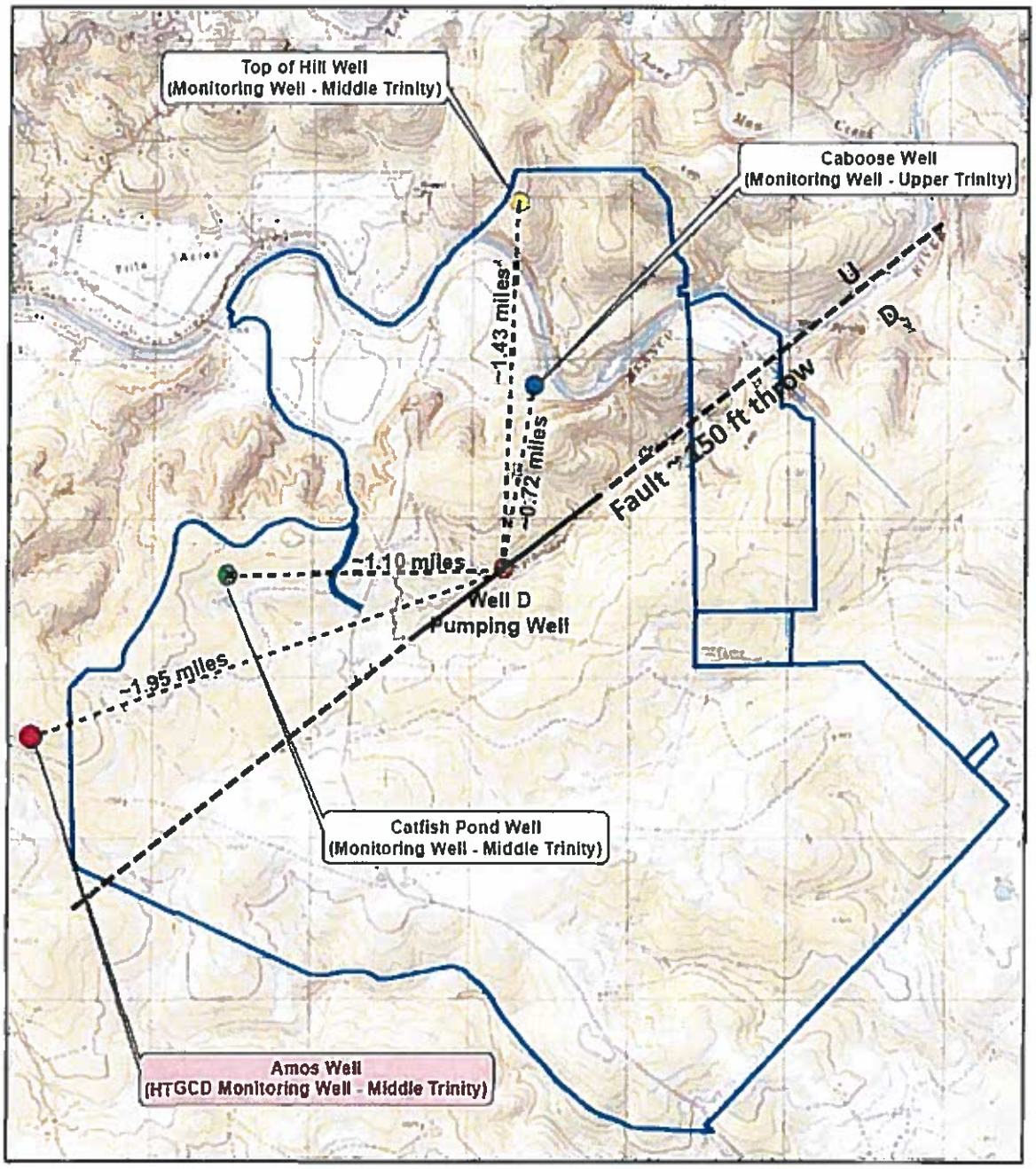


Figure A-1. Location map of the Needmore Ranch and wells in the study (basemap modified from WRGS). Note the fault that is mapped and confirmed in the field by BSEACD staff. The well is located on the fault, however the production zone is on the up-thrown side of the fault.

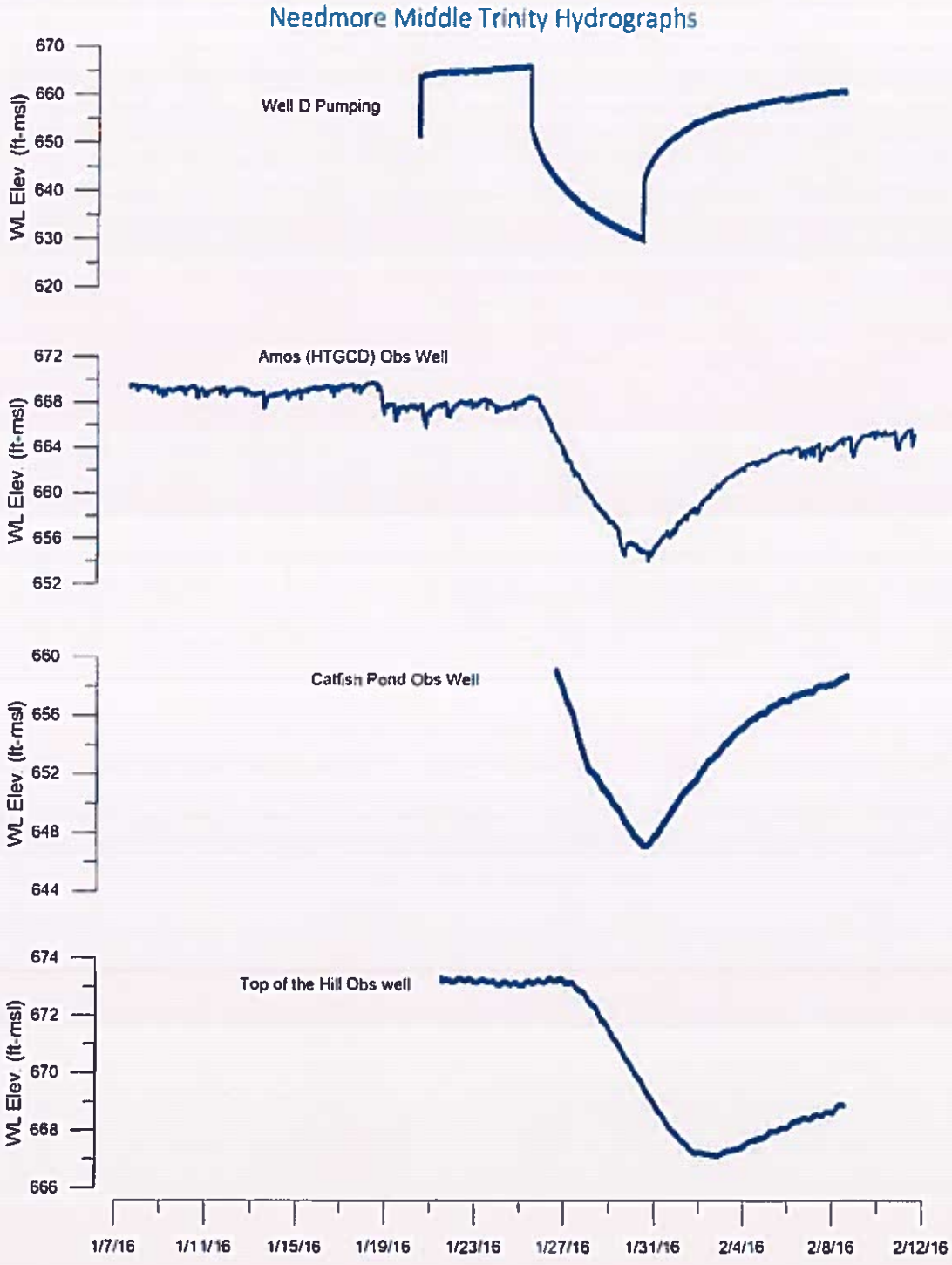


Figure A-2. Hydrograph from transducer data for all Middle Trinity wells.

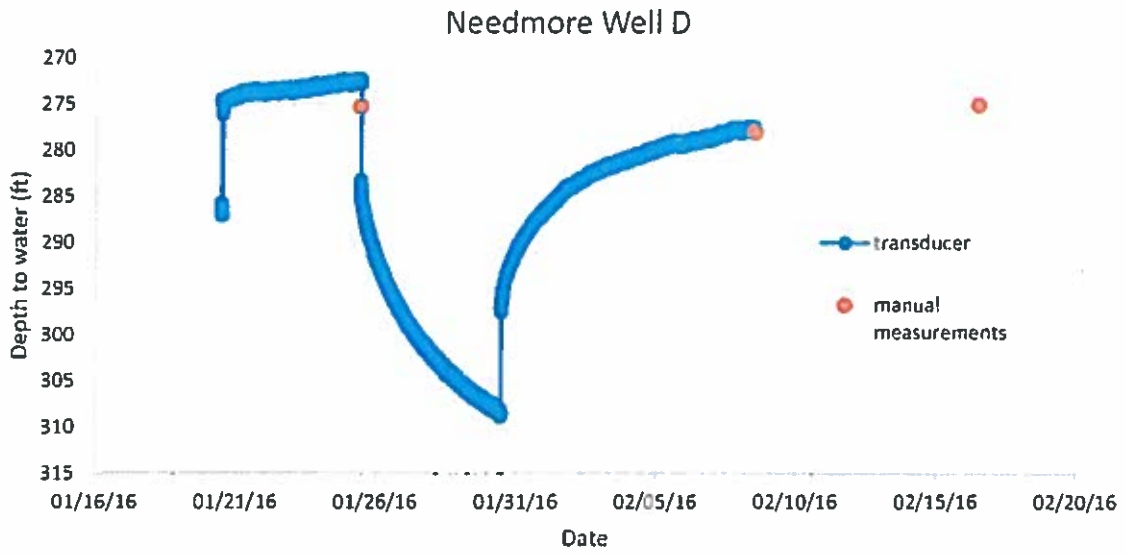


Figure A-3. Hydrograph of the Needmore D pumping well transducer and manual data. Water levels were rising from pre-test of pump on 1/20/16 when test started on 1/25/16. Note that a "pumping level" or psuedo-steady state was not reached before the end of the pumping phase. Maximum drawdown was 35 feet at the end of the test. Water levels reached 86% recovery after 14 days (when transducer was taken out), and 94% after 22 days of recovery and last measurement on 2/16/16.

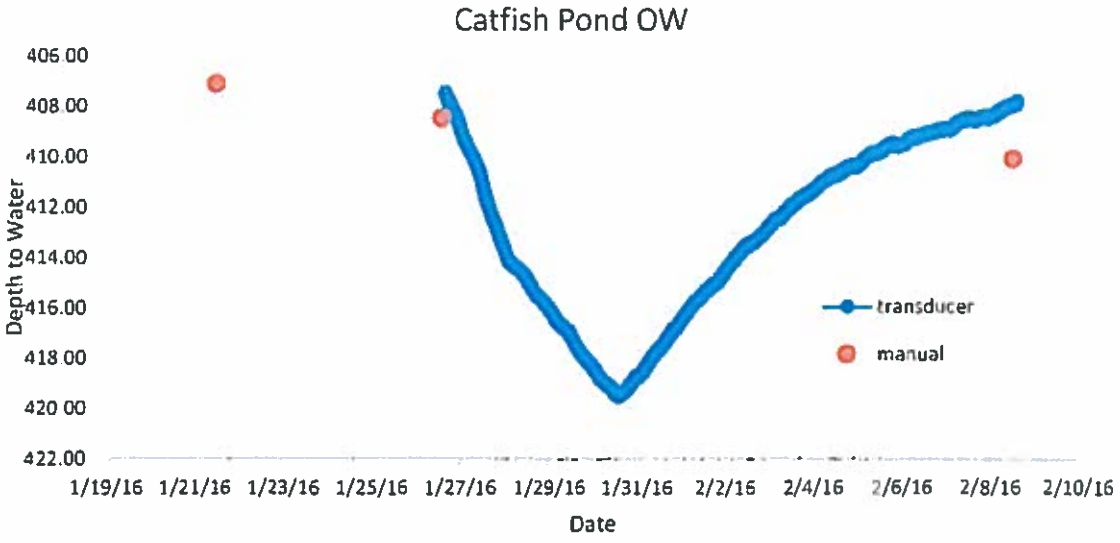


Figure A-4. Hydrograph of the Catfish Observation Well transducer and manual data. An error in the placement of the transducer resulted in missing early-time data. Note there is 0.7 ft discrepancy in the manual measurements and the transducer data on 1/26/16. There is about a 2.0 ft discrepancy in the manual measurements and transducer data on 2/8/16. Source of the error is unknown but it could be

double subtractions of a measurement point. Maximum drawdown during the test was 16 feet. Water levels reached 90% recovery after 13 days with last measurement on 2/8/16.

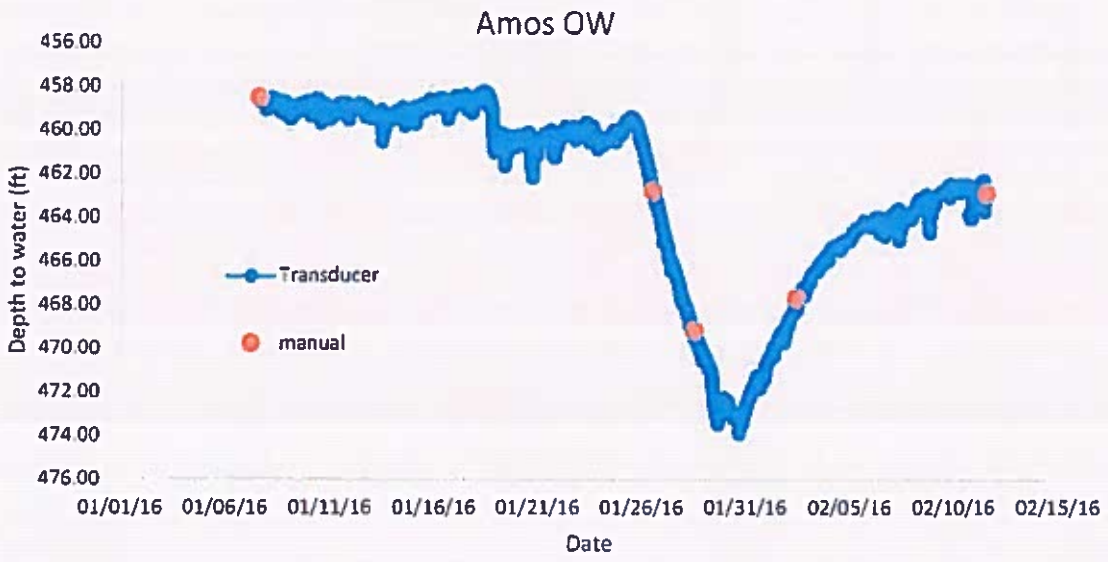


Figure A-5. Hydrograph of the HTGCD Amos Observation well transducer and manual data. Some local well interference creates the small variations of up to about 2 ft. Pre-test water level trends are relatively flat. Maxium drawdown was about 13 feet. Water levels reached 77% recovery after 13 days with last measurement on 2/11/16.

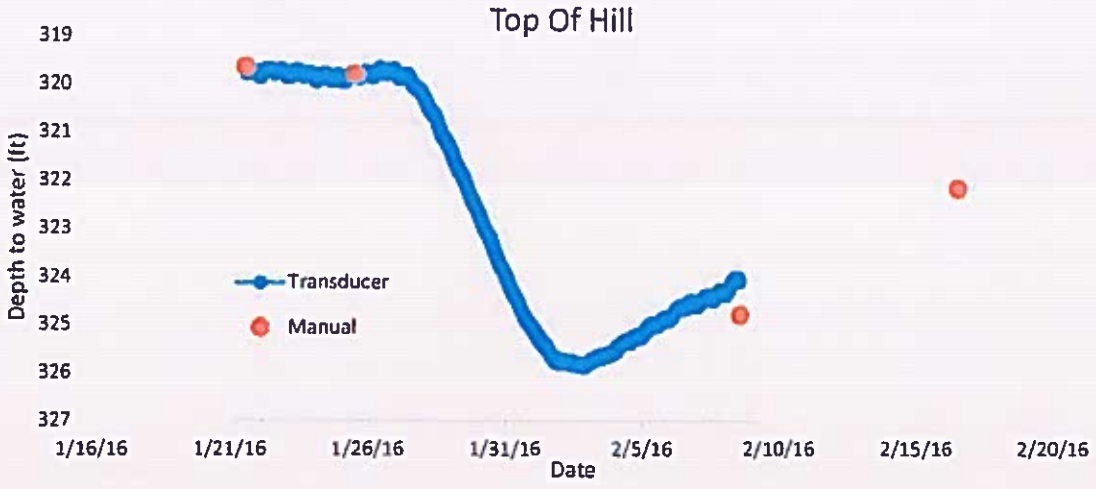


Figure A-6. Hydrograph of the Top of the Hill Observation Well transducer and manual data. Note there is 0.7 ft discrepancy in the manual measurement and the transducer data on 2/8/16. Source could

be instrument drift or manual measurement error. Pre-test water level trends are relatively flat. Maximum drawdown was about 6 feet. Water levels reached 60% recovery after 22 days and last measurement on 2/16/16.

Parameter Estimates

(Note all values below are draft and subject to more technical review.)

Table A-3 summarizes two estimates of Transmissivity from specific capacity data, including empirical (Mace, 2001) and analytical (Theis et. al, 1963; Cooper-Jacob). **Figure 7** shows the Cooper-Jacob analytical solution using the change in head over one log-cyle of time. **Tables 4-7** summarize the parameters from various analytical solutions using Aqtesolv software (except where indicated).

Table 3. Empirical and Analytical estimates of Transmissivity from specific capacity (15.4 gpm/ft) of the pumping well Needmore D.

Method--Transmissivity	Value (ft2/d)	units
Empirical (Mace, 2001)	2,068	Developed for fractured Glen Rose and Cow Creek
Analytical (Theis 1963)	5,751	Interactive spreadsheet described in Mace, 2001.
Analytical (Driscoll, 1986)	4,120	
Analytical (Cooper-Jacob)	976	
average	***3,229***	

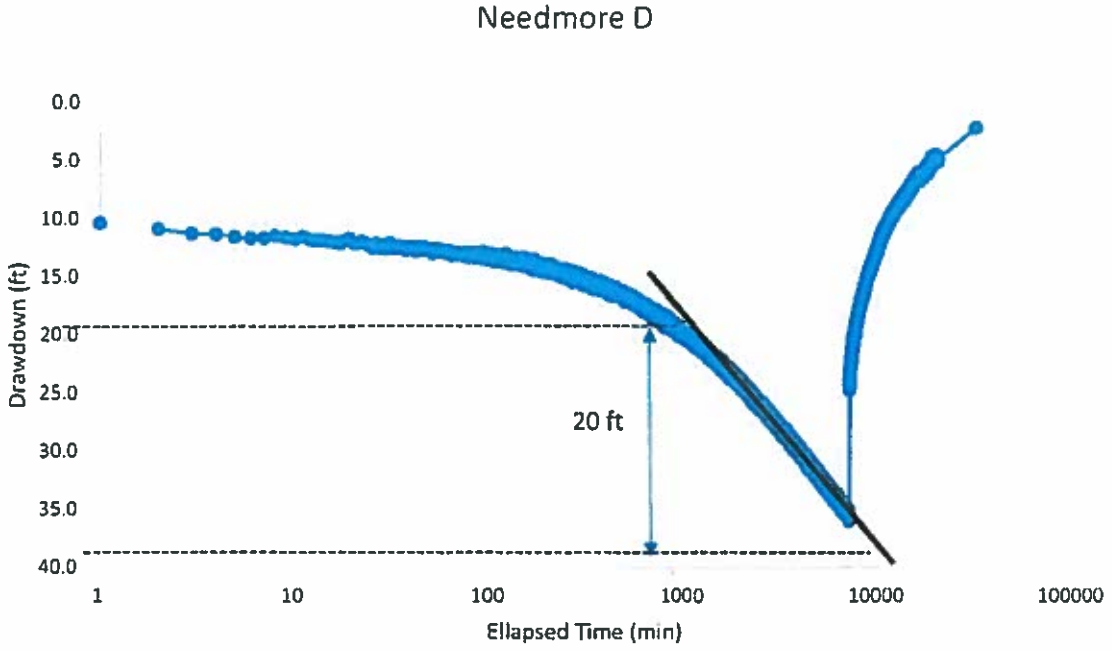


Figure A-7. Cooper-Jacob analytical method to estimate Transmissivity.

Table A-4. Needmore Pumping Well D Parameter Estimation from analytical solutions

Method	Result (T, ft^2/d)	Storativity	Comment
Theis	774	n/a	partial penetration
Theis Recovery	617	n/a	
Cooper-Jacob	855	n/a	
Papadopulos-Cooper	737	n/a	Wellbore storage
Dougherty-Babu	737	n/a	Wellbore storage, partial penetration
average	744		

1 gpd/ft = 0.13 ft2/d
1 ft2/d = 7.48 gpd/ft

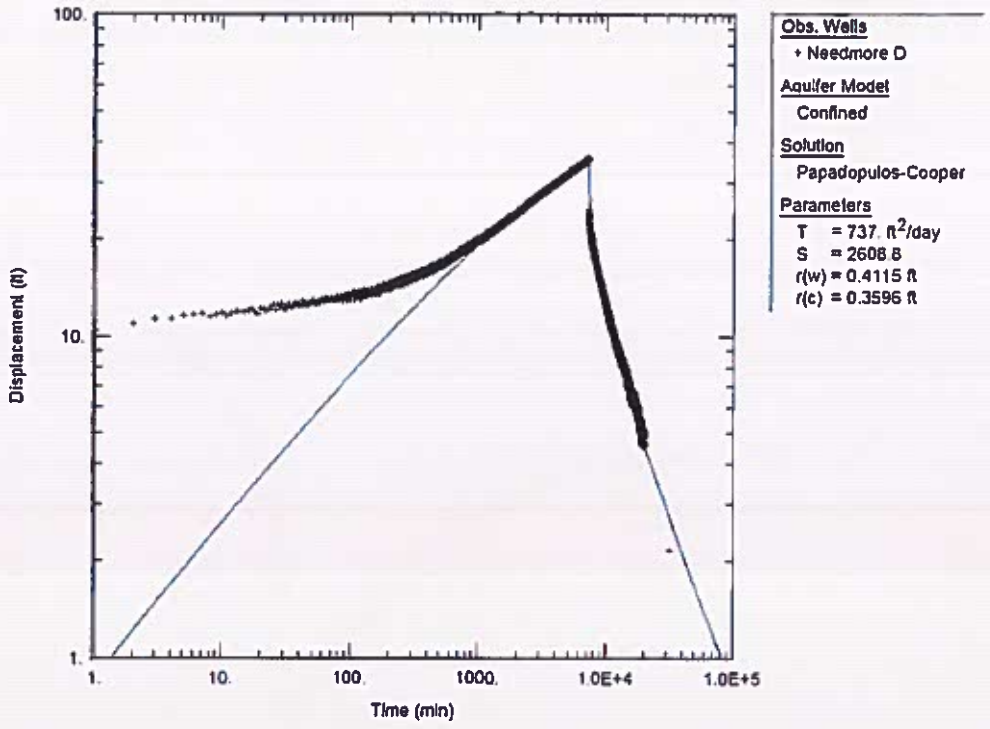


Figure A-8. Selected Aqtesolv solution and curve match for Needmore D pumping well. Note the early time suggests well bore storage effects.

Table A-5. Catfish Pond Observation Well Parameter Estimation

Method	Result (T, ft^2/d)	Storativity	Comment
Theis	921	9.8e-5	
Theis/Agarwal	557	8.0e-5	recovery
Theis Recovery	850	n/a	
Cooper-Jacob	837	8.1e-5	
Papadopulos-Cooper	895	9.8e-5	
Dougherty-Babu	896	1.0e-4	
average	*826*	*9.14e-5*	

1 gpd/ft = 0.13 ft2/d
1 ft2/d = 7.48 gpd/ft

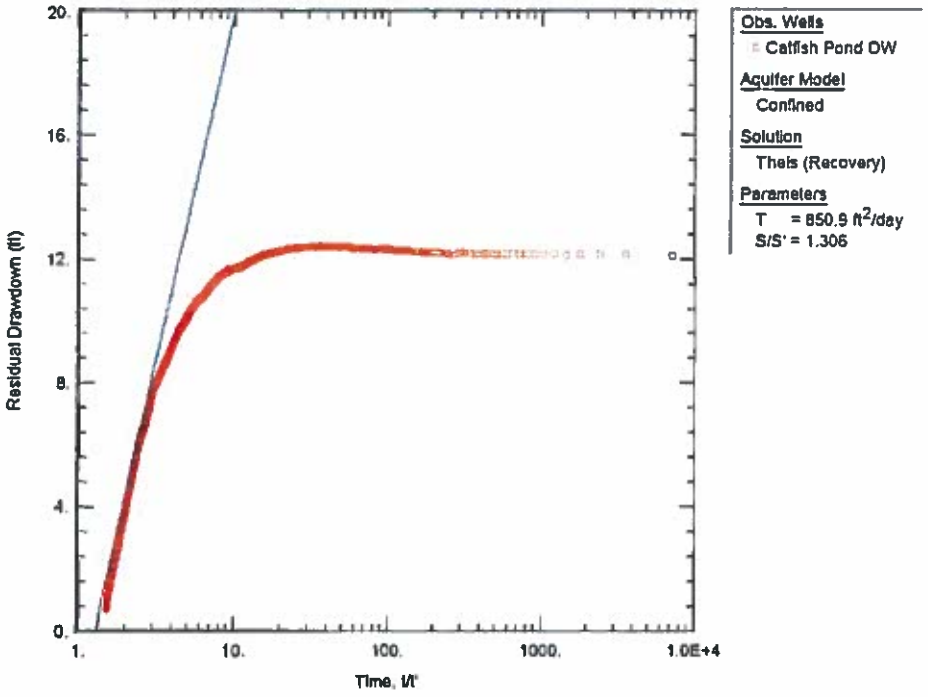


Figure A-9. Selected Aqtesolv solution and curve match for Catfish Pond Observation Well.

Table A-6. Amos HTGCD Observation Well Parameter Estimation

Method	Result (T, ft^2/d)	Storativity	Comment
Theis	834	2.7e-5	
Theis/Agarwal	585	3.1e-5	
Theis Recovery	945	n/a	
Cooper-Jacob	1,186	2.0e-5	
Papadopulos-Cooper	813	2.7e-5	
Dougherty-Babu	824	2.4e-5	

MLU-single layer	*823*	*2.3e-5*	*MLU software*
MLU-multi layer	*500*	*2.7e-5*	*MLU software*
average	*814*	*2.6e-5*	

1 gpd/ft = 0.13 ft2/d
1 ft2/d = 7.48 gpd/ft

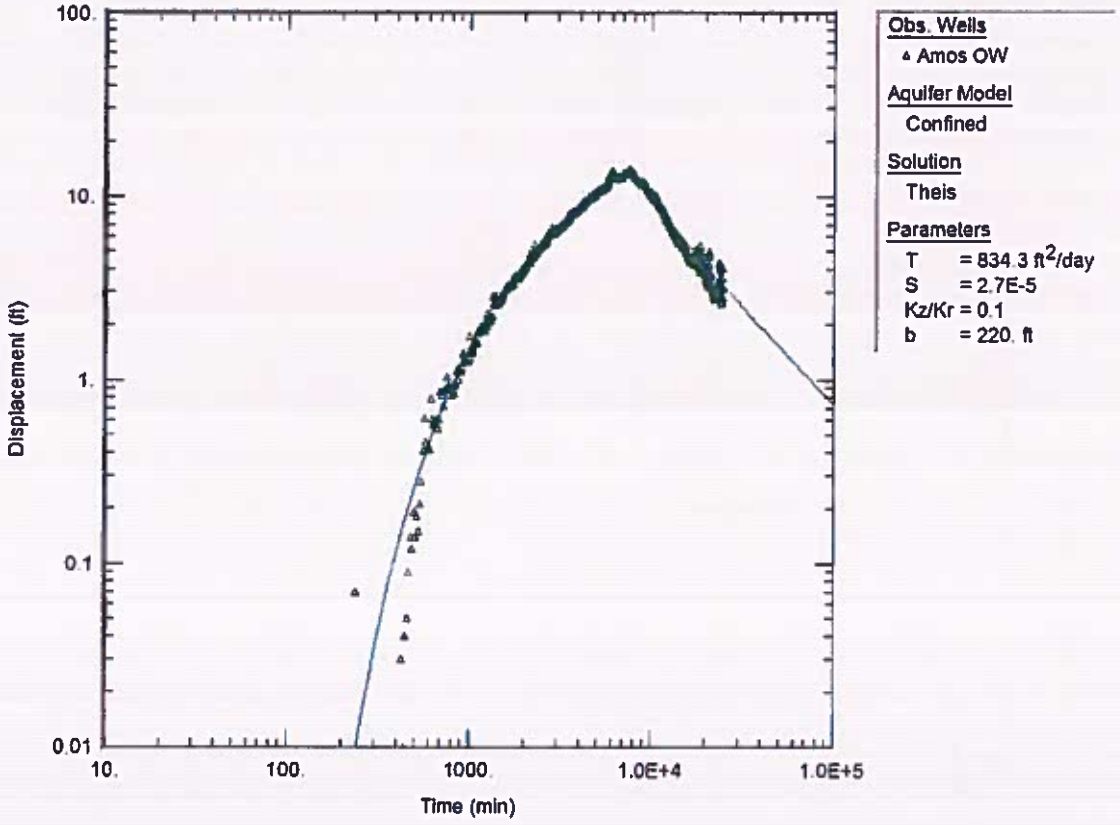


Figure A-10. Selected Aqtesolv solution and curve match for Amos Observation Well.

Table A-7. Top of the Hill Observation Well Parameter Estimation

Method	Result (T, ft²/d)	Storativity	Comment
Theis	504	1.8e-4	
Theis Recovery	1838	n/a	
Cooper-Jacob	1366	1.5e-4	
Papadopulos-Cooper	438	1.7e-4	
Dougherty-Babu	494	1.4e-4	
MLU-single layer	*509*	*1.8e-4*	*MLU software*
MLU-multi layer	*358*	*1.4e-4*	*MLU software*
average	*786*	*1.6e-4*	

1 gpd/ft = 0.13 ft2/d
1 ft2/d = 7.48 gpd/ft

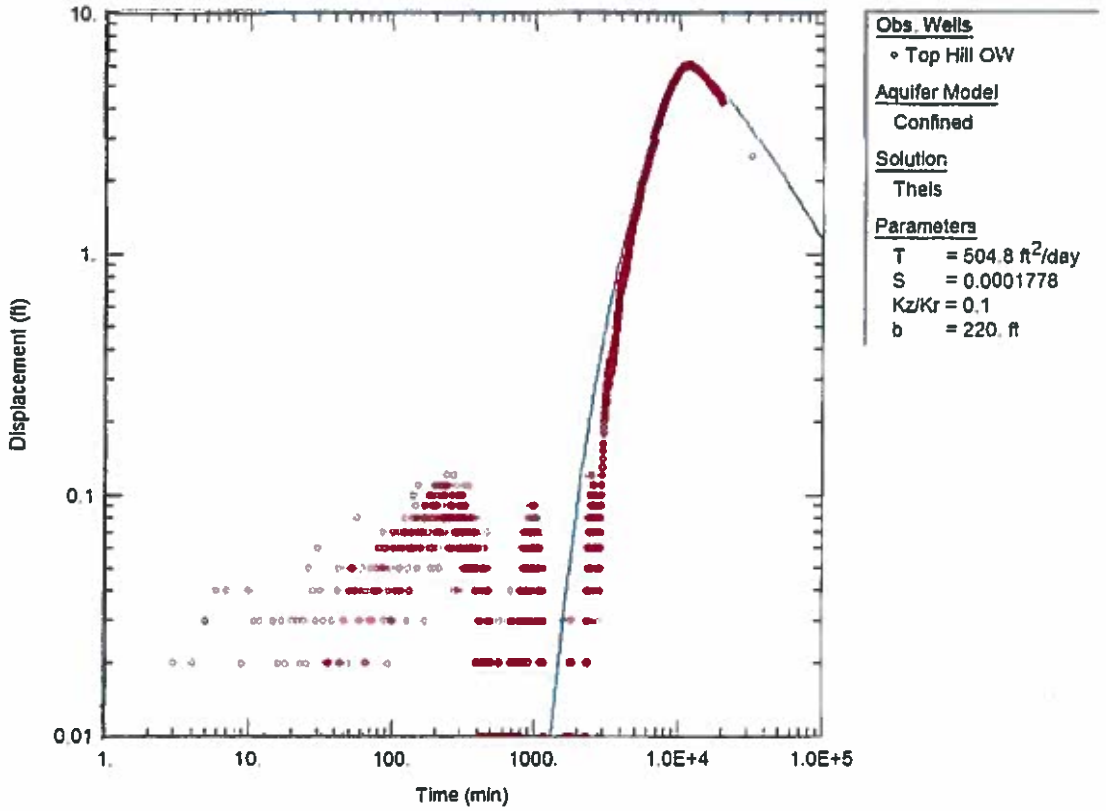
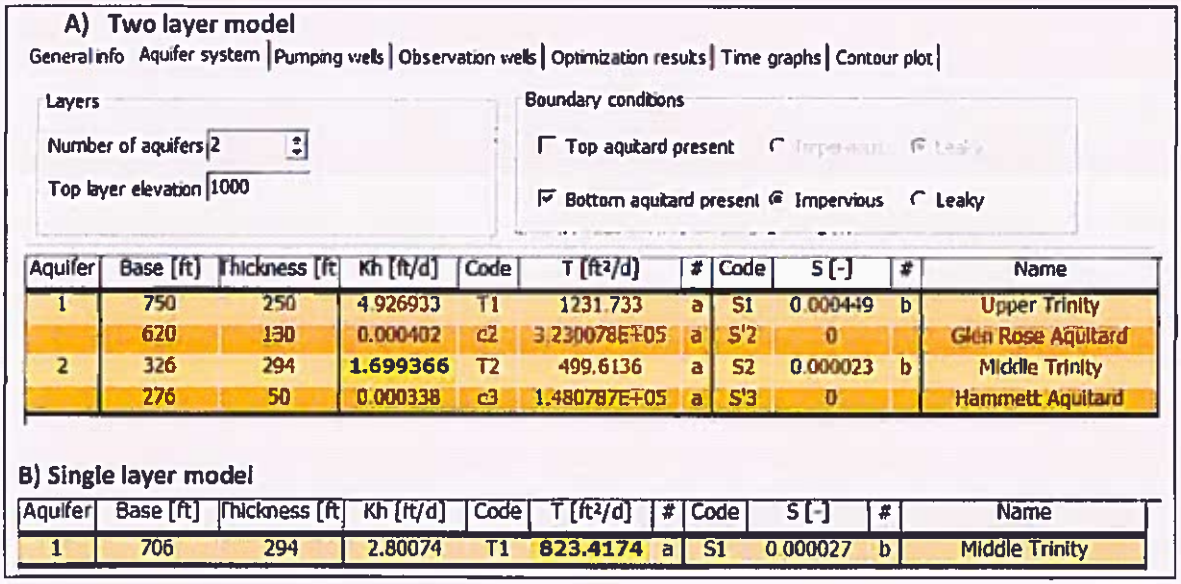


Figure A-11. Selected Aqtesolv solution and curve match for Top of Hill Observation Well.

MLU Software

MLU (Multi-Layer Unsteady state; http://www.microfem.com/products/mlu.html) software is another analytical solution to estimate aquifer parameters, but in layered aquifer systems. The benefit to MLU is that the layered stratigraphy and aquifer parameters can be used to test conceptual models and potentially provide a better fit to data that other analytical solutions that do not consider layered hydrostratigraphy.

For this evaluation, a two aquifer system with two aquitards (limits of the freeware) were created for testing. MLU was calibrated to the Amos Well and the Hill Top Well, independently (**Figures 12-15**). Similar to Aqtesolv, the model would not calibrate with multiple observation wells together, owing to the anisotropy and heterogeneity of the aquifer.



A) Two layer model

General info | Aquifer system | Pumping wells | Observation wells | Optimization results | Time graphs | Contour plot

Layers: Number of aquifers 2; Top layer elevation 1000

Boundary conditions: ☐ Top aquitard present; ☑ Bottom aquitard present ◉ Impervious ○ Leaky

Aquifer	Base [ft]	Thickness [ft]	Kh [ft/d]	Code	T [ft²/d]	#	Code	S [-]	#	Name
1	750	250	4.926933	T1	1231.733	a	S1	0.000449	b	Upper Trinity
	620	130	0.000402	c2	3.230078E+05	a	S'2	0		Glen Rose Aquitard
2	326	294	**1.699366**	T2	499.6136	a	S2	0.000023	b	Middle Trinity
	276	50	0.000338	c3	1.480787E+05	a	S'3	0		Hammett Aquitard

B) Single layer model

Aquifer	Base [ft]	Thickness [ft]	Kh [ft/d]	Code	T [ft²/d]	#	Code	S [-]	#	Name
1	706	294	2.80074	T1	**823.4174**	a	S1	0.000027	b	Middle Trinity

Figure A-12. MLU conceptual models that returned the best-fit of the data to the Amos Well considering two aquifers and two aquitards (upper) and only one aquifer (lower). Note that the value under T (ft2/d) in the aquitard is actually a conductance value. A) contains a conceptual model with two aquifers that has a good fit. B) Contains a conceptual model with only 1 layer that has the best fit of the data.

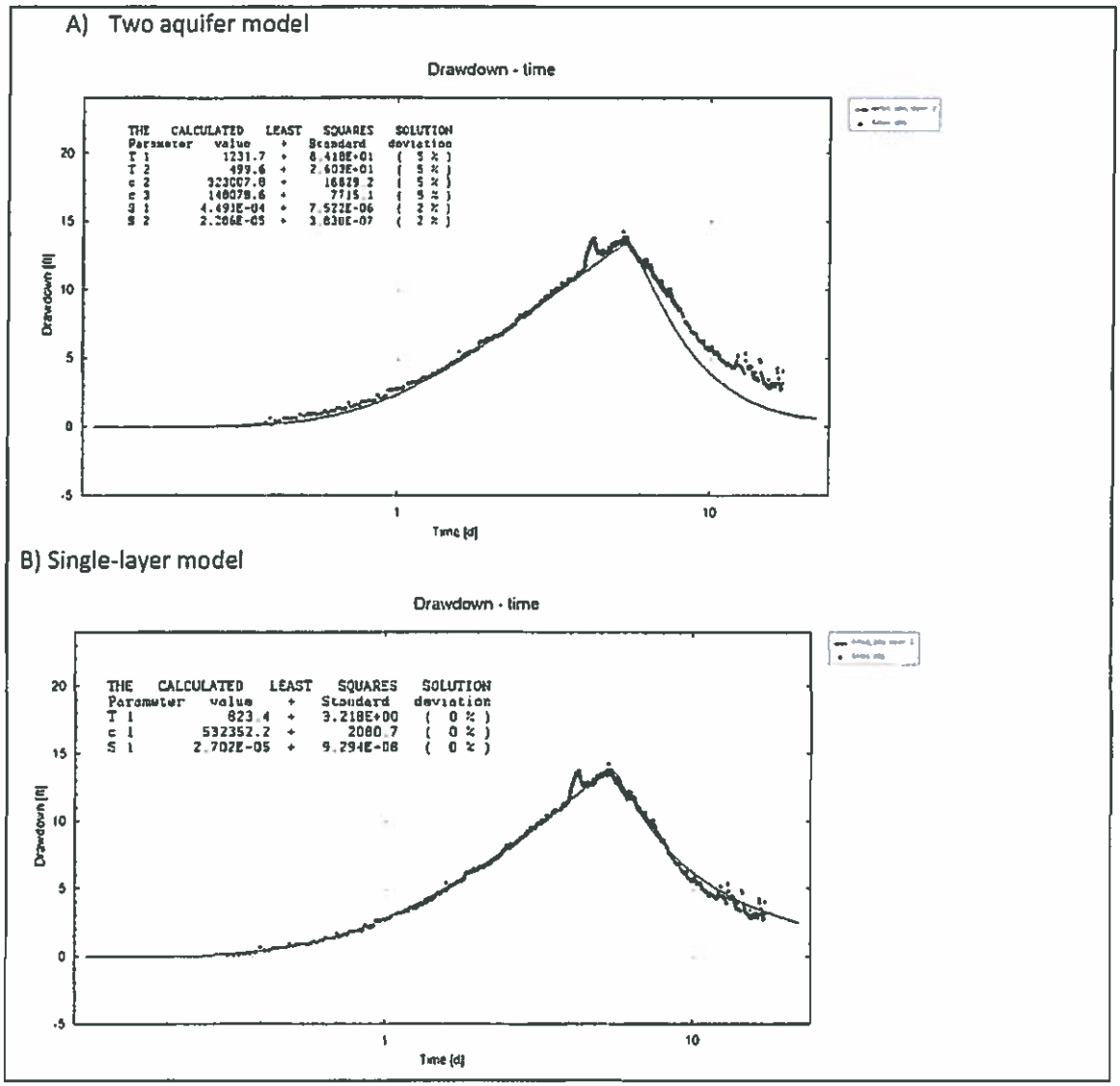


Figure A-13. MLU time-drawdown graph for the Amos OW showing data and model output. A) results from with two aquifers, B) results with just one aquifer, and has a better fit.

A) Two Aquifer model

Aquifer	Base [ft]	Thickness [ft]	Kh [ft/d]	Code	T [ft²/d]	#	Code	S [-]	#	Name
1	750	250	3.533548	T1	883.3869	a	S1	0.002882	b	Upper Trinity
	620	130	0.000561	c2	2.31658E+05	a	S'2	0		Glen Rose Aquitard
2	326	294	1.218768	T2	358.3179	a	S2	0.000147	b	Middle Trinity
	276	50	0.000471	c3	1.062005E+05	a	S'3	0		Hammett Aquitard

B) One aquifer model

Aquifer	Base [ft]	Thickness [ft]	Kh [ft/d]	Code	T [ft²/d]	#	Code	S [-]	#	Name
1	706	294	1.729687	T1	**508.5281**	a	S1	0.000179	b	Middle Trinity

Figure A-14. MLU conceptual models that returned the best-fit of the data to the Hill Top Well considering A) two aquifers and two aquitards, and B) one aquifer. Note that the value under T (ft2/d) in the aquitard is actually a conductance value. The upper figure with two aquifers had a good fit. However, the second conceptual model had the same good fit.

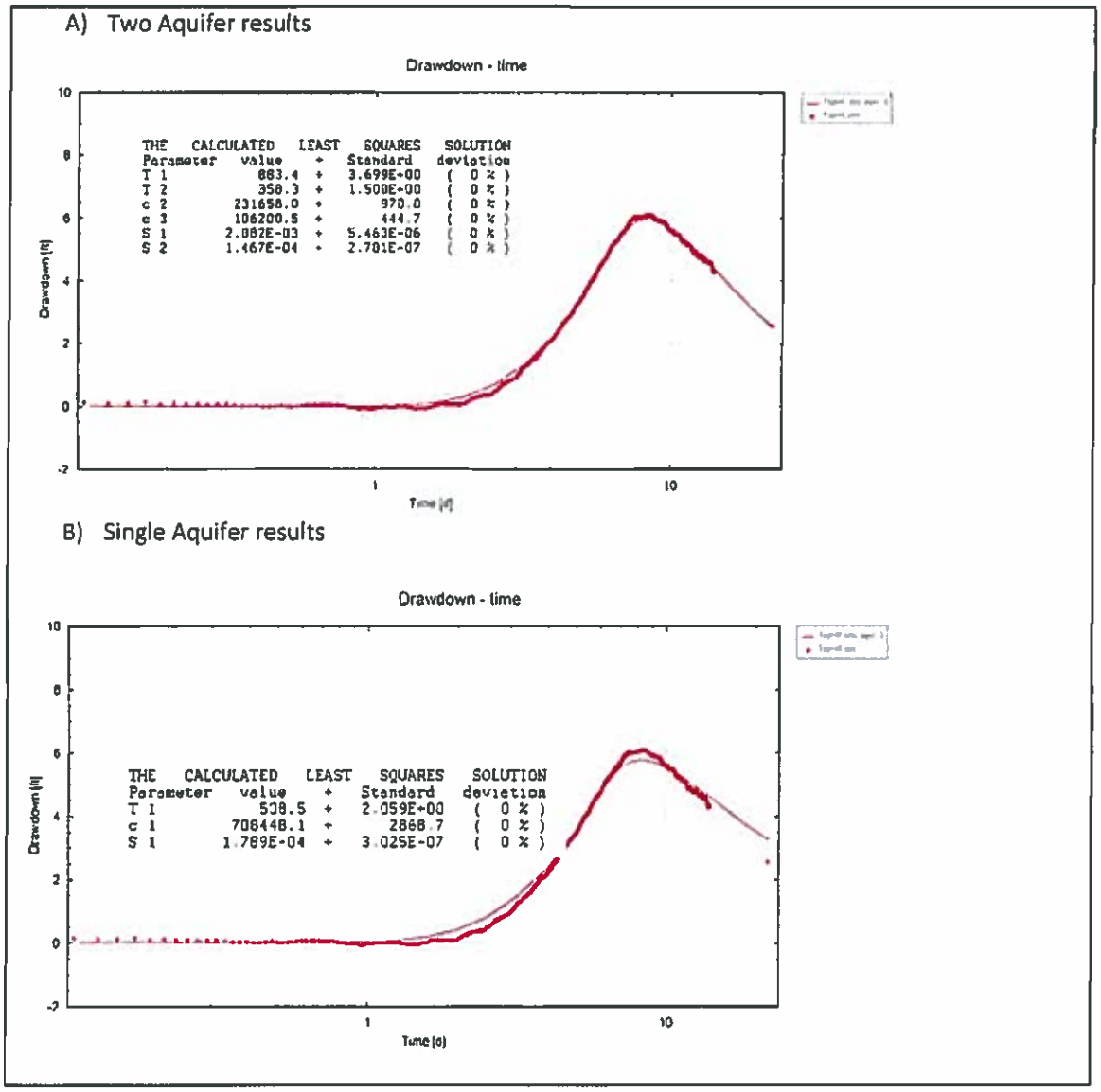


Figure A-15. MLU time-drawdown graphs for the Hill Top OW showing data and model output. The upper figure is with two aquifers, the lower is with just one aquifer—they both had equal statistical fit of the data. However, the multi-layer (A) figure visually matches the late-time better than the single layer.

Discussion and Conclusions

Analytical estimates of transmissivity using various analytical solutions in Aqutesolv and MLU were consistent among the pumping well and all three observation wells. However, estimates of transmissivity from specific capacity were elevated when compared to analytical solutions in Aqtesolv and MLU.

Along strike of the Needmore Well D, and parallel to the fault zone, the observation wells responded quicker and with a larger magnitude to pumping than the Hill Top Well updip and normal to the fault zone. Wells along strike appear to have higher transmissivity and lower storativity values compared to the updip Hill Top Observation Well.

The MLU program provided similar results as the analystical solutions of Aqtesolv. However, MLU demonstrated that to fit the data, leaky or layered aquifer systems are not needed for a test of this duration. In other words, for this test, the Middle Trinity Aquifer does not appear to derive significant amounts of water from the overlying Upper Trinity Aquifer. Supporting this was the fact that the Caboose Upper Trinity Observation Well monitored for this test did not register any response to the pumping.

Only the discrepancy between manual measurements and transducer data (noted above), and the lack of early-time data in the Catfish Observation Well were problems with the data from this test. However, those issues do not appear to signifcantly affect these evaluations and parameter estimations.

Two aspects of the well response to pumping deserve further investigation as to understanding the response in terms of long-term implications, if any:

1. The lack of pseudo-steady state or pumping level reached by the Needmore D Well and therefore the observation wells.
2. Very slow to incomplete recovery of the pumping and observation wells.

The aquifer test conducted by WRGS was done according to BSEACD guidelines and the District was consulted and involved in all aspects of the test. The data collected for the test was of good quality and allows a relatively straight-forward parameter estimation. **Table 8** contains a summary of the average values of parameter for each well, and the overall average value.

Table A-8. Summary of average aquifer parameters

Well	*Average Transmissivity (ft2/d)*	*Storativity*
Needmore D_PW	744	n/a
Catfish OW	*826*	*9.14e-5*
Amos OW	*814*	*2.6e-5*
Hill Top OW	*786*	*1.6e-4*
Average	793	9.25e-5

References

(Incomplete)

Mace, R., 2001, Estimating Transmissivity Using Specific-Capacity Data, Geological Circular 01-2, Bureau of Economic Geology, University of Texas at Austin, 44 p.

Theis, C.V., Brown, R.H., and Myers, R.R., 1963, Estimating the transmissibility of aquifers from the specific capacity of wells: methods of determining permeability, transmissivity, and drawdown, in U.S. Geological Survey Water-Supply Paper, No. 1464, 693 p.

Appendix "D"

EAA v. Day, 360 S.W.3d 814 (Tex. 2012)

LexisNexis®

2 of 4 DOCUMENTS

Caution
As of: Oct 05, 2014

THE EDWARDS AQUIFER AUTHORITY AND THE STATE OF TEXAS, PETITIONERS, v. BURRELL DAY AND JOEL MCDANIEL, RESPONDENTS

NO. 08-0964

SUPREME COURT OF TEXAS

369 S.W.3d 814; 2012 Tex. LEXIS 161; 55 Tex. Sup. J. 343; 42 ELR 20052

February 17, 2010, Argued
February 24, 2012, Opinion Delivered

SUBSEQUENT HISTORY: Released for Publication August 2, 2012.
Motion for rehearing on petition for review denied by *Edwards Aquifer Auth. v. Day, 2012 Tex. LEXIS 488 (Tex., June 8, 2012)*

PRIOR HISTORY: [**1]
ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS.
Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 2008 Tex. App. LEXIS 9777 (Tex. App. San Antonio, 2008)

CASE SUMMARY:

PROCEDURAL POSTURE: The Court of Appeals for the Fourth District of Texas agreed with petitioner aquifer authority that groundwater from the well became state surface water in the lake and could not be considered in determining the amount of respondent landowners' initial regular permit (IRP). It found, however, that the landowners' takings claim should not have been dismissed. The authority, petitioner State, and landowners petitioned for review.

OVERVIEW: The supreme court noted that there was substantial evidence to support the authority's finding that the groundwater became state water in the lake; thus, the authority's decision to issue an IRP for 14 acre-feet had to be affirmed. A landowner had a right to exclude others from groundwater beneath his property, but one that could not be used to prevent ordinary drainage. Where there were some differences in the rules governing groundwater and hydrocarbons, at heart both were governed by the same fundamental principle: each represented a shared resource that had to be conserved under the Constitution. There was no reason to conclude that the common law allowed ownership of oil and gas in place but not groundwater. Neither the authority nor the State suggested a reason why the Edwards Aquifer Authority Act (Act) had to be more restrictive in permitting groundwater use than Tex. Water Code Ann. ch. 36, nor did the Act suggest any justification. The State had a legitimate interest in discouraging suits against groundwater districts to protect them from costs and burdens associated with such suits, and a cost-shifting statute was rationally related to advancing that interest.

OUTCOME: The judgment was affirmed.

LexisNexis(R) Headnotes

Real Property Law > Water Rights > Groundwater
[HN1] The Edwards Aquifer Authority Act (Act) prohibits withdrawals of water from the aquifer without a permit issued by the Authority, EAAA § 1.15(b). The only permanent exception is for wells producing less than 25,000 gallons per day for domestic or livestock use. The Act gives preference to existing users-- defined as persons who withdrew and beneficially used underground water from the aquifer on or before June 1, 1993, EAAA

§ 1.03(1)-- and their successors and principals. With few exceptions, water may not be withdrawn from the aquifer through wells drilled after June 1, 1993, EAAA § 1.14(e). Each permit must specify the maximum rate and total volume of water that the water user may withdraw in a calendar year, and the total of all permitted withdrawals per calendar year cannot exceed the amount specified by the Act, EAAA § 1.15(d).

Real Property Law > Water Rights > Beneficial Use
Real Property Law > Water Rights > Groundwater
[HN2] A user's total annual withdrawal allowed under an initial regular permit (IRP) is calculated based on the beneficial use of water without waste during the period from June 1, 1972, to May 31, 1993, Edwards Aquifer Authority Act (EAAA) § 1.16. The Act, like the Water Code, defines beneficial use as the use of the amount of water that is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose, EAAA § 1.03(4). Although other provisions of the Water Code governing groundwater management districts define beneficial use more broadly and include recreational purposes, *Tex. Water Code Ann. § 36.001(9)*, they also state that any special law governing a specific district shall prevail, *Tex. Water Code Ann. § 36.052(a)*. "Waste" is broadly defined, EAAA § 1.03(21).

Real Property Law > Water Rights > Beneficial Use
Real Property Law > Water Rights > Groundwater
[HN3] A user's total permitted annual withdrawal cannot exceed his maximum beneficial use during any single year of the historical period, or for a user with no historical use for an entire year, the normal beneficial use for the intended purpose, Edwards Aquifer Authority Act (EAAA) § 1.16(e). But the total withdrawals under all permits must be reduced proportionately as necessary so as to not exceed the statutory maximum annual withdrawal from the aquifer. An "existing user" who operated a well for three or more years during the historical period is entitled to a permit for at least the average amount of water withdrawn annually. And every existing irrigation user shall receive a permit for not less than two acre-feet a year for each acre of land the user actually irrigated in any one calendar year during the historical period.

Real Property Law > Water Rights > Groundwater
[HN4] The Water Code defines state water -- water owned by the State -- as the water of ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state, *Tex. Water Code Ann. § 11.021(a)*. The character of water as groundwater or state water can change. The Code recognizes this reality, providing, for example, that storm water or floodwater -- state water -- when put or allowed to sink into the ground, loses its character and classification and is considered percolating groundwater, *Tex. Water Code Ann. § 11.023(d)*. By the same token, irrigation runoff draining into a stream or other watercourse wholly loses its character as groundwater and becomes state water.

Real Property Law > Water Rights > Groundwater
[HN5] Groundwater can be transported through a natural watercourse without becoming state water. The Code specifically allows the Water Commission to authorize a person to discharge privately owned groundwater into a natural watercourse and withdraw it downstream, *Tex. Water Code Ann. § 11.042(b)*. But this exception proves the rule. The necessary implication is that when the water owner has not obtained the required authorization for such transportation, the water in the natural watercourse becomes state water. Before such authorization was required, the Texas Supreme Court, too, acknowledged the propriety of transporting non-state-owned water by natural watercourse, but only when the water owner controls the discharge and withdrawal so that the water moves directly from the source to use.

Real Property Law > Water Rights > Riparian Rights
[HN6] Under the common law, a riparian use must be a reasonable one, and a use which works substantial injury to the common right as between riparians is an unreasonable use.

Energy & Utilities Law > Exploration, Discovery & Recovery > Rule of Capture
Real Property Law > Water Rights > Groundwater
[HN7] That the person who owns the surface may dig therein and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action.

Energy & Utilities Law > Exploration, Discovery & Recovery > Rule of Capture
Real Property Law > Water Rights > Groundwater

[HN8] In the absence of express contract and a positive authorized legislation, as between proprietors of adjoining land, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible. (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.

Energy & Utilities Law > Exploration, Discovery & Recovery > Rule of Capture
Real Property Law > Water Rights > Groundwater
[HN9] But while the rule of capture does not entail ownership of groundwater in place, neither does it preclude such ownership.

Energy & Utilities Law > Exploration, Discovery & Recovery > Rule of Capture
Energy & Utilities Law > Oil, Gas & Mineral Interests > Personalty & Realty Interests
[HN10] Notwithstanding the rule of capture, landowner's right to the oil and gas beneath his land is an exclusive and private property right inhering in virtue of his proprietorship of the land, and of which he may not be deprived without a taking of private property. Ownership of oil and gas in place is the prevailing rule among the states.

Real Property Law > Water Rights > Groundwater
[HN11] Groundwater, like oil and gas, often exists in subterranean reservoirs in which it is fugacious. A landowner is entitled to prohibit a well from being drilled on other property but bottomed in an oil and gas formation under his own -- a slant or deviated well. Thus, a landowner has a right to exclude others from groundwater beneath his property, but one that cannot be used to prevent ordinary drainage.

Real Property Law > Water Rights > Groundwater
[HN12] The principal concerns in regulating oil and gas production are to prevent waste and to provide a landowner a fair opportunity to extract and market the oil and gas beneath the surface of the property. Groundwater is different in both its source and uses. Unlike oil and gas, groundwater in an aquifer is often being replenished from the surface, and while it may be sold as a commodity, its uses vary widely, from irrigation, to industry, to drinking, to recreation. Groundwater regulation must take into account not only historical usage but future needs, including the relative importance of various uses, as well as concerns unrelated to use, such as environmental impacts and subsidence.

Energy & Utilities Law > Oil, Gas & Mineral Interests > Personalty & Realty Interests
Real Property Law > Water Rights > Groundwater
[HN13] In Texas 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. This correctly states the common law regarding the ownership of groundwater in place.

Real Property Law > Water Rights > Groundwater
[HN14] See *Tex. Water Code Ann. § 36.002.*

Real Property Law > Water Rights > Groundwater
[HN15] By ownership of groundwater as real property, the Legislature appears to mean ownership in place, *Tex. Water Code Ann. § 36.002.*

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > Just Compensation
Real Property Law > Water Rights > Groundwater
[HN16] Groundwater rights are property rights subject to constitutional protection, whatever difficulties may lie in determining adequate compensation for a taking.

Governments > Public Lands > General Overview
Real Property Law > Water Rights > Groundwater
[HN17] In 1917, following a period of severe droughts and floods, the people of Texas adopted *Tex. Const. art. XVI, § 59*, the Conservation Amendment. The Amendment provides in part: The conservation and development of all of the natural resources of this State are each and all hereby declared to be public rights and duties;

and the Legislature shall pass all such laws as may be appropriate thereto. Thus, the responsibility for the regulation of natural resources, including groundwater, rests in the hands of the Legislature.

Real Property Law > Water Rights > Groundwater
[HN18] The Groundwater Conservation District Act of 1949 was the first significant legislation providing for the conservation and development of groundwater. Efforts to pass a comprehensive, statewide, groundwater management scheme had repeatedly failed. The Act permitted landowners to petition for creation of a groundwater conservation district to regulate production from an underground reservoir. The petition was directed to the county commissioners' court if the district lay entirely within one county, or to the State Board of Water Engineers if it did not. A district was required to be approved by voters and was governed by an elected board of directors. The Act, with many changes, is now chapter 36 of the Water Code. There are currently ninety-six groundwater districts covering all or parts of 173 counties. While districts have broad statutory authority, their activities remain under the local electorate's supervision.

Real Property Law > Water Rights > Groundwater
[HN19] Groundwater conservation districts have little supervision beyond the local level. Each district must develop a groundwater management plan every five years, which aims to address pertinent issues such as water supply needs, management goals, and the amount of water estimated to be used and recharged annually within the district, *Tex. Water Code Ann. §§ 36.1072(e), 36.1071*. The management plan must be submitted for approval by the Texas Water Development Board and its implementation is subject to review by the State Auditor's Office, *Tex. Water Code Ann. §§ 36.1072(a), 36.302(c)*. Districts are also required to participate in joint planning within designated groundwater management areas (GMAs), *Tex. Water Code Ann. § 35.002(11)*. The regional water planning process was created in 1997, and since 2001 it has included all of the major and minor aquifers in the State, *Tex. Water Code Ann. § 35.004*. Now, sixteen regional groundwater management areas cover the State, with their borders mirroring those of the State's major aquifers. About 80% of Texas overlies nine major aquifers and twenty minor aquifers, with the nine major aquifers providing about 97% of the State's groundwater. Since 1995, groundwater conservation districts within a groundwater management area have been required to work together, *Tex. Water Code Ann. § 36.108*.

Real Property Law > Water Rights > Groundwater
[HN20] As chapter 36 of the Water Code states, groundwater conservation districts created as provided by this chapter are the state's preferred method of groundwater management through rules developed, adopted, and promulgated by a district in accordance with the provisions of this chapter, *Tex. Water Code Ann. § 36.0015*. *Section 36.113* provides that districts must require a permit for the drilling, equipping, operating, or completing of wells or for substantially altering the size of wells or well pumps, *Tex. Water Code Ann. § 36.113(a)*. In acting on permit requests, a district must consider, among other things, whether the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders, whether the proposed use of water is dedicated to any beneficial use, and whether the proposed use of water is consistent with the district's approved management plan, *Tex. Water Code Ann. § 36.113(d)(2)-(4)*. In issuing permits, a district must also manage total groundwater production on a long-term basis to achieve an applicable desired future condition, considering estimates of groundwater availability, *Tex. Water Code Ann. § 36.1132(b)*.

Real Property Law > Water Rights > Groundwater
[HN21] See *Tex. Water Code Ann. § 36.116(a)*.

Real Property Law > Water Rights > Groundwater
[HN22] *Tex. Water Code Ann. § 36.116(b)* provides that in promulgating any rules limiting groundwater production, the district may preserve historic or existing use before the effective date of the rules to the maximum extent practicable consistent with the district's management plan and as provided by *Section 36.113*. The amount of groundwater withdrawn and its purpose are both relevant when identifying an existing or historic use to be preserved. Indeed, in the context of regulating the production of groundwater while preserving an existing use, it is difficult to reconcile how the two might be separated. Both the amount of water to be used and its purpose are normal terms of a groundwater production permit and are likewise a part of any permit intended to preserve historic or existing use. A district's discretion to preserve historic or existing use is accordingly tied both to the amount and purpose of the prior use.

Real Property Law > Water Rights > Groundwater
[HN23] Districts may have different rules; indeed, a district may adopt different rules for different areas of the district, *Tex. Water Code Ann. § 36.116(d)*. Special leg-

islation, unique to each district, may also grant powers beyond those provided in chapter 36.

Real Property Law > Water Rights > Groundwater
[HN24] Although the Edwards Aquifer Authority is a conservation and reclamation district, Edwards Aquifer Authority Act (EAAA) § 1.02(a), created under the Conservation Amendment, its powers and duties are governed by the EAAA, not by chapter 36 of the Water Code. The EAAA does not refer to chapter 36. The Authority is responsible not only for permitting groundwater use but for protecting terrestrial and aquatic life, EAAA § 1.01, specifically, species that are designated as threatened or endangered under applicable federal or state law, EAAA § 1.14(a)(7).

Real Property Law > Water Rights > Beneficial Use
Real Property Law > Water Rights > Groundwater
[HN25] The Edwards Aquifer Authority Act requires the Authority, in issuing permits, to give preference to "existing users", considering only the amounts of groundwater put to beneficial use during the twenty-year historical period ending May 31, 1993.

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > Takings
[HN26] In construing *Tex. Const. art. I, § 17*, the Texas Supreme Court generally been guided by the United States Supreme Court's construction and application of the similar guarantee provided by the *Fifth Amendment to the United States Constitution*, *U.S. Const. amend. V*, and made applicable to the states by the Fourteenth Amendment, *U.S. Const. amend. XIV*. The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking, this is a question of degree -- and therefore cannot be disposed of by general propositions. The question at bottom is upon whom the loss of the changes desired should fall.

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > Takings
[HN27] There are two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment, *U.S. Const. amend. V*, purposes. First, where government requires an owner to suffer a permanent physical invasion of her property -- however minor -- it must provide just compensation. A second categorical rule applies to regulations that completely deprive an owner of all economically beneficial use of her property. Outside these two relatively narrow categories (and the special context of land-use exactions), regulatory takings challenges are governed by the standards set forth in Penn Central. The Court identified several factors that have particular significance. Primary among those factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action -- for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good -- may be relevant in discerning whether a taking has occurred. The Penn Central factors have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or Lucas rules.

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > Takings
Real Property Law > Water Rights > Groundwater
[HN28] The third Penn Central factor focuses on the nature of the regulation and is not as factually dependent as the other two. Unquestionably, the State is empowered to regulate groundwater production. Groundwater provides 60% of the 16.1 million acre-feet of water used in Texas each year. In many areas of the state, and certainly in the Edwards Aquifer, demand exceeds supply. Regulation is essential to its conservation and use.

Real Property Law > Water Rights > Groundwater
[HN29] As with oil and gas, one purpose of groundwater regulation is to afford each owner of water in a common, subsurface reservoir a fair share. Because a reservoir's supply of oil or gas cannot generally be replenished, and because oil and gas production is most commonly used solely as a commodity for sale, land surface area is an important metric in determining an owner's fair share. Reasonable regulation aims at allowing an owner to withdraw the volume beneath his property and sell it. Groundwater is different. Aquifers are often recharged by rainfall, drainage, or other surface water. The amount of groundwater beneath the surface may increase as well as decrease; any volume associated with the surface is constantly changing. Groundwater's many beneficial uses -- for drinking, agriculture, industry, and recreation -- often do not involve a sale of water. It value is realized not only in personal consumption but through crops, products, and diversion. Groundwater may be used entirely on the land from which it is pumped, or it may be transported for use or sale elsewhere. Consequently, regulation that affords an owner a fair share of subsurface water must take into account factors other than surface area.

Real Property Law > Water Rights > Groundwater
[HN30] Texas Water Code chapter 36 gives groundwater conservation districts the discretion in regulating production to preserve historic or existing use, *Tex. Water Code Ann. § 36.116(b)*.

Real Property Law > Water Rights > Groundwater
[HN31] Texas Water Code chapter 36 requires groundwater districts to consider several factors in permitting groundwater production, among them the proposed use of water, the effect on the supply and other permittees, a district's approved management plan, *Tex. Water Code Ann. § 36.113(d)(2)-(4)*. By contrast, the Edwards Aquifer Authority Act (EAAA) requires that permit amounts be determined based solely on the amount of beneficial use during the historical period and the available water supply. Under the EAAA, a landowner may be deprived of all use of groundwater other than a small amount for domestic or livestock use, EAAA §§ 1.15(b), 1.16(c), and 1.33, merely because he did not use water during the historical period. Preserving groundwater for future use has been an important strategy for groundwater rights owners.

Real Property Law > Water Rights > Groundwater
[HN32] The Legislature last year amended *Tex. Water Code Ann. § 36.002* to recognize that a landowner owns the groundwater below the surface of the landowner's land as real property.

Real Property Law > Water Rights > Groundwater
[HN33] See *Tex. Water Code Ann. § 36.002*.

Real Property Law > Water Rights > Groundwater
[HN34] Under the Edwards Aquifer Authority Act (EAAA), a landowner can be prohibited from producing groundwater except for domestic and livestock use. This regulation, according to *Tex. Water Code Ann. § 36.002(e)*, is unaffected by the Legislature's recognition of groundwater ownership in subsection (a). But subsection (c) abjures all authority to deprive or divest a landowner of groundwater ownership and rights If prohibiting all groundwater use except for domestic and livestock purposes does not divest a landowner of groundwater ownership, then either the groundwater rights recognized by *§ 36.002* are extremely limited, or else by "deprive" and "divest" subsection (c) does not include a taking of property rights for which adequate compensation is constitutionally guaranteed. The Texas Supreme Court thinks the latter is true. The EAAA itself states: The legislature intends that just compensation be paid if implementation of this article causes a taking of private property or the impairment of a contract in contravention of the Texas or federal constitution, EAAA § 1.07. The requirement of compensation may make the regulatory scheme more expensive, but it does not affect the regulations themselves or their goals for groundwater production.

Real Property Law > Water Rights > Groundwater
[HN35] The Legislature has declared that "rules developed, adopted, and promulgated by a district in accordance with the provisions of chapter 36 comprise the state's preferred method of groundwater management, *Tex. Water Code Ann. § 36.0015*. Chapter 36 allows districts to consider historical use in permitting groundwater production, but it does not limit consideration to such use. A landowner cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during an historical period and supply is limited.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards
Real Property Law > Water Rights > Groundwater
[HN36] The State has a legitimate interest in discouraging suits against groundwater districts to protect them from costs and burdens associated with such suits, and a cost-shifting statute, *Tex. Water Code Ann. § 36.066(g)*, is rationally related to advancing that interest.

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JUDGES: JUSTICE HECHT delivered the opinion of the Court.

OPINION BY: Nathan L. Hecht

OPINION

[*817] 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*.[1] We hold that it does. We affirm the judgment of the court of [*818] appeals[2] and remand the case to the district court for further proceedings.

1 TEX. CONST. art. I, § 17(a) ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made. . . .").

2 *Edwards Aquifer Auth. v. Day, 274 S.W.3d 742 (Tex. App.--San Antonio 2008).*

I

In 1994, R. Burrell Day and Joel McDaniel (collectively, "Day") bought 381.40 acres on which to grow oats and peanuts and graze cattle. The land overlies the Edwards Aquifer, "an underground layer of porous, water-bearing rock, 300-700 feet thick, and five to forty miles wide at the surface, that stretches in an arced curve from Brackettville, 120 miles west of San Antonio, to Austin."[3] A well drilled in 1956 had been used for irrigation through the early 1970s, but its casing collapsed and [**5] its pump was removed sometime prior to 1983. The well had continued to flow under artesian pressure, and while some of the water was still used for irrigation, most of it flowed down a ditch several hundred yards into a 50-acre lake on the property. The lake was also fed by an intermittent creek, but much of the water came from the well. Day's predecessors had pumped water from the lake for irrigation. The lake was also used for recreation.

3 *Edwards Aquifer Auth. v. Chem. Lime, Ltd., 291 S.W.3d 392, 394 (Tex. 2009).*

To continue to use the well, or to drill a replacement as planned, Day needed a permit from the Edwards Aquifer Authority. The Authority had been created by the Edwards Aquifer Authority Act ("the EAAA" or "the Act") in 1993, the year before Day bought the property.[4] The Edwards Aquifer is "the primary source of water for south central Texas and therefore vital to the residents, industry, and ecology of the region, the State's economy, and the public welfare."[5] The Legislature determined that the Authority was "required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, [**6] and the economic development of the state."[6]

4 Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, amended by Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of May 28, 2001, 77th Leg., R.S., ch. 966, §§ 2.60-.62 and 6.01-.05, 2001 Tex. Gen. Laws 1991, 2021-2022, 2075-2076; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of June 1, 2003, 78th Leg., R.S., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193; Act of May 23, 2007, 80th Leg., R.S., ch. 510, 2007 Tex. Gen. Laws 900; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01-2.12, 2007 Tex. Gen Laws 4612, 4627-4634; Act of May 28, 2007, 80th Leg. R.S., ch. 1430, §§ 12.01-12.12, 2007 Tex. Gen. Laws 5848, 5901-5909; Act of May 21, 2009, 81st Leg., R.S., ch. 1080, 2009 Tex. Gen. Laws 2818 [hereinafter "EAAA"]. Citations are to the EAAA's current sections, without separate references to amending enactments. The EAAA remains uncodified, but [**7] an unofficial compilation can be found on the Authority's website, at http://www.edwardsaquifer.org/files/EAAact.pdf.

5 *Chem. Lime, 291 S.W.3d at 394.*

6 EAAA § 1.01.

[HN1] The Act "prohibits withdrawals of water from the aquifer without a permit issued by the Authority".[7] The only permanent exception is for wells producing less than 25,000 gallons per day for domestic or [*819] livestock use.[8] The Act gives preference to "existing user[s]" -- defined as persons who "withdr[ew] and beneficially used underground water from the aquifer on or before June 1, 1993"[9] -- and their successors and principals. With few exceptions, water may not be withdrawn from the aquifer through wells drilled after June 1, 1993.[10] Each permit must specify the maximum rate and total volume of water that the water user may withdraw in a calendar year,[11] and the total of all permitted withdrawals per calendar year cannot exceed the amount specified by the Act.[12]

7 *Chem. Lime, 291 S.W.3d at 394* (citing EAAA § 1.15(b) ("Except as provided by Sections 1.17 ['Interim Authorization'] and 1.33 [wells producing less than 25,000 gallons per day for domestic or livestock use] of this article, a person may not withdraw water from the aquifer [**8] or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority.") and EAAA § 1.35(a) ("A person may not withdraw water from the aquifer except as authorized by a permit issued by the authority or by this article.")).

8 *Id. at 394 n.10.*

9 *Id. at 395* (quoting EAAA § 1.03(10)).

10 EAAA § 1.14(e).

11 EAAA § 1.15(d).

12 EAAA 1.14(c) (formerly EAAA 1.14(b)); *see also Chem. Lime, 291 S.W.3d at 395 n.8* (providing the history of 1.14(b) and (c)).

[HN2] A user's total annual withdrawal allowed under an "initial regular permit" ("IRP") is calculated based on the beneficial use of water without waste during the period from June 1, 1972, to May 31, 1993.[13] The Act, like the Water Code, defines beneficial use as "the use of the amount of water that is economically necessary for a

purpose authorized by law, when reasonable intelligenee and reasonable diligence are used in applying the water to that purpose."[14] Although other provisions of the Water Code governing groundwater management districts define beneficial use more broadly and include recreational purposes,[15] they also state that "any special law governing a specific district [**9] shall prevail".[16] "Waste" is broadly defined.[17]

13 EAAA § 1.16(a) ("An existing user may apply for an initial regular permit by filing a declaration of historical use of underground water withdrawn from the aquifer during the historical period from June 1, 1972, through May 31, 1993."); *id.* § 1.16(e) ("To the extent water is available for permitting, the board shall issue the existing user a permit for withdrawal of an amount of water equal to the user's maximum beneficial use of water without waste during any one calendar year of the historical period. If a water user does not have historical use for a full year, then the authority shall issue a permit for withdrawal based on an amount of water that would normally be beneficially used without waste for the intended purpose for a calendar year.").

14 EAAA § 1.03(4); *see also TEX. WATER CODE § 11.002(4)* ("'Beneficial use' means use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.").

15 *TEX. WATER CODE § 36.001(9)* ("'Use for a beneficial purpose' means use for: [**10] (A) agricultural, gardening, domestic, stock raising, municipal, mining, manufacturing, industrial, commercial, recreational, or pleasure purposes; (B) exploring for, producing, handling, or treating oil, gas, sulphur, or other minerals; or (C) any other purpose that is useful and beneficial to the user.").

16 *Id. § 36.052(a).*

17 EAAA § 1.03(21) ("'Waste' means: (A) withdrawal of underground water from the aquifer at a rate and in an amount that causes or threatens to cause intrusion into the reservoir of water unsuitable for agricultural, gardening, domestic, or stock raising purposes; (B) the flowing or producing of wells from the aquifer if the water produced is not used for a beneficial purpose; (C) escape of underground water from the aquifer to any other reservoir that does not contain underground water; (D) pollution or harmful alteration of underground water in the aquifer by salt water or other deleterious matter admitted from another stratum or from the surface of the ground; (E) willfully or negligently causing, suffering, or permitting underground water from the aquifer to escape into any river, creek, natural watercourse, depression, lake, reservoir, drain, sewer, street, [**11] highway, road, or road ditch, or onto any land other than that of the owner of the well unless such discharge is authorized by permit, rule, or order issued by the commission under Chapter 26, Water Code; (F) underground water pumped from the aquifer for irrigation that escapes as irrigation tailwater onto land other than that of the owner of the well unless permission has been granted by the occupant of the land receiving the discharge; or (G) for water produced from an artesian well, "waste" has the meaning assigned by *Section 11.205, Water Code.*").

[HN3] A user's total permitted annual withdrawal cannot exceed his maximum beneficial [*820] use during any single year of the historical period, or for a user with no historical use for an entire year, the normal beneficial use for the intended purpose.[18] But the total withdrawals under all permits must be reduced proportionately as necessary so as to not exceed the statutory maximum annual withdrawal from the aquifer.[19] An "existing user" who operated a well for three or more years during the historical period is entitled to a permit for at least the average amount of water withdrawn annually.[20] And every "existing irrigation user shall receive a [**12] permit for not less than two acre-feet a year for each acre of land the user actually irrigated in any one calendar year during the historical period."[21]

18 EAAA § 1.16(e).

19 *Id.* ("If the total amount of water determined to have been beneficially used without waste under this subsection exceeds the amount of water available for permitting, the authority shall adjust the amount of water authorized for withdrawal under the permits proportionately to meet the amount available for permitting.").

20 *Id.*

21 *Id.* One acre-foot of water, enough to cover one acre one foot deep, is equal to 43,560 cubic feet or 325,851.43 gallons, slightly less than half the volume of an olympic-size swimming pool (660,430 gallons).

For various reasons, the Authority did not become operational until 1996, and all IRP applications were required to be filed before December 30, 1996.[22] Day timely applied for authorization to pump 700 acre-feet of water annually for irrigation. Attached to the application

was a statement by Day's predecessors, Billy and Bret Mitchell, that they had "irrigated approximately 300 acres of Coastal Bermuda grass from this well during the drought years of 1983 and 1984." The application's request [**13] for 700 acre-feet appears to have been based on two acre-feet for the total beneficial use of irrigating the 300 acres plus the recreational use of the 50-acre lake.

22 *Edwards Aquifer Auth. v. Chem. Lime, Ltd., 291 S.W.3d 392, 396, 402 (Tex. 2009).*

In December 1997, the Authority's general manager wrote Day that the Authority staff had "preliminarily found" that his application "provide[d] sufficient convincing evidence to substantiate" the irrigation of 300 acres in 1983-1984 and thus an average annual beneficial use of 600 acre-feet of water during the historical period. The letter invited Day to submit additional information, but he did not respond. In December 1999, the Authority approved Day's request to amend his application to move the point of withdrawal from the existing well to a replacement well to be drilled on the property. Although the Authority cautioned that it still had not acted on the application, Day proceeded to drill the replacement well at a cost of $95,000. In November 2000, the Authority notified Day that, "[b]ased on the information [*821] available," his application would be denied because "withdrawals [from the well during the historical period] were not placed to [**14] a beneficial use".

Day protested the Authority's decision, and the matter was transferred to the State Office of Administrative Hearings for hearing. During discovery, Billy Mitchell testified at his deposition that in 1983 and 1984, an area totaling only about 150 acres had been irrigated, that this had been done using an agricultural sprinkler system that drew water from the lake, and that no more than seven acres had been irrigated with water directly from the well. Day offered no other evidence of beneficial use during the historical period.[23] The administrative law judge concluded that water from the lake, including the well water that had flowed into it, was state surface water, the use of which could not support Day's application for groundwater, and that the recreational use of the lake was not a beneficial use as defined by the EAAA. The ALJ found that the maximum beneficial use of groundwater shown by Day during the historical period was for the irrigation of seven acres of grass and concluded that Day should be granted an IRP for 14 acre-feet of water. The Authority agreed.

23 Day offered a record of the United States Geological Survey Department to show that the well had pumped [**15] 39 million gallons in 1972 and 13.1 million gallons in 1973, but the mere fact that water may have been pumped from the well does not prove beneficial use, and in any event, Day did not base his application on any such use of water in 1972-1973.

Day appealed the Authority's decision to the district court and also sued the Authority for taking his property without compensation in violation of *article I, section 17(a) of the Texas Constitution*, and for other constitutional violations. The Authority impleaded the State as a third-party defendant, asserting indemnification and contribution for Day's taking claim.[24] The court granted summary judgment for Day on his appeal, concluding that water from the well-fed lake used to irrigate 150 acres during the historical period was groundwater, and that Day was entitled to an IRP based on such beneficial use. The court granted summary judgment for the Authority on all of Day's constitutional claims, including his takings claim. The court remanded the case to the Authority for issuance of a new IRP.

24 The State argues for the first time in this Court that only the Authority, an independent political subdivision, can be liable to Day on his takings [**16] claim, and therefore the State is immune from the Authority's third-party suit. The Authority responds that it was required by state law to act as it did and that it is the EAAA itself, rather than the Authority's actions under it, that resulted in any taking liability. Because the issue was not developed below and has not been fully briefed in this Court, we decline to address it.

Day and the Authority appealed. The court of appeals agreed with the Authority that groundwater from the well became state surface water in the lake and could not be considered in determining the amount of Day's IRP.[25] Thus, the court affirmed the Authority's decision to issue Day a permit for 14 acre-feet. But the court held that "landowners have some ownership rights in the groundwater beneath their property . . . entitled to constitutional protection",[26] and therefore Day's takings claim should not have been dismissed. Rejecting Day's other constitutional arguments, the court remanded the case to the district court for further proceedings.

25 *Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 753-755 (Tex. App.—San Antonio 2008).*

26 *Id. at 756.*

[*822] The Authority, the State, and Day each petitioned for review. We granted [**17] all three petitions.[27] We begin by considering whether, under the EAAA, the Authority erred in limiting Day's IRP to 14 acre-feet and conclude that it did not. Next, we turn to whether Day has a constitutionally protected interest in the groundwater beneath his property and conclude that

he does. We then consider whether the Authority's denial of an IRP in the amount Day requested constitutes a taking and conclude that the issue must be remanded to the trial court for further proceedings. We end with Day's other constitutional arguments, concluding that they are without merit.

27 53 Tex. Sup. Ct. J. 230 (Jan. 15, 2010). The following have filed amici curiae briefs in support of the Authority and the State: Alliance of EAA Permit Holders; Angela Garcia and Environmental Defense Fund, Inc.; City of San Antonio by and through the San Antonio Water System; Harris-Galveston Subsidence District; Medina County Irrigators Alliance; and Texas Alliance of Groundwater Districts. The following have filed amici curiae briefs in support of Day: Glenn and JoLynn Bragg; Canadian River Municipal Water Authority; City of Amarillo; City of El Paso; Anne Windfohr Marion and the Tom L. and Anne Burnett Trust; [**18] Mesa Water, L.P.; Pacific Legal Foundation; Texas Cattle Feeders Association; Texas Farm Bureau; Texas Landowners Council; Texas and Southwestern Cattle Raisers Association; and Texas Wildlife Association. The following have also filed amici curiae briefs: City of Victoria; the Texas Comptroller of Public Aecounts; and Senator Robert Duncan.

II

Day contends that the Authority was required to base his IRP on his predeccssors' beneficial use of water drawn from the lake, supplied in part by the well, to irrigate 150 acres for two years during the historical period. The Authority counters that the lake water, whatever its origin, was state surface water and could not be considered in determining the amount of the IRP.

[HN4] The Water Code defines state water -- water owned by the State -- as "[t]he water of ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state".[28] Day argues that because groundwater -- defined by the Code as "water percolating below the surface of the earth"[29] -- is not included [**19] in this list, it can never be state water. But the character of water as groundwater or state water can change. The Code recognizes this reality, providing, for example, that storm water or floodwater -- state water -- when "put or allowed to sink into the ground, . . . loses its character and classification . . . and is considered percolating groundwater."[30] By the same token, irrigation runoff draining into a stream or other watercourse wholly loses its character as groundwater and becomes state water.

28 *TEX. WATER CODE § 11.021(a)*. Such water "is the property of the state." *Id.; see also Goldsmith & Powell v. State, 159 S.W.2d 534, 535 (Tex. Civ. App.--Dallas 1942, writ ref'd)*.

29 *TEX. WATER CODE § 35.002(5)*.

30 *Id. § 11.023(d)*.

There is an exception. [HN5] Groundwater can be transported through a natural watercourse without becoming state water. The Code specifically allows the Water Commission to authorize a person to discharge privately owned groundwater into a natural watercourse and withdraw it downstream.[31] But this exception proves the [*823] rule. The necessary implication is that when the water owner has not obtained the required authorization for such transportation, the water in the natural [**20] watercourse becomes state water. Before such authorization was required,[32] we, too, acknowledged the propriety of transporting non-state-owned water by natural watercourse, but only when the water owner controls the discharge and withdrawal so that the water moves directly from the source to use.[33]

31 *Id. § 11.042(b)* ("A person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater must obtain prior authorization from the commission for the diversion and the reuse of these return flows. The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries. A person wishing to divert and reuse future increases of return flows derived from privately owned groundwater must obtain authorization to reuse inereases in return flows before the increase.").

32 *Section 11.042(b)* was adopted [**21] by Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 2.06, 1997 Tex. Gen. Laws 3610, 3620.

33 *City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798, 802-803 (Tex. 1955)*.

In this case, Day's predecessors did not measure the amount of water flowing from the well to the lake or the amount pumped from the lake into the irrigation system.

There was no direct transportation from source to use; the flow into the lake was as constant as the artesian pressure allowed, except when water was diverted to irrigate the seven acres, while withdrawal was only periodic as needed to irrigate the 150 acres. Nor does it appear that the lake was used to store water for irrigation. While the water remained in the lake, it was used for recreation, and since most of the water in the lake came from the well, that appears to have been its principal purpose. Indeed, there is no evidence that lake water was used for irrigation during the historical period other than in 1983 and 1984, while the lake was used constantly for recreation. This was substantial evidence to support the Authority's finding that the groundwater became state water in the lake. We do not suggest that a lake can never be used to store [**22] or transport groundwater for use by its owner.[34] We conclude only that the Authority could find from the evidence before it that that was not what had occurred on Day's property.

34 A lake was used for part of the groundwater transportation in *City of Corpus Christi, 276 S.W.2d at 799*.

Day having offered no other evidence of beneficial use during the historical period, the Authority's decision to issue an IRP for 14 acre-feet must be affirmed.

III

Whether groundwater can be owned in place is an issue we have never decided. But we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently.

A

We agree with the Authority that the rule of capture does not require ownership of water in place, but we disagree that the rule, because it prohibits an action for drainage, is antithetical to such ownership.

We adopted the rule of capture in 1904 in *Houston & T.C. Railway v. East*.[35] A well on East's homestead, five feet in diameter and thirty-three feet deep, had long supplied him with water for household purposes. But the Railroad dug a well [*824] nearby, twenty feet in diameter and sixty-six feet deep, from which it pumped 25,000 gallons a day for use in its [**23] locomotives and machine shops, and East's well dried up. East sued the Railroad for the destruction of his well. After a bench trial, the trial court found that the Railroad's use of water was unreasonable under riparian law, but concluded it was not actionable,[36] and rendered judgment for the Railroad. The court of appeals reversed and rendered judgment for East for the damages claimed, $206.25.[37] The Railroad appealed.

35 *98 Tex. 146, 81 S.W. 279 (Tex. 1904)*.

36 *Id. at 280* ("I further find that the use to which defendant puts its well was not a reasonable use of their property as land, but was an artificial use of their property, and if the doctrine of reasonable use, as applicable to defined streams, is applied to such cases, this was unreasonable.").

37 *Id.*

[HN6] "Under the common law . . . , a riparian use must be a reasonable one, and . . . [a] use which works substantial injury to the common right as between riparians is an unreasonable use . . . ."[38] The issue before us was whether this law applied. The same issue had been considered by the English Court of the Exchequer in *Acton v. Blundell*.[39] As in *East*, a landowner had sued for damage to his well from wells dug nearby,[40] and the question was "whether [**24] the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to, and regulates, a watercourse flowing on the surface."[41] That rule was "well established":

> each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that, neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above.[42]

After considering the basis for the rule, the consequences of applying it to groundwater, and such authorities as it could find, the court concluded that the law governing the use of groundwater should be different.[43] The court stated the applicable rule as follows:

> [*825] [HN7] That the person who owns the surface may dig therein and apply all that is there found to his own purposes, at his free will and pleasure, and that if, in the exercise of [**25] such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action.[44]

This Court, noting that arguments regarding the applicable law had been "thoroughly presented" in *Acton*,[45] and believing that the English court's rule had been "recognized and followed . . . by all the courts of last resort in this country before which the question has come, except the Supreme Court of New Hampshire",[46] adopted the rule for Texas. We later came to refer to the rule as the "rule or law of capture."[47]

38 *Motl v. Boyd, 116 Tex. 82, 286 S.W. 458, 470 (Tex. 1926)* (internal citations omitted).

39 (1843) 152 Eng. Rep. 1123 (Exch.); 12 Mees & W. 324.

40 *Id.* at 1232-1233 ("At the trial the plaintiff proved that, within twenty years before the commencement of the suit, viz., in the latter end of 1821, a former owner and occupier of certain land and a cotton-mill, now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill; and that the defendants, in the year 1837, had sunk a coal-pit in the land [**26] of one of the defendants, at about three quarters of a mile from the plaintiff's well, and about three years after sunk a second, at a somewhat less distance; the consequence of which sinking was, that by the first the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill.").

41 *Id.* at 1233.

42 *Id.*

43 *Id.* ("But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.").

44 *Id.* at 1235.

45 *Houst. & T.C. Ry. v. East, 98 Tex. 146, 81 S.W. 279, 280 (Tex. 1904)* ("The arguments in favor of the application to such cases [involving groundwater] of the doctrines applicable to defined streams of water were thoroughly presented at the bar in Acton v. Blundell, and the reasons for the conclusion of the court against such application [**27] were carefully stated in the opinion.").

46 *Id.*

47 *Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558, 561 (Tex. 1948).* The historical origins and development of the rule are thoroughly examined in Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas -- Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 15-41 (2004).

Under that rule, we held that the Railroad's conduct was not actionable. "The practical reasons" for the rule, we explained, had been summarized by the Ohio Supreme Court in *Frazier v. Brown*:[48]

> [HN8] In the absence of express contract and a positive authorized legislation, as between proprietors of adjoining land, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible. (2) Because any [**28] such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.[49]

By "correlative rights", we referred specifically to the right East claimed: to sue for damages from a loss of water due to subsurface drainage by another user for legitimate purposes. The reasons the law did not recognize that right -- the "hopeless uncertainty" involved in its enforcement and the material interference with public progress -- did not preclude all correlative rights in groundwater. On the contrary, we noted that East had made "no claim of malice or wanton conduct of any character, and the effect to be given to such a fact when it exists is beside the present inquiry",[50] [*826] suggesting at least the possibility that an action for damages might lie in such circumstances, despite difficulty in proof. Malice and wanton conduct were only examples. *Acton*'s rule of non-liability, we said, was a "general doctrine".[51]

48 *12 Ohio St. 294 (1861), overruled by Cline v. Am. Aggregates Corp., 15 Ohio St. 3d 384, 15 Ohio B. 501, 474 N.E.2d 324 (Ohio 1984).*

49 *East, 81 S.W. at 280-281* [**29] (quoting *Frazier, 12 Ohio St. at 311*).

50 *Id. at 282.*

51 *Id.*

The effect of our decision denying East a cause of action was to give the Railroad ownership of the water pumped from its well *at the surface*. No issue of ownership of groundwater *in place* was presented in *East*, and our decision implies no view of that issue. Riparian law, which East invoked, governs users who do not own the water. Under that law, the Railroad would have been liable even if East did not own the water in place. The Railroad escaped liability, certainly not because East did own the water in place, but irrespective of whether he did. Our quote from the New York Court of Appeals' decision in *Pixley v. Clark*[52] must be read in this context:

> An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface.[53]

Whatever the New York court may have intended by this statement,[54] [**30] we could have meant only that a landowner is the absolute owner of groundwater flowing at the surface from its well, even if the water originated beneath the land of another.

52 *35 N.Y. 520 (1866).*

53 *East, 81 S.W. at 280-281* (quoting *Pixley, 35 N.Y. at 527*).

54 The issue in *Pixley* was whether landowners who raised their dam on a creek were liable for flooding other landowners adjacent the creek. The court held they were, applying the law governing riparian use, not the law governing the use of groundwater. *Pixley, 35 N.Y. at 531-532*. The statement quote is dicta apparently meant to distinguish between the two.

In four cases since *East*, we have considered the rule of capture as applied to groundwater. In none of them did we determine whether the water was owned in place. In *City of Corpus Christi v. City of Pleasanton*,[55] the parties all owned wells pumping from the same sands. The City of Corpus Christi was using natural watercourses -- the Nueces River and Lake Corpus Christi -- to transport its water 118 miles from its wells to the point where it withdrew the water for use. The other well owners complained that the loss of water along the way to evaporation, transpiration, and seepage was [**31] waste, and that water reserves for all the wells were being depleted unnecessarily because the City was taking much more water than it used. We reaffirmed that, under the rule of capture, "percolating waters are regarded as the property of the owner of the surface",[56] but as in *East*, the water ownership to which we referred was at the surface, not in place. "The precise question" in *East*, we said, was "whether the Railway Company was liable in damages to East" for its use of water.[57] *East* established

> that an owner of land had a legal right to take all the water he could capture under his land that was needed by him for his use, even though the use had no [*827] connection with the use of the land as land and required the removal of the water from the premises where the well was located.[58]

Just as the Railroad was not liable to East, the City was not liable to other well owners for the loss of water involved in its transportation. But as we had suggested in *East*, the rule of capture was not absolute. "Undoubtedly," we noted, "the Legislature could prohibit the use of any means of transportation of percolating or artesian water which permitted the escape of excessive amounts, but it has not seen [**32] fit to do so."[59]

55 *154 Tex. 289, 276 S.W.2d 798 (Tex. 1955).*

56 *Id. at 800.*

57 *Id. at 801.*

58 *Id. at 800.*

59 *Id. at 803.*

In *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*,[60] the Court held that a landowner pumping water from wells on its property was not liable for the resulting subsidence in neighboring property. This result, the Court concluded, was necessitated by *East*, which had "adopted the absolute ownership doctrine of underground percolating waters."[61] But without overruling *East*, the Court held that prospectively, a landowner could be liable for subsidence caused by removing groundwater.[62] Avoiding the tension in these seemingly inconsistent views of *East*, Justice Pope argued convincingly in dissent that the rule of capture was irrelevant to the case and that the Court had based its

decision on "the mistaken belief that the case is governed by the ownership of ground water."[63] *East* was about liability for a loss *of* water, not liability for a loss *from* water. In any event, no claim of right to groundwater in place was made or decided.

60 *576 S.W.2d 21 (Tex. 1978).*
61 *Id. at 25.*
62 *Id. at 29-30.*
63 *Id. at 31* (Pope, J., dissenting).

In *City of Sherman v. Public Utility Commission*,[64] a water [**33] utility petitioned the PUC to prohibit the City of Sherman from drilling wells in the utility's service area to obtain water for the City's needs outside the area. The Court concluded that the City's activities were permitted by *East*, which had adopted an "absolute ownership theory regarding groundwater", to which "[a] corollary . . . is the right of the landowner to capture such water."[65] The PUC, we held, had no statutory authority "to regulate groundwater production or adjudicate correlative groundwater rights."[66] Rather, the Legislature had chosen to regulate groundwater use and production through groundwater districts under the Water Code.[67] The issues in the case did not implicate ownership of groundwater in place.

64 *643 S.W.2d 681 (Tex. 1983).*
65 *Id. at 686.*
66 *Id.*
67 *Id.*

Finally, in *Sipriano v. Great Spring Waters of America, Inc.*,[68] we revisited the rule of capture in a factual setting virtually identical to that in *East*: landowners sued their neighbor for pumping so much water (90,000 gallons a day) that their wells were depleted. Once again, we explained:

> The rule of capture answers the question of what remedies, if any, a neighbor has against a landowner based on the landowner's [**34] use of the water under the landowner's land. Essentially, the rule provides that, absent malice or willful waste, landowners have the right to take [*828] all the water they can capture under their land and do with it what they please, and they will not be liable to neighbors even if in so doing they deprive their neighbors of the water's use.[69]

The right to capture was not unfettered; it precluded the plaintiffs' suit but not legislative regulation, which we expressly recognized and encouraged.[70] The concern was that with no common law liability for a landowner's unlimited pumping, legislators had inadequately provided for the protection of groundwater supplies.[71] No issue regarding the ownership of groundwater in place was involved.

68 *1 S.W.3d 75 (Tex. 1999).*
69 *Id. at 76.*
70 *Id. at 79* ("Today, again, we reiterate that the people have constitutionally empowered the Legislature to act in the best interest of the State to preserve our natural resources, including water. We see no reason . . . for the Legislature to feel constrained from taking appropriate steps to protect groundwater. Indeed, we anticipated legislative involvement in groundwater regulation in *East*: [']*In the absence . . . of positive* [**35] *authorized legislation*, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth.[']" (quoting *Houst. & T.C. Ry. v. East, 98 Tex. 146, 81 S.W. 279, 280 (1904)*)).
71 *Id. at 81* (Hecht, J., concurring).

[HN9] But while the rule of capture does not entail ownership of groundwater in place, neither does it preclude such ownership. Although we have never discussed this issue with respect to groundwater, we have done so with respect to oil and gas, to which the rule of capture also applies. In *Stephens County v. Mid-Kansas Oil & Gas Co.*,[72] Mid-Kansas, the assignee of an oil and gas lease, argued that its interest in the minerals was not taxable because, by the rule of capture, they were "subject to appropriation, without the consent of the owner of the tract, through drainage from wells on adjacent lands."[73] The argument "lack[ed] substantial foundation", we explained, because Mid-Kansas could likewise drain oil and gas from adjacent lands.[74]

> Ultimate injury from the net results of drainage, where proper diligence is used is altogether too conjectural to form the basis for the denial of a right of property [**36] in that which is not only plainly as much realty as any other part of the earth's contents, but realty of the highest value to mankind . . . and often worth far more than anything else on or beneath the surface within the proprietor's boundaries.[75]

Ownership of gas in place did not entitle the owner to specific molecules of gas that might move beneath surface tracts but to volumes that, while they could be diminished through drainage, with "proper diligence",

could also be replenished through drainage. Recapping our decision years later, we stated that while the rule of capture, "at first blush, would seem to conflict with the view of absolute ownership of the minerals in place, . . . it was otherwise decided in [*Stephens County*]."[76]

> [N]otwithstanding the fact that oil and gas beneath the surfaee are subject both to capture and administrative regulation, the fundamental rule of absolute ownership of the minerals in place is not affected [*829] in our state.[77]

72 *113 Tex. 160, 254 S.W. 290 (Tex. 1923).*
73 *Id. at 292.*
74 *Id.*
75 *Id.*
76 *Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558, 561 (Tex. 1948).*
77 *Id.*

Most recently, in *Coastal Oil & Gas Corp. v. Garza Energy Trust*,[78] we observed that "the rule of capture determines title [**37] to [natural] gas that drains from property owned by one person onto property owned by another. It says nothing about the ownership of gas that has remained in place."[79] The same is true of groundwater.

78 *268 S.W.3d 1 (Tex. 2008).*
79 *Id. at 14.*

B

We held long ago that oil and gas are owned in place. In *Texas Co. v. Daugherty*,[80] the issue was whether an oil and gas lessee's interest was subject to ad valorem taxation. If the lessee's interest were "a mere franchise or privilege . . . with the usufructuary right . . . to appropriate a portion of such oil and gas as might be discovered," then the interest was part of the value of the land on which the landowner, not the lessee, should be taxed.[81] But we concluded that the lessee's interest was a separate, real interest, "amount[ing] to a defeasible title in fee to the oil and gas in the ground".[82] We recognized that "[b]ecause of the fugitive nature of oil and gas, some courts, emphasizing the doctrine that they are incapable of absolute ownership until captured and reduced to possession and analogizing their ownership to that of things ferae naturae," had held that oil and gas interests, unlike interests in non-fugacious minerals, were not [**38] interests in realty.[83] We thought that the rule of capture provided no "substantial ground" for treating the two kinds of interests differently.[84]

> 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.[85]

[HN10] Notwithstanding the rule of capture, we concluded, a landowner's "right to the oil and gas beneath his land is an exclusive and private property right . . . inhering in virtue of his proprietorship of the land, and of which he may not be deprived without a taking of private property."[86] Ownership of oil and gas in place is the prevailing rule among the states.[87]

80 *107 Tex. 226, 176 S.W. 717 (Tex. 1915).*
81 *Id. at 718.*
82 *Id. at 719.*
83 *Id.*
84 *Id. at 719-720.*
85 *Id. at 720.*
86 *Id. at 722; see also Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 940 (Tex. 1935)* ("The rule in Texas recognizes the ownership of oil and gas in place . . . . Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas [**39] in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining landowner diminishing the oil and gas under one's land by the exercise of the same right of capture. . . . Both rules are subject to regulation under the police power of a state.").
87 *See* HOWARD R. WILLIAMS ET AL., *OIL & GAS LAW § 203.3* (2011).

[HN11] Groundwater, like oil and gas, often exists in subterranean reservoirs in which it is fugacious. Unless the law treats [*830] groundwater differently from oil and gas, *Daugherty* refutes the Authority's argument that the rule of capture precludes ownership in place. The Authority contends that the rule of capture deprives a landowner's interest in groundwater of two attributes essential to the ownership of property: a right of possession (i) from which others are excluded[88] and (ii) which may be enforced. Because a landowner is not entitled to any specific molecules of groundwater or even to any specific amount, the Authority argues that the

landowner has no interest that entitles him [**40] to exclude others from taking water below his property and therefore no ownership in place. The lessee in *Daugherty* made essentially the same argument, and we rejected it. Furthermore, we later held that a landowner is entitled to prohibit a well from being drilled on other property but bottomed in an oil and gas formation under his own -- a slant or deviated well.[89] Thus, a landowner has a right to exclude others from groundwater beneath his property, but one that cannot be used to prevent ordinary drainage.

88 *See College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)* ("The hallmark of a protected property interest is the right to exclude others. That is one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (internal citations and quotation marks omitted).

89 *Hastings Oil Co. v. Tex. Co., 149 Tex. 416, 234 S.W.2d 389, 396 (Tex. 1950).*

The Authority argues that groundwater must be treated differently because the law recognizes correlative rights in oil and gas but not in groundwater. The Authority points to *East*'s observation that "the law recognizes no correlative rights in respect to underground waters percolating [**41] . . . through the earth"[90] but over-reads this statement. As we have explained above, *East* did not rule out an action for "malice or wanton conduct",[91] including waste.[92] Likewise, the rule of capture does not preclude an action for drainage of oil and gas due to waste, as we held in *Elliff v. Texon Drilling Co.*[93] More importantly, however, the Court observed in *Elliff* 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".[94] Similarly, one purpose of the EAAA's regulatory provisions is to afford landowners their fair share of the groundwater beneath their property. In both instances, correlative rights are a creature of regulation rather than the common law. In 1904, when *East* was decided, neither groundwater production nor oil and gas production were regulated, and we indicated that limiting groundwater production might impede public purposes. The State soon decided that regulation of oil and gas production was essential, adopting well-spacing regulations [**42] in 1919,[95] and it has since [*831] determined that the same is true for groundwater production, as for example, in the EAAA.

90 *Hous. & T.C. Ry. v. East, 98 Tex. 146, 81 S.W. 279, 280 (Tex. 1904)* (quoting *Frazier v. Brown, 12 Ohio St. 294, 311 (1861)).*

91 *Id. at 282.*

92 *Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76 (Tex. 1999)* (noting that the rule of capture does not insulate "malice or willful waste" from liability).

93 *210 S.W.2d 558, 146 Tex. 575, 582-583 (Tex. 1949).*

94 *Id. at 562.*

95 *Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 941 (Tex. 1935).*

The Authority argues that regulation of oil and gas production to determine a landowner's fair share is based on the area of land owned and is fundamentally different from regulation of groundwater production. It is true, of course, that the considerations shaping the regulatory schemes differ markedly.[HN12] The principal concerns in regulating oil and gas production are to prevent waste and to provide a landowner a fair opportunity to extract and market the oil and gas beneath the surface of the property. Groundwater is different in both its source and uses. Unlike oil and gas, groundwater in an aquifer is often being replenished from the surface, and while it may be sold [**43] as a commodity, its uses vary widely, from irrigation, to industry, to drinking, to recreation. Groundwater regulation must take into account not only historical usage but future needs, including the relative importance of various uses, as well as concerns unrelated to use, such as environmental impacts and subsidence. But as the State tells us in its petition: "While there are some differences in the rules governing groundwater and hydrocarbons, at heart both are governed by the same fundamental principle: each represents a shared resource that *must* be conserved under the Constitution."[96] In any event, the Authority's argument is that groundwater cannot be treated like oil and gas because landowners have no correlative rights, not because their rights are different. That argument fails.

96 State of Texas, Petition for Review at 11.

Finally, the Authority argues that groundwater is so fundamentally different from oil and gas in nature, use, and value that ownership rights in oil and gas should have no bearing in determining those in groundwater. Hydrocarbons are minerals; groundwater, at least in some contexts, is not.[97] Groundwater is often a renewable resource, replenished in aquifers [**44] like the Edwards Aquifer; is used not only for drinking but for recreation, agriculture, and the environment; and though life-sustaining, has historically been valued much below oil and gas. Oil and gas are essentially non-renewable, are used as a commodity for energy and in manufacturing, and have historically had a market value higher than groundwater. But not all of these characteristics are fixed. Although today the price of crude oil is hundreds

of times more valuable than the price of municipal water, the price of bottled water is roughly equivalent to, or in some cases, greater than the price of oil. To differentiate between groundwater and oil and gas in terms of importance to modern life would be difficult. Drinking water is essential for life, but fuel for heat and power, at least in this society, is also indispensable. Again, the issue is not whether there are important differences between groundwater and hydrocarbons; there certainly are. But we see no basis in these differences to conclude that the common law allows ownership of oil and gas in place but not groundwater.

97 *See TEX. NAT. RESOURCES CODE § 53.1631(a)* ("Unless otherwise expressly provided by statute, deed, patent, [**45] or other grant from the State of Texas, groundwater shall not be considered a mineral in any past or future reservation of title or rights to minerals by the State of Texas.").

In *Elliff*, we restated the law regarding ownership of oil and gas in place:

> [HN13] In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. [*832] 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.[98]

We now hold that this correctly states the common law regarding the ownership of groundwater in place.

98 *146 Tex. 575, 210 S.W.2d 558, 561* (internal citations omitted).

C

The Legislature appears to share this view of the common law. "The ownership and rights of the owner of the land, his lessees and assigns, in underground water" were "recognized" in one provision of the Groundwater Conservation District [**46] Act of 1949 (the "GCDA"),[99] which later became *section 36.002*[100] of the *Water Code*.[101] That bare recognition of landowners' rights did not describe them with specificity, but last year, the Legislature amended *section 36.002*, to set out its fuller understanding of the matter:

> [HN14] (a) The legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property.
>
> (b) The groundwater ownership and rights described by this section:
>
> (1) entitle the landowner, including a landowner's lessees, heirs, or assigns, to drill for and produce the groundwater below the surface of real property, subject to Subsection (d), without causing waste or malicious drainage of other property or negligently causing subsidence, but does not entitle a landowner, including a landowner's lessees, heirs, or assigns, to the right to capture a specific amount of groundwater below the surface of that landowner's land; and
>
> (2) do not affect the existence of common law defenses or other defenses to liability under the rule of capture.[102]

[HN15] By ownership of groundwater as real property, the Legislature appears to mean ownership in place.[103]

99 Act of May 23, 1949, 51st Leg., R.S., ch. 306, [**47] § 1, 1949 Tex. Gen. Laws 559, 562 (codified as TEX. REV. CIV. STAT. ANN. art. 7880-3c(D), later codified as *TEX. WATER CODE § 52.002*).

100 Act of May 29, 1995, 74th Leg., R.S., ch. 933, § 2, 1995 Tex. Gen. Laws 4673, 4680 (adopting *TEX. WATER CODE § 36.002*) ("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 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.").

101 *TEX. WATER CODE § 36.002(a)-(b).*

102 Importantly, the State does not claim to own groundwater.

The State distinguishes its position from the Authority's. The State argues that landowners have ownership rights in groundwater but those rights are "too inchoate" to be protected by the *Takings Clause of the Texas Constitution*. Groundwater ownership, the State contends, cannot entitle a landowner to any specific amount of water because its availability in a rechargeable aquifer is difficult to determine and constantly changing due to climate conditions. In this same vein, amicus curiae Houston-Galveston Subsidence District argues that while [**48] groundwater rights should be severable from the land and freely transferable, the uncertainties [*833] involved in determining ownership to any amount of water preclude constitutional compensation for a taking. But the State acknowledges that its argument cannot be pushed to the extreme. Suppose a landowner were prohibited from all access to groundwater. In its brief, the State concedes: "Given that there is a property interest in groundwater, some manner and degree of groundwater regulation could, under some facts, effect a compensable taking of property."[103] We agree, but the example demonstrates the validity of Day's claim. [HN16] Groundwater rights are property rights subject to constitutional protection, whatever difficulties may lie in determining adequate compensation for a taking.

103 Brief of Petitioner State of Texas at 26.

The rest of *section 36.002*, not quoted here but discussed below, evidences the Legislature's understanding of the interplay between groundwater ownership and groundwater regulation, which forms the backdrop of the issue to which we now turn: whether Day has stated a viable takings claim.

IV

Day alleges that the EAAA's permitting process has deprived him of his groundwater [**49] and therefore constitutes a taking for which compensation is due under *article I, section 17 of the Texas Constitution*. To assess this claim, we begin by surveying the history and current status of groundwater regulation in Texas in order to place the EAAA in context, and then we turn to its application.

A

[HN17] In 1917, following a period of severe droughts[104] and floods,[105] the people of Texas adopted *article XVI, section 59 of the Texas Constitution*, the Conservation Amendment. The Amendment provides in part: "The conservation and development of all of the natural resources of this State . . . are each and all hereby declared to be public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." Thus, the "responsibility for the regulation of natural resources, including groundwater, rests in the hands of the Legislature."[106]

104 *In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin, 642 S.W.2d 438, 446 (Tex. 1982)* ("The droughts in 1910 and 1917 prompted the citizens of Texas to adopt the 'Conservation Amendment' to the Texas Constitution, mandating the conservation of public waters.").

105 *See TEX. CONST. art. XVI, § 59* [**50] interp. commentary, at 402 (West 1993) ("Inspired by the terrific floods in Texas during 1913 and 1914, the citizens began to demand a constructive conservation program and agitated for an amendment to the constitution which would recognize the state's duty to prevent floods, or at least to take steps necessary for the conservation of the state's natural resources.").

106 *Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 77 (Tex. 1999).*

[HN18] The Groundwater Conservation District Act of 1949 was the first significant legislation providing for the conservation and development of groundwater. Efforts to pass a comprehensive, statewide, groundwater management scheme had repeatedly failed.[107] The Act permitted landowners [*834] to petition for creation of a groundwater conservation district to regulate production from an underground reservoir. The petition was directed to the county commissioners' court if the district lay entirely within one county, or to the State Board of Water Engineers if it did not. A district was required to be approved by voters and was governed by an elected board of directors. The Act, with many changes, is now chapter 36 of the Water Code. There are currently ninety-six [**51] groundwater districts covering all or parts of 173 counties.[108] While districts have broad statutory authority,[109] their activities remain under the local electorate's supervision.[110]

107 Edward P. Woodruff, Jr. & James Peter Williams, Jr., Comment, *Texas Groundwater District Act of 1949: Analysis and Criticism*, 30 TEX.L.REV.862, 865-866 (1952) ("During the past fifteen years, several attempts have been made in the Legislature to provide the state with comprehensive groundwater legislation. Bills which would have accomplished this object were introduced in 1937, 1939, 1941, and in 1947. The

rejection of each of these proposed measures made it apparent that if the state were to have any groundwater legislation, some retreat would have to be made from the ideal of a comprehensive code. As a result of compromises between divergent factions of groundwater users, the important and controversial Act of 1949 was passed.").

108 *See* TEX. WATER DEV. BD., 2012 STATE WATER PLAN 23-24 (available from the Texas Water Development Board's website, at http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf).

109 *TEX. WATER CODE § 36.101(a)* ("A district may make and enforce rules, including [**52] rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater and to carry out the powers and duties provided by this chapter.").

110 *Id. §§ 36.011-36.0171.* Voter approval is often the most significant hurdle, as unwanted taxes and groundwater regulation lead to opposition to the creation of new districts. *See* TEX. COMM'N ON ENVTL. QUALITY & TEX. WATER DEV. BD., PRIORITY GROUNDWATER MANAGEMENT AREAS AND GROUNDWATER CONSERVATION DISTRICTS, REPORT TO THE 81ST TEXAS LEGISLATURE 37, tbl.6 (2009) (listing the failed GCDs since 1989), *available at* http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/053_06.pdf.

[HN19] Groundwater conservation districts have little supervision beyond the local level. Each district must develop a groundwater management plan every five years, which aims to address pertinent issues such as water supply needs, management goals, and the amount of water estimated to be used and recharged annually within the district.[111] [**53] The management plan must be submitted for approval by the Texas Water Development Board and its implementation is subject to review by the State Auditor's Office.[112] Districts are also required to participate in joint planning within designated groundwater management areas ("GMAs").[113] The regional water planning process was created in 1997,[114] and since 2001 it has included all of the major and minor aquifers in the State.[115] Now, sixteen regional groundwater management areas cover the State, with their borders mirroring those of the State's major aquifers.[116] About 80% of Texas overlies nine major aquifers and twenty minor aquifers, with the nine major aquifers providing about 97% of the State's groundwater.[117] Since 1995, groundwater conservation districts within a groundwater [*835] management area have been required to work together.[118]

111 *TEX. WATER CODE §§ 36.1072(e), 36.1071.*

112 *Id. §§ 36.1072(a), 36.302(c).*

113 *Id. § 35.002(11).*

114 Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610.

115 Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.22, 2001 Tex. Gen. Laws 1991, 2003 (codified at *TEX. WATER CODE § 35.004*).

116 *See generally 31 TEX. ADMIN. CODE § 356(B)*; TEX. WATER [**54] DEV. BD., GROUNDWATER MANAGEMENT AREAS IN TEXAS (providing a map of the sixteen GMAs), *available at* http://www.twdb.state.tx.us/mapping/maps/pdf/GMA%20map%208x11.pdf.

117 Ronald Kaiser, *Who Owns the Water?: A Primer on Texas Groundwater Law and Spring Flow*, TEX.PARKS & WILDLIFE, July 2005, at 33, *available at* http://www.tamu.edu/faculty/rakwater/research/tpwd_Water_Article.pdf.

118 Act of May 29, 1995, 79th Leg., R.S., ch. 933, § 5, 1995 Tex. Gen. Laws 4673, 4688 (codified at *TEX. WATER CODE § 36.108*).

Still, [HN20] as chapter 36 states, "[g]roundwater conservation districts created as provided by this chapter are the state's preferred method of groundwater management through rules developed, adopted, and promulgated by a district in accordance with the provisions of this chapter."[119] *Section 36.113* provides that districts must "require a permit for the drilling, equipping, operating, or completing of wells or for substantially altering the size of wells or well pumps."[120] In acting on permit requests, a district must consider, among other things, whether "the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders", whether "the proposed [**55] use of water is dedicated to any beneficial use", and whether "the proposed use of water is consistent with the district's approved management plan".[121] In issuing permits, a district must also "manage total groundwater production on a long-term basis to achieve an applicable desired future condition", considering estimates of groundwater availability.[122]

119 *TEX. WATER CODE § 36.0015*; *cf. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 81 (Tex. 1999)* (Hecht, J., concurring) ("Actually, such districts are not just the preferred method of groundwater management, they are the only method presently available.").

120 *TEX. WATER CODE § 36.113(a).*

121 *Id. § 36.113(d)(2)-(4).*
122 *Id. § 36.1132(b)*

Districts' regulatory authority is broad:

> [HN21] In order to minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure, to control subsidence, to prevent interference between wells, to prevent degradation of water quality, or to prevent waste, a district by rule may regulate:
>
> (1) the spacing of water wells by:
>
> (A) requiring all water wells to be spaced a certain distance from property lines or adjoining wells;
>
> (B) requiring wells with a certain production capacity, [**56] pump size, or other characteristic related to the construction or operation of and production from a well to be spaced a certain distance from property lines or adjoining wells; or
>
> (C) imposing spacing requirements adopted by the board; and
>
> (2) the production of groundwater by:
>
> (A) setting production limits on wells;
>
> (B) limiting the amount of water produced based on acreage or tract size;
>
> (C) limiting the amount of water that may be produced from a defined number of acres assigned to an authorized well site;
>
> (D) limiting the maximum amount of water that may be produced on the basis of acre-feet per acre or gallons per minute per well site per acre;
>
> (E) managed depletion; or
>
> (F) any combination of the methods listed above in Paragraphs (A) through (E).[123]

123 *Id. § 36.116(a).*

[HN22] *Section 36.116(b)* provides that "[i]n promulgating any rules limiting groundwater production, the district may preserve historic or existing use before the effective date of the rules to the maximum extent [*836] practicable consistent with the district's management plan . . . and as provided by *Section 36.113*."[124] In *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District*,[125] we rejected the argument that [**57] a district's discretion in preserving "historic or existing use" was limited to the amount of water permitted. Rather, we said,

> the amount of groundwater withdrawn and its purpose are both relevant when identifying an existing or historic use to be preserved. Indeed, in the context of regulating the production of groundwater while preserving an existing use, it is difficult to reconcile how the two might be separated. . . . [B]oth the amount of water to be used and its purpose are normal terms of a groundwater production permit and are likewise a part of any permit intended to "preserve historic or existing use." A district's diseretion to preserve historic or existing use is accordingly tied both to the amount and purpose of the prior use.[126]

124 *Id. § 36.116(b).*
125 *263 S.W.3d 910 (Tex. 2004).*
126 *Id. at 916.*

[HN23] Districts may have different rules; indeed, a district may adopt different rules for different areas of the district.[127] Special legislation, unique to each district, may also grant powers beyond those provided in chapter 36.[128]

127 *TEX. WATER CODE § 36.116(d)* ("For better management of the groundwater resources located in a district or if a district determines that conditions in or use [**58] of an aquifer differ substantially from one geographic area of the district to another, the district may adopt different rules for: (1) each aquifer, subdivision of an aquifer, or geologic strata located in whole or in part within the boundaries of the district; or (2) each geographic area overlying an aquifer or subdivision of an aquifer located in whole or in part within the boundaries of the district.").

128 *See, e.g.*, Act of June 18, 2005, 79th Leg., R.S., ch. 1324, § 1, 2005 Tex. Gen. Laws 4138 (creating the Corpus Christi Aquifer Storage and Recovery Conservation District); Act of June 17, 2005, 79th Leg., R.S., ch. 661, § 1, 2005 Tex. Gen. Laws 1644 (creating the Victoria County Groundwater Conservation District).

B

[HN24] Although the Edwards Aquifer Authority is a "conservation and reclamation district"[129] created under the Conservation Amendment,[130] its powers and duties are governed by the EAAA, not by chapter 36 of the Water Code. The EAAA does not refer to chapter 36. The Authority is responsible not only for permitting groundwater use but for "protect[ing] terrestrial and aquatic life",[131] specifically, "species that are designated as threatened or endangered under applicable federal [**59] or state law".[132]

129 EAAA § 1.02(a) ("A conservation and reclamation district, to be known as the Edwards Aquifer Authority, is created . . . .").

130 *Id.* § 1.02(b) ("The authority is created under and is essential to accomplish the purposes of *Article XVI, Section 59, of the Texas Constitution.*").

131 *Id.* § 1.01.

132 *Id.* § 1.14(a)(7). The Legislature passed the EAAA, in part, to end federal litigation that sought judicial regulation of the Edwards Aquifer. *See, e.g., Sierra Club v. City of San Antonio, 112 F.3d 789 (5th Cir. 1997)* (vacating preliminary injunction entered pursuant to the Endangered Species Act for lack of a showing of probable success on the merits following enactment of the EAAA); *Edwards Aquifer Auth. v. Bragg, 21 S.W.3d 375, 377 (Tex. App.--San Antonio 2000), aff'd, 71 S.W.3d 375 (Tex. 2002)*. Chapter 36 does not mention endangered species.

[*837] As already noted, [HN25] the EAAA requires the Authority, in issuing permits, to give preference to "existing users", considering only the amounts of groundwater put to beneficial use during the twenty-year historical period ending May 31, 1993. The Authority received some 1,100 IRP applications by the December 30, 1996 filing deadline, claiming [**60] 834,244 acre-feet per year, far more than the 450,000 acre-feet-per-year cap then in place. Approximately 58% of the applications were for irrigation, 20% for industrial use, 15% for municipal use, and 7% for permit-exempt domestic and livestock wells.[133] The Authority recommended denying 22% of the IRP applications and reducing the permitted amounts for 71% of the applications granted.[134] Of the total permitted annual withdrawal of 563,300 acre-feet, approximately 47% was for irrigation, 13% for industrial use, and 40% for municipal use. Some 35% of the applicants requested review.[135] (Day's contest was the first one decided.) Currently, the Authority has issued 1,975 permits to the limit of its statutory cap of 572,000 acre-feet per year.[136]

133 *See* Darcy Alan Frownfelter, *Edwards Aquifer Authority, in* ESSENTIALS OF TEXAS WATER RESOURCES 364-365 (Mary K. Sahs ed., 2009).

134 *Id.* at 365-366.

135 *Id.* at 366.

136 EAAA § 1.14(c); Edwards Aquifer Authority, *Groundwater Permit List*, http://www.edwardsaquifer.org/pweb/PermitList.aspx (last visited Feb. 23, 2012) (authorizing 571,599.500 acre-feet).

Numerous facial constitutional challenges to the EAAA were asserted in *Barshop v. Medina County Underground* [**61] *Water Conservation District*,[137] and we rejected them all, concluding that the EAAA "is a valid exercise of the police power necessary to safeguard the public safety and welfare."[138] One claim was that the Act's permitting process, on its face, constituted an uncompensated taking in violation of *article I, section 17 of the Texas Constitution*. The parties differed over whether landowners had a property right in groundwater subject to the constitutional provision. We explained their positions as follows:

> Plaintiffs concede that the State has the right to regulate the use of underground water, but maintain that they own the water beneath their land and that they have a vested property right in this water. The State insists that, until the water is actually reduced to possession, the right is not vested and no taking occurs. Thus, the State argues that no constitutional taking occurs under the statute for landowners who have not previously captured water, while Plaintiffs argue that these landown-

> ers have had a constitutional deprivation of property rights. The parties simply fundamentally disagree on the nature of the property rights affected by this Act.[139]

Noting that we had "not previously [**62] considered the point at which water regulation unconstitutionally invades the property rights of landowners", we concluded that that "complex and multi-faceted" issue was not properly presented by a facial challenge to the Act.[140]

> Assuming without deciding that Plaintiffs possess a vested property right in the water beneath their land, the State still can take the property for a public use as long as adequate compensation is provided. The Act expressly provides that the Legislature "intends that just [*838] compensation be paid if implementation of [the Act] causes a taking of private property or the impairment of a contract in contravention of the Texas or federal constitution." Based on this provision in the Act, we must assume that the Legislature intends to compensate Plaintiffs for any taking that occurs. As long as compensation is provided, the Act does not violate *article I, section 17*.[141]

137 *925 S.W.2d 618 (Tex. 1996)*.
138 *Id. at 635*.
139 *Id. at 625* (citation omitted).
140 *Id. at 626*.
141 *Id. at 630-631* (citation omitted) (quoting EAAA § 1.07).36

Today we have decided that landowners do have a constitutionally compensable interest in groundwater, and we come at last to the issue not presented [**63] in *Barshop*: whether the EAAA's regulatory scheme has resulted in a taking of that interest.

C

As we noted in *Sheffield Development Co. v. City of Glenn Heights*,[142][HN26] in construing *article I, section 17 of the Texas Constitution*, we have generally been guided by the United States Supreme Court's construction and application of the similar guarantee provided by the *Fifth Amendment to the United States Constitution* and made applicable to the states by the *Fourteenth Amendment*.[143] We described the foundation principle of federal regulatory takings jurisprudence as follows:

> "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 [**64] as a taking", adding, "this is a question of degree -- and therefore cannot be disposed of by general propositions." "[T]he question at bottom is upon whom the loss of the changes desired *should* fall."[144]

142 *140 S.W.3d 660 (Tex. 2004)*.
143 *Id. at 669* ("The two guarantees, though comparable, are worded differently. The Texas Constitution provides that '[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . .' The *Takings Clause of the Fifth Amendment* states: 'nor shall private property be taken for public use without just compensation.' . . . [I]t could be argued that the differences in the wording of the two provisions are significant, [but absent such an argument] we . . . look to federal jurisprudence for guidance, as we have in the past . . ." (footnotes omitted)).
144 *Id. at 670* (footnotes omitted) (emphasis in original) (quoting *Pa. Coal Co. v. Mahon, 260 U.S. 393, 413, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922)*).

The Supreme Court has developed three analytical categories, as summarized in *Lingle v. Chevron U.S.A. Inc.*:

> [HN27] Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for *Fifth Amendment* [**65] purposes. First, where government requires an owner to suffer a permanent physical invasion of her property -- however minor -- it must

provide just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp., [458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868] (1982)* (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings [*839] effected a taking). A second categorical rule applies to regulations that completely deprive an owner of "*all* economically beneficial us[e]" of her property. [*Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)* (emphasis in original).] . . .

Outside these two relatively narrow categories (and the special context of land-use exactions . . .), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City, [438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631] (1978)*. The Court in *Penn Central* acknowledged that it had hitherto been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but identificd "several factors that have particular significance." [*Id., at 124.*] Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation [**66] has interfered with distinct investment-backed expectations." *Ibid.* In addition, the "character of the governmental action" -- for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good" -- may be relevant in discerning whether a taking has occurred. *Ibid.* The *Penn Central* factors -- though each has given rise to vexing subsidiary questions -- have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or Lucas rules.

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto, Lucas,* and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.[145]

145 *544 U.S. 528, 538-539, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)* (citations omitted).

We followed [**67] this analytical structure in *Sheffield,* adding that all of the surrounding circumstances must be considered in applying "a fact-sensitive test of reasonableness",[146] but in the end, "whether the facts are sufficient to constitute a taking is a question of law."[147]

146 *Sheffield, 140 S.W.3d at 672* (quoting *City of Coll. Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex.1984)* (internal quotation marks omitted).

147 *Id. at 673* (quoting *Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 933 (Tex.1998)).*

The first category -- involving a physical invasion of property -- does not apply to the present case. It is an interesting question, and one we need not decide here, whether regulations depriving a landowner of all access to groundwater -- confiscating it, in effect -- would fall into the category. The EAAA does not restrict landowners' access to as much as 25,000 gallons of groundwater a day for domestic and livestock use.[148] Also, we have held that Day is entitled to a permit for fourteen acre-feet of water per year for irrigation.

148 EAAA §§ 1.15(b), 1.16(c), 1.33.

With respect to the second category -- for a deprivation of all economically beneficial [*840] use of property -- and the first of the three [**68] *Penn Central* factors for the third category -- the economic impact on the claimant -- the summary judgment record before us is inconclusive. Day's permit will not allow him to irrigate as much as his predecessors, who used well water flowing into the lake. By making it much more expensive, if not impossible, to raise crops and graze cattle, the denial of Day's application certainly appears to have had a significant, negative economic impact on him, though it may be doubted whether it has denied him *all* economically beneficial use of his property.

The second *Penn Central* factor -- the interference with investment-backed expectations -- is somewhat difficult to apply to groundwater regulation under the EAAA. Presumably, Day knew before he bought the

property that the Act had passed the year before and could have determined from the same investigation he made later that he could not prove much historical use of groundwater to obtain a permit. Had all this information demonstrated that his investment in the property was not justified, one could argue that he had no reasonable expectation with which the EAAA could interfere. But the government cannot immunize itself from its constitutional duty [**69] to provide adequate compensation for property taken through a regulatory scheme merely by discouraging investment. While Day should certainly have understood that the Edwards Aquifer could not supply landowners' unlimited demands for water, we cannot say that he should necessarily have expected that his access to groundwater would be severely restricted. We underscore "necessarily" because there is little in the record to illuminate what his expectations were or reasonably should have been. In any event, no single *Penn Central* factor is determinative; all three must be evaluated together, as well as any other relevant considerations.

[HN28] The third *Penn Central* factor focuses on the nature of the regulation and is not as factually dependent as the other two. Unquestionably, the State is empowered to regulate groundwater production. In *East*, we concluded that there were no correlative rights in groundwater "[i]n the absence of . . . legislation",[149] suggesting that legislation would be permitted. A few years later, the Conservation Amendment made groundwater regulation "the responsibility . . . of the Legislature."[150] Groundwater provides 60% of the 16.1 million acre-feet of water used in [**70] Texas each year.[151] In many areas of the state, and certainly in the Edwards Aquifer, demand exceeds supply. Regulation is essential to its conservation and use.

149 *Hous. & T.C. Ry. v. East, 98 Tex. 146, 81 S.W. 279, 280 (Tex. 1904).*

150 *Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 77 (Tex. 1999).*

151 *See* TEX. WATER DEV. BD., 2012 STATE WATER PLAN 163.

[HN29] As with oil and gas, one purpose of groundwater regulation is to afford each owner of water in a common, subsurface reservoir a fair share.[152] Because a reservoir's supply of oil or gas cannot generally be replenished, and because oil and gas production is most commonly used solely as a commodity for sale, land surface area is an important metric in determining an owner's fair share. Reasonable regulation aims at allowing an owner to withdraw the [*841] volume beneath his property and sell it. Groundwater is different. Aquifers are often recharged by rainfall, drainage, or other surface water. The amount of groundwater beneath the surface may increase as well as decrease; any volume associated with the surface is constantly changing. Groundwater's many beneficial uses -- for drinking, agriculture, industry, and recreation -- often do not involve a [**71] sale of water. It value is realized not only in personal consumption but through crops, products, and diversion. Groundwater may be used entirely on the land from which it is pumped, or it may be transported for use or sale elsewhere. Consequently, regulation that affords an owner a fair share of subsurface water must take into account factors other than surface area.

152 *See Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558, 562 (Tex. 1948)* ("[O]ur courts, in decisions involving well-spacing regulations of our Railroad Commission, have frequently announced the sound view that each landowner should be afforded the opportunity to produce his fair share of the recoverable oil and gas beneath his land . . . .").

As explained above, [HN30] chapter 36 gives groundwater conservation districts the discretion in regulating production to "preserve historic or existing use".[153] In *Guitar Holding*, district rules required that a groundwater permit amount be based on the applicant's use of water for irrigation during a specified historical period. Guitar Holding, one of the largest landowners in the county, had irrigated only a small part of its land during the period.[154] When the district's rules took effect, [**72] the permits Guitar Holding received were limited in amount. Others who had irrigated more obtained permits for greater amounts. Meanwhile, a market for transporting water for consumption outside the district had developed, and landowners were turning from irrigation to selling water in the new market. Guitar Holding complained that the rules preserved only historic *amounts*, not historic *use*, and gave those who had used water for irrigation a perpetual franchise to transport it for sale. We agreed that "use" under the statute included purpose as well as amount.[155]

153 TEXAS WATER CODE § 36.116(b).

154 *Guitar Holding Co. v. Hudspeth Cnty. Underground Water Conservation Dist., 263 S.W.3d 910, 914-915 (Tex. 2008).*

155 *Id. at 916.*

As we have seen, [HN31] chapter 36 requires groundwater districts to consider several factors in permitting groundwater production, among them the proposed use of water, the effect on the supply and other permittees, a district's approved management plan.[156] By contrast, the EAAA requires that permit amounts be determined based solely on the amount of beneficial use during the historical period and the available water sup-

ply. Under the EAAA, a landowner may be deprived of all [**73] use of groundwater other than a small amount for domestic or livestock use,[157] merely because he did not use water during the historical period. The Authority argues that basing permits on historical use is sound policy because it recognizes the investment landowners have made in developing groundwater resources. But had the permit limitation been anticipated before the EAAA was passed, landowners would have been perversely incentivized to pump as much water as possible, even if not put to best use, to preserve the right to do so going forward. Preserving groundwater for future use has been an important strategy for groundwater rights owners. For example, amicus curiae Canadian River Municipal Water Authority argues that it has acquired groundwater rights to protect supplies for municipal use but has not produced them, waiting instead until they become necessary. The Authority's policy argument is flawed.

156 *TEX. WATER CODE § 36.113(d)(2)-(4).*
157 EAAA §§ 1.15(b), 1.16(c), and 1.33.

[*842] The Authority argues that this use-it-or-lose-it limitation is legally justified by *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*.[158] There we held that [**74] landowners who had not used water from the Upper Guadalupe River during a five-year historical period could be denied a permit for such water. We had previously upheld the cancellation of permits for use of river water after ten years' non-use.[159] But riparian rights are usufructuary, giving an owner only a right of use,[160] not complete ownership. Furthermore, non-use of groundwater conserves the resource, "whereas[] the non-use of appropriated waters is equivalent to waste."[161] To forfeit a landowner's right to groundwater for non-use would encourage waste.

158 *642 S.W.2d 438 (Tex. 1982).*
159 *Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642 (Tex. 1971).*
160 *Guadalupe, 642 S.W.2d at 444* ("It is true that riparians, whose land grants were acquired before July 1, 1895, have a vested right in the use of the non-flood waters, but that vested right is to a usufructory use of what the state owns. A usufruct has been defined as the right to use, enjoy and receive the profits of property that belongs to another.").
161 *Id. at 445* (quoting *Wright, 464 S.W.2d at 647*).

As already discussed,[HN32] the Legislature last year amended *section 36.002 of the Water Code* to "recognize[] that a landowner owns the groundwater [**75] below the surface of the landowner's land as real property." Regarding groundwater regulation, *section 36.002* continues:

> [HN33] (c) Nothing in this code shall be construed as granting the authority to deprive or divest a landowner, including a landowner's lessees, heirs, or assigns, of the groundwater ownership and rights described by this section.
>
> (d) This section does not:
>
> (1) prohibit a district from limiting or prohibiting the drilling of a well by a landowner for failure or inability to comply with minimum well spacing or tract size requirements adopted by the district;
>
> (2) affect the ability of a district to regulate groundwater production as authorized under *Section 36.113*, *36.116*, or *36.122* or otherwise under this chapter or a special law governing a district; or
>
> (3) require that a rule adopted by a district allocate to each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres owned by the landowner.
>
> (e) This section does not affect the ability to regulate groundwater in any manner authorized [for the Edwards Aquifer Authority, the Harris-Galveston Subsidence District, and the Fort Bend Subsidence District].

Subsections (c) [**76] and (e) appear to be in some tension. [HN34] Under the EAAA, a landowner can be prohibited from producing groundwater except for domestic and livestock use. This regulation, according to subsection (e), is unaffected by the Legislature's recognition of groundwater ownership in subsection (a). But subsection (c) abjures all "authority to deprive or divest a

landowner . . . of . . . groundwater ownership and rights". If prohibiting all groundwater use except for domestic and livestock purposes does not divest a landowner of groundwater ownership, then either the groundwater rights recognized by *section 36.002* are extremely limited, or else by "deprive" and "divest" subsection (e) does not include a taking of property rights for which adequate compensation is [*843] constitutionally guaranteed. We think the latter is true. The EAAA itself states: "The legislature intends that just compensation be paid if implementation of this article causes a taking of private property or the impairment of a contract in contravention of the Texas or federal constitution."[162] The requirement of compensation may make the regulatory scheme more expensive, but it does not affect the regulations themselves or their goals [**77] for groundwater production.

162 EAAA § 1.07.

[HN35] The Legislature has declared that "rules developed, adopted, and promulgated by a district in accordance with the provisions of [chapter 36]" comprise "the state's preferred method of groundwater management".[163] Chapter 36 allows districts to consider historical use in permitting groundwater production, but it does not limit consideration to such use.[164] Neither the Authority nor the State has suggested a reason why the EAAA must be more restrictive in permitting groundwater use than chapter 36, nor does the Act suggest any justification. But even if there were one, a landowner cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during an historical period and supply is limited.

163 *TEX. WATER CODE § 36.0015.*
164 *See generally id. § 36.116.*

In sum, the three *Penn Central* factors do not support summary judgment for the Authority and the State. A full development of the record may demonstrate that EAAA regulation is too restrictive of Day's groundwater rights and without justification in the overall regulatory scheme. We therefore agree with the court of appeals that summary judgment against [**78] Day's takings claim must be reversed.

D

The Authority warns that if its groundwater regulation can result in a compensable taking, the consequences will be nothing short of disastrous. A great majority of landowners in its area, it contends, cannot show the historical use necessary for a permit, and therefore the potential number of takings claims is enormous. The Authority worries that the financial burden of such claims could make regulation impossible, or at least call into question the validity of existing permits. Regulatory takings litigation is especially burdensome, the Authority notes, because of the uncertainties in applying the law that increase the expense and risk of liability. And the uncertainties are worse with groundwater regulation, the Authority contends, because there is no sure basis for determining permit amounts other than historical use. Moreover, the Authority is concerned that takings litigation will disrupt the robust market that has developed in its permits and that buyers will be wary of paying for permits that may later be reduced.

It must be pointed out that the Authority has identified only three takings claims that have been filed in the more than fifteen [**79] years that it has been in operation. While the expense of such litigation cannot be denied, groundwater regulation need not result in takings liability. The Legislature's general approach to such regulation has been to require that all relevant factors be taken into account. The Legislature can discharge its responsibility under the Conservation Amendment without triggering the *Takings Clause*. But the *Takings Clause* ensures that the problems of a limited public resource -- the water supply -- are shared by the public, not foisted onto a few. We cannot know, of [*844] course, the extent to which the Authority's fears will yet materialize, but the burden of the *Takings Clause* on government is no reason to excuse its applicability.

V

We turn briefly to Day's other constitutional claims.

Day contends that he was denied procedural due process in the administrative proceedings before the State Office of Administrative Hearings ("SOAH"). First, he complains that he was not allowed to challenge the constitutionality of the EAAA. But as a rule, an agency lacks authority to decide such an issue,[165] and Day points to no exception for this case. Second, Day complains that his case should have been heard by [**80] the Authority's full board of directors rather than an administrative law judge. But the Legislature created SOAH "to serve as an independent forum for the conduct of adjudicative hearings" and "to separate the adjudicative function from the investigative, prosecutorial, and policymaking functions in the executive branch".[166] SOAH was authorized to hear Day's case,[167] and Day does not explain how a hearing in an independent forum violated his constitutional rights. Third, Day complains that an administrative law judge's statutory authority to "communicate ex parte with an agency employee who has not participated in a hearing in the case for the purpose of using the special skills or knowledge of the agency and its staff in evaluating the evidence"[168] violates constitutional guarantees of due process and open courts. The authority quoted is an exception to the general statutory rule prohibiting ex

parte contacts.[169] We need not address Day's argument because he points to no ex parte contacts in this case.

165 *Cent. Power & Light Co. v. Sharp, 960 S.W.2d 617, 618 (Tex. 1997)* (per curiam) ("Where, as here, the final agency order is challenged in the trial court on the ground that the underlying [**81] statute is unconstitutional, the agency lacks the authority to decide that issue.").

166 *TEX. GOV'T CODE § 2003.021(a).*

167 *Id. § 2003.021(b)(4)* ("[SOAH] may conduct . . . administrative hearings . . . in matters voluntarily referred to the office by a governmental entity.").

168 *Id. § 2001.061(c).*

169 *Id. § 2001.061(a)* ("Unless required for the disposition of an ex parte matter authorized by law, a member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or a representative of those entities, except on notice and opportunity for each party to participate.").

Day argues that the substantial evidence rule deprives him of due process by restricting the evidence he can present on judicial review of the administrative decision. Day does not identify evidence he was prevented from presenting in the administrative proceeding that would have affected the Authority's decision. The substantial evidence rule does not operate to restrict Day's evidence on his takings claim.[170]

170 *See City of Dall. v. Stewart, 361 S.W.3d 562, 573, 2012 Tex. LEXIS 113, *32 (Tex. 2012).*

Day [**82] complains that the Authority acted arbitrarily by indicating its preliminary approval of a 600 acre-feet permit, granting his application for a replacement well, which he drilled at a cost of $95,000, then limiting his permit to 14 acre feet. But the Authority clearly communicated to Day that neither decision suggested what its final decision would be.

[*845] Finally, Day complains that *section 36.066(g) of the Water Code*,[171] which authorizes an award of attorney fees and expenses to a groundwater conservation district that prevails in a suit like this but not to an opposing party, violates equal protection. Day does not argue that the statute "'jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic,'"[172] and thus "the law will be upheld as long as it is rationally related to a legitimate state interest."[173] We agree with the court of appeals that [HN36] the State has a legitimate interest in "discourag[ing] suits against groundwater districts to protect them from costs and burdens associated with such suits", and a cost-shifting statute is rationally related to advancing that interest.[174]

171 *TEX. WATER CODE § 36.066(g)* ("If the district prevails [**83] in any suit other than a suit in which it voluntarily intervenes, the district may seek and the court shall grant, in the same action, recovery for attorney's fees, costs for expert witnesses, and other costs incurred by the district before the court. The amount of the attorney's fees shall be fixed by the court.").

172 *First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 639 (Tex. 2008)* (quoting *Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992)).*

173 *Id. at 639.*

174 *Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 755 (Tex. App.--San Antonio 2008).*

Accordingly, we conclude that Day's various constitutional claims, other than his takings claim, are without merit.

* * *

For these reasons, the judgment of the court of appeals is

Affirmed.

Nathan L. Hecht

Justice

Opinion delivered: February 24, 2012

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Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 2012 Tex. LEXIS 161, 55 Tex. Sup. Ct. J. 343, 42 Envtl. L. Rep. 20052 (Tex. 2012)

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SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary
No negative subsequent appellate history.
Citing References:

⚠	Cautionary Analyses:	**Distinguished (3)**
	Positive Analyses:	Followed (2)
	Neutral Analyses:	Dissenting Op. (1), Explained (2)
	Other Sources:	Law Reviews (35), Statutes (6), Treatises (24), Court Documents (7)

LexisNexis Headnotes: HN3 (2), HN5 (4), HN10 (2), HN11 (3), HN12 (5), HN13 (5), HN15 (2), HN19 (4), HN20 (4), HN22 (2), HN26 (3), HN27 (4), HN28 (3), HN29 (6), HN32 (2), HN34 (5)

PRIOR HISTORY (4 citing references)

1. *In re Edwards Aquifer Auth.*, 217 S.W.3d 581, 2006 Tex. App. LEXIS 8934 (Tex. App. San Antonio 2006)

2. **Rehearing denied by:**
In re Edwards Aquifer Auth., 2006 Tex. App. LEXIS 11291 (Tex. App. San Antonio Dec. 5, 2006)

3. **Judgment entered by, Remanded by:**
Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 2008 Tex. App. LEXIS 9777 (Tex. App. San Antonio 2008)

4. **Motion denied by:**
Edwards Aquifer Auth. v. Day, 2010 Tex. LEXIS 138 (Tex. Feb. 5, 2010)

Affirmed by, Remanded by (CITATION YOU ENTERED):
Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 2012 Tex. LEXIS 161, 55 Tex. Sup. Ct. J. 343, 42 Envtl. L. Rep. 20052 (Tex. 2012)

SUBSEQUENT APPELLATE HISTORY (1 citing reference)

5. **Motion for rehearing on petition for review denied by:**
Edwards Aquifer Auth. v. Day, 2012 Tex. LEXIS 488 (Tex. June 8, 2012)

CITING DECISIONS (11 citing decisions)

TEXAS COURT OF APPEALS

6. **Distinguished by, Explained by:**
City of Lubbock v. Coyote Lake Ranch, LLC, 2014 Tex. App. LEXIS 7535 (Tex. App. Amarillo July 10, 2014) **LexisNexis Headnotes HN5, HN11, HN12, HN13, HN15, HN19, HN20, HN29, HN32, HN34**
Distinguished by:
2014 Tex. App. LEXIS 7535

Explained by:
2014 Tex. App. LEXIS 7535

7. **Distinguished by, Explained by:**
City of Lubbock v. Coyote Lake Ranch, LLC, 2014 Tex. App. LEXIS 6708, 44 Envtl. L. Rep. 20139 (Tex. App. Amarillo 2014) **LexisNexis Headnotes HN5, HN11, HN12, HN13, HN15, HN19, HN20, HN29, HN32, HN34**
Distinguished by:
2014 Tex. App. LEXIS 6708

Explained by:
2014 Tex. App. LEXIS 6708

8. **Cited by:**
City of Dallas v. Millwee-Jackson J.V., 2014 Tex. App. LEXIS 3691 (Tex. App. Dallas Apr. 4, 2014) **LexisNexis Headnotes HN26, HN27**
2014 Tex. App. LEXIS 3691

9. **Cited by:**
Concho River Basin Water Conservancy Ass'n v. Tex. Comm'n on Envtl. Quality, 2013 Tex. App. LEXIS 14622 (Tex. App. Amarillo Dec. 3, 2013)
2013 Tex. App. LEXIS 14622

10. **Distinguished by, Followed by:**
Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118, 2013 Tex. App. LEXIS 13854 (Tex. App. San Antonio 2013) **LexisNexis Headnotes HN3, HN5, HN12, HN13, HN19, HN20, HN22, HN26, HN27, HN28, HN29, HN34**
Distinguished by:
421 S.W.3d 118 *p.127*

Followed by:
421 S.W.3d 118 *p.137*

11. **Followed by, Cited by:**
Walton v. City of Midland, 409 S.W.3d 926, 2013 Tex. App. LEXIS 11246 (Tex. App. Eastland 2013) **LexisNexis Headnotes HN10, HN26, HN27**
Followed by:
409 S.W.3d 926 *p.931*

Cited by:
409 S.W.3d 926 *p.930*

12. **Cited by:**
Edwards Aquifer Auth. v. Bragg, 2013 Tex. App. LEXIS 10838, 43 Envtl. L. Rep. 20202 (Tex. App. San Antonio 2013) **LexisNexis Headnotes HN3, HN5, HN12, HN13, HN19, HN20, HN22, HN27, HN28, HN29, HN34**
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13. **Cited by:**
City of McAllen v. Ramirez, 2013 Tex. App. LEXIS 8887 (Tex. App. Corpus Christi July 18, 2013) **LexisNexis Headnotes HN28**
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930 F. Supp. 2d 716 *p.788*

ANNOTATED STATUTES (6 Citing Statutes)

17. *Tex. Const. Art. I, @ 17*

18. *Tex. Water Code sec. 11.021*

19. *Tex. Water Code sec. 36.002*

20. *Tex. Water Code sec. 36.066*

21. *Tex. Water Code sec. 36.113*

22. *Tex. Water Code sec. 36.116*

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25. *SYMPOSIUM: THE LAW AND POLICY OF HYDRAULIC FRACTURING: ADDRESSING THE ISSUES OF THE NATURAL GAS BOOM: Recognizing the Shared Ownership of Subsurface Resource Pools*, 63 Case W. Res. L. Rev. 1041 (2013)
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26. *NOTE: Toward a Management Doctrine for Texas Groundwater*, 40 Ecology L.Q. 483 (2013)

27. *ARTICLE: Rethinking Transboundary Ground Water Resources Management: A Local Approach along the Mexico-U.S. Border*, 25 Geo. Int'l Envtl. L. Rev. 95 (2012)

28. *ARTICLE: The "Fair Share" Concept in Takings Law*, 19 Hastings W.-N.W. J. Env. L. & Pol'y 357 (2013)

29. *DEPARTMENT: LEGAL TRENDS: CLAIMS AGAINST PERPETUAL CARE CEMETERIES: AN EXCLUSIVE REMEDY*, 51 Houston Lawyer 44 (2014)

30. *ARTICLE: A PRIMER ON GROUNDWATER LAW*, 49 Idaho L. Rev. 265 (2013)

31. *ARTICLE: Escaping the Sporhase Maze: Protecting State Waters Within the Commerce Clause*, 73 La. L. Rev. 175 (2012)
    73 La. L. Rev. 175 *p.175*

32. *PROFESSIONAL ARTICLE: Coherence Between Water and Energy Policies*, 53 Nat. Resources J. 117 (2013)
    53 Nat. Resources J. 117 *p.117*

33. *ARTICLE: Assessing Institutional Ability to Support Adaptive, Integrated Water Resources Management*, 91 Neb. L. Rev. 805 (2013)
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34. *SYMPOSIUM: OKLAHOMA'S 21ST CENTURY WATER CHALLENGES: GROUNDWATER: A COMPARATIVE ANALYSIS OF THE REGULATION OF GROUNDWATER ENCOUNTERED IN SURFACE MINING*, 64 Okla. L. Rev. 539 (2012)
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Appendix "E"

Texas Water Code §36.002

September 1, 2015.

Sec. 36.002. OWNERSHIP OF GROUNDWATER. (a) The legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property.

(b) The groundwater ownership and rights described by this section entitle the landowner, including a landowner's lessees, heirs, or assigns, to:

(1) drill for and produce the groundwater below the surface of real property, subject to Subsection (d), without causing waste or malicious drainage of other property or negligently causing subsidence; and

(2) have any other right recognized under common law.

(b-1) The groundwater ownership and rights described by this section do not:

(1) entitle a landowner, including a landowner's lessees, heirs, or assigns, to the right to capture a specific amount of groundwater below the surface of that landowner's land; or

(2) affect the existence of common law defenses or other defenses to liability under the rule of capture.

(c) Nothing in this code shall be construed as granting the authority to deprive or divest a landowner, including a landowner's lessees, heirs, or assigns, of the groundwater ownership and rights described by this section.

(d) This section does not:

(1) prohibit a district from limiting or prohibiting the drilling of a well by a landowner for failure or inability to comply with minimum well spacing or tract size requirements adopted by the district;

(2) affect the ability of a district to regulate groundwater production as authorized under Section 36.113, 36.116, or 36.122 or otherwise under this chapter or a special law governing a district; or

(3) require that a rule adopted by a district allocate to each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres owned

by the landowner.

(e) This section does not affect the ability to regulate groundwater in any manner authorized under:

(1) Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, for the Edwards Aquifer Authority;

(2) Chapter 8801, Special District Local Laws Code, for the Harris-Galveston Subsidence District; and

(3) Chapter 8834, Special District Local Laws Code, for the Fort Bend Subsidence District.

Added by Acts 1995, 74th Leg., ch. 933, Sec. 2, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 966, Sec. 2.31, eff. Sept. 1, 2001.

Amended by:

Acts 2005, 79th Leg., Ch. 1116 (H.B. 2423), Sec. 2, eff. September 1, 2005.

Acts 2011, 82nd Leg., R.S., Ch. 1207 (S.B. 332), Sec. 1, eff. September 1, 2011.

Acts 2015, 84th Leg., R.S., Ch. 590 (H.B. 4112), Sec. 1, eff. June 16, 2015.

SUBCHAPTER B. CREATION OF DISTRICT

Sec. 36.011. METHOD OF CREATING DISTRICT. (a) A groundwater conservation district may be created under and subject to the authority, conditions, and restrictions of Section 59, Article XVI, Texas Constitution.

(b) The commission has exclusive jurisdiction over the creation of districts.

Added by Acts 1995, 74th Leg., ch. 933, Sec. 2, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 966, Sec. 2.32, eff. Sept. 1, 2001.

Sec. 36.012. COMPOSITION OF DISTRICT. (a) A district may include all or part of one or more counties, cities, districts, or other political subdivisions.

(b) A district may not include territory located in more than one county except on a majority vote of the voters residing

Appendix "F"

***Tri-City Freshwater Supply District No. 2 v. Mann*, 142 S.W.2d. 945-948 (Tex. 1940)**

LEXSEE

TRI-CITY FRESH WATER SUPPLY DISTRICT No. 2 OF HARRIS COUNTY V. GERALD C. MANN, ATTORNEY GENERAL.

Motion No. 14568

SUPREME COURT OF TEXAS

135 Tex. 280; 142 S.W.2d 945; 1940 Tex. LEXIS 200

September 11, 1940

SUBSEQUENT HISTORY: [***1] Rehearing overruled October 2, 1940

PRIOR HISTORY:

Original proceeding in mandamus instituted by the Tri-City Fresh Water Supply District No. 2 of Harris County to compel the Honorable Gerald C. Mann, Attorney General of Texas, to approve the transcript showing the proceedings relating to the issuance of

CASE SUMMARY:

$60,000.00 worth of bonds for said district and that he be required to certify to the State Comptroller that said bonds are valid, legal and binding on the said district. The Attorney General contests the issuance of the mandamus upon the grounds that the bonds are requested for purposes not authorized by the statutes.

Motion for leave to file petition in mandamus is overruled.

PROCEDURAL POSTURE: In a mandamus proceeding, petitioner water supply district sought to compel respondent attorney general to approve a transcript showing the proceedings relating to the issuance of $ 60,000 in bonds for the water supply district. The water supply district also sought to compel the state comptroller to certify the bonds as valid, legal, and binding upon the water district.

OVERVIEW: The attorney general opposed the issuance of mandamus on the grounds that the notices given for the voting of the bonds and the bonds themselves showed that the money proposed to be raised by the sale of the bonds was to be used for the construction of a sewage system and a sewage disposal plant and that such purposes were neither authorized by the Texas Constitution nor by statute. The court denied the petition for mandamus. The court held that the water supply district had no authority to issue bonds and levy taxes to raise money either to purchase and install equipment for fire protection or to construct, equip, and operate a sewerage system. The court reasoned that such powers were delegated to the district and that these distinct corporate functions could be implied from the powers specifically named in Tex. Rev. Civ. Stat. § 7881 (1925). The court concluded that the water supply district did not possess broad police powers to do those things, which were necessary to promote the public health and general welfare that were ordinarily expressly delegated by statute to cities and towns.

OUTCOME: The court denied the water district's petition for mandamus to compel the approval of the transcript of the bond issuance proceedings and the certification that the bonds were valid.

CORE TERMS: election, municipal, delegated, construct, writ of error, municipality, fire protection, plant, strictly construed, raise money, water, inhabitants, sewerage, issuance, mandamus, charter, acquire, notice, pump, expressly authorized, storm sewer, fresh water, purpose of constructing, powers conferred, governing bodies, incorporation, distributing, unauthorized, conservation, convenient

LexisNexis(R) Headnotes

Governments > Public Improvements > Sanitation & Water
Administrative Law > Separation & Delegation of Power > Legislative Controls
[HN1] Tex. Rev. Civ. Stat. § 7881 (1925) provides: There may be created within this state conservation districts to be known as Fresh Water Supply Districts for the purpose of conserving, transporting and distributing fresh water from lakes, pools, reservoirs, wells, springs, creeks, and rivers for domestic and commercial purposes, as contemplated by Tex. Const. art. 16, § 59; Said districts shall have and may exercise all the rights, privileges and powers given by this chapter and in accordance with its directions, limitations and provisions; Such districts may or may not include cities and towns.

Governments > Public Improvements > Sanitation & Water
Administrative Law > Separation & Delegation of Power > Legislative Controls
[HN2] Tex. Rev. Civ. Stat. § 7917 (1925) provides: All such districts have such powers of government, and with authority to exercise such rights, privileges and functions concerning the purposes for which they are created, as may be conferred by this chapter, or any other law in this state, to the benefit of which they may become entitled; All such districts shall have full authority and right to acquire water rights and privileges in any way that any individual or corporation may acquire same, and to hold the same either by gift, purchase, devise, appropriation or otherwise; No enumeration of specific powers herein shall be held a limitation upon the general powers conferred by this chapter, unless distinctly so expressed.

Governments > Public Improvements > Sanitation & Water
Administrative Law > Separation & Delegation of Power > Legislative Controls
[HN3] Tex. Rev. Civ. Stat. § 7918 (1925) provides: All districts shall have full power and authority to build, construct, complete, carry out, maintain, and in case of necessity add to and rebuild, all works and improvements within and without such districts necessary to accomplish any plan of conservation, transportation and distribution of fresh water adopted for or on behalf of such districts, and may make all necessary and proper contracts, and employ all persons and means necessary to that end; and such districts are authorized, if the governing bodies thereof shall deem it necessary, to take over in whole or in part by purchase or otherwise, any water plants or systems within such districts.

Administrative Law > Separation & Delegation of Power > Legislative Controls
[HN4] A normal municipal corporation has only such implied powers as are reasonably necessary to make effective the powers expressly granted. Powers which are not expressed and which are merely convenient or useful may not be included and cannot be maintained.

Administrative Law > Separation & Delegation of Power > Legislative Controls
Administrative Law > Separation & Delegation of Power > Constitutional Controls
[HN5] Governmental agencies are commonly referred to by courts as quasi municipal corporations, for the reason that they are constituted by the legislature to exercise, in a prescribed area, a very limited number of corporate functions, and they are said to be low down in the scale or grade of corporate existence. The powers of such districts are measured by the terms of the statutes which authorized their creation, and they can exercise no authority that has not been clearly granted by the legislature. The powers of such governmental agencies as counties, townships, and school districts are generally more strictly construed than those of incorporated municipalities.

Governments > State & Territorial Governments > Finance
Governments > State & Territorial Governments > Legislatures
[HN6] The power to tax belongs to the sovereignty. It can only be exercised by a subordinate corporate body when delegated to it either by the Texas Constitution or by the legislature, and when so delegated, it must be exercised for those purposes, only, which are distinctly included in the constitutional or legislative provision.

COUNSEL:

R. R. Lewis, Geo. D. Neal and *A. T. Carlton,* all of Houston, for relator.

Gerald C. Mann, Attorney General, *C. E. Crowe* and *Claud O. Boothman* and *Geo. W. Barcus,* Assistants Attorney General, for respondent.

OPINIONBY:

MOORE

OPINION:

[**946] [*281] MR. CHIEF JUSTICE MOORE delivered the opinion of the Court.

This is a mandamus proceeding instituted in the Supreme Court by Tri-City Fresh Water Supply District No. 2 of Harris County as relator against Gerald C. Mann, Attorney General, as [***2] respondent, praying that writ of mandamus issue, requiring the Attorney General to approve the transcript showing the proceedings relating to the issuance of bonds of relator in the aggregate amount of $60,000.00, and that he be required to certify to the Comptroller of the State of Texas that such bonds are valid, legal, and binding obligations of the Tri-City Fresh Water Supply District No. 2 of Harris County, Texas.

The Attorney General admits that the District has been duly and legally incorporated as a Fresh Water Supply District under Chapter 4, Article 7881 to 7959a, inclusive, of the Revised Civil Statutes of Texas, 1925, and amendments thereto as shown in Vernon's Texas Revised Civil Statutes (1936 ed.), [*282] and that it has all the powers and is subject to all the limitations under the Constitution and statutes appertaining to the organization of such a district.

The Attorney General resists the issuance of the mandamus on the grounds that the notices given for the voting of the bonds and the bonds themselves show that the money proposed to be raised by the sale of the bonds is to be used, in part, for "the construction of a sewage system and a sewage disposal plant [***3] and the laying of mains for fire protection and the erection of fire hydrants and the buying of fire equipment * * *"; and that such purposes are neither authorized by the Constitution nor by the statutes.

The notices which were posted for voting these bonds stated, in substance, that they were to be issued to raise money to construct, equip, and complete a "Fresh Water Supply System" for the inhabitants of the district, to consist of water wells, inundated tanks for storage, with the right to acquire necessary land upon which to drill wells, and the necessary pump lines for distribution, power, equipment, and all other equipment necessary or convenient to furnish water for all domestic and commercial purposes; to purchase physical properties consisting of any well or wells, tanks, pumps, land and easements and distributing systems now being operated in said district, and for the purpose of constructing, equipping necessary main line, fire plugs and connections, "*and all equipment necessary to furnish fire protection for the said district; for the purpose of constructing, equipping, connecting lines and main pump lines, including man-holes, and other appurtenances necessary to collect* [***4] *and transport sewerage from residences and commercial establishments in the district or for lift stations and disposal plant or plants and outfall to tide water,* with necessary lands and easements for the construction of all of same, * * *." (Italics ours.)

Substantially the same provisions are set forth in the order directing the issuance of the bonds, and in the purpose clause recited in the face of each of the bonds.

The people of this district do not have the power to determine for themselves such corporate functions as they may wish to inaugurate, such as are granted to cities and towns operating under home-rule charters. This district may exercise only such powers as have been expressly delegated to it by the Legislature, or which exist by clear and unquestioned implication. Therefore, the right to issue these bonds for all the purposes named in this bond record must be sought for in the [*283] words of the statute which authorized the creation of the district.

We have given careful consideration to all the articles of this statute, but we shall refer only to such of its provisions as are deemed material in the consideration of this case. Article 7881 sets forth the [***5] purposes of the law, and Articles 7917 and 7918 define the pertinent specific powers with which a Fresh Water Supply District may [**947] be invested when organized, and these articles are here copied verbatim.

[HN1] "Article 7881. There may be created within this State conservation districts to be known as Fresh Water Supply Districts for the purpose of conserving, transporting and distributing fresh water from lakes, pools, reservoirs, wells, springs, creeks, and rivers for domestic and commercial purposes, as contemplated by Section 59, Article 16 of the State Constitution. Said districts shall have and may exercise all the rights, privileges and powers given by this chapter and in accordance with its directions, limitations and provisions. Such districts may or may not include cities and towns."

[HN2] "Art. 7917. All such districts have such powers of government, and with authority to exercise such rights, privileges and functions concerning the purposes for which they are created, as may be conferred by this chapter, or any other law in this State, to the benefit of which they may become entitled. All such districts shall have full authority and right to acquire water rights and [***6] privileges in any way that any individual or corporation may acquire same, and to hold the same either by gift, purchase, devise, appropriation or otherwise. No enumeration of specific powers herein shall be held a limitation upon the general powers conferred by this chapter, unless distinctly so expressed."

[HN3] "Art. 7918. All districts shall have full power and authority to build, construct, complete, carry out, maintain, and in case of necessity add to and rebuild, all works and improvements within and without such districts necessary to accomplish any plan of conservation, transportation and distribution of fresh water adopted for or on behalf of such districts, and may make all necessary and proper contracts, and employ all persons and means necessary to that end; and such districts are authorized, if the governing bodies thereof shall deem it necessary, to take over in whole or in part by purchase or otherwise, any water plants or systems within such districts." [*284]

There is nothing contained in any other article of the Statute which purports to confer on Fresh Water Supply Districts any different powers than those named in the foregoing sections.

Looking therefore [***7] to these provisions, we have reached the conclusion that this district has no authority to issue bonds and levy taxes to raise money either to purchase and install equipment for fire protection, or to construct, equip, and operate a sewerage system. No such powers are expressly delegated to the district, as is plainly evident from the language of the statute, and under well-established principles of law we are of the opinion that these distinct corporate functions cannot be implied from the powers specifically named in the statute.

It is a general rule of judicial construction that [HN4] even normal municipal corporation has only such implied powers as are reasonably necessary to make effective the powers expressly granted. That is to say, such as are indispensable to the declared objects of the corporation and the accomplishment of the purposes of its creation. Powers which are not expressed and which are merely convenient or useful may not be included and cannot be maintained. Furthermore, where powers are granted to a municipality by specific provisions, such powers are not enlarged by general language found elsewhere in the act, such as is found in Article 7917, supra. City of Arlington [***8] v. Lillard, 116 Texas 446, 294 S.W. 829; Dallas Consol. Electric St. Ry. Co. v. City of Dallas (Tex. Com. App.), 260 S.W. 1034. In discussing this subject this Court in the case of Foster v. City of Waco, 113 Texas 352, 255 S.W. 1104, speaking through the late Chief Justice Cureton, said: "Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void."

Additional discussion of authorities would seem to be unnecessary, but because of the pertinency of the facts, we direct attention to the case of Dallas Consol. Electric St. Ry Co. v. City of Dallas, supra. In that case it was claimed by the city that by clear implication it had the power to assess a tax against the Street Railway Company in order to pay, in part, the cost of digging a storm sewer in connection with the [***9] construction of other improvements along a certain street. The [*285] Court held that the city had no such implied power, in that [**948] the construction of a storm sewer was not a necessary incident to the construction of surface improvements along said street, for which the city was expressly authorized by charter to make an assessment against contiguous property owners, and reversed the decision of the Court of Civil Appeals, which had held to the contrary. In so doing the court quoted with approval from 19 Corpus Juris, p. 715, where it is stated: "The power to levy assessments for the construction of drains can be exercised only when granted in clear and unmistakable terms, and statutes purporting to grant such power must be strictly construed as against those asserting the right to exercise it." See also Anderson v. City of San Antonio, 123 Texas 163, 67 S.W. (2d) 1036; City of South Houston v. Dabney, 132 Texas 96, 120 S.W. (2d) 436; City of Arlington v. Lillard, supra; Texas-Louisiana Power Co. v. City of Farmersville (Tex. Com. App.), 67 S.W. (2d) 236; McQuillin on Municipal Corporations (2d ed.) Vol. 1, p. 926; Dillon on Municipal Corporations (5th ed.), Vol. 1, [***10] p. 448 et seq.

What has been said relates primarily to municipal corporations, proper, because what is applicable to them is usually applicable to districts such as that of relator, but with some limitations. For one thing these districts do not possess, at least the relator does not possess, broad police powers to do those things which are necessary to promote the public health and general welfare, which are ordinarily expressly delegated by statute to cities and towns, and by virtue of which the

governing bodies of such municipalities are permitted to make rules and regulations and enact ordinances, which, if not expressly authorized, are very generally upheld by the courts as being in the interest of the health and safety of the inhabitants of the municipalities.

[HN5] Governmental agencies, or bodies corporate such as Fresh Water Supply Districts, under our statute, are commonly referred to by courts as quasi municipal corporations, for the reason that they are constituted by the Legislature to exercise, in a prescribed area, a very limited number of corporate functions, and they are said to be "low down in the scale or grade of corporate existence." The powers of such districts are [***11] measured by the terms of the statutes which authorized their creation, and they can exercise no authority that has not been clearly granted by the Legislature. As expressed by the Court in Stratton v. Commissioners' Court of Kinney County (Tex. Civ. App.), 137 S.W. 1170 (writ of error denied), the powers of [*286] such governmental agencies as counties, townships, and school districts "are generally more strictly construed than those of incorporated municipalities." See also Grand Lodge, Etc. v. Curry et al (Tex. Civ. App.), 108 S.W. (2d) 574 (writ of error denied); McQuillin on Municipal Corporations (2d ed.), Vol. 1, p. 391, sec. 135; 17 American Jurisprudence, page 789, O'Brien v. Wheelock, 184 U.S. 450, 46 L. Ed. 636; Board of Improvement of Sewer District No. 2 of Fort Smith v. Moreland, 94 Ark. 381, 127 S.W. 469; Eastern Illinois State Normal School v. City of Charleston, 271 Ill. 602, 101 N.E. 573; L.R.A. 1916D, 991. Numerous cases of similar import from other jurisdictions might be cited.

Had the Legislature intended to invest Fresh Water Supply Districts with corporate powers to purchase and install apparatus for fire prevention and fire protection and to construct [***12] and operate a sewerage system within a given territory, it doubtless would have so enacted in plain language. Not having done so, and this district having no such delegated legislative powers, it becomes unnecessary to discuss the constitutional question suggested by the Attorney General.

It is axiomatic that if the Tri-City Fresh Water Supply District No. 2 of Harris County has no power to construct the aforementioned improvements, it has no right to levy taxes against the inhabitants of the district to raise money to construct such improvements. [HN6] The power to tax belongs to the sovereignty. It can only be exercised by a subordinate corporate body when delegated to it either by the Constitution or by the legislature, and when so delegated, it must be exercised for those purposes, only, which are distinctly included in the constitutional or legislative provision. As stated by this Court in Frosh v. City of Galveston, 73 Texas 401, such power, when so conferred, "is to be strictly construed and must be closely followed." To the same effect are the following cases: Wood v. City of Galveston, 76 Texas 126, 13 S.W. 227; City of Tyler v. Coker (Tex. Civ. App.), 124 S.W. 729; Ripley [***13] v. Trinity River Canal & Conservancy Dist., [**949] 88 S.W. (2d) 752 (writ of error denied); State v. Houston & T.C. Ry. co. (Tex. Civ. App.), 209 S.W. 820; Stratton v. Commissioners' Court of Kinney County, supra.

It appears from the record in the instant action that the petition for the election to determine whether or not this district should be incorporated indicated that the signers contemplated that the district, if incorporated, would have authority or power to do and perform all of the functions and things for which these bonds are contemplated to be issued. We [*287] assume that the order for the election and the notice thereof indicated the same thing. Ptacek et al appeared before the Commissioners' Court and contested the order of the election as petitioned for. In spite of the contest the Commissioners' Court entered and sustained the order just indicated. Thereafter Ptacek et al filed suit in the district court to annul or cancel such election order. This suit was filed before the election was held, but tried after such event had transpired. On final trial in the district court judgment was entered refusing cancellation of the above-mentioned election order. [***14] On appeal by Ptacek et al the judgment of the district court was affirmed by the Court of Civil Appeals. Ptacek v. Hofheinz, 128 S.W. (id) 872. This Court refused writ of error.

If we properly interpret their brief and argument, counsel for relator in this action contend that the judgment of the Court of Civil Appeals in the former action above mentioned is res adjudicata of the right or power of this district to issue these bonds. It is our opinion that the former judgment only adjudicated that the election order under attack was sufficient in form and substance to order an election to determine whether this district should be incorporated with powers conferred by law. It can hardly be said that a district like this, or for that matter any district, can be given powers not authorized by law by the simple expedient of indicating such unauthorized powers in the preliminary steps incident to incorporation. Simply stated, we are of the opinion that the fact that the preliminary steps incident to the incorporation of this district indicated that it was contemplated that it might exercise powers not authorized by law would neither invalidate the district nor invest it with such unauthorized [***15] powers.

This proceeding has been heard upon the motion to file relator's petition for mandamus, and the Court being of the opinion that the mandamus should be refused, it is ordered that the motion to file said petition be and the same is hereby overruled.

Opinion delivered September 11, 1940.

Rehearing overruled October 2, 1940.

Appendix "G"

***South Plains La Mesa Railroad v. High Plains UWD No. 1*, 52 S.W.3d. 770, 780 (Tex. App.-Amarillo 2001, no writ)**

LEXSEE

SOUTH PLAINS LAMESA RAILROAD, LTD. AND KITTEN FAMILY LIVING TRUST, APPELLANTS v. HIGH PLAINS UNDERGROUND WATER CONSERVATION DISTRICT NO. 1, APPELLEE

NO. 07-00-0089-CV

COURT OF APPEALS OF TEXAS, SEVENTH DISTRICT, AMARILLO

52 S.W.3d 770; 2001 Tex. App. LEXIS 2497

April 17, 2001, Decided

PRIOR HISTORY: [**1] FROM THE 364TH DISTRICT COURT OF LUBBOCK COUNTY; NO. 98-503,533, HONORABLE BRADLEY S. UNDERWOOD, JUDGE.

This Opinion Substituted on Denial of Rehearing for Withdrawn Opinion of January 25, 2001, Previously Reported at: 2001 Tex. App. LEXIS 544.

DISPOSITION: Judgment of trial court signed January 18, 2000, reversed and motion for summary judgment of Kitten Trust and South Plains granted. Actions of District in revoking Kitten Trust application permit no. 8149-A and denial of South Plains's water well application permit no. 8209 declared null and void. Portion of judgment regarding whether attorney's fees and costs should be awarded to either party and amount thereof severed and cause remanded to trial court.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants sued appellee in the 364th District Court, Lubbock County (Texas), about appellee's revocation of a water well permit and appellee's denial of an application for such a permit. The trial court granted appellee's summary judgment motion and appellants sought review. After denying appellee's rehearing motion, the appellate court substituted this opinion for its previous opinion.

OVERVIEW: Appellee granted appellant trust a permit to drill a water well on its easement covering a tract owned by appellant railroad. After the well was drilled, adjoining landowners protested, and, after hearing, appellee revoked the permit. Appellant railroad applied for a similar permit remedying alleged procedural deficiencies in appellant trust's application, and, while acknowledging appellee's spacing requirements were complied with, appellee denied it. Both the revocation and denial were based on the finding the permit allowed the taking of a disproportionate amount of water compared to the size of the tract. The common law rule of capture that an owner had the right to withdraw underground percolating water was not subject to the "reasonable use" test, and was the law in Texas. Under Tex. Water Code Ann. § 36.002 (Vernon 2000), nothing in the water code was to be construed to deprive an owner of its rights, subject to a groundwater district's rules. Appellant had no rule allowing denial or revocation of a well permit, based on taking a disproportionate amount of water compared to the size of the property. Appellant had no authority not clearly granted by the legislature.

OUTCOME: The trial court's judgment was reversed because appellee's action to prevent the pumping of a disproportionate amount of water as it related to tract size was contrary to the rule of capture as applied to underground water and was not done pursuant to any properly adopted rule of appellee authorizing such action.

CORE TERMS: water, groundwater, summary judgment, tract, disproportionate, spacing, regulation, amount of water, pump, authorize, revoke, capture, pumped, site, minute, equipped, gallons, reasonable use, prevent waste, ownership rights, complied, nearest, pumping, yards, judicial review, public policy, subsidence, per acre, discretionary, non-movant

LexisNexis(R) Headnotes

Governments > State & Territorial Governments > Water Rights
[HN1] Tex. Const. art. XVI, § 59(a) provides that the legislature shall pass all laws as may be appropriate to water conservation and development and Tex. Const. art. XVI, § 59(b) authorizes the creation of districts to have the authority as may be conferred by the law, which § 59(a) directs the legislature to enact. By Tex. Water Code Ann. § 36.0015 (Vernon 2000), the legislature declares that regional groundwater districts are the state's preferred method of groundwater management and under Tex. Water Code Ann. § 36.001(15) (Vernon 2000), a district is a political subdivision exercising state powers, and such districts stand upon the same footing as a county.

Civil Procedure > Summary Judgment > Summary Judgment Standard
[HN2] For a party to prevail on a traditional motion for summary judgment under Tex. R. Civ. P. 166a(c), he must conclusively establish the absence of any genuine question of material fact and that he is entitled to judgment as a matter of law. This requirement dictates that when the defendant is the movant, he must conclusively negate at least one of the essential elements of the plaintiff's cause of action. Likewise, a defendant who conclusively establishes each element of an affirmative defense is entitled to summary judgment.

Civil Procedure > Summary Judgment > Burdens of Production & Proof
[HN3] The standard by which the appellate court is to review a summary judgment is (1) the movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; (3) every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Civil Procedure > Summary Judgment > Burdens of Production & Proof
[HN4] Once a movant establishes a right to summary judgment, the non-movant has the burden to respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment. Issues which the non-movant contends preclude the granting of a summary judgment must be expressly presented to the trial court by written answer or other written response to the motion and not by mere reference to summary judgment evidence. Issues not expressly presented to the trial court in writing shall not be considered on appeal as grounds for reversal. Tex. R. Civ. P. 166a(c). Further, all theories in support of or in opposition to a motion for summary judgment must be presented in writing to the trial court.

Civil Procedure > Summary Judgment
[HN5] Where both sides move for summary judgment and the trial court grants one motion and denies the other, on appeal, the appellate court reviews the summary judgment evidence of both sides and determines all questions presented, and renders judgment the trial court should have rendered.

Governments > State & Territorial Governments > Water Rights
[HN6] A groundwater district has only such powers and authority as may be conferred by law. Tex. Const. art. XVI, § 59(b). The power of a groundwater district is limited by the terms of applicable statutes authorizing its creation and a district can exercise no authority that the legislature has not clearly granted.

Governments > State & Territorial Governments > Water Rights
[HN7] See Tex. Water Code Ann. § 36.002 (Vernon 2000).

Governments > State & Territorial Governments > Water Rights
[HN8] By using the term code and not chapter, Tex. Water Code Ann. § 36.002 (Vernon 2000), recognizing the rights of landowners to groundwater, applies to groundwater notwithstanding any provision to the contrary in any other chapter of the Water Code.

Governments > State & Territorial Governments > Water Rights
[HN9] Because a statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it, by enactment of Tex. Water Code Ann. § 36.002 (Vernon 2000) effective September 1, 1995, the legislature recognized the rule of capture as it applies to groundwater according to the decisions of the Texas Supreme Court.

Governments > State & Territorial Governments > Water Rights
[HN10] Under Tex. Water Code Ann. § 36.001(1) (Vernon 2000) a groundwater district is defined as an authority created under Tex. Const. art. XVI, § 59 that has the authority to regulate the spacing of water wells, the production from water wells, or both. However, spacing of wells or regulation of production from water wells is not defined.

Governments > State & Territorial Governments > Water Rights
[HN11] To implement the management responsibility of a groundwater district, the rule making power of a district is covered by subchapter D. Among other provisions, Tex. Water Code Ann. § 36.101(a) (Vernon 2000) gives a district rule making authority to control subsidence or prevent waste of groundwater and to carry out the powers and duties provided by this chapter.

Governments > State & Territorial Governments > Water Rights
[HN12] Tex. Water Code Ann. § 36.116 (Vernon 2000) specifically addresses well spacing and production of water wells. This section authorizes a groundwater district to provide for well spacing and regulation of production to (1) minimize the drawdown of the water table or (2) the reduction of artesian pressure (3) to control subsidence or (4) to prevent waste. Because a district is not a state agency with statewide jurisdiction, but is a regional political subdivision, the Administrative Procedure and Practice Act does not apply, Tex. Gov't Code Ann. § 2001.003(7) (Vernon 2000), except that Tex. Gov't Code Ann. § 2001.174 is made applicable under Tex. Water Code Ann. § 36.253 (Vernon 2000) for purposes of judicial review of district actions.

Governments > State & Territorial Governments > Water Rights
[HN13] Tex. Water Code Ann. § § 36.251 through 36.254 (Vernon 2000) contain provisions regarding judicial review of any rule or order made by a groundwater district. Tex. Water Code Ann. § 36.253 (Vernon 2000) provides that any challenged law, rule, order, or act shall be deemed prima facie valid, and the section provides that the substantial evidence rule covered by Tex. Gov't Code Ann. § 2001.174 shall also apply upon judicial review of a district's rule or order. However, where the ruling of a district is challenged on the ground that it did not have the authority to revoke a well permit or refuse to issue a well permit for the purpose of disallowing a disproportionate amount of water to be pumped as it related to the tract size, appellate review of this question of law is de novo.

Governments > State & Territorial Governments > Water Rights
[HN14] That (1) the common law rule of capture that an owner has the right to withdraw underground percolating water is not correlative but is "absolute," and is not subject to the reasonable use rule adopted by some other jurisdictions, remains the law in Texas, and (2) as provided by Tex. Const. art. XVI, § 59, adopted in 1917, groundwater regulation is a duty imposed on the legislature.

Governments > State & Territorial Governments > Water Rights

[HN15] A groundwater district can exercise no authority that has not been clearly granted by the legislature. The court presumes that Tex. Water Code Ann. provisions were enacted by the legislature with complete knowledge of the rule that any authority granted to a groundwater district must be clearly granted.

Governments > State & Territorial Governments > Water Rights
[HN16] A groundwater district's action to prevent the pumping of a disproportionate amount of water as it relates to tract size is contrary to the rule of capture as applied to underground water in Texas law, and also prohibited by Tex. Water Code Ann. § 36.002.

Governments > State & Territorial Governments > Water Rights
[HN17] Although Tex. Water Code Ann. § 36.101 (Vernon 2000) authorizes a groundwater district to make rules to control subsidence or prevent waste of groundwater, and Tex. Water Code Ann. § 36.116 (Vernon 2000) authorizes a groundwater district to provide for spacing of water wells and regulation of production of wells for the four purposes stated in the section, these sections do not clearly authorize the district to revoke or deny a well permit to prohibit the production of a disproportionate amount of groundwater as it relates to the tract size.

Governments > State & Territorial Governments > Water Rights
[HN18] Because the right to withdraw underground percolating water is not correlative, but is "absolute," and the legislature has not enacted a "reasonable use" rule as exists in other jurisdictions, and considering that by Tex. Water Code Ann. § 36.002 (Vernon 2000), the legislature provided that nothing in the water code shall deprive or divest the owners of groundwater of their ownership rights, the applicable water code provisions do not clearly authorize a groundwater district to enact a regional rule to prohibit the production of a disproportionate amount of groundwater as it relates to the size of the tract or to implement a reasonable use rule.

Governments > State & Territorial Governments > Water Rights
[HN19] In Texas, legislative power is defined broadly and includes the power to set public policy. Tex. Const. art. XVI, § 59 charges the legislature with the duty of groundwater conservation and authorizes the creation of districts to have the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law. By Tex. Water Code Ann. § 36.002 (Vernon 2000), the legislature announces the state wide public policy regarding the rule of capture as applied to groundwater. None of the applicable water code provisions make any reference to the size of the tract upon which a proposed well is to be located or address the issue of production of disproportionate volumes of water as it relates to tract size. Omissions are presumed to be intentional.

Governments > State & Territorial Governments > Water Rights
[HN20] Although the legislature may delegate powers to a groundwater district to carry out legislative purposes, it must establish reasonable standards to guide the district in exercising those powers. Several water code sections mention regulations to prevent waste, control subsidence, or avoid reduction of artesian pressure, but none of the sections authorize a rule creating a "reasonable use" rule or address the issue of disproportionate production of water as it relates to tract size.

Governments > State & Territorial Governments > Water Rights
[HN21] The last clause of Tex. Water Code Ann. § 36.002 (Vernon 2000), which provides that its announced public policy is subject to rules promulgated by a groundwater district, is nevertheless ineffective to authorize the action of a groundwater district to deny and revoke well permits in order to prevent the production of a disproportionate amount of water as it relates to tract size because the subject is not mentioned in any of the sections authorizing regulations, and the statute does not establish reasonable standards to guide the agency in exercising its rule making power as applied to the expressed public policy favoring the rule of capture.

Governments > State & Territorial Governments > Water Rights
[HN22] Under Tex. Water Code Ann. § 36.002 (Vernon 2000), which, as applicable to groundwater, prevails over any other provision in the water code to the contrary, groundwater ownership rights are "subject to rules," but the section does not make groundwater ownership rights subject to discretionary decisions of a groundwater district.

Governments > State & Territorial Governments > Water Rights
[HN23] Tex. Water Code Ann. § 36.101 (Vernon 2000) gives a groundwater district the discretion to promulgate rules under the procedure that is also prescribed by the legislature, but neither § 36.101 nor Tex. Water Code Ann. § 36.002 (Vernon 2000) define the term "rule." As applied to § 36.002, the word rule contemplates an established standard prescribing a guide for conduct, regulation or principle that does not include discretionary acts of a groundwater district board. Because § 36.002 requires that regulation of groundwater ownership rights must be by rule promulgated by a groundwater district, not discretionary decisions, the district does not have the authority to implement such regulation without a rule adopted after public notice and public hearing required by Tex. Water Code Ann. § 36.101(b) (Vernon 2000).

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JUDGES: PANEL D, Before BOYD, C.J., and QUINN and REAVIS, JJ. Quinn, J., concurring.

OPINIONBY: Don H. Reavis

OPINION: [*773]

ON MOTION FOR REHEARING

On original submission, we reversed and rendered in part and severed and remanded in part for further proceedings. High Plains Underground Water District No. 1 (District) has now filed a motion for rehearing. We overrule the motion, but withdraw our original opinion of January 25, 2001 and, in lieu thereof, issue the following [**2] opinion. Our judgment of January 25, 2001 is unaffected.

By this appeal, South Plains Lamesa Railroad, Ltd. (South Plains) and the Kitten Family Living Trust (Kitten Trust) challenge a summary judgment denying their request for declaratory relief and awarding attorney's fees to the District. By their four issues, they ask 1) whether the trial court erred in granting the motion for summary judgment of the District, 2) whether the District could reopen and revoke a water well application four months after granting the permit absent a finding of changed circumstances, 3) whether the District could apply an *ad hoc* standard not part of its rules to deny a water well permit even though the application had satisfied all of the District's rules, and 4) whether the District can nullify the rule of capture. In this appeal, we must determine the validity of the action of the District revoking one water well permit and denying another permit on the ground that it was proper to avoid the pumping of a disproportionate amount of water as it relates to the tract size and the District's well spacing regulations. Because none of the eleven cases cited by the District involve groundwater districts [**3] or their rule making authority, we conclude that the question presented is a case of first impression. Based upon the rationale and authorities expressed herein, we reverse and render in part, and sever and remand in part for further proceedings.

[HN1] Section 59(a) of Article XVI of the Texas Constitution provides that the Legislature shall pass all laws as may be appropriate to water conservation and development and section 59(b) authorizes the creation of districts to have the authority as may be conferred by the law, which [*774] subsection (a) directs the Legislature to enact. By section 36.0015 of the Water Code, n1 the Legislature has declared that regional groundwater districts are the State's preferred method of groundwater management and under section 36.001(15), a district is a political subdivision exercising State powers and such districts stand upon the same footing as a county. Lew Cox & Son v. High Plains Underground Water, 538 S.W.2d 659, 663 (Tex.Civ.App.--Amarillo 1976, writ ref'd n.r.e.).

n1 Unless otherwise designated all references are to the Texas Water Code Annotated (Vernon 2000).

[**4]

On December 9, 1997, the District approved water well application permit no. 8149-A that allowed the Kitten Trust to drill, equip, and produce a water well on

its easement covering a small tract owned by South Plains. After the Kitten Trust drilled and equipped a well and constructed a pipeline at a cost of approximately $ 30,000, on April 13, 1998, adjoining landowners filed a protest to the Kitten Trust application for water well permit no. 8149-A. Following a hearing on May 12, 1998, the Board of the District passed a motion to disallow water well permit no. 8149-A, which provided that the Board found:

1. That the legal description supplied by Plaintiff Kitten Trust in Water Well Application 8149-A was not of sufficient detail to apprise Defendant of the size of the tract on which the well was to be drilled.

2. That if the size of the tract had been known, it is unlikely that the Lubbock County Committee would have recommended its approval.

3. That Water Well Permit 8149-A would have allowed a disproportionate amount of water to be pumped as it relates to the tract size and Defendant District's well spacing regulations as they relate to gallons per minute per acre as set by [**5] the District's spacing rules.

Then, on May 13, 1998, South Plains filed its water well application permit no. 8209 that remedied alleged procedural deficiencies in the Kitten Trust application. On July 13, 1998, the same adjacent landowners filed a protest to water well application no. 8209. At a hearing on July 14, 1998, the District Board denied application permit no. 8209 even though the District Board Manager reported to the Board that the application complied with the District's spacing requirements. n2 In response to request for admissions, the District admitted that the District's Board of Directors on July 14, 1998, voted to deny South Plains's application permit no. 8209 "to prevent disproportionate taking of water."

n2 Uncontroverted by the District.

By their trial pleadings, South Plains and the Kitten Trust contended that the action of the District in revoking application permit no. 8149-A and denying application permit no. 8209 was in error as a matter of law, and they also sought attorney's [**6] fees in accordance with the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. § § 37.001 - 37.011 (Vernon 1997), specifically section 37.009. The answer of the District included a general denial and a request for an award of attorney's fees pursuant to section 37.009. After traditional motions for summary judgment were filed by all parties, the trial court granted the motion for summary judgment of the District and awarded attorney's fees to the District. Before we commence our analysis of the issues, we first set out the appropriate standard of review.

[*775] **Summary Judgment Standard of Review**

[HN2] For a party to prevail on a traditional motion for summary judgment under Tex. R. Civ. P. 166a(c), he must conclusively establish the absence of any genuine question of material fact and that he is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). This requirement dictates that when the defendant is the movant, he must conclusively negate at least one of the essential elements of the plaintiff's cause of action. Likewise, a defendant who conclusively establishes each element of [**7] an affirmative defense is entitled to summary judgment. Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995). [HN3] In Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985), the Court set out the standard by which we are to review a summary judgment:

1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.

3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

[HN4]
Once the movant has established a right to summary judgment, the non-movant has the burden to respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment. City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 678 (Tex. 1979); Barbouti v. Hearst Corp., 927 S.W.2d 37, 64 (Tex.App.--Houston [1st Dist.] 1996, writ denied). Issues which the non-movant contends [**8] preclude the granting of a summary judgment must be expressly presented to the trial court by written answer or other written response to the motion and not by mere reference to summary judgment evidence. McConnell v. Southside School Dist., 858 S.W.2d 337, 341 (Tex. 1993). Issues not expressly presented to the trial court in writing shall not be considered on appeal as grounds for reversal. Tex. R. Civ. P. 166a(c). Further, all theories in support of or in opposition to a motion for summary judgment must be presented in writing to the trial court. Casso v. Brand, 776 S.W.2d 551, 553 (Tex. 1989).

[HN5] Where, as here, both sides move for summary judgment and the trial court grants one motion and denies the other, on appeal, we review the summary judgment evidence of both sides and determine all questions presented, and render judgment the trial court should have rendered. Bradley v. State ex rel. White, 990 S.W.2d 245, 247 (Tex. 1999); Greg Lair, Inc. v. Spring, 23 S.W.3d 443, 446 (Tex.App.--Amarillo 2000, pet. denied).

Summary Judgment Grounds

As the sole ground for their motion for summary judgment, the Kitten Trust and South [**9] Plains contended that they were entitled to summary judgment because the District's Board did not have the authority under law to revoke a well permit, or refuse to issue a well permit, based on the reason that to permit such a well would "allow a disproportionate amount of water to be pumped as it relates to the tract size and the District's well spacing regulations as they relate to gallons per minute per acre as set by the District's spacing rules." We construe the grounds n3 of the motion [*776] for summary judgment by the District to be (1) section 36.253, which provides that the burden of proof is on the petitioner and the challenged rule order or act shall be deemed *prima facie* valid and the substantial evidence rule as defined by section 2001.174 of the Texas Government Code, and (2) a general allegation that the District complied with groundwater statutes and local rules.

n3 Rule 166a(c) of the Texas Rules of Civil Procedure provides that a motion for summary judgment shall state the specific grounds therefor.

[**10]

By their first issue, the Kitten Trust and South Plains contend the trial court erred in granting the motion for summary judgment of the District and by the third issue, they contend the District did not have the lawful authority to apply an *ad hoc* n4 standard not part of its rules to deny a water well permit even though the applicant has satisfied all of the District's rules. Also, by their fourth issue, they contend the District cannot nullify the rule of capture. Because these three issues and argument thereunder present the issue of lawful authority of the District and its rule making power, we will consider them together.

n4 Ad hoc. For this special purpose. Black's Law Dictionary 41 (6th ed. 1990).

Applicable Water Code Provisions

Because water regulation is essentially a duty of the Legislature, Sipriano v. Great Spring Waters of America, 1 S.W.3d 75, 80 (Tex. 1999), and the Legislature has declared districts to be the preferred method of groundwater management, we first [**11] review several provisions of chapter 36 of the Water Code entitled "Groundwater Districts." [HN6] A district has only such powers and authority as "may be conferred by law." Tex. Const. Art. XVI, § 59(b). Because the power of a district is limited by the terms of applicable statutes authorizing its creation and a district can exercise no authority that the Legislature has not clearly granted, Tri-City Fresh Water Supply Dist. No. 2 v. Mann, 135 Tex. 280, 142 S.W.2d 945, 948 (1940), the statutes must be closely examined to determine if any statute clearly grants a district the authority to revoke or deny a well permit to prevent the production of a disproportionate amount of water as it relates to the tract size and a district's well spacing regulations as they relate to gallons per minute per acre.

After defining certain terms and stating the purpose of groundwater districts, by section 36.002, the Legislature confirmed ownership rights of groundwater. That section provides:

[HN7] 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* shall be construed as *depriving* or *divesting* [**12] the owners or their lessees and assigns of the ownership or rights, subject to rules promulgated by a district.

(Emphasis added). [HN8] By using the term *code* and not *chapter*, this section applies to groundwater notwithstanding any provision to the contrary in any other chapter of the Water Code. [HN9] Because a statute is presumed to have been enacted by the Legislature with complete knowledge of the existing law and with reference to it, Acker v. Texas Water Com'n, 790 S.W.2d 299, 301 (Tex. 1990), by enactment of this section effective September 1, 1995, the Legislature recognized the rule of capture as it applies to groundwater according to the decisions of the Texas Supreme Court in Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904) and City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798, 801 (Tex. 1955). [HN10] Under section 36.001(1) a district is defined as an authority created under section 59, article XVI of the Texas Constitution that has the authority to "regulate the spacing of water wells, the production from water wells, or [*777] both." However, spacing of wells or regulation of production from water wells [**13] is not defined.

[HN11] To implement the management responsibility, the rule making power of a district is covered by subchapter D. Among other provisions, section 36.101(a) gives a district rule making authority "to control subsidence or prevent waste of groundwater and to carry out the powers and duties provided by this chapter." [HN12] Section 36.116 specifically addresses well spacing and production. This section authorizes a district to provide for well spacing and regulation of production to (1) minimize the drawdown of the water table or (2) the reduction of artesian pressure (3) to control subsidence or (4) to prevent waste. Because a district is not a state agency with statewide jurisdiction, but is a regional political subdivision, the Administrative Procedure and Practice Act does not apply, n5 except that section 2001.174 of the Government Code is made applicable under section 36.253 for purposes of judicial review of district actions.

n5 *See* Tex. Gov't Code Ann. § 2001.003(7) (Vernon 2000).

[**14]

De Novo Review

By its first ground for its motion for summary judgment, the District urged that the challenged rulings of the District are deemed *prima facie* valid and the substantial evidence rule applied. [HN13] Sections 36.251 through 36.254 of the Water Code contain provisions regarding judicial review of any rule or order made by a district. As applicable here, section 36.253 provides that any challenged law, rule, order, or act shall be "deemed prima facie valid," and the section provides that the substantial evidence rule covered by section 2001.174 of the Government Code shall also apply upon judicial review of a district's rule or order. However, where, as here, the ruling of a district is challenged on the ground that it did not have the authority to revoke a well permit or refuse to issue a well permit for the purpose of disallowing a disproportionate amount of water to be pumped as it related to the tract size, our review of this question of law is *de novo*. Matter of Humphreys, 880 S.W.2d 402, 404 (Tex. 1994). Accordingly, the first ground of the District is not applicable. [**15]

By its second ground, the District contended that it "complied with state groundwater statutes and local district rules in rendering the decisions which are now challenged . . . ." Because this ground raises questions of statutory authority of a district, we will combine our analysis with the contentions of the Kitten Trust and South Plains presented in their motion for summary judgment and presented here by their first, third, and fourth issues complaining that the District did not have the authority under law to revoke a well permit or refuse to issue a well permit, because to permit such a well would "allow a disproportionate amount of water to be pumped as it relates to the tract size the District's well spacing regulations as they relate to gallons per minute per acre as set by the District's spacing rules."

Application Met Spacing Requirements

It is undisputed that at the hearing, the Board Manager of the District reported to the Board that the application complied with the District's spacing requirements. Minutes of the District hearing regarding application permit no. 8209 state in part that:

Mr. Wyatt said that Application for Permit Number 8209 meets the spacing [**16] requirements of the Water District. However, the question remains as to whether a 4-inch well on the 100-foot wide right-of-way [*778] would take a disproportionate amount of water from the strip of land on which it is located.

By interrogatory number 7, the Kitten Trust and South Plains asked the District if any of its rules authorized or specified a "disproportionate taking" or similar standard for the grant or denial of water well permits and, if so, requested that the rule be identified. By its answer, the District designated its Rule 8 entitled "Minimum Spacing of Wells," as authorizing the district to deny a water well application permit because of "disproportionate taking" or similar standard. As material herein, the rule provides in part:

RULE 8 -- MINIMUM SPACING OF WELLS

(a) Wells to be drilled after the effective date of these rules shall be spaced as follows:

A well to be equipped with a four-inch or smaller pump shall be located at least 200 yards from the nearest well or authorized well site; a well to be equipped with a five-inch pump shall be located at least 250 yards from the nearest well or authorized well site; a well to be equipped with a six-inch pump shall be [**17] located at least 300 yards from the nearest well or authorized well site; a well to be equipped with an eight-inch pump shall be located at least 400 yards from the nearest well or authorized well site; and a well to be equipped with a ten-inch or larger pump shall be located at least 440 yards from the nearest well or authorized well site. An authorized well site is not a permit to drill. An authorized well site shall be:

(1) The location of a proposed well on an application duly filed until such application is denied; or

(2) The location of a proposed well on a valid permit.

* * *

(b) It is contemplated that the pumps of the respective sizes set out above shall refer to the inside diameter of the pump column pipe and shall produce water at the ordinary or usual pumping rates of pumps of such sizes. The ordinary or usual pumping rates of such pumps are to be regarded as follows:

* * *

If the pump which is to be used by the applicant is of a different size or type, or is to be operated at a different rate in gallons per minute from the pumps in general use as set out above, such facts shall be made known in the application, and in such case, the actual rate at which the well [**18] is to be pumped shall be the determining factor in the spacing for such well instead of the size of the pump. A pump to be operated against an artificial head in a closed or semi-closed system shall be given special consideration.

* * *

The rule contains no provisions that would authorize the denial of a permit because a well would produce a disproportionate amount of water from the land on which the proposed well is located and does not establish a minimum tract size. Further, if the proposed well site meets the minimum distance requirement between wells, the size of the tract and its shape or dimensions are irrelevant for purposes of Rule 8. Accordingly, because the application complied with the spacing rule, the District's action in revoking the well permit and denying the other application for a well permit was improper.

Moreover, the action of the District prohibiting "a disproportionate amount of water [*779] to be pumped as it relates to tract size" was not otherwise authorized by statute because (1) such authority was not clearly authorized by the Legislature, (2) the statute did not provide reasonable standards to guide the District in exercising its powers, (3) the District was [**19] not authorized to deny a permit to prohibit the pumping of a disproportionate amount of water to be pumped as it relates to tract size based upon its alleged discretionary power.

Not Clearly Authorized

Following the decisions of the Supreme Court in Sipriano v. Great Spring Waters of America, 1 S.W.3d 75 (Tex. 1999) and Barshop v. Medina Under. Wat. Cons. Dist., 925 S.W.2d 618 (Tex. 1996), it is firmly established that [HN14] (1) the common law rule of capture that an owner has the right to withdraw underground percolating water is not correlative but is "absolute," and is not subject to the reasonable use rule adopted by some other jurisdictions, remains the law in Texas, and (2) as provided by section 59, article XVI of the Texas Constitution adopted in 1917, that groundwater regulation is a duty imposed on the Legislature. n6 The need for legislative regulation of water continues to be recognized. *Sipriano*, 1 S.W.3d at 79. Even though the Legislature has declared that groundwater districts are the State's preferred method of groundwater management, we must review the Water Code to determine if the Legislature has clearly authorized the [**20] action of the District.

n6 Because the rule of capture applies only to groundwater, our analysis will be limited to chapter 36 entitled Groundwater Districts.

In Tri-City Fresh Water Supply Dist. No. 2 v. Mann, 135 Tex. 280, 142 S.W.2d 945, 948 (1941), the Court held that [HN15] a district "can exercise no authority that has not been *clearly* granted by the Legislature." The *clearly* granted test was reaffirmed in Quincy Lee Company v. Lodal & Bain Engineers, 602 S.W.2d 262, 264 (Tex. 1980). Accordingly, we presume that the applicable Water Code provisions were enacted by the Legislature with complete knowledge of the rule that any authority granted to a district must be clearly granted. Acker v. Texas Water Com'n, 790 S.W.2d 299, 301 (Tex. 1990).

[HN16] The action of the District to prevent the pumping of a disproportionate amount of water as it relates to the tract size is contrary to the rule of capture as applied to underground water in Texas law as established by *East*, 81 S.W. at 279, [**21] and its progeny, and also prohibited by section 36.002. n7 [HN17] Moreover, although section 36.101 authorizes the District to make rules to control subsidence or prevent waste of groundwater, and section 36.116 authorizes the District to provide for spacing of water wells and regulation of production of wells for the four purposes stated in the section, these sections do not clearly authorize the District to revoke or deny a well permit to prohibit the production of a disproportionate amount of groundwater as it relates to the tract size. [HN18] Because the right to withdraw underground percolating water is not correlative, but is "absolute," and the Legislature has not enacted a "reasonable use" rule as exists in other jurisdictions, *Barshop*, 925 S.W.2d at 625, and considering that by section 36.002, the Legislature provided that nothing in the Code shall deprive or divest the owners of groundwater of their ownership rights, we hold that the applicable Code provisions do not *clearly* authorize the District to enact a regional rule to [*780] prohibit the production of a disproportionate amount of

groundwater as it relates to the size of the tract or to implement a reasonable use rule. [**22]

n7 Section 36.002 provided in part "and nothing in this code shall be construed as depriving or divesting the owners . . . of their ownership or rights . . . ."

No Reasonable Standards

[HN19] In Texas, legislative power is defined broadly and includes the power to set public policy. FM Properties Operating v. City of Austin, 22 S.W.3d 868, 873 (Tex. 2000). Article XVI Section 59 of the Texas Constitution charged the Legislature with the duty of groundwater conservation and authorized the creation of districts to have "the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law." By section 36.002, the Legislature announced the state wide public policy regarding the rule of capture as applied to groundwater. It is important to note that none of the applicable code provisions make any reference to the size of the tract upon which a proposed well is to be located or address the issue of production of disproportionate [**23] volumes of water as it relates to tract size. n8 This omission is significant because omissions are presumed to be intentional. Matter of Arent, 890 S.W.2d 39, 41 (Tex. 1994).

n8 The action of the District was based on its decision to prohibit the production of volumes of water that it considered to be a disproportionate amount of water from the strip of land on which it is located. However, because the District does not cite any code provision or other authority or commentary supporting such a test it appears to be an attempt to apply a "reasonable use" rule.

[HN20] Although the Legislature may delegate powers to the District to carry out legislative purposes, it must establish reasonable standards to guide the District in exercising those powers. *FM Properties Operating*, 22 S.W.3d at 873. Several code sections mention regulations to prevent waste, control subsidence, or avoid reduction of artesian pressure, but none of the sections authorize a rule creating a "reasonable use" rule or [**24] address the issue of disproportionate production of water as it relates to tract size. [HN21] We recognize that the last clause of section 36.002, which provides that the announced public policy is "subject to rules promulgated by a district," is nevertheless ineffective to authorize the action of the District to deny and revoke well permits in order to prevent the production of a disproportionate amount of water as it relates to tract size because the subject is not mentioned in any of the sections authorizing regulations, and the statute does not establish reasonable standards to guide the agency in exercising its rule making power as applied to the expressed public policy favoring the rule of capture.

Section 36.002 Requires Rule

Moreover, the decision of the District based on discretion vested "in a groundwater District by the Legislature to regulate a natural resource" does not support the action of the District. The District does not cite any specific section of the Water Code granting such discretionary powers and we have found none. [HN22] Further, under section 36.002, which, as applicable to groundwater, prevails over any other provision in the Water Code to the contrary, groundwater [**25] ownership rights are "subject to *rules*," but the section does not make groundwater ownership rights subject to discretionary decisions of the District.

As above discussed, the source of the District's authority is legislative action and the District has no power that is not clearly granted by the Legislature. *Hunt*, 142 S.W.2d at 948. [HN23] Section 36.101 [*781] gives the District the discretion to promulgate rules under the procedure that is also prescribed by the Legislature, but neither section 36.101 nor section 36.002 define the term "rule" as applicable here. n9 As applied to section 36.002, we conclude that the word *rule* contemplates an established standard prescribing a guide for conduct, regulation or principle that does not include discretionary acts of the District Board. Black's Law Dictionary, 1331 (6th ed. 1990). Because section 36.002 requires that regulation of groundwater ownership rights must be by *rule* promulgated by the District, not discretionary decisions, the District did not have the authority to implement such regulation without a rule adopted after public notice and public hearing are required by Section 36.101(b). We conclude that the action [**26] of the District cannot be supported on the ground of its alleged discretion.

n9 The Administrative Procedure and Practice Act does not apply because the District is not a statewide agency. Section 2001.003(7).

We have not overlooked the District's argument that its action was proper under sections 36.113(d)(2) and 36.1131(b)(8). However, section 36.113(d)(2) is not applicable because it is concerned with the proposed use of water and not the size of the tract where the well is located. Also, section 36.113(d)(2) does not apply

because water withdrawal may be limited to prevent waste, but prevention of waste was not the basis of the District's actions. Further, these sections cited by the District clearly do not authorize it to revoke or deny a well permit because such a well would allow a disproportionate amount of water to be pumped as it relates to the tract size and the well spacing regulations as they relate to gallons per minute as set by the spacing rules. Accordingly, we hold that the District's second [**27] ground will not support summary judgment, and issues one, three, and four of the Kitten Trust and South Plains are sustained. Our sustension of these issues pretermits consideration of their second issue.

As was also presented in *Barshop*, 925 S.W.2d at 637, the final matter which we must address is the trial court's award of attorney's fees to the District under section 37.009 of the Texas Civil Practice and Remedies Code, which may be awarded or denied in accordance with the discretion of the trial court. Ooke v. Collin County, 692 S.W.2d 454, 455 (Tex. 1985). Here, by its motion for summary judgment, the District also sought an award of attorney's fees and the trial court's order granted the motion for summary judgment and awarded $ 9,500 in attorney's fees. As in *Barshop*, because this award may no longer be valid, and because the award of attorney's fees in declaratory judgment actions is within the discretion of the trial court, we remand this cause to the trial court for it to consider and exercise its discretion regarding attorney's fees, if any, which should be awarded to the parties in the underlying case. [**28]

In conclusion, rendering judgment the trial court should have rendered, the judgment of the trial court signed January 18, 2000, is reversed and the motion for summary judgment of the Kitten Trust and South Plains is granted. It is further ordered that the actions of the District in revoking the Kitten Trust application permit no. 8149-A and the denial of South Plains's water well application permit no. 8209 are hereby declared to be null and void because such acts were in excess of the lawful authority of the District. That portion of the judgment regarding whether attorney's fees and costs should be awarded [*782] to either party and the amount thereof is severed and the cause is remanded to the trial court for its determination and rendition of judgment in accordance with this opinion and its determination of the severed question.

Don H. Reavis

Justice

Quinn, J., concurring.

CONCURBY: Brian Quinn

CONCUR:

CONCURRING OPINION

I join in the judgment rendered by the majority and concur in that portion of the opinion discussing the Conservation District's deviation from Rule 8. So too do I write to say that the actions of an administrative body must be reasonable to survive [**29] judicial review. Implicit in this standard of reasonableness lies the concept of prior notice or what some would call fundamental fairness.

Admittedly, administrative bodies may regulate on an *ad hoc* or case-by-case basis. *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202, 67 S. Ct. 1575, 1580, 91 L. Ed. 1995 (1947); *Southwestern Bell Tel. Co. v. Public Utility Comm'n*, 745 S.W.2d 918, 926 (Tex. App.--Austin 1988, writ denied); *Madden v. Texas Bd. Chiropractic Examiners*, 663 S.W.2d 622, 626 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Despite that power, however, those appearing before the administrative body must be afforded prior notice of the issues of fact and law which will control the result to be reached by the body. *Madden v. Texas Bd. Chiropractic Examiners*, 663 S.W.2d at 626 (imposing, *ad hoc*, a requirement restricting the practice of chiropractic medicine to those who have graduated from an accredited institution). Violating the latter principle contravenes fundamental fairness and renders the agency decision arbitrary and unreasonable. *Id.* at 626-27. In short, an [**30] administrative body cannot say that factors A, B, and C determine a particular result and then interject factor D once the proceeding has begun.

As expressed in the majority opinion at bar, Rule 8 said nothing about a minimum number of acres needed to obtain particular well permits. So, to use that factor as a basis to revoke a permit *already issued* and deny another application pending issuance constitutes a deprivation of fundamental fairness. That is, the Kitten Family Living Trust and South Plains Lamesa Railroad, Ltd were entitled to prior notice of the facts and law which would control the Conservation District's ultimate decision. Those two entities being denied that entitlement by the District, the latter's decision cannot stand. *Madden v. Texas Bd. Chiropractic Examiners*, *supra*.

For the foregoing reason, I concur in the judgment of the majority.

Brian Quinn

Justice

Appendix "H"

Chapter 245, Texas Local Gov't Code

LOCAL GOVERNMENT CODE

TITLE 7. REGULATION OF LAND USE, STRUCTURES, BUSINESSES, AND RELATED ACTIVITIES

SUBTITLE C. REGULATORY AUTHORITY APPLYING TO MORE THAN ONE TYPE OF LOCAL GOVERNMENT

CHAPTER 245. ISSUANCE OF LOCAL PERMITS

Sec. 245.001. DEFINITIONS. In this chapter:

(1) "Permit" means a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought.

(2) "Political subdivision" means a political subdivision of the state, including a county, a school district, or a municipality.

(3) "Project" means an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor.

(4) "Regulatory agency" means the governing body of, or a bureau, department, division, board, commission, or other agency of, a political subdivision acting in its capacity of processing, approving, or issuing a permit.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 6 (S.B. 848), Sec. 1, eff. April 27, 2005.

Sec. 245.002. UNIFORMITY OF REQUIREMENTS. (a) Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the

time:

(1) the original application for the permit is filed for review for any purpose, including review for administrative completeness; or

(2) a plan for development of real property or plat application is filed with a regulatory agency.

(a-1) Rights to which a permit applicant is entitled under this chapter accrue on the filing of an original application or plan for development or plat application that gives the regulatory agency fair notice of the project and the nature of the permit sought. An application or plan is considered filed on the date the applicant delivers the application or plan to the regulatory agency or deposits the application or plan with the United States Postal Service by certified mail addressed to the regulatory agency. A certified mail receipt obtained by the applicant at the time of deposit is prima facie evidence of the date the application or plan was deposited with the United States Postal Service.

(b) If a series of permits is required for a project, the orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project. All permits required for the project are considered to be a single series of permits. Preliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project.

(c) After an application for a project is filed, a regulatory agency may not shorten the duration of any permit required for the project.

(d) Notwithstanding any provision of this chapter to the contrary, a permit holder may take advantage of recorded subdivision plat notes, recorded restrictive covenants required by a regulatory agency, or a change to the laws, rules, regulations, or ordinances of a regulatory agency that enhance or protect the project, including changes that lengthen the effective life of the

permit after the date the application for the permit was made, without forfeiting any rights under this chapter.

(e) A regulatory agency may provide that a permit application expires on or after the 45th day after the date the application is filed if:

(1) the applicant fails to provide documents or other information necessary to comply with the agency's technical requirements relating to the form and content of the permit application;

(2) the agency provides to the applicant not later than the 10th business day after the date the application is filed written notice of the failure that specifies the necessary documents or other information and the date the application will expire if the documents or other information is not provided; and

(3) the applicant fails to provide the specified documents or other information within the time provided in the notice.

(f) This chapter does not prohibit a regulatory agency from requiring compliance with technical requirements relating to the form and content of an application in effect at the time the application was filed even though the application is filed after the date an applicant accrues rights under Subsection (a-1).

(g) Notwithstanding Section 245.003, the change in law made to Subsection (a) and the addition of Subsections (a-1), (e), and (f) by S.B. No. 848, Acts of the 79th Legislature, Regular Session, 2005, apply only to a project commenced on or after the effective date of that Act.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 6 (S.B. 848), Sec. 2, eff. April 27, 2005.

Sec. 245.003. APPLICABILITY OF CHAPTER. This chapter applies only to a project in progress on or commenced after September 1, 1997. For purposes of this chapter a project was in progress on September 1, 1997, if:

(1) before September 1, 1997:

(A) a regulatory agency approved or issued one or more permits for the project; or

(B) an application for a permit for the project was filed with a regulatory agency; and

(2) on or after September 1, 1997, a regulatory agency enacts, enforces, or otherwise imposes:

(A) an order, regulation, ordinance, or rule that in effect retroactively changes the duration of a permit for the project;

(B) a deadline for obtaining a permit required to continue or complete the project that was not enforced or did not apply to the project before September 1, 1997; or

(C) any requirement for the project that was not applicable to or enforced on the project before September 1, 1997.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.

Sec. 245.004. EXEMPTIONS. This chapter does not apply to:

(1) a permit that is at least two years old, is issued for the construction of a building or structure intended for human occupancy or habitation, and is issued under laws, ordinances, procedures, rules, or regulations adopting only:

(A) uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization; or

(B) local amendments to those codes enacted solely to address imminent threats of destruction of property or injury to persons;

(2) municipal zoning regulations that do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality;

(3) regulations that specifically control only the use of land in a municipality that does not have zoning and that do not affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, or building size;

(4) regulations for sexually oriented businesses;

(5) municipal or county ordinances, rules, regulations, or other requirements affecting colonias;

(6) fees imposed in conjunction with development permits;

(7) regulations for annexation that do not affect landscaping or tree preservation or open space or park dedication;

(8) regulations for utility connections;

(9) regulations to prevent imminent destruction of property or injury to persons from flooding that are effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy;

(10) construction standards for public works located on public lands or easements; or

(11) regulations to prevent the imminent destruction of property or injury to persons if the regulations do not:

(A) affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, building size, residential or commercial density, or the timing of a project; or

(B) change development permitted by a restrictive covenant required by a municipality.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.
Amended by Acts 2003, 78th Leg., ch. 646, Sec. 1.
Amended by:

Acts 2005, 79th Leg., Ch. 31 (S.B. 574), Sec. 1, eff. September 1, 2005.

Sec. 245.005. DORMANT PROJECTS. (a) After the first anniversary of the effective date of this chapter, a regulatory agency may enact an ordinance, rule, or regulation that places an expiration date on a permit if as of the first anniversary of the effective date of this chapter: (i) the permit does not have an expiration date; and (ii) no progress has been made towards completion of the project. Any ordinance, rule, or regulation enacted pursuant to this subsection shall place an expiration date

of no earlier than the fifth anniversary of the effective date of this chapter.

(b) A regulatory agency may enact an ordinance, rule, or regulation that places an expiration date of not less than two years on an individual permit if no progress has been made towards completion of the project. Notwithstanding any other provision of this chapter, any ordinance, rule, or regulation enacted pursuant to this section shall place an expiration date on a project of no earlier than the fifth anniversary of the date the first permit application was filed for the project if no progress has been made towards completion of the project. Nothing in this subsection shall be deemed to affect the timing of a permit issued solely under the authority of Chapter 366, Health and Safety Code, by the Texas Commission on Environmental Quality or its authorized agent.

(c) Progress towards completion of the project shall include any one of the following:

(1) an application for a final plat or plan is submitted to a regulatory agency;

(2) a good-faith attempt is made to file with a regulatory agency an application for a permit necessary to begin or continue towards completion of the project;

(3) costs have been incurred for developing the project including, without limitation, costs associated with roadway, utility, and other infrastructure facilities designed to serve, in whole or in part, the project (but exclusive of land acquisition) in the aggregate amount of five percent of the most recent appraised market value of the real property on which the project is located;

(4) fiscal security is posted with a regulatory agency to ensure performance of an obligation required by the regulatory agency; or

(5) utility connection fees or impact fees for the project have been paid to a regulatory agency.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 31 (S.B. 574), Sec. 1, eff. September 1, 2005.

Sec. 245.006. ENFORCEMENT OF CHAPTER. (a) This chapter may be enforced only through mandamus or declaratory or injunctive relief.

(b) A political subdivision's immunity from suit is waived in regard to an action under this chapter.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 31 (S.B. 574), Sec. 1, eff. September 1, 2005.

Sec. 245.007. CONSTRUCTION AND RENOVATION WORK ON COUNTY-OWNED BUILDINGS AND FACILITIES IN CERTAIN COUNTIES. (a) This section applies only to a building or facility that is owned by a county with a population of 3.3 million or more and is located within the boundaries of another political subdivision.

(b) A political subdivision may not require a county to notify the political subdivision or obtain a building permit for any new construction or any renovation of a building or facility owned by the county if the construction or renovation work is supervised and inspected by an engineer or architect licensed in this state.

(c) This section does not exempt a county from complying with the building standards of the political subdivision during the construction or renovation of the building or facility.

Added by Acts 2005, 79th Leg., Ch. 532 (H.B. 960), Sec. 1, eff. June 17, 2005.