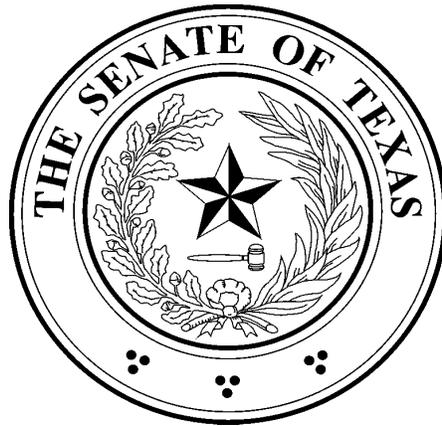


**The Senate
Committee on
Natural Resources**



**Interim Report
to the 81st Legislature**

*Implementation of House Bill 1763 and
Groundwater Management in Texas*

February 2009

SENATE COMMITTEE ON NATURAL RESOURCES

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SENATOR CARLOS URESTI

February 9, 2009

The Honorable David Dewhurst
Lieutenant Governor of Texas
Members of the Texas Senate
Texas State Capitol
Austin, Texas 78701

Dear Governor Dewhurst and Fellow Members:

The Senate Committee on Natural Resources of the Eightieth Legislature hereby submits its interim report including findings and recommendations for consideration by the Eighty-first Legislature.

Respectfully Submitted,

Handwritten signature of Senator Craig Estes in black ink.

Senator Craig Estes, Vice-Chair

Handwritten signature of Senator Kip Averitt in black ink.

Senator Kip Averitt, Chair

Handwritten signature of Senator Glenn Hegar in black ink.

Senator Glenn Hegar

Senator Kim Brimer

Handwritten signature of Senator Juan "Chuy" Hinojosa in black ink.

Senator Juan "Chuy" Hinojosa

Handwritten signature of Senator Robert Deuell in black ink.

Senator Robert Deuell

Senator Mike Jackson

Handwritten signature of Senator Robert Duncan in black ink.

Senator Robert Duncan

Handwritten signature of Senator Kel Seliger in black ink.

Senator Kel Seliger

Handwritten signature of Senator Kevin Eltife in black ink.

Senator Kevin Eltife

Handwritten signature of Senator Carlos Uresti in black ink.

Senator Carlos Uresti

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INTERIM CHARGE

Monitor the implementation of House Bill (H.B.) 1763, 79th Legislative Session, including progress by Groundwater Conservation Districts (GCDs) on joint planning within Groundwater Management Areas (GMAs) and collaboration with entities within a GMA in joint planning including areas not covered by a GCD. Study the impact of HB 1763 on the following:

- GCD creation within areas not covered by a GCD
- single or partial county GCDs
- consolidation with existing GCDs, and within priority groundwater management areas

BACKGROUND

House Bill 1763 required GCDs in GMAs to meet at least once every year to conduct joint planning, which includes defining desired future conditions (DFCs) of the groundwater resources within the GMA and reviewing groundwater management plans and accomplishments. The DFCs are due to Texas Water Development Board (TWDB) no later than September 1, 2010, and every five years thereafter. The TWDB is responsible for calculating or verifying the managed available groundwater (MAG) based on hydrologic studies and submitted DFCs. The TWDB will deliver MAG values to GCDs and regional water planning groups for inclusion in their plans.¹

PRIORITY GROUNDWATER MANAGEMENT AREAS

A Priority Groundwater Management Area (PGMA) is an area designated and delineated by the Texas Commission on Environmental Quality (TCEQ) that is experiencing, or is expected to experience within the immediate 25-year period following TCEQ's review, critical groundwater problems. Critical groundwater problems include shortages of surface water or groundwater, land subsidence resulting from groundwater withdrawal, and contamination of groundwater supplies. Through the establishment of a PGMA, areas in need of GCDs are identified, local initiative to create a GCD is encouraged, and TCEQ is authorized to establish a GCD if local initiatives to do so do not succeed.²

Currently, the process for delineating a PGMA begins with staff of TCEQ and TWDB identifying areas with groundwater concerns. The executive director of TCEQ then completes a report about the area, including a recommendation for or against designating all or part of the area as a PGMA. Should a PGMA designation be established, the executive director's report will also recommend the creation of a GCD. Once a report is complete, its findings are made public.

If an area is recommended for designation as a PGMA, a State Office of Administrative Hearings (SOAH) contested-case hearing is held. The hearing judge considers evidence and presents a proposal to TCEQ on the PGMA designation and GCD creation recommendation. Following the recommendation from SOAH, TCEQ determines whether the area will be designated as a PGMA and makes a recommendation about GCD creation through a PGMA designation order. The date of the PGMA designation

order starts a two-year time frame for local action to establish a GCD through special law or petition.³ The TCEQ cannot take action in the first 120 days following issue of the order. However, the TCEQ must either create a GCD within two years of the date of the order or recommend that the counties included in the PGMA designation be added to an existing GCD. The process is intended to give local entities the opportunity to manage their groundwater resources locally, but provides a timeline for doing so to ensure that the resource is protected by the state if action is not taken at the local level.

INTERIM EFFORTS/ISSUE STATUS

INTERIM COMMITTEE HEARING

The Senate Committee on Natural Resources held a public hearing in Amarillo, Texas, on August 5, 2008. A portion of the testimony focused on groundwater issues. The Amarillo hearing agenda can be found in Appendix A.

HOUSE BILL 1763 IMPLEMENTATION UPDATE

The TWDB has indicated that all GMAs with GCDs plan to meet the statutory DFC deadline of September 1, 2010. One of the GMAs, GMA 8, has already submitted its final DFCs to the TWDB.⁴ For a more detailed report on the progress of the GMA and DFC processes, refer to Appendix B. Based on the testimony heard from various GMAs during the August 5 hearing, there was general consensus that even though there have been some challenges, the Legislature should wait to make changes until after the implementation process of H.B. 1763 is complete.

Staffing is one of the challenges that TWDB faces with respect to implementation of H.B. 1763. Groundwater Conservation Districts would like TWDB to reduce turnaround time for groundwater availability modeling runs. To address this issue, TWDB has pulled staff from other projects to run models, worked with GCDs to prioritize runs, and prepared a state budget exceptional item request that will be submitted to the 81st Legislature containing salary adjustments for modelers to improve retention and recruitment.⁵

Another challenge that TWDB has encountered relates to the accuracy of the models. Models by definition, are approximations and therefore have uncertainties associated with them. Given the importance of MAG numbers to permitting, GCDs are concerned about the accuracy of the models, especially those models for the minor aquifers. To address this concern, TWDB has evaluated the accuracy of models with calibration statistics, encouraged GCDs to manage adaptively, and prepared a budget request exceptional item for consideration by the 81st Legislature that includes both funding for more aggressive improvements to the models and focused studies on the minor aquifers.⁶

Exempt use is another area of concern that TWDB has identified while going through the GMA process. Small wells, primarily used for domestic and livestock purposes, wells used for oil and gas production, and wells existing at the time of creation of the GCD are generally exempt from permitting. Groundwater Conservation Districts are required to permit, to the extent possible, up to the MAG number. However, many districts have exempt use that comprises a considerable part of their total use. If exempt use is not

considered in the MAG number, then districts will not be able to achieve their DFCs if all exempt use and permitted water is pumped.⁷

Areas without GCDs present another challenge. Counties without GCDs do not have a vote in the GMA process to set the DFC for their aquifers. Although the groundwater is not regulated, the MAG number will be used by the regional water planning groups, and could affect the use of groundwater as a water management strategy. Similarly, pumping of groundwater in the unregulated areas within a GMA impacts the areas ability to accurately achieve the DFC. In response, TWDB has encouraged GMAs to reach out to areas without GCDs and encouraged local officials in counties without GCDs to get involved in the joint planning process.⁸

INTERIM ACTIVITY

Between 1987 and 2008, TCEQ and TWDB evaluated 18 PGMA study areas. To date, seven PGMAs have been designated. They are listed below:

- Hill Country PGMA in all or part of eight counties (1990)
- Reagan, Upton and Midland County PGMA in part of each county (1990)
- Briscoe, Swisher and Hale County PGMA in all or part of each county (1990)
- Dallam County PGMA in part of county (1990)
- El Paso County PGMA in part of county (1998)
- Northern Bexar County (added to Hill County PGMA in 2001)

- Central Texas Trinity Aquifer PGMA in all or part of Bosque, Coryell, Hill, McLennan, and Somervell counties (2008)⁹

In June 2007, the executive director of the TCEQ filed a report entitled, *Updated Evaluation of North-Central Texas-Trinity and Woodbine Aquifer Priority Groundwater Management Study Area*. The executive director's report recommended that Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant, and Wise counties be designated as the Northern Trinity and Woodbine Aquifers PGMA. A SOAH hearing was conducted, and the SOAH administrative law judge's proposal for decision was filed with TCEQ on September 2, 2008.¹⁰ On February 11, 2009, TCEQ determined the Northern Trinity and Woodbine Aquifers PGMA be designated for the recommended 13-county area. The designation of this PGMA will become effective upon issuance of the TCEQ Order.¹¹ For a map of designated and recommended PGMA's along with confirmed and unconfirmed GCDs, refer to Appendix C.

IMPORTANT JUDICIAL DECISIONS

During the 80th Interim, there were several judicial decisions handed down that impacted Chapter 36 of the Texas Water Code. Through these decisions, some of which are still in the appeals process, the courts made more modifications to Chapter 36 than have been made since its inception. Consequently, these decisions may lead to legislative action. These cases include:

- Edwards Aquifer Authority (EAA) v. Day, which required the EAA to undertake a takings analysis because it granted a groundwater production permit allowing

production of only a portion of the total amount requested by the landowners/applicants

- City of Del Rio v. Clayton Sam Colt Hamilton Trust, which holds that landowners have some ownership interest in groundwater in place beneath the surface of their property
- Guitar Holding Co., LP v. Hudspeth County Underground Water Conservation District No. 1, relating to the ability of a GCD to issue production permits based upon historic use and to authorize the transport of water produced pursuant to such a production permit
- City of Aspermont v. Rolling Plains GCD, relating to the ability of a political subdivision to rely upon governmental immunity as a shield against GCD enforcement efforts

For further discussion of these cases, refer to an analysis prepared by Greg Ellis, Executive Director, Texas Alliance of Groundwater Districts, provided in Appendix D.

CONCLUSION

With respect to H.B. 1763, the Legislature should give the process time to unfold while reinforcing the Legislature's desire to conserve groundwater. The Legislature should safeguard against actions that may compromise the original intent of the legislation.

As PGMA designations are made by TCEQ, additional GCDs will be created. The Legislature should monitor all GCD creation to ensure that there is regional management and coordination of groundwater resources.

As a result of judicial activity concerning Chapter 36 of the Texas Water Code, legislative responses to some decisions should be considered. Of particular concern is the City of Aspermont v. Rolling Plains Groundwater Conservation District case. If political subdivisions are exempt from regulation by GCDs, or if GCDs have no meaningful ability to enforce their regulation against political subdivisions, it will completely undermine Chapter 36 of the Texas Water Code and the groundwater management system established by the Legislature.

¹ Texas Commission on Environmental Quality and Texas Water Development Board, Priority Groundwater Management Areas and Groundwater Conservation Districts, Report to the 81st Texas Legislature, January 2009.

² Kelly Mills, Testimony before the Senate Committee on Natural Resources, August 5, 2008, Amarillo, Texas.

³ Id.

⁴ TWDB, Testimony before the Senate Committee on Natural Resources, August 5, 2009, Amarillo, Texas.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id at 1.

¹⁰ Id at 1.

¹¹ Isaac Jackson, Personal Communication, February 11, 2009.

Appendix

A



AGENDA
Senate Committee on Natural Resources
August 5, 2008, 10:00 a.m..
Region 16 Education Service Center – Head Start Center
Conference Center
1601 S. Cleveland
Amarillo, TX 79102

I. Call to Order

- Welcome - Mayor Debra McCartt, City of Amarillo

II. Texas Water Development Board

- Kevin Ward, Executive Administrator
- Robert Mace, Director, Groundwater Resources Division
- Bill Mullican, Deputy Executive Administrator, Water Science and Conservation

III. Priority Groundwater Management Area (PGMA) Update

- Kelly Mills, Team Leader, Groundwater Planning and Assessment Team, Water Supply Division, Texas Commission on Environmental Quality

IV. Emerging Groundwater Issues Panel

- Billy Howe, State Legislative Director, Texas Farm Bureau
- Greg Ellis, Executive Director, Texas Alliance of Groundwater Districts
- Brian Sledge, Attorney-at-Law, Lloyd Gosselink Rochelle & Townsend, P.C.
- Monique Norman, Attorney-at-Law

V. Groundwater Management Areas (GMA) Panels

GMA 1 Panel

- GMA 1 Chair - Danny Krienke, Board Member, North Plains GCD
- C.E. Williams, General Manager, Panhandle GCD
- Janet Guthrie, General Manager, Hemphill GCD

GMA 2 Panel

- GMA 2 Chair - Jason Coleman, General Manager, South Plains UWCD
- Jim Conkwright, General Manager, High Plains GCD
- Harvey Everhart, General Manager, Mesa UWCD
- Gary Walker, General Manager, Sandy Land UWCD

Other GMAs Panel

- Mike Mahoney, General Manager, Evergreen UWCD
- Janet Adams, General Manager, Jeff Davis and Presidio County UWCDs
- Mike Massey, General Manager, Upper Trinity GCD

(over)

VI. Municipal Supply Panel

- Kent Satterwhite, General Manager, CRMWA
- John Grant, General Manager, CRMWD
- Jarrett Atkinson, Assistant City Manager, City of Amarillo
- Tom Adams, Deputy City Manager, City of Lubbock

VII. Disposal Wells and the Reuse and Recycling of Wastewater from Oil and Gas Operations

- Doug O. Johnson, PE, Manager for Injection-Storage Permits and Support, Technical Permitting Section, Oil and Gas Division, Railroad Commission of Texas

Industry Panel

- Donna Warndorf, Director of Public Affairs, TIPRO
- Bill Stevens, Executive Vice President, Texas Alliance of Energy Producers
- Ben Shepperd, Executive Vice President, Permian Basin Petroleum Association
- Jason Herrick, President of the Board of Directors, Panhandle Producers and Royalty Owners Association

- Jay Ewing, Completion/Construction Supervisor- North Texas Operations, Devon Energy

- Janet Guthrie, General Manager, Hemphill UWCD

- Jason Hill, Attorney-at-Law, Lloyd Gosselink Rochelle & Townsend, P.C.

VIII. Brackish Groundwater Panel

- Jacob M. White, EIT, NRS Consulting Engineers
- Steve Kosub, Corporate Counsel-Water Resources, San Antonio Water System
- Bill Mullican, Deputy Executive Administrator, Water Science and Conservation, Texas Water Development Board

IX. Public Testimony

X. Recess

Appendix

B

Groundwater Management Area (GMA) Desired Future Conditions (DFCs) Process Status

January 23, 2009

GMA 1

- has not submitted any DFCs.
- has held 15 meetings.

GMA 2

- has not submitted any DFCs.
- has held six meetings.

GMA 3

- has not submitted any DFCs.
- has held at least one meeting, there is only one groundwater conservation district.

GMA 4

- has not submitted any DFCs.
- has held four meetings.

GMA 5

- does not have any groundwater conservation districts.

GMA 6

- has not submitted any DFCs.
- has held three meetings.

GMA 7

- has not submitted any DFCs.
- has held three meetings.

GMA 8

- has submitted all DFCs, including
 - Trinity Aquifer
 - Edwards (Balcones Fault Zone) Aquifer
 - Blossom Aquifer
 - Brazos River Alluvium Aquifer
 - Ellenburger-San Saba Aquifer
 - Hickory Aquifer
 - Nacatoch Aquifer
 - Marble Falls Aquifer
 - Woodbine Aquifer
- has held 15 meetings and one workshop.

GMA 9

- has submitted several DFCs, including:
 - Ellenburger-San Saba Aquifer
 - Hickory Aquifer
 - Marble Falls Aquifer
 - Edwards Group of the Edwards-Trinity Plateau Aquifer
- has held 18 meetings and an additional two public meetings, and three GMA Technical Work Group meetings (GCD managers only).

GMA10

- has not submitted any DFCs.
- has held six meetings and an additional three public workshops for DFC input

GMA 11

- has not submitted any DFCs.
- has held eight meetings.

GMA 12

- has not submitted any DFCs.
- has held eight meetings, with one additional stakeholder meeting

GMA 13

- has not submitted any DFCs.
- has held eight meetings with three GMA stakeholder meetings and one informal meeting before the required start of the legislation

GMA 14

- has not submitted any DFCs.
- has held 15 meetings.

GMA 15

- has not submitted any DFCs.
- has held eight meetings.

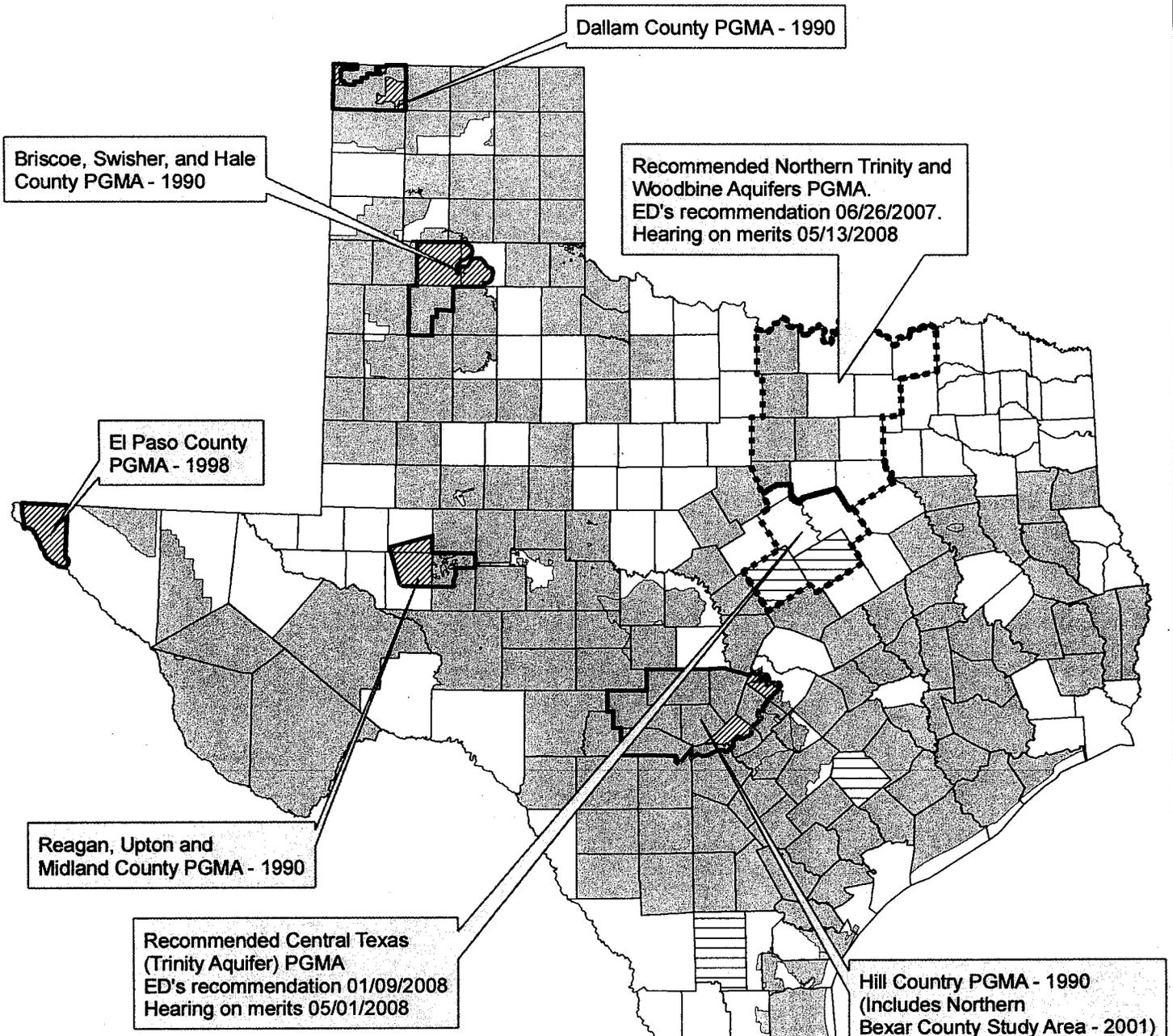
GMA 16

- has not submitted any DFCs.
- has held 12 meetings and one informal meeting before the required start of the legislation

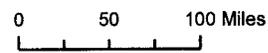
In addition, GMAs 15 and 16 held one joint meeting prior to the GMA boundary change between GMA 15 and GMA 16.

Appendix C

Priority Groundwater Management Areas (PGMA)



-  Designated PGMA
-  Area within Designated PGMA not incorporated into a Groundwater Conservation District
-  Recommended PGMA
-  Confirmed Groundwater Conservation District (93)
-  Created but Unconfirmed Groundwater Conservation District (4)



This map was prepared by the TCEQ for display purposes only. No claims are made to the accuracy or completeness of the information shown here nor is this map suitable for any other use. The scale and location of mapped data are approximate. The groundwater conservation district boundaries are not land survey data and may not accurately depict legal descriptions. For more information about this map, please contact TCEQ Groundwater Planning and Assessment Team.

Map Printed July, 2008

Appendix D

Groundwater Cases

1) *Guitar Holding v. Hudspeth County UWCD No.1*

The Hudspeth County UWCD No. 1 had jurisdiction over the Bone Springs Victorio Peak aquifer, which supports approximately 30,000 acres of irrigated agriculture. The Guitar family owns over 38,000 acres of ranchland within the District and produce groundwater for domestic and livestock purposes, which is exempt from the District's permit requirements.

In 2002, the Board revised the District rules to establish a cap on overall production, establish an historic use period of 10 years from date of adoption of the rules, and created "validation" permits for historic and existing users that qualified and allowed those "historic" users to change the place of use or purpose of use without losing their historic user protections. The Guitars filed suit challenging the rules and the District's interpretation of Section 36.116(b), Water Code, which provides:

(b) 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 comprehensive management plan under Section 36.1071 and as provided by Section 36.113.

The District Court and the 8th Court of Appeals ruled in favor of the District. The Guitars appealed, and the Texas Supreme Court overturned the Court of Appeals decision. The Supreme Court held that protecting "historic use" required protecting both the amount of use and the purpose of use:

The court of appeals upheld the district's permitting scheme, concluding, in effect, that the district's authority to preserve the "historic or existing use" of groundwater pertained only to the amount of water used in the past and not its purpose. 209 S.W.3d 146, 158-59. We conclude, however, that the amount of groundwater used and its beneficial purpose are components of "historic or existing use" and that the district thus exceeded its rule-making authority in grandfathering existing wells without regard for both. Accordingly, we reverse the court of appeals' judgment and render judgment, declaring the district's scheme for issuing permits for the transfer of groundwater out of the district invalid.

...

In 2005, the Legislature added a new definition for "evidence of historic or existing use," which it defined as "evidence that is material and relevant to a determination of the amount of groundwater beneficially used" during the relevant time period. *Id.* § 36.001(29). The chapter already defined "use for a beneficial purpose" with a list of specific purposes and "any other purpose that is useful and beneficial to the user." *Id.* § 36.001(9). Read together, these definitions indicate that 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. *See id.* § 36.0015 (purpose of groundwater conservation districts is to conserve, preserve, and protect groundwater through regulation). . . . A district's discretion to preserve historic or existing use is accordingly tied both to the amount and purpose of the prior use.

The Court's opinion also addressed the issue of transfer permits and whether an "historic use" permit could be transferred. The Court held that any transfer permit application would be a "new application" as that term is used in Section 36.113(e), Water Code, and that all new applications must be applied

uniformly. By linking the transfer permits to existing production permits the District, in essence, gave preferential treatment for new transfer permit applications from existing users. The Court held that preferential treatment is prohibited by Section 36.113, Water Code, and therefore invalid.

2) *City Of Del Rio v. Clayton Sam Colt Hamilton Trust*

The City of Del Rio ("Del Rio") purchased land from the Clayton Sam Colt Hamilton Trust ("Trust") and the deed conveying the property included the following reservations:

SURFACE ESTATE ONLY described as fifteen (15 acres) more fully described in Exhibit "A" attached hereto and incorporated herein for all purposes.

SAVE AND EXCEPT and Seller shall reserve unto Seller, its successors, heirs and assigns forever all of the oil, gas, and other mineral rights in, on and under and that may hereinafter be produced and saved therefrom beginning at 100 feet below the surface of the land and deeper. Seller hereby agrees and does hereby relinquish all rights of ingress and egress in and on the property and covenants that no portion of the property being conveyed under the terms of this contract shall be used for any operations either of drilling, exploration, or producing of the minerals reserved by the Seller hereunder and Seller agrees there will be no surface operations whatsoever involving this property so conveyed.

Grantor RESERVES unto Grantor, its successors, heirs and assigns forever *all water rights associated with said tract*, however, Grantor may not use any portion of the surface of said tract for exploring, drilling or producing any such water.

In 2001 the City decided to drill a water well on the fifteen-acre tract it purchased from the Trust. The well was completed in the summer of 2002 at a cost to the City of about \$850,000. The Trust filed suit against the City seeking a declaratory judgment that (1) the Trust owned the groundwater beneath the fifteen-acre tract, and (2) the City's claim of ownership to those water rights should be rejected. The Trust also sought monetary damages for unconstitutional taking and action for trespass. The City responded with a counterclaim, seeking a declaratory judgment that the warranty deed did not leave the Trust with "right, title, or interest in any groundwater pumped to the surface by the City" on the fifteen-acre tract and that any groundwater pumped to the surface was the City's property. Alternatively, the City pled for condemnation of the water rights reserved by the Trust.

The City argued that the "absolute ownership" doctrine does not refer to ownership of the actual corpus of water beneath the land but only to a right of the surface estate owner to acquire possession of the water. Essentially they argued that because the Rule of Capture grants title to whoever captures the water there is no vested property right that can be reserved in a warranty deed conveying the fifteen-acre tract to the City. The Trust responded that the Absolute Ownership doctrine grants ownership of the surface and subsurface estate, and any portion thereof may be reserved. The Court discussed both concepts and ruled in favor of the Trust:

The Texas Supreme Court has stated that percolating water is a "part of, and not different from, the soil" and the landowner is the "absolute" owner of it. *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 281 (1904); *see, e.g., City of Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681, 686 (Tex. 1983) ("The absolute ownership theory regarding groundwater was adopted by this Court in *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904)."); *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21, 25-27 (Tex. 1978). "Water, *unsevered expressly by conveyance or*

reservation, has been held to be part of the surface estate." *Sun Oil Co v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972) (emphasis added). And, groundwater is the "exclusive property" of the owner of the surface and "subject to barter and sale as any other species of property." *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 278 (1927). Thus, under the absolute ownership theory, the Trust was entitled to sever the groundwater from the surface estate by reservation when it conveyed the surface estate to the City of Del Rio.

The Court further ruled that the groundwater "right" could be severed and retained by the Trust. The City filed motions for rehearing and rehearing en banc, both of which were denied on September 19, 2008. The City of Del Rio filed a petition for review with the Texas Supreme Court on October 30, 2008.

3) *Day & McDaniel v. EAA*

In 2004 the EAA "partially granted" an application for an Initial Regular Permit ("IRP") for irrigation filed by Burrell Day and Joel McDaniel ("Day & McDaniel"). Day & McDaniel sought an IRP for 700 acre-feet of historic irrigation pumping rights based upon a claim of having irrigated 300 acres during the EAA's statutory "Historical Period."

Following a hearing conducted by the State Office of Administrative Hearings ("SOAH"), the EAA granted Day & McDaniel an IRP for 14 acre-feet of water based on 7 acres of land irrigated directly from the well during the Historical Period. The rest of the Day & McDaniel claim was denied because EAA ruled that the water was pumped from a surface-water course and lake, and therefore should have been permitted by TCEQ. Day & McDaniel appealed this decision to District Court in Atascosa County.

For purposes of the litigation and the discussion of the Partial Motion for Summary Judgment, Day & McDaniel claimed that the EAA's permitting decision resulted in a "taking" of their right to pump as much from the Edwards Aquifer as they could have had the EAA not existed, an amount Day & McDaniel asserted was as much as 1834.80 acre-feet a year.

Day & McDaniel filed a petition in district court challenging the Final Order and asserting numerous constitutional claims relating to the decision and the process, including a constitutional "taking" of their right to pump as much from the Edwards Aquifer as they could have had the EAA not existed. In the conclusion to their petition, Day & McDaniel asked the trial court to reverse EAA's Final Order, find Day & McDaniel irrigated three hundred acres of land during the historical period with water from the Aquifer, and remand the matter to EAA to reconsider its decision in light such findings. Alternatively, Day & McDaniel asked the court to find in their favor on their constitutional takings claim.

Day & McDaniel filed a motion for summary judgment asking for a ruling that the water withdrawn from the Lake was groundwater and therefore should have been considered as part of the basis for an IRP. They alleged EAA and the ALJ erred in concluding the water used from the lake during the historical period was state water within the meaning of section 11.021(a) of the Texas Water Code rather than groundwater from the Aquifer. EAA filed a competing motion for summary judgment, arguing the decisions by EAA and the ALJ were correct as a matter of law.

The trial court granted Day & McDaniel's motion for summary judgment, ruling EAA erred in adopting the ALJ's conclusion that the Creek and the Lake are watercourses, that the water within those watercourses is state water, and any irrigation from the Lake was using state surface water. The trial court also granted motions for summary judgment filed by EAA with regard to Day & McDaniel's constitutional claims. (Note that the State of Texas had been joined as a party-defendant based on the constitutional claims because it was the State, not the EAA, that limited groundwater production rights to

the amount beneficially used during the Historical Period. Once the constitutional claims were dismissed the State stopped participating in the case.)

Both Day & McDaniel and the EAA filed appeals; EAA appealed the Court's ruling on the question of surface water vs. groundwater; Day & McDaniel appealed the dismissal of their constitutional claims.

Day & McDaniel asserted that their complaint arose from "the taking of their real property rights identified in the fee simple estate," which included ownership of "all of the minerals and water below the surface of their land to the center of the earth. They argued that the EAA's IRP denied them access to all, or most of their groundwater estate for a public purpose, which was identical to a "confiscation of property rights for a public purpose" and asserted that compensation must be paid.

The 4th Court of Appeals issued a decision on August 29, 2008 holding that the evidence proved the Lake is a watercourse and that once water from the well entered the Lake its character changed from groundwater subject to the control of the EAA to surface water subject to the control of the TCEQ. Therefore the original permit issued by the EAA was upheld. However, the opinion also ruled that the constitution takings claim required further consideration by the Trial Court:

[L]andowners have some ownership rights in the groundwater beneath their property. *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, No. 04-06-00782-CV, 2008 WL 508682, *4 (Tex. App.-San Antonio Feb. 27, 2008, no pet. h.) (citing *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 281 (1904)). Because Applicants have some ownership rights in the groundwater, they have a vested right therein. *See Tex. S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 903 (Tex. App.-Houston [1st Dist.] 2007, pets. denied) (holding vested property right is one that has definitive, rather than potential, existence). Applicants' vested right in the groundwater beneath their property is entitled to constitutional protection. *See Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002) (holding vested right is property right protected by constitution). The trial court therefore erred in granting the Authority's motion for summary judgment on this constitutional claim. Because the Authority moved for summary judgment only on the ground Applicants have no vested property right, we must remand Applicants' constitutional taking claim for further proceedings.

Finally, the Court denied Day & McDaniel's other claims, including 1) substantive due process claims, 2) procedural due process claims, 3) Section 11.021, Water Code, claims ownership of both the surface water and land on Day & McDaniel's property, 4) the EAA Act requiring applicants to prove up historic claims is a "retroactive law," and 5) the EAA could not amend its rules while the application was pending.

Contrary to Applicants' assertion, section 11.021 of the Water Code does not give the State ownership of the real property beneath watercourses on private property. *See Tex. Water Code Ann. § 11.021* (Vernon 2008). Rather, that section merely defines the types of water that belong to the State. *Id.* Even if the water in the watercourse is state water, Applicants are not entitled to compensation for the State's use of the watercourse to transport the state water. "[T]he State has the right to transport water through watercourses for a public purpose without seeking permission from any riparian owners." *Domel v. City of Georgetown*, 6 S.W.3d 349, 358 (Tex. App.-Austin 1999, pet. denied).

The 4th Court of Appeals overruled all motions for rehearing; the deadline for filing petitions for review with the Texas Supreme Court is January 2, 2009. (Note: the State of Texas was granted an extension to January 2, 2009 in order to file its own petition for review of the constitutional takings claim.

4) *Rolling Plains GCD v. City of Aspermont*

In July 2005, the Rolling Plains Groundwater Conservation District (“District”) brought an enforcement action against the City of Aspermont (the “City”) for the failure to pay groundwater transport fees, failure to file monthly exportation reports, and the failure to file meter reports with the District. Water users transporting groundwater outside the district’s boundaries are generally required to pay transportation (or export) fees to that district as authorized by §§ 36.122(e) and 36.205(g), Water Code. The City claimed that it was not subject to regulation by the District and refused to pay the transport fees. The City answered the District’s suit and filed a Plea to the Jurisdiction based on governmental immunity. The trial Court denied the City’s plea to the jurisdiction and found that the City is subject to the District’s rules. The City filed in interlocutory appeal.

The 11th Court of Appeals ruled in favor of the City on May 8, 2008, holding that the City has governmental immunity and therefore is protected from suit. The Court also held that the City’s immunity has not been waived:

Although there are provisions within Chapter 36 that specifically relate to municipalities, there are no provisions in that chapter or in the Rolling Plains legislation that clearly and unambiguously waive the immunity of a municipality from suit. Section 36.102 provides for the enforcement of a district’s rules and regulations by injunction or other appropriate remedy in a court of competent jurisdiction and allows a district such as Rolling Plains to set reasonable penalties not to exceed \$10,000 per day per violation—with each day of a continuing violation constituting a separate violation—and to seek attorney’s fees, costs for expert witnesses, and other costs of court. Section 36.102 does not specifically authorize a suit against a political subdivision or a municipality; nor, for that matter, does it specifically authorize the assessment of penalties against a political subdivision or municipality. We note that the penalties in this case could potentially be astronomical for Aspermont, with three wells having daily violations for missing reports and for overdue transportation fees that date as far back as May 2004.

We also cannot interpret the session laws specifically relating to Rolling Plains as constituting a waiver of sovereign immunity from suit. The obvious effect of the provision in the 2003 legislation regarding Section 36.121 was to nullify exemptions from regulation by Rolling Plains that were previously held by municipalities or other political subdivisions pursuant to Section 36.121. This legislation, however, did not authorize a suit for money damages and did not clearly and unambiguously waive any immunity from suit held by a municipality or other political subdivision of this state.

After reviewing the applicable legislation, we can find no language constituting a clear and unambiguous waiver of sovereign immunity from suit. Consequently, we hold that Aspermont is immune from suit for monetary damages.

The Court did acknowledge that the District could file a suit for declaratory judgment as to future payments:

We find that [*City of Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007)] controls the outcome of this case to the extent that Rolling Plains seeks a judgment for money damages for injuries that have already occurred, i.e., the past due fees, penalties, and other costs. However, as distinguished from *Williams*, Rolling Plains does not merely attempt to transform a suit for monetary damages into a request for declaratory relief. In

its petition, Rolling Plains also asserts a viable request for declaratory relief for present and future purposes. As to this request for statutory construction and prospective relief, we agree with the reasoning and holding of our sister court in *Anderson v. City of McKinney*, 236 S.W.3d 481 (Tex. App. Dallas 2007, no pet.). In *Anderson*, the court determined that McKinney was immune from suit to the extent that the plaintiff firefighters asserted a statutory claim for back pay but that McKinney was not immune from the firefighters' suit to the extent it sought prospective relief in the form of declaratory, injunctive, and mandamus relief that would force McKinney to comply with the statute in the future. 236 S.W.3d at 483-84.

The District filed a petition for review with the Supreme Court, and on November 14, 2008 the Court requested briefing on the merits from all parties and Amici.