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New Strategies for Groundwater Litigation in Texas

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NEW STRATEGIES FOR GROUNDWATER LITIGATION IN TEXAS

AMY HARDBERGER*

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INTRODUCTION

In 1985, the Texas Department of Transportation created an ad campaign to stop roadside litter.¹ The slogan was simple: Don't Mess with Texas.² Since then, this saying has morphed into a pseudo state motto. In a state known for its fierce independence and dedication to private property, one could aptly modify the phrase to Don't Mess with Texas Property.³

While many Texans view private property rights as unalterable, the reality is much more nuanced. This is particularly true when discussing natural resources like groundwater. Unlike activities occurring at the surface, removal of groundwater can impact the surrounding property owners, who may prefer their property to be protected from drainage.⁴ Consideration of the public's interest in natural resources, as required by the 1917 state constitutional conservation amendment, creates another layer of concern.⁵ When all interests are considered together, it is clear that the law does allow for legal limitations on property owners in order to protect the value of others' property rights.⁶ This is not unlike the consideration of the environment when issuing surface water permits or limiting private property uses to avoid nuisance.

Texans' dependence on groundwater is not new.⁷ Although groundwater has historically been used by farmers throughout the state's history,

¹ Alex Mayyasi, *The Surprising Origins of "Don't Mess With Texas"*, PRICEONOMICS (June 11, 2014), <https://priceonomics.com/the-surprising-origins-of-don-t-mess-with-texas/> [<https://perma.cc/4JVW-BK5H>].

² *Id.*

³ See Timothy Sandefur, *Don't Mess with Property Rights in Texas: How the State Constitution Protects Property Owners in the Wake of Kelo*, 41 REAL PROP., PROB. & TR. J. 44, 46 (2006). Ninety-five percent of Texas is privately owned. Jennifer Dorsett, *Texas Landowners Face Uncertainty with Eminent Domain*, TEX. FARM BUREAU (Apr. 23, 2019), <https://texasfarmbureau.org/texas-landowners-face-uncertainty-eminant-domain/> [<https://perma.cc/4Q5D-Y6WT>].

⁴ See U.S. GEOLOGICAL SURV., GROUND-WATER DEPLETION ACROSS THE NATION 1–2 (2003).

⁵ TEX. CONST. art. XVI, § 59.

⁶ *Id.*

⁷ Groundwater is defined by the Texas Water Code as "water percolating below the surface of the earth." TEX. WATER CODE ANN. § 36.001(5) (West 2017). Implementing regulations state that groundwater is "[w]ater under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving." 30 TEX. ADMIN. CODE § 297.1(22) (2012). Once groundwater leaves the ground in the form of springs or discharges into a river, its legal character changes and it becomes surface water. *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 236 (Tex. App. 1989).

municipal and industrial uses have consistently increased.⁸ Even many state surface water users are dependent on groundwater to provide the headwaters and base flow of many Texas rivers.⁹ As Texas' population continues to grow, so will its demand on groundwater—even while many of these resources continue to deplete. The state's resilience depends on effective management.

As dependence on groundwater increased, so did tensions related to property rights.¹⁰ This culminated in the 2012 Texas Supreme Court ruling in the *Edwards Aquifer Authority v. Day*, which established a vested right in groundwater.¹¹ Since that decision, conversations and litigation have centered on defining the Fifth Amendment rights of property owners who are denied water rights.¹² The threat of a takings claim obligates Groundwater Conservation Districts (“GCDs”) to evaluate the potential of costly litigation when promulgating or enforcing permitting rules.¹³ Centering on the ability of a landowner who is denied a property right to bring a takings claim shifts the focus away from owners with conflicting economic interests and statutory obligations to conserve water. This effectively prioritizes the property interests of those who wish to pump over those who value leaving water in place, and this ignores state law obligating water protection.

Vested groundwater rights are not the end of the story. The majority of the state's groundwater is managed by GCDs, which are formed to regulate pumping and protect water resources.¹⁴ A GCD is allowed to modify property rights consistent with Chapter 36 of the Texas Water Code.¹⁵ Among other requirements, GCDs are required to create a management plan that conserves water and protects natural resources, and pass rules

⁸ PETER G. GEORGE ET AL., *AQUIFERS OF TEXAS*, REPORT 380, 10 (Tex. Water Dev. Bd. 2011).

⁹ *See id.* at 91, 107, 129.

¹⁰ *See Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 817–18 (Tex. 2012).

¹¹ *Id.* at 838.

¹² *See* Kathryn M. Casey, Comment, *Water in the West: Vested Water Rights Merit Protection Under the Takings Clause*, 6 *CHAP. L. REV.* 305, 306, 349 (2003).

¹³ *See Lone Star GCD Approves Settlement Ending Litigation with Conroe and Quadvest*, HELLO WOODLANDS (Jan. 24, 2019), <https://hellowoodlands.com/lone-star-gcd-approve-settlement-ending-litigation-with-conroe-and-quadvest/> [<https://perma.cc/6KKJ-2M7A>].

¹⁴ *TEX. WATER DEV. BD.*, *Groundwater Conservation Districts*, https://www.twdb.texas.gov/groundwater/conservation_districts/index.asp [<https://perma.cc/59PB-VZPC>] (last visited Jan. 12, 2022).

¹⁵ Throughout Texas, there are areas that are not managed by groundwater districts. In those “white areas,” there are no additional groundwater regulations beyond common law protections. This Article focuses on the areas of the state subject to GCD regulations. *See* *TEX. WATER CODE ANN.* §§ 36.0015, 36.021(d) (West 2017).

that are in harmony with that plan.¹⁶ Districts are also obligated to designate a goal for future aquifer conditions and to issue pumping permits consistent with that goal.¹⁷ This process is analogous to land use law and zoning, in which the city creates a vision for its future and zones, and implements said vision utilizing the delegated police power authority to restrict some landowners for the benefit of the larger community.¹⁸ Conservation-oriented landowners, the larger community, and the natural resources themselves also have recognized legal rights. When one views the larger context of GCDs' authority and obligations, litigation avenues are available that will balance the rights of all owners and better protect water resources.

This Article evaluates the evolution of the understanding of groundwater rights since the *Day* decision and assesses the relative power of property rights in groundwater that have emerged and what can be done to equalize resulting inequities. Part I reviews the current state of groundwater ownership rights and includes a brief history of litigation that led to that point.¹⁹ Part II explains the authority and obligations of groundwater conservation districts, which create a regulatory overlay on the common law vested rights through permitting rules and the statewide planning process.²⁰ Part III summarizes the history of constitutional challenges litigated after the *Day* decision established a vested property right in groundwater.²¹

Finally, Part IV presents recommendations for how litigation can also be used by landowners who seek to maintain their groundwater or protect the resource itself.²² First, litigants can use the obligations in Chapter 36, which find their roots in the conservation amendment, to compel GCDs to plan and permit groundwater in ways that prioritize conservation and avoid waste.²³ Second, an examination of inverse condemnation jurisprudence provides pathways for courts to avoid requiring compensation for alleged property rights infringements.²⁴ Finally, other

¹⁶ WATER § 36.1071.

¹⁷ *Id.* § 36.108 (c)–(d).

¹⁸ *Cf.* AUSTIN, TEX., CODE OF ORDINANCES, ch. 25-2, art. I, § 1-1 (2021) (City zoning ordinance intended to protect older neighborhoods by requiring new construction and additions in existing neighborhoods to be characteristically compatible).

¹⁹ *See* discussion *infra* Part I.

²⁰ *See* discussion *infra* Part II.

²¹ *See* discussion *infra* Part III.

²² *See* discussion *infra* Part IV.

²³ *See* discussion *infra* Section IV.A.

²⁴ *See* discussion *infra* Section IV.B.

litigation opportunities are discussed including options for impacted surface water rights holders.²⁵

I. THE CHALLENGE OF CAPTURE

Texas is a popular place to be these days.²⁶ The promise of jobs, no state income tax, and affordable housing is attracting people from coast to coast.²⁷ Due to its appeal, Texas' population is predicted to increase seventy percent between 2020 and 2070, from 29.5 million to 51 million people.²⁸ Each of these citizens will need water with an estimated total demand increase of seventeen percent in the next fifty years.²⁹ Population trends project that most Texans will be concentrated in a few urban areas, further increasing infrastructure challenges.³⁰ Water needed to meet these growing demands must be found in a drought-prone state with increasing aridity and highly allocated surface water. Because of these challenges, groundwater will continue to be a critical resource to meet new water needs.

According to the 2017 State Water Plan, Texas' nine major aquifers and twenty-one minor aquifers provided nearly fifty percent of the water used throughout the state, which amounted to 7.19 million acre-feet per year.³¹ Agriculture accounted for the majority of statewide groundwater use.³² Approximately seventy-five percent of irrigated agriculture utilized a total of 6.4 million acre-feet of groundwater per year.³³ Despite this existing dependence, groundwater capacity is projected to decrease twenty-four percent by 2070, primarily due to groundwater mining in the Ogallala and Gulf Coast Aquifers.³⁴

²⁵ See discussion *infra* Section IV.C.

²⁶ See Andy Kiersz & Madison Hoff, *Elon Musk, Like Everyone Else, Is Moving to Texas. Here are 12 Lone Star State Cities America Is in Love With.*, BUS. INSIDER (May 19, 2021, 9:54 AM), <https://www.businessinsider.com/texas-cities-everyone-is-moving-to-2019-11> [<https://perma.cc/5MTQ-MP9A>].

²⁷ *Key Reasons Why Millions Are Moving to Texas*, ASSOCIATED PRESS (May 19, 2021), <https://apnews.com/article/texas-business-census-2020-science-0d436b250dc07111bffa4b4f6cdd6682b> [<https://perma.cc/EKA8-W5XE>].

²⁸ TEX. WATER DEV. BD., STATE WATER PLAN 3 (2017).

²⁹ *Id.* This is a decrease from twenty-two percent in the 2012 plan.

³⁰ *Id.* at 3, 5–6.

³¹ *Id.* at 65, 70, 72. An acre-foot is equal to 325,851 gallons of water.

³² *Id.* at 70.

³³ *Id.*

³⁴ TEX. WATER DEV. BD., *supra* note 28, at 71.

Many groundwater resources have no regulation, placing them at the mercy of overlying landowners.³⁵ Others have a variety of regulatory schemes managing their use, which leads to inconsistencies and confusion for property owners.³⁶ The growing dependence on groundwater, coupled with legal questions related to regulations and property rights, threatens the viability of many of these resources. Because litigation history in Texas has imbued property owners with a vested ownership interest in groundwater, overseeing groundwater use must respect existing property rights while still considering natural resource protection. Post-*Day* litigation has focused on property owners who wish to pump and are denied a permit, but property owners who wish to protect the water under their land are speaking with increasing volume and are unwilling to cede their own rights to property value. To project the future of Texas' water litigation, one must first understand how courts have managed these issues in the past.

A. *East and Sipriano*

Right of capture was first adopted as Texas' groundwater management approach in 1904 by the Texas Supreme Court in *Houston & T. C. Ry. Co. v. East*.³⁷ Under right of capture, a landowner has equal ownership of the soil and the water and can drain water from a neighbor without liability.³⁸ The *East* court made exceptions for injury as a result of malice or willful waste.³⁹ Subsidence was later added as an additional exception.⁴⁰

In its reasoning, the court stated that the complexity of groundwater made it difficult to govern differently and they feared that a shared system such as correlative rights may interfere with the state's economic development.⁴¹

The issue of capture was not considered again until 1999, when the Texas Supreme Court evaluated whether the rule of capture remained the

³⁵ See TEX. A&M UNIV., *Texas water law*, <https://texaswater.tamu.edu/water-law.html> [<https://perma.cc/7ESP-YWXS>] (last visited Jan. 12, 2022).

³⁶ Kate Galbraith, *Ambiguities Reign in Regulations for Groundwater Fracking*, TEX. TRIB. (Mar. 13, 2013, 6:00 AM), <https://www.texastribune.org/2013/03/13/fracking-ground-water-rules-reflect-legal-ambiguiti/> [<https://perma.cc/6V5U-8GVV>].

³⁷ See *Houston & Tex. Cent. R.R. Co. v. East*, 81 S.W. 279, 280 (Tex. 1904).

³⁸ *Id.* at 280.

³⁹ *Id.* at 281–82.

⁴⁰ *Id.* Common law right of capture is limited by waste, malicious intent and negligent pumping that would lead to subsidence. *Friendswood Dev. Co. v. Smith–Sw. Indus.*, 576 S.W.2d 21, 22, 25–26 (Tex. 1978).

⁴¹ *East*, 81 S.W. at 280–81.

state's preferred method of groundwater management.⁴² In *Sipriano v. Great Spring Waters of America*, a landowner whose wells had been drained by a bottled water company, asked the court to replace strict rule of capture and replace it with reasonable use.⁴³

Despite indications in dicta that the court felt the law of capture might be outdated, the court refused to abandon it.⁴⁴ After expressing misgivings about such a rule in a growing state, the court reiterated that the capitol should be the source of any changes citing the importance of recent groundwater initiatives including Senate Bill 1 (“SB 1”).⁴⁵ Instead, the court stated such a decision was not within the court's authority—not yet at least.⁴⁶

B. *From Right of Capture to Ownership*

As courts maintained the rule of capture, questions began to arise concerning the specifics of the property right created by the common law rule. Although Texas courts stated on multiple occasions that capture was the law, neither the courts nor lawmakers ever specified if ownership vested in place or upon capture.⁴⁷ The answer to this question did not have a significant impact when there was sufficient water for all users, but defining the line between regulatory opportunities and constitutional limitations on property is more critical as water supplies diminish.⁴⁸

While most GCDs have not created a cap on pumping, the Edwards Aquifer Authority (“EAA”), a legislatively created special district, formed as a result of a court ruling on an Endangered Species Act (“ESA”) claim, was created with pumping limits in mind.⁴⁹

The Edwards Aquifer Authority Act (“EAAA”) capped permit withdrawals in the Edwards Aquifer to 450,000 acre-feet per calendar

⁴² *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 80 (Tex. 1999).

⁴³ *Id.* at 75–76.

⁴⁴ *Id.* at 80.

⁴⁵ *Id.* at 79.

⁴⁶ *Id.* at 80.

⁴⁷ *See, e.g., id.* at 76; *Houston & Tex. Cent. R.R. Co. v. East*, 81 S.W. 279, 280 (Tex. 1904).

⁴⁸ *See* Marvin W. Jones & Andrew Little, *The Ownership of Groundwater in Texas: A Contrived Battle for State Control of Groundwater*, 61 BAYLOR L. REV. 578, 579–80, 592 (2009) (“[B]ecause ownership of the water in place is not clear, it would occur to me that in the future, there is a lot of opportunity for central control of that water.” (quoting Sen. Duncan)).

⁴⁹ Joe Nick Patoski, *History, The Edwards Aquifer & the EAA*, EDWARDS AQUIFER AUTH., <https://www.edwardsaquifer.org/eaahistory> [<https://perma.cc/8PZB-BGE6>] (last visited Jan. 12, 2022).

year until December 31, 2007.⁵⁰ Beginning January 1, 2008, permitted withdrawals were reduced to 400,000 acre-feet annually.⁵¹ The EAAA was later amended to increase permitted withdrawals to 572,000 acre-feet per year.⁵² In addition to dictating how much water could be pumped, the legislation provides a rubric for permit allocation.⁵³ Historic permits were issued to those who could demonstrate beneficial use of Edwards water during the historic period.⁵⁴ An irrigator who could demonstrate use, but not a specific quantity, received a permit for two acre-feet a year per acre irrigated during any one year of the historic period.⁵⁵ All requests for historic permits were due by March 1, 1994.⁵⁶ Other than the stated exceptions, it is illegal to pump water from the Edwards Aquifer without an EAA permit.⁵⁷

The EAA's strict limitations on new permits and clear limitations on historic use designations gave rise to the specific questions of ownership when permits were denied.⁵⁸ *Day* provided the Texas Supreme Court the opportunity to clarify when ownership rights in groundwater vest.⁵⁹

Plaintiff Day applied for a historic permit to pump 700 acre-feet of Edwards water annually. To support his request, he presented evidentiary statements of 300 irrigated acres during the look-back period and additional 50 acre-feet for recreational use in a lake on the property into which some groundwater flowed.⁶⁰

The EAA issued a preliminary decision entitling Day to 600 acre-feet of water.⁶¹ Before the EAA ruled on his permit, Day drilled a new

⁵⁰ Act of May 30, 1993, § 1.14(a)–(c).

⁵¹ *Id.*

⁵² Act of May 28, 2007, ch. 1430, § 12.02(c), 2007 Tex. Gen. Laws 5902 (amending Act of May 30, 1993, § 1.11). When the Act of May 28, 2007, was passed, the law included the 400,000 acre-feet per year provision; however, the EAA was required to permit 572,000 acre-feet per year based on strict application of the rules. Darcy Alan Frownfelter, *Groundwater Withdrawal Permit Program*, in *ESSENTIALS OF TEXAS WATER RESOURCES* § 17.20 (State Bar of Tex. eds. 2018). The cap increase was an effort to match the legislation to actual permits issued.

⁵³ Act of May 30, 1993, §§ 1.14–1.16.

⁵⁴ *Id.* § 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.”

⁵⁵ *Id.* § 1.16(e).

⁵⁶ *Id.* § 1.16(b).

⁵⁷ *Id.* § 1.35.

⁵⁸ *See, e.g.*, *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 831–32 (Tex. 2012).

⁵⁹ *See id.*

⁶⁰ *Id.* at 820.

⁶¹ *Id.* at 817.

well.⁶² In November 2000, Day’s permit request was denied because well “withdrawals . . . were not placed to a beneficial use.”⁶³

After a long procedural history, the case arrived at the Texas Supreme Court in 2010.⁶⁴ The primary legal issue was whether Day had a vested interest in the groundwater thus limiting the EAA’s ability to deny a permit without owing compensation.⁶⁵ The court determined that the groundwater rights were vested in the landowner.⁶⁶ Despite this determination, the court reiterated that regulations can dictate a district’s authority to regulate wells, but too much regulation would constitute a constitutional taking requiring compensation.⁶⁷ *Day* defined the property right to water, which limits the extent to which districts can regulate groundwater before it becomes a regulatory taking.⁶⁸ Unfortunately for regulators, the court did not define where that limit is.⁶⁹

II. THE HISTORY AND AUTHORITY OF GROUNDWATER CONSERVATION DISTRICTS

As Texas courts consistently maintained property right in groundwater, the legislature promulgated regulation to assist in management.⁷⁰ The first piece of legislation was passed in 1910 and 1917 in the form of a constitutional amendment creating both the authority and the duty for the state to protect the state’s natural resources.⁷¹ Although not self-enacting, it clearly obligates the legislature to implement policy relating to groundwater and other natural resources.⁷² This conservation amendment has been cited regularly in court opinions to support the argument

⁶² *Id.* at 820. The well cost \$95,000.

⁶³ *Id.* at 820–21.

⁶⁴ *Day*, 369 S.W.3d at 821–22.

⁶⁵ *See id.* at 821–33, 837–43.

⁶⁶ *Id.* at 833. The court remanded to determine the specific issue of whether a taking had occurred in this case. It ultimately settled for an undisclosed amount.

⁶⁷ *Id.* at 843.

⁶⁸ *Id.* at 832–33.

⁶⁹ *Id.* at 839–41.

⁷⁰ *See* TEX. CONST. art. XVI, § 59(a).

⁷¹ *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 77 (Tex. 1999) (“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.” (quoting TEX. CONST. art. XVI, § 59(a))).

⁷² TEX. CONST. art. XVI, § 59(a).

that the legislature, not the judiciary, is the appropriate body to implement laws to manage groundwater.⁷³

A. *Birth and Evolution of GCDs*

Using the authority found in the conservation amendment, the legislature opted to manage groundwater resources through local GCDs instead of a statewide regulatory agency.⁷⁴ A GCD's purpose is:

To provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and to control subsidence caused by withdrawal of water from those groundwater reservoirs or their subdivisions, consistent with the objectives of Section 59, Article XVI, [of the] Texas Constitution⁷⁵

Although GCDs were permissive as early as 1917, only thirty-four districts existed in 1996.⁷⁶ Often, conversations about the need for additional water management only surfaced after dry years.⁷⁷ Even then, it generally focused on discrete issues rather than a wholesale approach.⁷⁸ Texas' first historic omnibus water bill, SB 1, marked the first attempt to shift from water development to a statewide approach to groundwater.⁷⁹ SB 1 was passed in 1997 after a three-year drought.⁸⁰ Lack of rain combined with a rapidly growing state led to an important leadership moment in Texas water.⁸¹

⁷³ See, e.g., *Sipriano*, 1 S.W.3d at 79–80.

⁷⁴ TEX. WATER CODE ANN. § 36.0015 (West 2019).

⁷⁵ *Id.*

⁷⁶ *Groundwater Conservation Districts*, TEX. WATER DEV. BD., https://www.twdb.texas.gov/groundwater/conservation_districts/index.asp [<https://perma.cc/W36T-77R2>] (choose “District Map” in the drop-down menu under “Groundwater Conservation Districts”) (last visited Jan. 12, 2022).

⁷⁷ Martin Hubert, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs*, 30 TEX. TECH L. REV. 53, 55 (1999).

⁷⁸ Chris Lehman, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 107 (2004).

⁷⁹ *Id.* SB 1 is one of three omnibus water bills ever passed. The others are SB 2 and SB 3.

⁸⁰ Hubert, *supra* note 77, at 55.

⁸¹ *Id.* at 55–56.

SB 1 significantly impacted Texas groundwater.⁸² Due to the low number of GCDs, the vast majority of the state did not have any groundwater management in place.⁸³ However, because SB 1 stated that “[g]roundwater conservation districts . . . are the state’s preferred method of groundwater management,” the number of districts grew quickly after its passage.⁸⁴ The preference for GCDs centered on empowering control at the local level, with those who have the best understanding of the resource.⁸⁵

The regulations and responsibilities associated with GCDs were consolidated into Chapter 36 of the Texas Water Code.⁸⁶ This chapter defines how districts can be created, their means of governance, the extent of their powers, and obligations.⁸⁷ Although SB 1 did not create districts, it did expand their authority, obligated districts to complete management plans, and required permits for any nonexempt wells.⁸⁸ Districts could also issue or deny permits for out-of-basin water transfers.⁸⁹ Although SB 1 increased regulation opportunities in areas with a GCD, it did not replace the right of capture as Texas’ management scheme.

A second omnibus water bill, Senate Bill 2 (“SB 2”), was passed in 2001. SB 2 further enhanced the permitting and enforcement powers of GCDs.⁹⁰ The bill provided for further regulation of well spacing to minimize well interference.⁹¹ Districts were also authorized to set acre-feet per acre or gallons per minute production limits based on tract size or production capacity.⁹² Some GCDs require the installation of well meters and require reporting of groundwater pumping.⁹³

⁸² Lehman, *supra* note 78, at 104.

⁸³ *Id.*

⁸⁴ *Id.*; TEX. WATER CODE ANN. § 36.0015 (West 2019).

⁸⁵ Hubert, *supra* note 77, at 66.

⁸⁶ Russell Johnson, *Groundwater Law and Regulation*, in *ESSENTIALS OF TEXAS WATER RESOURCES* 113 (Mary K. Sahs ed., 2009).

⁸⁷ See WATER § 36.0001 et. seq. GCDs can “limit[] 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.” *Id.* § 36.101(a).

⁸⁸ Hubert, *supra* note 77, at 66.

⁸⁹ Act of June 1, 1997 § 4.33 at 3648 (codified in TEX. WATER CODE ANN. § 36.122).

⁹⁰ Act of May 27, 2001, 77th Legis., R.S., ch. 966, §§ 2.49–50, 2001 Tex. Gen. Laws 1991 at 2015 (amending TEX. WATER CODE ANN. § 36.116).

⁹¹ *Id.* § 2.50.

⁹² *Id.*

⁹³ See, e.g., HIGH PLAINS UNDERGROUND WATER CONSERVATION DIST., RULES OF THE HIGH PLAINS WATER DISTRICT (Nov. 24, 2020), <https://static1.squarespace.com/static/53286fe5e4b0bbf6a4535d75/t/5fbcbdc7145a8629dc92cd9e/1606335943119/HPWD+Adopted+Rules>

GCDs provide a regional, bottom-up approach to planning that allows a tailored approach to individual aquifer management.⁹⁴ Although these legislatively created districts have extensive regulatory authority, the rule of capture still looms large.⁹⁵

B. *A Legacy of Protection*

GCDs cannot be separated from resource protection. Even the name “groundwater conservation district” telegraphs their overriding purpose. If the legislator intended districts to simply allocate property rights, they might have been named Groundwater Permitting Districts or some equivalent. In fact, the authority for their existence emanates from a conservation principle found in the conservation amendment that is consistently echoed throughout the regulations and authority chronicled in Chapter 36.⁹⁶

The primary purpose of districts is “to provide for the *conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs* or their subdivisions, and to control subsidence caused by withdrawal of water from those groundwater reservoirs or their subdivisions, consistent with the objectives of Section 59, Article XVI, Texas Constitution”⁹⁷ While ownership may constrain the ways in which GCDs can limit pumping, it does not negate their ability to regulate groundwater extraction.⁹⁸ This regulatory authority is explicitly stated in statute and referenced in case law.⁹⁹

Section 36.002 of the Texas Water Code states that ownership “rights may be limited or altered by rules promulgated by a district.”¹⁰⁰ The *Day* opinion reinforces this sentiment.¹⁰¹ By stating that extreme regulation might create a Fifth Amendment violation, the court is clearly indicating that some groundwater regulation is expected to continue.¹⁰²

+November+2020.pdf [https://perma.cc/GP56-89WS].

⁹⁴ Lehman, *supra* note 78, at 103.

⁹⁵ See Act of May 27, 2001, § 2.50 at 2015–16 (amending TEX. WATER CODE ANN. § 36.116).

⁹⁶ See TEX. CONST. art. XVI, § 59(a); TEX. WATER CODE ANN. § 36.0015(b) (West 2019).

⁹⁷ TEX. WATER CODE ANN. § 36.0015(b) (emphasis added). Groundwater is defined as “water percolating below the surface of the earth.” *Id.* § 36.001(5). A groundwater reservoir is defined as “a specific subsurface water-bearing reservoir having ascertainable boundaries containing groundwater.” *Id.* § 36.001(6).

⁹⁸ See WATER § 36.002(d)(2) (West 2019).

⁹⁹ See WATER § 36.101(a)(4) (West 2019); Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 78–80 (Tex. 1999).

¹⁰⁰ WATER § 36.002 (West 2011), amended by Act of June 16, 2015, 84th Legis., R.S., ch. 590, § 1, 2015 Tex. Sess. Laws.

¹⁰¹ Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 833, 842–43 (Tex. 2012).

¹⁰² *Id.* at 833–36. The opinion also reviews the history of GCDs and their rulemaking

Before reviewing Section 36.116(a) in detail, the court specifically states that “[d]istricts’ regulatory authority is broad”¹⁰³ This balance between ownership and regulation for the greater good is not unfamiliar. The use of the police powers to modify property rights without requiring compensation has been permitted countless times in land use litigation since Euclidian zoning was deemed to be constitutional in 1926.¹⁰⁴ The ability to curb the absolute access to groundwater for the protection of the water source and other landowners who also have a vested right is analogous to zoning jurisprudence.

Even in areas without GCDs, the common law places limits on the absolute ownership rule.¹⁰⁵ Throughout the adjudication history, courts have recognized the requirement that water must be put to a beneficial use without willful waste or malice.¹⁰⁶ Later, the rule was expanded to also prohibit a landowner from negligent groundwater withdrawal that would result in subsidence of another’s land.¹⁰⁷ Chapter 36 includes these common law rules and obligates districts to go further.¹⁰⁸

Perhaps the most important obligation related to groundwater is the requirement for a beneficial use, which was stated as early as *East*.¹⁰⁹ The challenge for districts is defining “beneficial.” Use for a beneficial purpose is defined broadly to include uses such as agriculture, domestic use, water for mineral exploration, and “any other purpose that is useful and beneficial to the user.”¹¹⁰ Although “beneficial” is written broadly to provide flexibility in what might be included, one thing that is prohibited is waste.¹¹¹ By definition, water that is wasted cannot be considered put to a beneficial use.¹¹² Beneficial is the basis and the measure of the quantity in relation to the use.

authority.

¹⁰³ *Id.* at 835.

¹⁰⁴ *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (holding that limiting of individual private property rights for the benefit of the community through the adoption of a comprehensive zoning plan is constitutionally within the authority of the police powers so long as the plan is not arbitrary and capricious).

¹⁰⁵ *Sipriano*, 1 S.W.3d at 77.

¹⁰⁶ *Id.* at 76 (*citing* *Houston & Tex. Cent. R.R. Co. v. East*, 81 S.W. 279, 279 (Tex. 1904)). A landowner may make non-wasteful use of their waters. *Pecos Cnty. Water Control and Improvement Dist. v. Williams*, 271 S.W.2d 503, 505 (Tex. Civ. App. 1954).

¹⁰⁷ *Sipriano*, 1 S.W.3d at 78 (*citing* *Friendswood*, 576 S.W.2d 21).

¹⁰⁸ *See* TEX. WATER CODE ANN. § 36.002(b) (West 2019).

¹⁰⁹ *Houston & Tex. Cent. R.R. Co. v. East*, 81 S.W. 279, 281 (Tex. 1904).

¹¹⁰ WATER § 36.001(8) (West 2017).

¹¹¹ *See id.* § 36.001(9).

¹¹² *See id.* § 36.001(9)(c).

While GCDs have discretion within their rulemaking authority, one of their primary obligations to meet the express purpose is to create a management plan.¹¹³ This plan has many listed objectives. They are:

- (1) providing the most efficient use of groundwater;
- (2) controlling and preventing waste of groundwater;
- (3) controlling and preventing subsidence;
- (4) addressing conjunctive surface water management issues;
- (5) addressing natural resource issues;
- (6) addressing drought conditions;
- (7) addressing conservation, recharge enhancement, rainwater harvesting, precipitation enhancement, or brush control, where appropriate and cost-effective; and
- (8) addressing the desired future conditions adopted by the district under Section 36.108¹¹⁴

These plans “shall” be created in coordination with regional surface water managers.¹¹⁵

Once a district identifies their management goals and they are approved by the Texas Water Development Board (“TWDB”), the district “shall adopt rules necessary to implement the management plan.”¹¹⁶ The tools GCDs have to meet their conservation and protection obligations

¹¹³ See *id.* § 36.1071(a)(1–8).

¹¹⁴ *Id.* Details of plan obligations can be found in the TWDB rules. 31 TEX. ADMIN. CODE § 356.52. Notable requirements include: “providing the most efficient use of groundwater;” “controlling and preventing waste of groundwater;” “addressing conjunctive surface water management issues . . . ;” “addressing natural resource issues;” and “addressing conservation.”

¹¹⁵ WATER § 36.1071(a) (West 2011).

¹¹⁶ *Id.* § 36.1071(f) (emphasis added).

A district may make and enforce rules, including 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.

Id. § 36.101. Senator Perry introduced a bill in 2021 that would allow “[a] person with groundwater ownership and rights [to] petition the district where the property that gives rise to the ownership and rights is located to adopt a rule or modify a rule adopted under this chapter.” S.B. 152, 87th Leg., Gen. Sess. (Tex. 2021) (as introduced on Mar. 3, 2021).

are clearly enumerated in statute.¹¹⁷ While a GCD has discretion to add additional obligations, the statute again requires districts to ensure water is used wisely. In any permit application or modification, a GCD must consider whether “the proposed use of water is dedicated to any beneficial use” and whether “the applicant has agreed to avoid waste and achieve water conservation.”¹¹⁸ Although GCDs must wait for plan approval before they can fully promulgate rules, districts are permitted to regulate pumping in the interim to ensure water is put to a beneficial use without waste.¹¹⁹ This advanced permission authority underscores the importance of that goal above all others.

Despite the repeated emphasis on ensuring conservation and beneficial use, the reality is that an individual district likely cannot accomplish this for an entire aquifer over which many GCDs may be operating, which is why the law also requires collaborative planning.

C. *The Groundwater Planning Process*

After the passage of SB 1, the number of districts increased dramatically.¹²⁰ There are currently ninety-eight confirmed districts and three pending.¹²¹ Even with the increased authority to regulate groundwater, no immediate conflict between regulators and property rights was apparent. The first notable increase in tension began when regional planning processes indicated that any water access may be curtailed. Increased regulation, coupled with increasing demand, placed owners and regulators on a collision course.

Statewide water planning was first discussed in SB 1.¹²² The bill created a planning process and required what information must be included in GCD’s management plans.¹²³ Specifically, plans must include the district’s objectives and performance standards, and demonstrate how the plan’s goals will be achieved.¹²⁴

¹¹⁷ WATER § 36.101(a) (West 2019).

¹¹⁸ *Id.* § 36.113 (d)(3), (6).

¹¹⁹ *Id.* § 36.1071(f).

¹²⁰ Lehman, *supra* note 78, at 104.

¹²¹ *Groundwater Conservation District Facts*, TEX. WATER DEV. BD., http://www.twdb.texas.gov/groundwater/conservation_districts/facts.asp [<https://perma.cc/JPX3-QNF7>] (last visited Jan. 12, 2022).

¹²² Hubert, *supra* note 77, at 57.

¹²³ *Id.* at 57.

¹²⁴ *See* TEX. WATER CODE ANN. § 36.1071(e) (2011).

GCDs are created based on political boundaries; therefore, many districts may overlay a single aquifer.¹²⁵ To compel multiple districts to coordinate in shared aquifer planning, the state created Groundwater Management Areas (“GMAs”).¹²⁶ The state’s sixteen GMAs play a large role in statewide planning.¹²⁷ In addition to creating goals for the shared aquifer, GCDs within the same GMA also must share their groundwater management plans.¹²⁸

The integrated groundwater planning process contemplated in SB 1 and SB 2 did not fully take shape until the passage of House Bill 1763 (“HB 1763”) in 2005, which made significant changes to the planning process.¹²⁹ HB 1763 regionalized decisions on groundwater availability and required statewide regional planning groups to integrate groundwater availability numbers from the GMA process in their statewide water forecasting.¹³⁰

HB 1763 also required coordination between the GCDs within a GMA.¹³¹ Often, numerous GCDs in each GMA have varying approaches to management and sustainability.¹³² Previously, GCDs could define their own groundwater availability for their individual management plans, which meant there could be several different approaches for the same aquifer.¹³³ Joint planning sought to remedy this conflict by requiring a desired future condition (“DFC”) for an entire management area.¹³⁴

A DFC is “[t]he desired, quantified condition of groundwater resources (such as water levels, spring flows, or volumes) within a management area at one or more specified future times as defined by participating groundwater conservation districts within a groundwater management area as part of the joint planning process.”¹³⁵ A DFC allows a region to determine what they want the resource to look like in the

¹²⁵ Robert E. Mace et al., *A Streetcar Named Desired Future Conditions: The New Groundwater Availability for Texas (Revised)*, in *THE CHANGING FACE OF WATER RIGHTS IN TEXAS*, ch. 2.1, at 2 (2008).

¹²⁶ *Id.* at 1. The name “groundwater management area” has changed over the years but will be referred to throughout with this current moniker.

¹²⁷ *Id.* at 1.

¹²⁸ Act of May 27, 2001, § 2.48 at 2013–15 (amending TEX. WATER CODE ANN. § 36.108).

¹²⁹ See Act of May 30, 2005, 79th Leg., R.S., ch. 970, 3254–56 (amending TEX. WATER CODE ANN. § 36.108).

¹³⁰ *Id.*

¹³¹ *Id.* at 3254.

¹³² Mace et al., *supra* note 125, at 2.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 31 TEX. ADMIN. CODE § 356.10(9).

future.¹³⁶ GMAs that have more than one aquifer can create DFCs for each.¹³⁷ The “future time” can be selected by the districts. GCDs must reconsider the groundwater availability models every five years and review their DFCs.¹³⁸ The DFC can be updated during each review process.

Once a DFC is established, the TWDB conducts groundwater modeling to translate that goal into the amount of managed available groundwater (“MAG”) available for pumping to meet the DFC.¹³⁹ A district’s management plans must be consistent with their DFC.¹⁴⁰ “A district, to the extent possible, shall issue permits up to the point that the total volume of groundwater permitted equals the managed available groundwater” in order to meet the DFC.¹⁴¹ The planning process is intended to allow for local level engagement and provide for statewide groundwater sustainability.

The regional planning process and the apparent authorization of pumping caps to meet DFCs allow districts to limit permitting, which created conflicts between regulation and the rule of capture. A possible cap on permitting bestowed significant regulatory power that was previously unauthorized except in certain special districts like the Edwards Aquifer providing for a new frontier of Texas water litigation.¹⁴² The concept of a DFC is a scientific-based methodology to allow for local planning with the water source as the goal,¹⁴³ but a goal is only as good as its implementation and enforcement.

¹³⁶ Mace et al., *supra* note 125, at 2.

¹³⁷ Act of May 30, 2005, § 8 at 3255 (amending TEX. WATER CODE ANN. § 36.108).

¹³⁸ TEX. WATER CODE ANN. § 36.108(d) (West 2021); 31 TEX. ADMIN. CODE § 356.31(a).

¹³⁹ Mace et al., *supra* note 125, at 4–5; Act of May 30, 2005, § 8 at 3254–56 (amending TEX. WATER CODE ANN. § 36.108(d)).

¹⁴⁰ Mace et al., *supra* note 125, at 3–4.

¹⁴¹ Act of May 30, 2005, § 11 at 3258 (amending TEX. WATER CODE ANN. § 36.1132); 31 TEX. ADMIN. CODE §§ 356.34–35.

In issuing permits, the district shall manage total groundwater production on a long-term basis to achieve an applicable desired future condition and consider: (1) the modeled available groundwater determined by the executive administrator; (2) the executive administrator’s estimate of the current and projected amount of groundwater produced under exemptions granted by district rules and Section 36.117; (3) the amount of groundwater authorized under permits previously issued by the district; (4) a reasonable estimate of the amount of groundwater that is actually produced under permits issued by the district; and (5) yearly precipitation and production patterns. WATER § 36.1132(b). Managers are required to estimate withdrawals for exempt uses.

Id. § 36.1132(c).

¹⁴² Mace et al., *supra* note 125, at 3.

¹⁴³ See 31 TEX. ADMIN. CODE § 356.10(9) (2021).

If a district fails to meet its joint planning obligations under Chapter 36, “[a] district or person with a legally defined interest in the groundwater within the management area may file a petition with the commission requesting an inquiry if a district or districts refused to join in the planning process or the process failed to result in adequate planning,” including not establishing a reasonable DFC.¹⁴⁴ The commission can also take direct action if a district fails to submit a management plan, fails to adopt rules that are not designed to achieve DFCs, rules are not adequately protective of groundwater, or if the district fails to enforce their rules.¹⁴⁵ Districts are also vulnerable to challenges outside of a joint planning administrative challenge. “A person, firm, corporation, or association of persons affected by and dissatisfied with any rule or order made by a district . . . is entitled to file suit . . . to challenge the validity of the law, rule, or order” after all administrative remedies have been exhausted.¹⁴⁶

D. *Turning Desires into Reality*

Issues related to the establishment and approval of the DFC process have already arisen. In August, 2019, TWBD rejected an updated management plan submitted by Lone Star Groundwater Conservation District (“Lone Star”) after determining that it was administratively incomplete.¹⁴⁷ Lone Star appealed this determination pursuant to Texas Water Code Section 36.1072 and Texas Administrative Code Sections 356.50–57.¹⁴⁸ In its appeal letter to the TWBD, Lone Star argued that the rejection exceeded TWBD’s authority, and the determination was in conflict with the guidance Lone Star had received from TWBD staff.¹⁴⁹

The explanation of the history of their management plans highlights the challenges related to modeling assumptions and groundwater

¹⁴⁴ WATER § 36.108(f) (2011). Commission refers to the Texas Natural Resource Conservation Commission. *Id.* § 36.001(2) (2019). This agency is now known as the Texas Commission on Environmental Quality (“TCEQ”).

¹⁴⁵ *Id.* §§ 36.301, 36.3011. Permissible actions by the TCEQ under these statutes include issuing an order to require the district to take or refrain from certain actions, dissolving the district’s board, asking the attorney general to bring suit, or dissolving the district.

¹⁴⁶ *Id.* § 36.251.

¹⁴⁷ Lone Star GDC Appeals the Executive Administrator’s Decision Not to Approve Its Management Plan, TEX. ALL. GROUNDWATER DIST., at 1 [hereinafter Lone Star GCD Appeal], <https://texasgroundwater.org/wp-content/uploads/2019/09/lone-star-gcd-appeal.pdf> [<https://perma.cc/TFW5-XZXJ>] (last visited Jan. 12, 2022).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

data. In Lone Star's 2019 plan, the district stated that the 2016 DFCs and corresponding MAGs had limited applicability because of a previous finding that they were no longer reasonable; however, Lone Star included the 2016 numbers because the statute required the latest numbers to be used.¹⁵⁰ The TWDB rejected the submitted plan because it did not include the 2010 DFCs.¹⁵¹ Lone Star left out the 2010 numbers because they were superseded by the 2016 figures and the Texas Water Code prohibits reinstatement of expired DFCs.¹⁵² Lone Star argued the 2010 DFCs could only be included if they were reinstated through a successful vote of the GMA.¹⁵³ Lone Star's appeal was rejected by TWDB in October 2019.¹⁵⁴ Lone Star and TWDB settled in mediation, and their management plan was accepted.¹⁵⁵ The final version did attach the 2010 DFCs to make it administratively complete, and the district adopted goals for long term water monitoring.¹⁵⁶ Although they were attached, Lone Star contends that DFCs are still unresolved.¹⁵⁷

The authority question is increasingly important as the efficacy of the rules governing GMAs and DFCs become a larger conversation. It presents the embedded question of who, if anyone, can effectively review and enforce GCD permitting as it relates to DFCs. The TWDB is a planning agency who has the primary task of providing technical support to translate DFCs into a permitting reality for the various GCDs within the GMA.¹⁵⁸ If that is the limit of their authority, the agency may be obligated if a

¹⁵⁰ Press Release, San Jacinto River Authority, State of Texas Rejects Lone Star Groundwater Conservation District's Proposed Management Plan for Second Time (Oct. 3, 2019), <https://www.sjra.net/wp-content/uploads/2019/10/10-03-2019-Press-Release-TWDB-Rejects-LSGCD-Appeal.pdf> [<https://perma.cc/FEX3-T89R>].

¹⁵¹ Lone Star GCD Appeal, *supra* note 147, at 1.

¹⁵² *Id.*; see TEX. WATER CODE ANN. § 36.108 (West 2017).

¹⁵³ See Brief in Appeal at 26, Lone Star Groundwater Conservation District's Appeal of the Texas Water Development Board's Executive Administrator's Decision not to Approve the District's Management Plan 26 (Aug. 9, 2019), https://static1.squarespace.com/static/58347802cd0f6854e2f90e45/t/5d54422fc3de050001ac89cd/1565803059294/2019_08-09_Brief+in+Appeal+%28filestamped%29.pdf [<https://perma.cc/22V7-SYQF>].

¹⁵⁴ Vanessa Holt, *Lone Star Groundwater Conservation District Appeal Rejected by Water Board Oct. 3*, CMTY. IMPACT NEWSPAPER (Oct. 3, 2019, 9:46 PM), <https://communityimpact.com/houston/the-woodlands/city-county/2019/10/03/lone-star-groundwater-conservation-district-appeal-rejected-by-water-board-oct-3/> [<https://perma.cc/HDS4-WB37>].

¹⁵⁵ Telephone Interview with Stacey Reese, Att'y, Lone Star (Feb. 15, 2020).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *About the Texas Water Development Board*, TEX. WATER DEV. BD., <https://www.twdb.texas.gov/about/> [<https://perma.cc/7ZJC-FUT2>] (last visited Jan. 12, 2022).

management plan contained the data required by Section 36.1071(a)–(e) and TWDB's own rules dictating administrative completeness.¹⁵⁹

In addition to the issue discussed above, and despite the detailed regulations in Chapter 36, many questions related to groundwater rights have been, and will continue to be, decided in the courts. While there are several reasons for this, perhaps the most pertinent is the reluctance of the legislature to significantly alter rule of capture, or even clearly define property rights in groundwater since the *East* decision. Because of the lack of clarity combined with growing demand, a 2012 Texas Supreme Court decision permanently limits what changes the legislature can make to groundwater law, even if they had the will to do so.¹⁶⁰

III. THE CURRENT STATE OF TEXAS GROUNDWATER LITIGATION

Since *East*, courts have been intricately involved in the shaping of Texas' groundwater law. Although the Texas Supreme Court often called on the legislature to act, significant changes and clarifications never came until the court spoke in *Day*, designating a new property right.¹⁶¹ This vested interest reduces the action that the legislature can take to avoid rights' infringement; therefore, the future of water law will be determined in the courts as questions revolve around defining the extent of ownership rights as GCDs promulgated new rules to meet their DFCs. While some recent litigation has predictably centered on inverse condemnation, other important trends have emerged.

A. *Post-Day Takings Litigation*

After the *Day* case, much of the groundwater litigation conversations revolved around trying to predict what type of permitting regulations might constitute a taking. Although the Texas Supreme Court established a property rights scenario in which excessive permitting regulations could require just compensation, no one knew where that line would be drawn.¹⁶² Because the *Day* case settled on remand, it was never determined if that fact pattern was an example of an authority going "too far" in an as-applied takings analysis.¹⁶³ The first data point on the takings

¹⁵⁹ 31 TEX. ADMIN. CODE §§ 356.50–57; TEX. WATER CODE ANN. § 36.1071 (West 2011).

¹⁶⁰ *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 843 (Tex. 2012).

¹⁶¹ *Id.* at 833.

¹⁶² *See id.*

¹⁶³ *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978). The court

spectrum arrived in rather dynamic fashion, illustrating the impact *Day* might have on groundwater districts seeking to strictly regulate pumping.

1. The Takings Verdict Heard Around the State

While *Day* was being litigated, another ownership case, *Bragg v. Edwards Aquifer Authority*, was also moving through the courts. The Braggs ultimately prevailed, providing the first and only example of financial compensation in Texas groundwater permitting.¹⁶⁴ The Braggs owned two parcels.¹⁶⁵ The first was a 60-acre property called “Home Place” on which they planted more than 1,800 pecan trees.¹⁶⁶ In 1983, the couple added a 40-acre orchard near D’Hanis and planted 1,500 pecan trees.¹⁶⁷ The Braggs applied for groundwater permits from the EAA for both farms.¹⁶⁸ For the Home Place orchard, the Braggs requested approximately twice the amount of water they had historically used.¹⁶⁹ On the D’Hanis orchard, the Braggs sought a water right despite having no historic use.¹⁷⁰ Their requests totaled about 625 acre-feet per year.¹⁷¹

The EAA denied the permit for the D’Hanis tract because of the lack of statutorily required historic use.¹⁷² For the Home Place, the EAA limited the permit to 120 acre-feet per year, based on the two acre-feet per year standard provided in its rules.¹⁷³ Using this calculation, the permit issued was approximately half of the quantity requested for that parcel.¹⁷⁴ The Braggs filed suit, citing a Fifth Amendment violation.¹⁷⁵ As the case progressed, the Braggs leased water rights and continued production successfully.¹⁷⁶

Applying the economic impact test set out by *Penn Central Transportation Company v. New York City*, the Medina County district court

in the *Day* case made it clear that any takings evaluation in that case should follow federal jurisprudence for partial economic deprivation. *Day*, 369 S.W.3d at 838–40, 838 n. 143.

¹⁶⁴ *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 153 (Tex. App. 2013).

¹⁶⁵ *Id.* at 124.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 126.

¹⁶⁹ *Id.*

¹⁷⁰ *Bragg*, 421 S.W.3d at 126.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Bragg v. Edwards Aquifer Auth.*, No. 06-11-18170-CV, slip op. at *2 (Tex. 38th Dist. Ct. Mar. 25, 2011).

¹⁷⁶ *Bragg v. Edwards Aquifer Auth.*, 342 Fed. Appx. 43, 45 (5th Cir. 2009).

held that the Braggs were entitled to compensation of \$732,493 for the EAA's failure to issue the requested pumping permits.¹⁷⁷ Both parties appealed to the Fourth Court of Appeals.¹⁷⁸ In August 2013, the court of appeals issued their opinion, citing the *Day* case to confirm that a taking had occurred.¹⁷⁹ Applying the *Penn Central* factors, the court focused on testimony heard in trial court to assess the economic impact of the regulation, which had prohibited the requested permits.¹⁸⁰ Testimony, including evidence of planting of new trees, construction of barns, and installation of drip irrigation systems, supported their argument that pecan farming was the highest value use for the properties and a use for which the Braggs had already made large monetary investments to develop and expand.¹⁸¹ The court of appeals saw the necessity for the Braggs to seek out additional water leases to avoid reducing the number of trees as a concrete example that met the *Penn Central* economic impact test.¹⁸² "The result of the regulation forces the Braggs to purchase or lease what they had prior to the regulation—an unrestricted right to the use of the water beneath their land."¹⁸³

Turning to the investment backed expectations prong of the *Penn Central* test, the court found it reasonable that the Braggs had purchased the property with the intention of having a commercial pecan farm, at least in part because the properties overlay the Edward's Aquifer, which the Braggs believed would provide as much water as they needed.¹⁸⁴ Although the Braggs knew about the EAAA when it was passed, both properties were purchased before any regulatory structure was in place.¹⁸⁵ The court noted that, although it would not have been reasonable for them to assume that they would never be subject to regulation, the fact that none

¹⁷⁷ *Bragg v. Edwards Aquifer Auth.*, No. 06-11-18170-CV, slip op. at *2 (Tex. 38th Dist. Ct. Mar. 25, 2011).

¹⁷⁸ *Bragg*, 421 S.W.3d at 126.

¹⁷⁹ *Id.* at 126–51. The court also held that the EAA and not the legislature was responsible for the payment and provided guidance about how compensation should be calculated in the case. *Id.* at 131, 146–51. Finally, the court determined that the statute of limitations began to run when the permit was denied, not the date of the EAAA's passage.

¹⁸⁰ *Id.* at 138–45.

¹⁸¹ *Id.* at 138, 140–41, 143. Pecan orchards presented a slightly different challenge than traditional agriculture because water is needed year around, not just during a specific growing season. Additionally, their water demand increased over the years because more mature trees require more water than the saplings.

¹⁸² *Id.* at 141.

¹⁸³ *Id.*

¹⁸⁴ *Bragg*, 421 S.W.3d at 142–43.

¹⁸⁵ *Id.* at 143.

existed when they purchased and invested in the properties should be weighed when evaluating their investment backed expectations.¹⁸⁶

The final prong of the test, which evaluates the nature of the government action, received surprisingly less consideration than the first two.¹⁸⁷ Although the court conceded that “[r]egulation is essential to [water’s] conservation and use” and “this factor weighs heavily against finding of a compensable taking,” it provided no further information regarding how it was weighed against the others prongs or how it could be measured.¹⁸⁸ Taking the test together as a whole, the court affirmed a taking had occurred.¹⁸⁹ Once the court of appeals had confirmed a taking, the issue was remanded to trial court to calculate damages consistent with the opinion.¹⁹⁰

Again, both parties appealed, but the Texas Supreme Court declined to hear the case, which was surprising considering it was the first of its kind since the decision to designate water as a vested property interest.¹⁹¹ Finally, after ten years of litigation, the Braggs received a verdict in February 2016, entitling them to approximately \$2.5 million in compensation for property rights infringements and setting a precedent that others hoped to follow.¹⁹²

2. The Road to Just Compensation

After the large verdict for the Bragg family, many felt there would be a rush of litigants asserting inverse condemnation claims. This has not yet occurred for several likely reasons. The length of time takings litigation requires may have a chilling effect on claims being filed. In addition, although the Bragg’s verdict might be desirable for dejected landowners, it is a case with a very extreme fact pattern and provides little understanding of where other scenarios might land in a *Penn Central* analysis.¹⁹³ Although the court in *Day* created a vested water right, the opinion is clear

¹⁸⁶ *Id.* at 144.

¹⁸⁷ *See id.* at 144–45. *Contra* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 840–41 (Tex. 2012) (explaining the importance of groundwater in Texas and the need for regulation).

¹⁸⁸ *Bragg*, 421 S.W.3d at 145.

¹⁸⁹ *Id.* at 146.

¹⁹⁰ *Id.*

¹⁹¹ *See id.* at 118.

¹⁹² Brendan Gibbons, *Edwards Aquifer Authority Must Shell Out to Pecan Farmers*, SAN ANTONIO EXPRESS-NEWS (Feb. 23, 2016, 10:21 AM), <https://www.expressnews.com/news/local/article/BRAGG-VERDICT-6847721.php> [<https://perma.cc/RC62-LZH4>]. Total compensation with interest totaled approximately \$4 million.

¹⁹³ *See Bragg*, 421 S.W.3d at 138.

that groundwater districts still have the authority to regulate, thus making an inverse condemnation claim a risky proposition, particularly when the plaintiffs are responsible for attorney's fees if they are not successful.¹⁹⁴ That said, a few noteworthy cases have been filed that provide guideposts for takings proponents and districts alike.

In addition to *Bragg*, another constitutional claim that occurred in the Edwards Aquifer region is *GG Ranch v. EAA*.¹⁹⁵ The basic fact pattern mirrors that of *Day* and *Bragg*. Here, plaintiffs were landowners with no historic use who sought water permits in March 2012, which was more than fifteen years after the December 30, 1996, deadline to submit such a request.¹⁹⁶ Plaintiffs' permit applications were denied solely because of the late filing.¹⁹⁷ After losing a contested case hearing, plaintiffs filed a lawsuit claiming a violation of their Fifth Amendment property rights by inverse condemnation, citing the ownership right designated in the *Day* opinion.¹⁹⁸

In their Second Amended Original Petition, Plaintiffs leaned heavily on their interpretation of the ownership right to the exclusion of almost all other legal arguments.¹⁹⁹ Although the petition recognized that landowners are subject to EAA's regulation, it argued that the EAA failed to regulate permits reasonably and instead "implement[ed] regulation based on cronyism."²⁰⁰ Plaintiffs also contended that the full deprivation of water caused by EAA's permit denials necessitated compensation.²⁰¹ Additionally, Plaintiffs claimed violations of their Fourteenth Amendment Due Process and Equal Protection by arguing that, as historic users, they were treated differently than other types of groundwater users and because the regulations treat owners of water differently than owners of oil, gas, and other minerals.²⁰²

In June 2015, the district court granted the EAA's 12(b)(6) motion dismissing the case.²⁰³ In their motion, the primary argument EAA made

¹⁹⁴ *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 843 (Tex. 2012).

¹⁹⁵ *GG Ranch, Ltd. v. Edwards Aquifer Auth.*, No. SA-14-CV-00848, 2015 BL 255526, slip op. at *2 (W.D. Tex. June 2, 2015).

¹⁹⁶ *Id.* at *2. Landowners had property in Uvalde and Medina counties, which are both within EAA jurisdiction.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Plaintiffs' Second Amended Original Petition at 6–12, *GG Ranch, Ltd. v. Edwards Aquifer Auth.*, No. SA-14-CV-00848, 2015 BL 255526, slip op. (W.D. Tex. June 2, 2015).

²⁰⁰ *Id.* at 4. The pleading provided no examples to support that assertion.

²⁰¹ *Id.* at 2.

²⁰² *Id.* at 7–8.

²⁰³ *GG Ranch, Ltd. v. Edwards Aquifer Auth.*, No. SA-14-CV-00848, 2015 BL 255526, slip op. at *8 (W.D. Tex. June 2, 2015).

in relation to the takings claim was that it was time-barred.²⁰⁴ They argued that the ten-year statute of limitations began to run in 1996 when the EAA Act's rules impeded the property right for which plaintiffs sought compensation.²⁰⁵ Looking to state law, the district court agreed.²⁰⁶ Applying the rule that the clock starts "when facts come into existence that authorize claimant to seek a judicial remedy,"²⁰⁷ the court determined that Plaintiffs' unlimited rights in groundwater were curtailed as soon as the Act became effective on December 30, 1996,²⁰⁸ therefore, that date should be the starting point.²⁰⁹ The opinion explained using the date of EAA's final application determination would render the statute of limitations meaningless.²¹⁰

For the Equal Protection claim, citing *Barshop*, the court stated that the decision to give preference to historic users is "rational and reasonably related to the State's legitimate goal of precluding increased demand."²¹¹ Disagreeing with the Plaintiffs' reading of *Day*,²¹² it held that while the comparison of water users to other mineral interests might be appropriate to evaluate a compensable taking, the two are not similarly situated for Equal Protection purposes.²¹³ The court explained that Plaintiffs were in the same class as other users who submitted Declarations of Historical Use after December 30, 1996, and they were not treated differently than anyone else in the class.²¹⁴

The court also dismissed the Due Process claim, applying a rational basis test.²¹⁵ The district court's rulings were affirmed by the Fifth Circuit.²¹⁶ Overall, the case can be seen as an approval that permit application deadlines, such as those dictated by the EAAA, are acceptable limitations on new landowners and one example of a regulation to

²⁰⁴ Defendants' 12(b)(6) Motion to Dismiss Plaintiffs' Second Amended Petition at 5, *GG Ranch, Ltd.*, No. SA-14-CV-00848.

²⁰⁵ *GG Ranch*, slip op. at *7.

²⁰⁶ *Id.* (quoting *Johnson & Higgins v. Kenneco Energy*, 962 S.W.2d 507, 514 (Tex. 1998)).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* The court distinguished this fact pattern from *Bragg* because in that case all permit applications were filed timely.

²¹⁰ *Id.* at *7–8.

²¹¹ *GG Ranch*, slip op. at *4.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at *5.

²¹⁵ *Id.* at *5–6.

²¹⁶ *GG Ranch, Ltd. v. Edwards Aquifer Auth.*, 639 F. App'x 269, 270 (5th Cir. 2016).

which the right of capture is subject without necessitating compensation.²¹⁷ In East Texas, a slightly different takings claim arose.²¹⁸

Mountain Pure is a water bottling company in Palestine, Texas.²¹⁹ Despite its active spring water bottling operations, it refused to apply for permits to operate a well or transfer water, nor did it file any required reports related to pumping.²²⁰ Its argument for this refusal was that the district lacked authority because the water was captured from an “underground formation from which water flowed naturally to the surface of the earth”²²¹ and, therefore, was not within the purview of Chapter 36.²²² The Neches and Trinity Valleys Groundwater Conservation District (“NTVGCD”), believing that Mountain Pure was utilizing groundwater from a well, filed suit to compel compliance with district rules.²²³ Rules listed included requiring permit applications, cessation of pumping from nonexempt wells, submission of pumping reports, and payment of production fees.²²⁴ Mountain Pure filed a counterclaim for a takings.²²⁵

What makes this case unique from the other takings claims is that it is not based on a permit denial.²²⁶ The condemnation action cited by Mountain Pure was the enforcement action itself, despite the fact that the issue of whether NTVGCD had authority over the company was still a pending matter.²²⁷ Mountain Pure claimed the NTVGCD’s initial enforcement action caused its tenant, Ice River, to abandon the contract and the loss of profit was a regulatory taking compensable under the Fifth Amendment.²²⁸ Groundwater districts already grappling with understanding regulatory takings limits were now faced with the possibility of being subject to such claims for the simple application of rules that were otherwise constitutional.²²⁹

²¹⁷ See *id.*; *GG Ranch*, slip op. at *8.

²¹⁸ See *Neches & Trinity Valleys Groundwater Conservation Dist. v. Mountain Pure, TX, LLC*, No. 12-19-00172-CV, 2019 WL 4462677, at *2–3 (Tex. App., Sept. 18, 2019) (mem. op., not designated for publication).

²¹⁹ *Id.* at *2.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at *1–3.

²²³ *Id.* at *2.

²²⁴ *Mountain Pure*, No. 12-19-00172-CV, 2019 WL 4462677, at *2.

²²⁵ *Id.* at *2–3. Mountain Pure’s counterclaim also included a claim for tortious interference with contracts relating to its tenant citing the same facts. That claim will not be discussed here.

²²⁶ Compare *id.* at *2–3, with *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 814 (Tex. 2012).

²²⁷ *Mountain Pure*, No. 12-19-00172-CV, 2019 WL 4462677, at *6.

²²⁸ *Id.*

²²⁹ See, e.g., *id.*

Plaintiff filed several pleas to the jurisdiction, including governmental immunity and requested dismissal of Mountain Pure's counterclaims.²³⁰ Plaintiff's plea was denied as to the takings claim.²³¹ On an interlocutory appeal, the Twelfth Court of Appeals evaluated the harm claimed by applying both the total economic and partial economic deprivations tests.²³² The court evaluated the current value of the plant, Mountain Pure's continued access to its property, its ability to bottle water, and the lack of a presented argument demonstrating the fine was onerous.²³³ Stating that "the United States Supreme Court has observed neither a diminution in property value nor a 'substantial reduction or the attractiveness of the property to potential purchasers' will suffice to establish that a taking has occurred," the court reversed the trial court, holding that no takings had occurred and remanded for further proceedings.²³⁴

Mountain Pure then filed a petition for review to the Supreme Court of Texas,²³⁵ presenting the following two takings issues:

1. Resolving a split of authority over *Carlson*,²³⁶ can a regulatory takings claim be based on the government's intentional but erroneous application of

²³⁰ *Id.* at *1, *3.

²³¹ *Id.* at *1.

²³² *Id.* at *7–8.

²³³ *Mountain Pure*, No. 12-19-00172-CV, 2019 WL 4462677, at *7–8.

²³⁴ *Id.* at *7–9. An amicus brief was submitted by over ten GCDs expressing concerns about the implications of expanding inverse condemnation to procedural actions stating that "such a holding would strip groundwater conservation districts (such as Amici) of vital protections afforded them under the governmental immunity doctrine." Brief of Amicus Curiae, Harris-Galveston Subsidence Dist., et al. Supporting Appellant at 4, *Mountain Pure*, No. 12-19-00172-CV, 2019 WL 4462677.

²³⁵ Petition of Review for Petitioner at 1, *Mountain Pure*, No. 12-19-00172-CV, 2019 WL 4462677.

²³⁶ *See City of Houston v. Carlson*, 451 S.W.3d 828, 829–33 (Tex. 2014). *Carlson* is a Texas takings case in which a group of condominium owners were ordered by the City of Houston to vacate the property due to unsafe conditions. The owners brought an inverse condemnation action for the code enforcement action that forced them to vacate, thus depriving them of their property. Plaintiffs did not challenge any of the ordinances upon which the enforcement action was based. The court held a taking was not appropriate based upon a procedural challenge, objecting "only to the penalty imposed and the manner in which the city enforced its standards." While the court and the City agreed that the action did interfere with the use and enjoyment of their property, stating that would be true of any civil enforcement action, it concluded that this impact was not for the purpose of a public use under the Fifth Amendment.

- property-use restrictions to a landowner's existing and permitted use of property?²³⁷
2. Does a temporary regulatory taking occur when the government wrongly brings a regulatory action and unreasonably interferes with the landowner's existing and permitted use of property?²³⁸

In their petition, Mountain Pure recognized the authority issue has not yet been resolved, but requested the Court resolve what is perceived as a split on interpretations for the *Carlson* case and determine whether a taking can extend to the application of a property-use restriction rather than the restriction itself.²³⁹ The second issue, related to a temporary taking, is dependent on the court's decision in the first issue.²⁴⁰ On September 3, 2021, the Texas Supreme Court denied the petition for review.²⁴¹

Across the state, in West Texas, a groundwater battle continues, involving the infamous Clayton Williams' water right in Fort Stockton.²⁴² This most recent dispute started in 2009 when the Williams family, through their company Fort Stockton Holdings ("FSH"), requested a transfer permit from the Middle Pecos Groundwater Conservation District ("Middle Pecos") in order to sell FSH's groundwater to the Permian Basin.²⁴³ FSH holds a historic and existing use permit for approximately 47,000 acre-feet that was received when Middle Pecos was first formed.²⁴⁴ Under district rules, historic water can only be used for irrigation and cannot be transferred for a different use or exported with additional permitting.²⁴⁵ For this reason, the application sought was for a new permit that would allow

²³⁷ Petition for Review at x, Mountain Pure, No. 12-19-00172-CV, 2019 WL 4462677.

²³⁸ *Id.*

²³⁹ *Id.* at 8–10.

²⁴⁰ *Id.* at 12.

²⁴¹ See generally Notice of Denial of Petition for Review, Mountain Pure, No. 12-19-00172-CV.

²⁴² Brandon Mulder, *Clayton Williams' Pipe Dreams—Litigation Resumes in Years-Long Water Fight*, MRT (Sept. 20, 2015), <https://www.mrt.com/news/article/Clayton-Williams-pipe-dreams-litigation-7413615.php> [<https://perma.cc/3XKV-9HA7>]; see also *Pecos Co. Water Control & Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503, 503 (Tex. App. 1954).

²⁴³ Mulder, *supra* note 242.

²⁴⁴ *Id.* Full use of the permit would result in removal of "more than 15,449,780 gallons annually and total more than 463 trillion gallons over the life of the 30-year permit." Julian Aguilar, *Fort Stockton vs. Claytie*, TEX. TRIBUNE (Apr. 21, 2012, 5:00 AM), <https://www.texastribune.org/2010/04/21/fort-stockton-challenges-williams-over-water-use/> [<https://perma.cc/Q8P5-KSPA>].

²⁴⁵ Aguilar, *supra* note 244.

a transfer of the portion of the water not being used for agriculture.²⁴⁶ Because a new permit would expand their total right if granted, FSH requested a special condition to reduce the use of their historic permit and ensure total pumping would not exceed their current water right.²⁴⁷

In its denial of the permit, Middle Pecos cited concerns about well impacts and potential aquifer dewatering.²⁴⁸ Publicly, the Williams family argued that there should not be a distinction made in the use of the water, and they did not see a difference between water being exported in a pipe and water exported as alfalfa, and any attempt to limit use of their permitted water is a violation of their property right in it.²⁴⁹ Jeff Williams contended that exporting the water to a city may result in a more beneficial use than growing water intensive crops in the desert.²⁵⁰

After a lengthy administrative appeal process, FSH filed a claim in court.²⁵¹ In the complaint, Plaintiff made several assertions of error related to Middle Pecos's misapplication of the law and challenged the district's findings of fact based on substantial evidence.²⁵² In the alternative, FSH brought a taking claim.²⁵³ The claim for compensation is dependent on Middle Pecos's permit decision being affirmed.²⁵⁴ FSH argued that if the permit denial is appropriate, adequate payment should be allocated to them for the resulting destruction of property;²⁵⁵ however, the pleading did not include any application of the facts to the *Penn Central* factors or other takings jurisprudence.²⁵⁶

In 2017, before the claim could be fully litigated in appeal, a settlement was reached between FSH and Middle Pecos.²⁵⁷ In exchange for an export permit, FSH agreed to relinquish historical use permits with

²⁴⁶ Mulder, *supra* note 242.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *From Hell to Heaven, OUR DESIRED FUTURE*, <http://www.ourdesiredfuture.com/from-hell-to-heaven.html> [<https://perma.cc/XE4Q-9WF9>] (last visited Jan. 12, 2022).

²⁵⁰ *Id.*

²⁵¹ Mulder, *supra* note 242.

²⁵² Plaintiff's Original Petition at 12–25, *Fort Stockton Holdings L.P. v. Middle Pecos Groundwater Conservation Dist.*, No. 08-15-00382-CV, 2017 WL 2570934 (Tex. Ct. App. June 14, 2017).

²⁵³ *Id.* at *25.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Marta L. Weismann, *Texas Districts Approve Water Project Permits*, *J. WATER* (Nov. 20, 2017), <https://journalofwater.com/jow/texas-districts-approve-water-project-permits/> [<https://perma.cc/WV8V-A8P6>].

more protections against pumping restrictions and accepted a new management approach for how the district could restrict their property right when aquifer levels are low.²⁵⁸ The export permit allows 16 million gallons to be exported each day.²⁵⁹ In May 2020, an interlocal agreement was entered into by the cities of Abilene, San Angelo, and Midland to purchase water from Williams's Fort Stockton Holdings.²⁶⁰

The Lost Pines GCD ("Lost Pines") found itself in a similar struggle.²⁶¹ In May 2013, it denied a request from Forestar Real Estate Group ("Forestar") for a permit to pump 45,000 acre-feet per year to sell water to Hays County.²⁶² To support the project, Forestar obtained leases across 20,000 acres of land and expended \$15 million to procure the leases and pay for aquifer studies and experts.²⁶³ Lost Pines only permitted 12,000 acre-feet per year, which threatened the project.²⁶⁴ Using many of the same arguments as seen in similar cases, Forestar filed a lawsuit to challenge the GCD's decision, claiming the district made Chapter 36 errors as well as Fifth and Fourteenth Amendment violations.²⁶⁵ Again, the takings argument was short and only cited to the ownership interest purportedly created by *Day* and *Bragg* and did not include a full takings analysis.²⁶⁶ The financial harm cited was the loss of the municipal water project caused by the smaller permit amount.²⁶⁷ Like the *Fort Stockton* case,²⁶⁸ this dispute was settled out of court.²⁶⁹

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Jamie Burch, *Cities of Abilene, San Angelo, Midland Voting Tuesday on Agreement for New Water Source*, KTXS 12ABC (May 10, 2020), <https://ktxs.com/news/local/cities-of-abilene-san-angelo-entering-into-agreement-with-midland-for-new-water-source> [<https://perma.cc/558A-VECE>]. After the settlement was reached, Cockrell Investment Partners sued twice to block the Williams's project with Abilene, Midland, and San Angelo. The second claim is still pending. As of the writing of this piece, it is unclear how this lawsuit will affect the project.

²⁶¹ Plaintiff's First Amended Petition at 1–2, *Forestar (USA) Real Est. Grp., Inc. v. Lost Pines Groundwater Conservation Dist.*, No. 15369 (335th Dist. Ct. Lee County, Tex. Mar. 14, 2014) [hereinafter *Forestar Plaintiff's Amended Petition*].

²⁶² *Id.*

²⁶³ *Id.* at 2.

²⁶⁴ *Id.*

²⁶⁵ *Id.* State constitutional claims that mirror the federal ones were also included.

²⁶⁶ Compare *id.* at 4–6, with Plaintiff's Original Petition at 25, *Fort Stockton Holdings L.P. v. Middle Pecos Groundwater Conservation Dist.*, No. 08-15-00382-CV, 2017 WL 2570934 (Tex. Ct. App. June 14, 2017).

²⁶⁷ *Forestar Plaintiff's Amended Petition*, *supra* note 261, at 39.

²⁶⁸ See *Fort Stockton Holdings, L.P. v. Middle Pecos Groundwater Conservation Dist.*, No. 08-15-00382-CV, 2017 WL 2570934, at *1 (Tex. Ct. App. June 14, 2017).

²⁶⁹ Andy Sevilla, *Lost Pines Groundwater District approves Forestar water permit*,

Although the *Williams* and *Forestar* cases never made it to a takings adjudication, the fact pattern is worth mentioning here as yet another example of the types of claims that are pervasive.²⁷⁰ Specifically, claims in which the plaintiff is a denied permit applicant and the district is forced to defend their legal ability to the permitting decision without owing compensation.²⁷¹ As litigation against GCDs increases, other legal claims are becoming increasingly frequent.²⁷²

B. Equal Protection

As discussed above, courts are increasingly asked to provide clarity about the vested property right as it relates to the districts' authorized police power to regulate,²⁷³ but these Fifth Amendment challenges often include other constitutional claims.²⁷⁴ A common corollary assertion is a violation of a landowner's Equal Protection.²⁷⁵ Equal Protection has actually been litigated throughout the history of Texas' groundwater regulatory conflicts.²⁷⁶ When districts attempt to categorize types of water users to permit, winners and losers often result.²⁷⁷ Equal Protection challenges turn on the definition of the class in which the plaintiff is included and the rational basis for the distinction in treatment.²⁷⁸

STATESMAN, <https://www.statesman.com/NEWS/20160828/Lost-Pines-Groundwater-District-approves-Forestar-water-permit> [<https://perma.cc/3Q6J-8W89>] (last visited Jan. 12, 2022).

²⁷⁰ Forestar Plaintiff's Amended Petition, *supra* note 261, at 2.

²⁷¹ *Id.*

²⁷² See Gregory M. Ellis et al., *Emerging Legal Issues*, TEX. ALL. GROUNDWATER DIST., <https://texasgroundwater.org/policy/emerging-legal-issues/> [<https://perma.cc/G99W-LMME>] (last visited Jan. 12, 2022).

²⁷³ See discussion *supra* Part I.

²⁷⁴ See, e.g., Forestar Plaintiff's Amended Petition, *supra* note 261, at 2.

²⁷⁵ Emily Willms Rogers et al., *Water Rights: Groundwater Permitting*, STATE BAR TEX. ENV'T L.J. (Jan. 21, 2021), <https://www.texasenrls.org/articles/vol-51-1-water-rights/> [<https://perma.cc/Y2VL-8NSZ>].

²⁷⁶ Michael J. Booth & Ross Richard-Crow, *Regulatory Dance: Rule of Capture and Chapter 36 District Perspective Texas Water Development Board*, in REPORT 361 CONFERENCE PROCEEDINGS 100 YEARS OF RULE OF CAPTURE: FROM EAST TO GROUNDWATER MANAGEMENT 19, 24 (2004).

²⁷⁷ See *Beckendorff v. Harris-Galveston Coastal Subsidence Dist.*, 558 S.W.2d 75, 80 (Tex. Civ. App. 1977).

²⁷⁸ Under Chapter 36 surface owners will be treated differently based on where they are located as each GCD has authority to pass independent regulations. Gerald Torres, *Liquid Assets: Groundwater in Texas*, 122 YALE L.J. ONLINE 143, 152–53, 157–58 (2012).

1. Early Equal Protection Claims

As seen in the Fifth Amendment discussion, the EAA has generated conflict since its inception.²⁷⁹ Although the more recent cases focused on the Fifth Amendment, one of the first conflicts for the district related to Equal Protection,²⁸⁰ an issue that has re-emerged in recent litigation.²⁸¹ The contention that similarly situated people are being treated differently is not new to groundwater litigation.²⁸² In *Barshop v. Medina Cnty. Underground Water Conservation District*,²⁸³ plaintiff landowners challenged the constitutionality of the EAA's permitting system.²⁸⁴ The plaintiffs complained that certain provisions of the EAAA were facially invalid.²⁸⁵ Plaintiffs also claimed the EAAA was an unconstitutional violation of their Equal Protection by allowing existing users to apply for historic permits, the Act discriminated against landowners who did not withdraw water before the historic period.²⁸⁶

The Texas Supreme Court held that the EAAA was not a facially invalid infringement on landowners' constitutional property rights.²⁸⁷ The court recognized the apparent conflict between right of capture and the state's regulation of groundwater withdrawals.²⁸⁸ While upholding the rules as facially valid, the court agreed that as applied challenges could be considered differently, stating, "[t]he issue of when a particular regulation becomes an invasion of property rights in underground water is complex and multi-faceted."²⁸⁹ Sixteen years later, the Texas Supreme Court ruled on that specific issue.²⁹⁰

Turning to the Equal Protection claim, the court applied a rational basis test and held that no such violation had occurred.²⁹¹ The court explained that allowing historical use permits to be issued before new users was rationally and reasonably related to the Legislature's stated

²⁷⁹ See, e.g., *Bragg v. Edwards Aquifer Auth.*, 342 F. App'x 43, 44 (5th Cir. 2009).

²⁸⁰ See *Beckendorff*, 558 S.W.2d at 80.

²⁸¹ See *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 625 (Tex. 1996).

²⁸² *Id.* at 632–33.

²⁸³ *Id.*

²⁸⁴ *Id.* at 625.

²⁸⁵ *Id.* at 628.

²⁸⁶ *Id.* at 631.

²⁸⁷ *Barshop*, 925 S.W.2d at 623.

²⁸⁸ *Id.* at 626.

²⁸⁹ *Id.*

²⁹⁰ See *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 118 (Tex. App. 2013).

²⁹¹ See *Barshop*, 925 S.W.2d at 631–32.

goal of precluding increased demand in the aquifer while protecting existing users.²⁹² Because the Edwards had a pumping cap, existing users had an opportunity to claim their right and additional permits could be issued for existing permitted withdrawals.²⁹³ This case provided critical information about how GCDs could constitutionally treat existing users differently from new users.²⁹⁴ In addition to *Barshop*, many of the recent cases cite to another early case to take on this issue: *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District*.²⁹⁵

As GCDs expanded their regulations questions regarding the extent to which districts could constitutionally regulate also grew.²⁹⁶ In *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District*, the local GCD's permitting scheme was challenged by a landowner.²⁹⁷ The Hudspeth County Underground Water Conservation District No. 1's (Hudspeth County)²⁹⁸ 2002 management plan was intended to protect the Bone Springs–Victorio Peak Aquifer at historically optimal levels.²⁹⁹

This plan “recognize[d] three types of permits: (1) validation permits, (2) operating permits, and (3) transfer permits.”³⁰⁰ Validation permits were issued to existing wells that were shown to have produced water during a defined period.³⁰¹ Historic use determined the quantity of water that could be permitted.³⁰² Landowners who irrigated during the historic period could receive a validation permit of four acre-feet of water per acre irrigated, which could be reduced to three acre-feet.³⁰³ Landowners that did not historically irrigate were entitled to a permit equal to

²⁹² *Id.* at 632.

²⁹³ *See Bragg*, 421 S.W.3d. at 125.

²⁹⁴ *See Barshop*, 925 S.W.2d at 632.

²⁹⁵ *Guitar Holding Co. v. Hudspeth Cnty. Underground Water Conservation Dist.*, 263 S.W.3d 910, 910 (Tex. 2008).

²⁹⁶ GEOLOGICAL SOC'Y OF AM., *THE EDWARDS AQUIFER: THE PAST, PRESENT, AND FUTURE OF A VITAL WATER RESOURCE* 195 (John Malcolm Sharp et al. eds., 2019).

²⁹⁷ *Guitar*, 263 S.W.3d at 910.

²⁹⁸ This groundwater district is located in far West Texas, less than one hundred miles east of El Paso. This area is extremely dry with very little precipitation to provide surface watering or recharge opportunities. Despite annual rainfall of only eight to ten inches, this region had a historic agricultural economy made possible by groundwater irrigation. *Id.* at 913.

²⁹⁹ *Id.* at 913. In 2000, prior to these new rules, the state auditor questioned whether the district was successfully managing the aquifer.

³⁰⁰ *Id.* at 914. Operating permits, although authorized, had limited value because they could not be used unless water rose above pre-irrigation levels.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Guitar*, 263 S.W.3d at 914.

“the maximum amount of water beneficially used in any one year during the [historic] period.”³⁰⁴ This system permitted water based solely on how water was used in the past and did not consider of the future intents of a landowner.³⁰⁵

Transfer permits were available to anyone holding a validation or operating permit, but there was a higher standard for those applying for completely new permits as compared to those holding validation permits.³⁰⁶ Guitar Holding Company, a large non-irrigating landowner, was eligible for fewer water permits than nearby irrigators because they could demonstrate higher water usage during the historic period.³⁰⁷ Under this system, a historic irrigator seeking to sell and transport water out of the district could gain a permit to pump more water than another historic non-irrigator with the same intention.³⁰⁸ Guitar argued that this was an illegal distinction based on “use.”³⁰⁹

Guitar’s interpretation of Texas Water Code Section 36.116(b) was that a district is authorized to preserve an existing use of the same type or purpose.³¹⁰ The court reasoned that, “[b]ecause transferring water out of the district is a new use [for anyone seeking such a permit,] it cannot be preserved or ‘grandfathered’ under [the] section,”³¹¹ and all those applying for transfer permits should be treated equally as new users.³¹² Therefore, linking the transfer permits to existing permits was a violation of Section 36.116(b) and is outside the authority given to GCDs.³¹³ Hudspeth County argued that Section 36.116(b) granted the authority to preserve historic or existing use “makes sense only if ‘use’ refers to an amount of groundwater, not its purpose.”³¹⁴

The Texas Supreme Court ruled that historic use should only apply to the exact use and location for which it had been used.³¹⁵ If either

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 912.

³⁰⁶ *Id.* at 913.

³⁰⁷ *Id.* at 914–15.

³⁰⁸ *Id.* at 912. To obtain a transfer permit, a landowner must first have a validation permit. *Id.* at 914.

³⁰⁹ Brief for Petitioner at 12, *Guitar Holding Co. v. Hudspeth Cnty. Underground Water Conservation Dist.*, 263 S.W.3d 910 (Tex. 2008).

³¹⁰ *Guitar*, 263 S.W.3d at 915.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 916. This is a statutorily allowable factor to consider in limiting groundwater production by a district. TEX. WATER CODE ANN. § 36.116(b) (West 2015).

of those changed, the permit holder had to be treated like any other new applicant.³¹⁶ Because no one had ever transferred water out of the basin, all transfers should be considered new uses with no prior use credited through validation permits.³¹⁷ GCDs are still permitted to distinguish between uses for the purposes of a historic and existing permit.³¹⁸ GCDs are limited to their treatment of existing permit holders seeking to sell and transport their water.³¹⁹ Ultimately, the perceived unfairness of lost transfer sale earnings may have driven the decision.³²⁰

2. Modern Equal Protection Claims

In a newer EAA case, landowners David Stratta and Anthony Fazzino sued the Brazos Valley Groundwater Conservation District (“BVGCD”), claiming that BVGCD violated both the Equal Protection and takings clauses by allowing the City of Bryan (“City”) to drain the water under their property.³²¹ Unlike the *GG Ranch* and *Mountain Pure* cases,³²² this case made a more detailed argument about how they were treated differently.³²³

Pursuant to the authority granted in Chapter 36 of the Texas Water Code,³²⁴ BVGCD promulgated permitting rules for production from the Simsboro aquifer in 2004.³²⁵ These rules included three categories of wells: (1) Existing Wells; (2) New Wells; and (3) Wells with Historic Use³²⁶ and regulated how much water could be pumped through spacing and

³¹⁶ *Guitar*, 263 S.W.3d at 917.

³¹⁷ *Id.* at 917–18.

³¹⁸ *Id.* at 917.

³¹⁹ *Id.* at 918.

³²⁰ *Id.*

³²¹ *Stratta v. Roe*, 961 F.3d 340, 346 (5th Cir. 2020). Stratta raised a First Amendment claim that will not be discussed here. *Id.* Other recent Texas water cases such as *GG Ranch* have raised Equal Protection claims without developing arguments such as those seen in *Stratta*. See generally *GG Ranch, Ltd. v. Edwards Aquifer Auth.*, No. SA-14-CV-00848, 2015 BL 255526, slip op. (W.D. Tex. June 2, 2015).

³²² See *GG Ranch, Ltd. v. Edwards Aquifer Auth.*, 639 F. App’x 269, 270 (5th Cir. 2016); *Neches & Trinity Valleys Groundwater Conservation Dist. v. Mountain Pure, TX, LLC*, No. 12-19-00172-CV, 2019 WL 4462677, at *2–3 (Tex. App. Sept. 18, 2019) (mem. op., not designated for publication).

³²³ *Stratta*, 961 F.3d at 360–61.

³²⁴ TEX. WATER CODE ANN. § 36.101(a), (c) (West 2019).

³²⁵ Rules of the Brazos Valley Groundwater Conservation District §§ 7.1(1)–(3) (published Dec. 1, 2004), https://web.archive.org/web/20041208021448fw_/http://www.brazosvalleygcd.org/id75. [<https://perma.cc/3UBZ-JBBB>].

³²⁶ *Id.* § 8.3(g).

production limits.³²⁷ The stated goal of these rules was to “minimize as far as practicable the drawdown of the water table and the reduction of artesian pressure, to control subsidence, to prevent interference between wells, to prevent degradation of water quality, and to prevent waste.”³²⁸ Rule 7.1 set maximum allowable production regulations for new wells using a calculation that considered acreage land owned or controlled by the owner or operator.³²⁹ Like many other districts, permits for Wells with Historic Use are generally based on the amount an owner can prove was beneficially used before the rules’ effective date.³³⁰ Existing Wells are wells “for which drilling or significant development of the well” predates the rules’ effective date;³³¹ however, no clear production limits were established for these wells.³³²

After the rules took effect, the City of Bryan started to drill on its 2.7 acre tract.³³³ The well was completed ten months later.³³⁴ “In June 2006, the City applied for a permit to operate [the well] at a production rate of 3,000 GPM.”³³⁵ This request was conditionally granted authorizing production of 4,838 acre-feet annually at a rate of 3,000 GPM in February of 2007.³³⁶ The City received an updated identical conditional permit in April 2013.³³⁷ In January 2017, ten years after the granting of the first permit to the City, Fazzino filed his complaint with the District, requesting a hearing and a revocation of City’s permit.³³⁸ In the alternative, he requested the District initiate proceedings to amend the permit and limit the City’s production of water.³³⁹

One factual issue is the characterization of this well. Because it was not producing water on December 2, 2004, when the rules went into effect, it could not be considered a historic use;³⁴⁰ however, it also was not

³²⁷ *Id.* §§ 6–7.

³²⁸ *Id.* § 6.1.

³²⁹ *Id.* § 7.1(2).

³³⁰ *Id.* § 1.1(16).

³³¹ Rules of the Brazos Valley Groundwater Conservation District § 1.1(12) (published Dec. 1, 2004), https://web.archive.org/web/20041208021448fw_/http://www.brazosvalleygcd.org/id75.htm [<https://perma.cc/3UBZ-JBBB>].

³³² *Id.*

³³³ *Stratta v. Roe*, 961 F.3d 340, 347 (5th Cir. 2020).

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.* at 347–48.

³³⁷ *Id.* at 348.

³³⁸ *Id.*

³³⁹ *Stratta*, 961 F.3d at 347–48.

³⁴⁰ *Id.*

technically an existing well because they had not completed significant development by the time required.³⁴¹ Fazzino argued that it should be permitted as a new well, which would have capped the production at 192 GPM based on the acreage City owned.³⁴² In addition to arguing that the production permitted was not allowed for a new well, the location of the well's cone of depression impacted adjacent wells.³⁴³

Fazzino's complaint was ultimately referred to the State Office of Administrative Hearings ("SOAH") for adjudication.³⁴⁴ City argued in part that BVGCD lacked legal authority to initiate an involuntary permit amendment proceeding based on a complaint.³⁴⁵ SOAH agreed, stating that, "[n]o provision of law authorizes someone other than the District to file a complaint with the District to challenge the legality of someone else's permit or to seek revocation or amendment of it. . . . Moreover, no statute authorizes the District to rule on such a complaint if one is filed."³⁴⁶ On these grounds, SOAH dismissed Fazzino's complaint.³⁴⁷

After the failed attempt at SOAH, Fazzino applied for an offset well permit.³⁴⁸ His request was denied twice for not being able to show he owned the acreage required for a 3,000 GPM well.³⁴⁹ Fazzino filed a 42 U.S.C. Section 1983 action claiming that he was treated differently than similarly situated applicants in violation of Equal Protection.³⁵⁰ First, Fazzino argued that City's well was mischaracterized and it should have

³⁴¹ *Id.* at 348, 361.

³⁴² *Id.* at 348.

³⁴³ *Id.* A cone of depression is drawdown that is created when more water is withdrawn from an aquifer than water flowing into an aquifer as recharge, causing less water to be available for pumping. Bruce Lesikar et al., *Questions About Groundwater Conservation Districts in Texas*, TEX. A&M AGRILIFE EXTENSION, <https://agrillifeextension.tamu.edu/library/water/questions-about-groundwater-conservation-districts-in-texas/#:~:text=A%20cone%20of%20depression%20is,therefore%2C%20groundwater%20levels%20are%20lowered.&text=You%20can%20still%20use%20the,your%20pump%20to%20draw%20water> [<https://perma.cc/XE44-HDKW>] (last visited Jan. 12, 2022). Well spacing in relation to hydrologic characteristics and pump size can prevent interference between neighboring wells. *Id.*

³⁴⁴ Proposal for Decision on Summary Disposition at 2, Complaint of the Brazos Valley Groundwater Rts. Ass'n and Tony Fazzino Against the City of Bryan, SOAH No. 960-17-4513 (SOAH Hearing Nov. 14, 2017).

³⁴⁵ *Id.* at 6.

³⁴⁶ *Id.* Texas rules authorize a permit holder to request a district to amend their own operating permit, and a district can initiate an amendment to an operating permit in accordance with their rules. TEX. WATER CODE ANN. §§ 36.1146(a), (c) (2015).

³⁴⁷ *Id.* at 6, 11.

³⁴⁸ *Stratta*, 961 F.3d at 348.

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 360.

been designated as a New Well and thus subject to the acreage equation.³⁵¹ Second, he argued that the BVGCD did not enforce their rules on land ownership, spacing, and production limited for the City, while enforcing them rigorously against him without any rational basis for the discrepancy.³⁵² The result of this alleged preferential treatment was a significant difference in permissive pumping quantities.³⁵³

The district court dismissed the case on a Rule 12 (b)(6) motion filed by BVGCD for three reasons.³⁵⁴ First, the court held that the district was immune from federal suits under the Eleventh Amendment by categorizing them as an extension of the state, thus making them sovereign.³⁵⁵ They also held the issue was not ripe and that the takings claim was subject to a *Burford* abstention.³⁵⁶ Without a clear definition of the rights Fazzino had in groundwater, a case could not progress to the merits.³⁵⁷ Fazzino appealed the ruling to the Fifth Circuit.³⁵⁸

In May 2020, the Fifth Circuit issued its opinion disagreeing with the trial court.³⁵⁹ First, the appellate court held that Texas law limits Eleventh Amendment sovereign immunity to state agencies that act as an “alter ego” or “arm of the state.”³⁶⁰ Using case law, in part by analogizing navigation districts and focusing on district’s rulemaking autonomy, it was determined that groundwater districts are sufficiently distinct from the state to be outside its protections and, therefore, subject to federal suits.³⁶¹

The court made quick work of overturning the trial court’s ruling in regards to ripeness.³⁶² In noting that the primary case on which the district court relied had been overturned, the court stated that a takings case is ripe when the complainant has exhausted their administrative

³⁵¹ *Id.* at 360–61.

³⁵² *Id.* at 361.

³⁵³ *Id.*

³⁵⁴ *Stratta*, 961 F.3d at 346, 349.

³⁵⁵ *Id.* at 346, 349–50.

³⁵⁶ *Id.* at 346, 349–50, 356; *Quackenbush v. Allstate Ins. Co.* 517 U.S. 706, 726 (1996) (“*Burford* allows a federal court to dismiss a case only if it presents ‘difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,’ or if its adjudication in a federal forum ‘would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.’” (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989))).

³⁵⁷ *Stratta*, 961 F.3d at 350.

³⁵⁸ *Id.* at 349.

³⁵⁹ *Id.* at 364.

³⁶⁰ *Id.* at 350.

³⁶¹ *Id.* at 354–56.

³⁶² *Id.* at 356.

remedies and potentially suffered a violation of his Fifth Amendment rights.³⁶³ Because Fazzino had done this, the case was ripe.³⁶⁴ Finally, the court turned to the *Burford* abstention argument.³⁶⁵ Applying the *Burford* factors,³⁶⁶ and citing the *Day* case holding, the court held that the claim brought forth by Fazzino was sufficiently appropriate under federal and state law to proceed.³⁶⁷

Once all of the jurisdictional merits were overturned, the Fifth Circuit turned to the merits of the claims.³⁶⁸ Reviewing the ownership law created by the *Day* case and stating that uncertainty remained regarding the status of the property right,³⁶⁹ the opinion tasks the trial court to assess whether BVGCD's regulations resulted in a takings of Fazzino's property interest.³⁷⁰ Similarly, the court pointed to the need for adjudication of the Equal Protection claim on the merits to determine: (1) whether Fazzino was "intentionally treated differently from others who were similarly situated"; and (2) whether there was a "rational basis" for this distinction.³⁷¹

Justice Jones provided some indication of how this test should be applied in the groundwater context.³⁷² Citing case law, she began by stating all factors that an "objectively reasonable . . . decisionmaker would have found relevant" can be considered in the inquiry.³⁷³ Specific to this case are the evaluations that a GCD must consider when promulgating their rules of property including rights in groundwater, the public interest, and the requirement for fairness and impartiality.³⁷⁴ One purpose of the rules, as defined by *Day*, was to provide property owners with a fair share of the reservoir.³⁷⁵ After describing the specifics of Fazzino's Equal Protection claim, the case was remanded for an adjudication on the merits.³⁷⁶

In August 2021, the district court on remand granted the Defendants' Motion for Summary Judgment thus denying Fazzino's equal

³⁶³ *Stratta*, 961 F.3d at 356.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 356–57.

³⁶⁶ *Id.* at 357–58.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 358.

³⁶⁹ *Stratta*, 961 F.3d at 359.

³⁷⁰ *Id.* at 360.

³⁷¹ *Id.* at 360–61.

³⁷² *Id.*

³⁷³ *Id.* at 360.

³⁷⁴ *Id.* (citing TEX. WATER CODE ANN. §§ 36.101(a)(2)–(4)).

³⁷⁵ *Stratta*, 961 F.3d at 360.

³⁷⁶ *Id.* at 360–61, 364.

protection claim.³⁷⁷ The court held that Fazzino failed to identify a “class” from whom he was treated differently.³⁷⁸ The court explained that even as a “class-of-one” he was obligated to support his assertions of disparate treatment by providing some facts analogizing himself with others.³⁷⁹ Instead, the only facts that appeared to relate him with the City of Bryan was land ownership and a request for production permits, but the court stated those similarities dissipated in light of all the surrounding facts.³⁸⁰ Although this determination would have disposed of the matter, the court continued their evaluation and held that Fazzino’s claim also fails on the rational basis test even if a class could have been established.³⁸¹

Under this review standard, a governmental decision can only be invalidated if there is no conceivable scenario that provides a rational basis for its existence.³⁸² The court looked at Chapter 36’s directive for districts to “balance the interests of constitutionally protected private property rights, with the increasingly zero-sum water supply of the state of Texas” to validate BVGCD’s regulations.³⁸³ Citing *Guitar*, Judge Manske stated that rules treating “existing wells” differently from “new wells” have a rational basis.³⁸⁴ It is also permissible for GCDs to treat pre-existing municipal water suppliers differently from new, individual groundwater applicants.³⁸⁵ Reiterating that property rights in groundwater are not unlimited, the court reviewed the authority and the responsibility of groundwater districts to manage withdrawals and stated that one applicant receiving more water than another does not automatically qualify as impermissible discrimination.³⁸⁶

In most of the post-*Day* groundwater litigation, the landowner seeking the permit is challenging the inability to access all the water requested.³⁸⁷ This imbues those wishing to pump, often large amounts of water, with a more powerful property interest simply because of threat of

³⁷⁷ Order Granting Defendants’ Motion for Partial Summary Judgment at *1, *Stratta v. Roe*, No. 6:18-CV-00114-ADA, 2021 WL 1199634 (W.D. Tex. Mar. 30, 2021).

³⁷⁸ *Id.* at *4.

³⁷⁹ *Id.* at *4–5.

³⁸⁰ *Id.* at *5.

³⁸¹ *Id.* at *6.

³⁸² *Id.* at *7.

³⁸³ Order Granting Defendants’ Motion for Partial Summary Judgment at *1, *Stratta v. Roe*, No. 6:18-CV-00114-ADA, 2021 WL 1199634 (W.D. Tex. Mar. 30, 2021).

³⁸⁴ *Id.* at *8.

³⁸⁵ *Id.* at *9.

³⁸⁶ *Id.*

³⁸⁷ *Bragg v. Edwards Aquifer Auth.*, No. 06-11-18170, 2011 WL 12548554, at *1 (Tex. Dist. Mar. 25, 2011).

an inverse condemnation claim.³⁸⁸ Unfortunately, this only represents a small fraction of landowners.³⁸⁹ Existing law should also be used to represent the property interests of landowners with different economic goals.³⁹⁰ As more landowners seek to stop drainage and concerns about the protection of groundwater aquifers grow,³⁹¹ there is an opportunity to review the authority given to districts by the legislature to shift the power away from permit seekers and back to the other stated goals in Chapter 36.

IV. NEW LITIGATION STRATEGIES

After the courts' rulings in *Day* and *Bragg*, legal conversations focused on GCD regulatory limits to avoid unconstitutionally infringing on property rights.³⁹² The irony of the *Day* opinion being hailed as a property rights victory was that it was only a victory for some property rights holders. Unfortunately, not everyone who lives within a groundwater district wants to pump large quantities of water.³⁹³ One of the prongs in the *Penn Central* takings test is to assess the reasonably backed economic expectations of the person seeking compensation,³⁹⁴ but landowners who have the reasonable expectation to keep water under their land for future generations are at a legal disadvantage.³⁹⁵ Like oil and gas law, all landowners have an equal right to drain and profit from their subsurface estate,³⁹⁶ but unlike oil and gas, groundwater has value in place.³⁹⁷ This sentiment is reflected in the conservation amendment and throughout Chapter 36.³⁹⁸

While legislation may also be needed to protect some landowners and groundwater itself, many of these issues will be resolved in the courts. Because the property interest in groundwater was vested by a

³⁸⁸ See, e.g., *id.*

³⁸⁹ Vanessa Puig-Williams, *It's Time to Pay Attention to the Water We Cannot See*, AUSTIN AM.-STATESMAN (Feb. 7, 2021, 6:17 AM), <https://www.statesman.com/story/opinion/columns/your-voice/2021/02/07/its-time-texas-pay-attention-water-we-cannot-see/4404479001/> [<https://perma.cc/8GZ3-YKKA>].

³⁹⁰ *Id.*

³⁹¹ See, e.g., Kate Galbraith, *Continued Drought Means Another Big Drop for Ogallala Aquifer*, TEX. TRIBUNE (May 22, 2013, 6:00 AM), <https://www.texastribune.org/2013/05/22/ogallala-aquifer-texas-panhandle-suffers-big-drop/> [<https://perma.cc/NV3V-7XC4>].

³⁹² *Stratta v. Roe*, 961 F.3d 340, 346–47, 353, 357 (5th Cir. 2020).

³⁹³ See Puig-Williams, *supra* note 389.

³⁹⁴ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

³⁹⁵ See Puig-Williams, *supra* note 389 and accompanying text.

³⁹⁶ TEX. WATER CODE ANN. § 36.002(b) (West 2019).

³⁹⁷ *Id.* §§ 36.101(a)(1)–(5); TEX. CONST. art. XVI, § 59(a).

³⁹⁸ WATER §§ 36.101(a)(1)–(5); TEX. CONST. art. XVI, § 59(a).

court,³⁹⁹ the limits of that interest will likely be defined through litigation over a period of time.⁴⁰⁰ Determining the limits of regulation is not the only reason that litigation will increase.⁴⁰¹ As the demand for groundwater increase and supplies decrease,⁴⁰² the management decisions of GCDs will be examined through lawsuits to determine if they are in compliance with Chapter 36 requirements.⁴⁰³

A. *Conservation and Protection: Obligations of GCDs*

Groundwater Conservation Districts were created by the authority of the conservation amendment for the purpose of protecting groundwater resources on behalf of the people of Texas.⁴⁰⁴ To fully appreciate the depth of that legal obligation, one must evaluate the plain meaning of the amendment and the regulations that govern GCDs within the context of their adoption.⁴⁰⁵

1. Conservation Amendment and the Public Trust

The focus on the property rights vested by *Day* pulls attention from the equally important aspect of groundwater management in most areas of the state: groundwater districts.⁴⁰⁶ Much like cities are delegated the police power to restrict private property uses for the good of the whole,⁴⁰⁷ GCDs are authorized and obligated to limit pumping as needed to protect other users, surface water, the environment, and the aquifer to ensure the survival of communities.⁴⁰⁸

The source of GCDs' authority is the conservation amendment, which elevates the importance of protecting Texas' natural resources.⁴⁰⁹ “[T]he preservation and conservation of all such natural resources of the

³⁹⁹ *Stratta v. Roe*, 961 F.3d 340, 359 (5th Cir. 2020).

⁴⁰⁰ *Water Rights in Texas*, TEX. PUB. POL'Y FOUND. (Sept. 14, 2020), <https://www.texaspolicy.com/legewaterrights/> [https://perma.cc/JKE8-2JNR].

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ Ellis et al., *supra* note 272.

⁴⁰⁴ TEX. WATER CODE ANN. § 36.0015(b) (West 2015).

⁴⁰⁵ See discussion *infra* Sections IV.A.1–4.

⁴⁰⁶ TEX. ALL. GROUNDWATER DISTS., *Groundwater Management through Groundwater Conservation Districts*, in 365 TEX. WATER DEV. BD. REP. 299, 299–303 (Robert Mace et al. eds., 2006).

⁴⁰⁷ T.S. Baumgardner, “Takings” under the Police Power—The Development of Inverse Condemnation as Method of Challenging Zoning Ordinances, 30 SMU L.J. 723, 723 (1976).

⁴⁰⁸ WATER § 36.207 (West 2019).

⁴⁰⁹ TEX. CONST. art. XVI, § 59(a).

State are each and all hereby declared public rights and duties.”⁴¹⁰ This statement vested the waters of Texas into the public trust long before they became the domain of public property rights.⁴¹¹ This is not to say that private rights do not exist, but they do not exist in a vacuum.⁴¹² Because groundwater districts are a result of state constitutional authority,⁴¹³ GCDs must regulate in a way that protects the public’s interest in these resources.⁴¹⁴

The concept of the public trust is reflected clearly throughout Texas law,⁴¹⁵ but it is not unique to the state.⁴¹⁶ The seminal U.S. case on the topic focused on access to surface water.⁴¹⁷ In the 1892 Supreme Court decision, the Court held that under the public trust doctrine, the state holds the title to the beds of navigable lakes in trust for the use and benefit of the public and their right of use.⁴¹⁸ The state acts as a type of fiduciary, which limits how these areas can be used and a state cannot divest itself of its public trust obligation.⁴¹⁹ While access to surface water has often been the focus of the public trust, it is not limited to that.⁴²⁰ Some jurisdictions have expanded the public trust to other common resources including air, wildlife, and land.⁴²¹ “Courts have focused less on the state’s property rights in the lands underlying the water, and more on

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Texas Water Law*, TEX. A&M UNIV., <https://texaswater.tamu.edu/water-law> [<https://perma.cc/28D4-Y8L7>] (last visited Jan. 12, 2022).

⁴¹³ TEX. CONST. art. XVI, § 59(a).

⁴¹⁴ TEX. WATER CODE ANN. § 36.101(a)(4) (West 2019).

⁴¹⁵ TEX. CONST. art. XVI, § 59(a); WATER § 11.0235.

⁴¹⁶ *See, e.g.*, TEX. CONST. art. XVI, § 59(a); WATER § 11.0235(a) (“The waters of the state are held in trust for the public.”). These rights originated in the state’s earliest history. When Texas established its independence from Mexico, all vacant public lands vested in the Republic of Texas. *Wortham v. Walker*, 128 S.W.2d 1138, 1145 (Tex. 1939). Later, the State of Texas retained all vacant and unappropriated lands within its limit when it joined the United States. *Id.*

⁴¹⁷ *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 433–35 (1892). The Public Trust far predates this case and can be traced back to sixth-century Roman civil law. JUSTINIAN J. INST. 2.1.1.

⁴¹⁸ *Ill. Cent. R. Co.*, 146 U.S. at 459.

⁴¹⁹ *Id.* at 458.

⁴²⁰ *See, e.g.*, Mary Christina Wood, *Nature’s Trust: Reclaiming an Environmental Discourse*, 25 VA. ENV’T L.J. 243, 263 (2007). Because of the lack of claims legally available to litigants seeking to protect environmental assets, the public trust is often asserted with varying levels of success. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 508 (1970); Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 VT. J. ENV’T L. 189, 216–21 (2008).

⁴²¹ Wood, *supra* note 420, at 261–63.

the state's duty as trustee to balance private property rights in common natural resources against the public's interest in water as a common natural resource."⁴²²

While groundwater is not specifically enumerated in the Texas Conservation Amendment, it does state "water" and it would be difficult to argue that groundwater does not fall within the larger "natural resources" umbrella.⁴²³ The inclusion of groundwater is a natural extension of the tidal waters discussion seen in *Illinois Central*.⁴²⁴ "The basic public trust doctrine principle—that some resources are to be shared by all and managed in a protective capacity for future generations by the sovereign—is particularly well-suited to groundwater."⁴²⁵

What is included in the public trust varies by state and has evolved over time.⁴²⁶ In 2000, Hawaii extended the public trust to all waters, which included groundwater.⁴²⁷ The court relied on two 1978 additions to the state constitution, which are closely analogous to Texas' conservation amendment.⁴²⁸ In its decision, the court stated that not including groundwater would lead to an absurd conclusion due to the related nature

⁴²² Tuholske, *supra* note 420, at 216.

⁴²³ TEX. CONST. art. XVI, § 59(a). The inclusion of groundwater is particularly critical for aquifers that are being mined. In areas like the panhandle of Texas, the vast majority of domestic and agricultural use, which is the primary economic driver in the area, is served by the quickly depleting Ogallala Aquifer. Tuholske, *supra* note 420, at 193–94. An exhaustion of those waters would have huge implications for the area citizens who would have no reliable water substitute. *See id.*

⁴²⁴ *Ill. Cent. R. Co.*, 146 U.S. at 435–37.

⁴²⁵ Tuholske, *supra* note 420, at 221.

⁴²⁶ *Id.* at 215–21.

⁴²⁷ *In re Water Use Permit Applications (Wai' Hole Ditch)*, 9 P.3d 409, 445 (Haw. 2000). Other states such as New Hampshire and Connecticut have also extended public trust protections to groundwater. Tuholske, *supra* note 420, at 220.

⁴²⁸ For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy source shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. . . . All public natural resources are held in trust by the State for the benefit of the people.

HAW. CONST. art. XI, § 1. In a related provisional amendment, the constitution now states, "[t]he State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people." *Id.* § 7. During the legislative discussion of this amendment, the goal was stated that its purpose was "to make clear that our obligations include the welfare of future generations and therefore in the use of our resources we must protect our natural resources against irreversible depletion, waste or destruction . . ." *Wai' Hole Ditch*, 9 P.3d at n.36.

of surface water and groundwater.⁴²⁹ Even outside this connection, the court held that groundwater was included within constitutional protections based on their plain meaning.⁴³⁰

Although Hawaii utilizes a different legal management scheme for groundwater,⁴³¹ its interpretation and application of their constitutional protections for natural resources can and should be mirrored in Texas.⁴³² Much like Hawaii, the state of Texas is obligated to protect the natural resources of the state on behalf of its citizens.⁴³³ This can be accomplished while still respecting vested private property rights.⁴³⁴

The trust alone may not be a solution, but it is a principle that should guide the management approach of this common resource.⁴³⁵ The purpose of a trust is to protect the asset for future users rather than allowing a few private interests to realize a short-term gain.⁴³⁶ “Groundwater mining and over drafting are inconsistent with basic trust duties; trusts must be managed to preserve trust assets and to fulfill trust purposes.”⁴³⁷ In Texas, districts are the preferred method to achieve this goal. The conservation amendment alone provides the duty of protection,⁴³⁸ but detailed obligations are also reflected throughout Chapter 36.⁴³⁹

2. GCDs’ Statutory Obligations

To find the conservation expectations placed on GCDs, one need look no further than their stated purpose.⁴⁴⁰ Section 36.0015 creates districts in the name of the conservation amendment goals⁴⁴¹ and reiterates their purpose to “provide for the conservation, preservation, protection,

⁴²⁹ *Wai’ Hole Ditch*, 9 P.3d at 484–85.

⁴³⁰ *Id.*

⁴³¹ Tuholske, *supra* note 420, at 225–26.

⁴³² *See id.* at 230 (“Judicial adoption of the public trust, founded on state constitutional law, is a viable avenue to extend protection to all water and the resources that depend on it Extension of the public trust to groundwater by judicial decision, especially if founded upon a state constitution, or earlier application of public trust, is not an exceptionally broad leap of legal logic.”).

⁴³³ *See id.* at 228–29.

⁴³⁴ *See id.* at 228–30 (discussing the examples of Montana and California in which the public trust coexists with private property rights).

⁴³⁵ *Id.* at 221.

⁴³⁶ *Id.* at 228.

⁴³⁷ Tuholske, *supra* note 420, at 227–28.

⁴³⁸ TEX. WATER CODE ANN. § 36.101(a)(4) (West 2019).

⁴³⁹ *Id.* §§ 36.101–.124.

⁴⁴⁰ *Id.* § 36.0015(b).

⁴⁴¹ *Id.*

recharging and prevention of waste of groundwater”⁴⁴² To effectuate these requirements, districts must create management plans and promulgate rules that are consistent with the plan.⁴⁴³ In its rulemaking, a district shall “consider the public interest in conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and in controlling subsidence caused by withdrawal of groundwater from those groundwater reservoirs or their subdivisions, consistent with the objectives of Section 59, Article XVI, Texas Constitution.”⁴⁴⁴ The repetition of the protection and conservation language throughout the sections pertaining not only to the goals, but also to the implementation of them, reinforces their importance.

In addition to the broader conservation language found in Chapter 36, the legislature has prescribed specific actions to ensure that this will be achieved by the districts.⁴⁴⁵ First, districts must adopt management plans that incorporate efficient use of groundwater, waste prevention, conjunctive surface water management, impact on other natural resources, conservation, and the adopted DFCs.⁴⁴⁶ Many of the same considerations are listed as part of the joint planning process and in the DFC requirements themselves.⁴⁴⁷ The statute states that, “[t]he desired future conditions . . . must provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater . . . in the management area.”⁴⁴⁸ Because districts must adopt rules that implement the management plan, and the management plan must be consistent with DFCs, this can be read to mean that districts should limit permits when the resource is going to be harmed or these other concerns are involved.⁴⁴⁹

There are several examples of GCDs who have taken these obligations seriously.⁴⁵⁰ An early adopter was the Hemphill County GCD.⁴⁵¹ Located in the panhandle,⁴⁵² this single county GCD did not agree with the

⁴⁴² *Id.*

⁴⁴³ See discussion *supra* Section II.B; WATER § 36.0171 (West 2019).

⁴⁴⁴ WATER § 36.101(a)(4) (West 2019).

⁴⁴⁵ See *infra* notes 477–80 and accompanying text.

⁴⁴⁶ WATER § 36.107(a) (West 2019).

⁴⁴⁷ *Id.* § 36.108(c).

⁴⁴⁸ *Id.* § 36.108(d-2).

⁴⁴⁹ *Id.* § 36.107(f); see *id.* § 36.1132.

⁴⁵⁰ See *infra* notes 482–97 and accompanying text.

⁴⁵¹ See TEX. WATER DEV. BD., HEMPHILL CNTY. UNDERGROUND CONSERVATION DIST. MGMT. PLAN 3 (adopted July 17, 2007) (showing Hemphill proposed initial plan in 2000, shortly after requirements were put in place).

⁴⁵² See John B. McFarland, *Water Fight in the Texas Panhandle*, OIL & GAS LAW. BLOG

DFCs adopted by surrounding GCDs because it wished to protect surface flows and prevent dewatering for the Ogallala Aquifer in that region.⁴⁵³ The first sentence in their management plan related to the district's mission reads, "[t]he Hemphill County Underground Water Conservation District . . . is committed to managing and protecting the groundwater resources of Hemphill County."⁴⁵⁴ The district's more conservative DFC was challenged by T. Boone Pickens, who had purchased water rights in the district and intended to pump water from the county and transport it for sale.⁴⁵⁵ Pickens asked TWDB to reject the DFC, arguing that allowing differing DFCs along political subdivision lines, in this case district boundaries, violated Chapter 36.⁴⁵⁶ Because achieving the DFC was technically feasible, TWDB approved it stating, it did not have authority to deny it.⁴⁵⁷ This continues to be the position of the TWDB.⁴⁵⁸

(Sept. 18, 2010), <https://www.oilandgaslawyerblog.com/water-fight-in-the-texas-panha/> [<https://perma.cc/5SM9-7JAX>].

⁴⁵³ *Id.* Unlike the more common area DFC of ensuring the aquifer was forty-fifty percent full in 50 years, Hemphill County adopted a target of eighty percent water remaining. TEX. WATER DEV. BD., REP. ON APPEAL OF THE REASONABLENESS OF THE DESIRED FUTURE CONDITIONS ADOPTED BY THE GROUNDWATER CONSERVATION DISTRS., *in* GROUNDWATER MGMT. AREA 1 FOR THE OGALLALA AND RITA BLANCA AQUIFERS at 8–9 (Feb. 10, 2010).

⁴⁵⁴ TEX. WATER DEV. BD., *supra* note 451, at 1.

⁴⁵⁵ McFarland, *supra* note 452.

⁴⁵⁶ *See* TEX. WATER CODE ANN. § 36.108(d-1); McFarland, *supra* note 452. Pickens's complaint also included a takings claim, arguing that his property right was devalued because more generous pumping regulations in neighboring Roberts County would drain his water. TEX. WATER DEV. BD., *supra* note 451, at 3. TWDB demurred on this issue, stating that property rights should be resolved by courts, but they did add this statement in another section: "The imposition of regulatory constraints is not unreasonable *per se*. The issue for the Districts appears to be how to balance competing concerns—environment, ecology, business, recreation, conservation, and development." *Id.* at 3, 7.

⁴⁵⁷ TEX. WATER DEV. BD., *supra* note 453, at 9.

When staff assesses whether DFCs are physically possible, they assess whether there is any pumping scenario that would allow the DFCs to be achieved. If a scenario would allow the DFCs to be achieved, then the DFCs are considered physically possible. The models, as run by staff and as described in the Districts' testimony, demonstrate that the DFCs are physically possible.

Id. at 8.

⁴⁵⁸ Pickens's interest in this legal argument ceased when he sold his water rights to the Canadian River Municipal Water Authority for \$130 million. Betsy Blaney, *T. Boone Pickens Sells Water Rights to Texas Water Supplier for \$103 Million*, THE OKLAHOMAN (June 24, 2011, 12:00 AM), <https://www.oklahoman.com/article/3579874/t-boone-pickens-sells-water-rights-to-texas-water-supplier-for-103-million#:~:text=Pickens%20and%20his%20Mesa%20Water,the%20worst%20stage%20of%20dryness> [<https://perma.cc/7QQ5-VTJZ>].

More recently, the Hays Trinity GCD adopted Rule 15 to protect water levels in the iconic Jacob's Well.⁴⁵⁹ This rule defines the Jacob's Well Groundwater Management Zone and sets drought management protections by establishing permitting criteria, and creating drought and pumping reductions for nonexempt wells within the Management Zone.⁴⁶⁰ What makes this rule particularly interesting is the recognition of groundwater management as a tool to protect an important surface water resource.⁴⁶¹ This same approach should be used to manage important spring flows as well as protect surface water permit holders.

In addition to the clear obligations in Chapter 36, courts have reiterated the districts' protection imperative.⁴⁶² As early as *East*, the court called for legislative action related to water management and source protection.⁴⁶³ The court stated, "[i]n the absence of . . . positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters"⁴⁶⁴ Since its passage, many court opinions cite the conservation amendment to underscore the importance and purpose of GCDs.⁴⁶⁵

In *Barshop*, the court recognized the district's constitutional obligation to regulate groundwater.⁴⁶⁶ "Water regulation is essentially a legislative function. The [1917 constitutional amendment] recognizes that preserving and conserving natural resources are public rights and duties."⁴⁶⁷ The Supreme Court, in its *Sipriano* opinion, again cited the Conservation Amendment as ample justification for the regulation of groundwater

⁴⁵⁹ See HAYS TRINITY GROUNDWATER CONSERVATION DIST., DISTRICT RULES § 15 (effective Mar. 5, 2020). Jacob's Well is a 140-foot cave filled with spring water. Janie H. Pace, *10 Things to Know Before Exploring Jacob's Well*, TRAVEL AWAITS (Nov. 20, 2020), <https://www.travelawaits.com/2559033/things-to-know-before-exploring-jacobs-well/> [<https://perma.cc/KXB9-RKL2>]. In the last twenty years, the well has stopped flowing three times during droughts due to nearby groundwater extraction. *Id.*

⁴⁶⁰ HAYS TRINITY GROUNDWATER CONSERVATION DIST., *supra* note 459, § 15. "Drought curtailments are mandatory for all permit holders" in the management zone. *Id.* § 15.2.1. The amount of curtailment is determined by the 10-day running average flow at Jacob's Well. *Id.* § 15.2.4.

⁴⁶¹ The EAAA seeks to accomplish the same goal but was mandated by a federal judge and not implemented through voluntary measures.

⁴⁶² See *infra* notes 494–506 and accompanying text.

⁴⁶³ See *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279, 280 (Tex. 1904).

⁴⁶⁴ *Id.*

⁴⁶⁵ See, e.g., *infra* notes 497–503 and accompanying text.

⁴⁶⁶ See *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 633 (Tex. 1996).

⁴⁶⁷ *Id.*

production.⁴⁶⁸ “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.”⁴⁶⁹ Declaring regulation as a “legislative function” creates a high level of deference to a district’s decision.⁴⁷⁰

Later, the *Day* court echoed much of the same sentiments even while simultaneously creating a vested property right.⁴⁷¹ Stating that “districts have broad authority,”⁴⁷² the opinion provides a detailed review of the obligations placed on districts by Chapter 36.⁴⁷³ When discussing how a *Penn Central* takings test might be applied to groundwater regulation, the court unambiguously states, “[u]nquestionably, the State is empowered to regulate groundwater production” and “[r]egulation is essential to its conservation and use.”⁴⁷⁴ A district’s ability to successfully manage groundwater begins with the understanding of which uses are permissible and which are not.⁴⁷⁵

3. Waste Not, Want Not

A threshold consideration for a groundwater permit is whether the water will be put to a beneficial use.⁴⁷⁶ “Beneficial” is defined broadly to include most uses,⁴⁷⁷ and while the statutes do not clearly or fully define the parameters of what is included within the term, wasteful uses do not qualify.⁴⁷⁸ Throughout the statutes and case law, prohibitions on waste can be found.⁴⁷⁹ In Chapter 36, waste is defined as:

. . . one or more of the following:

⁴⁶⁸ See *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 79 (Tex. 1999).

⁴⁶⁹ *Id.* (listing the history of legislation that both created and emboldened DCDs to manage groundwater through planning and permitting).

⁴⁷⁰ See *id.* at 78–79 (referring to the rational basis test applied in *Barshop*).

⁴⁷¹ See *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 833 (Tex. 2012).

⁴⁷² *Id.* at 834.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 840.

⁴⁷⁵ See discussion *infra* Section IV.A.3.

⁴⁷⁶ TEX. WATER CODE ANN. §§ 36.113(d)(3), (6).

⁴⁷⁷ *Id.* § 36.001(9).

⁴⁷⁸ “‘Use for a beneficial purpose’ means use for: (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.” *Id.*

⁴⁷⁹ See, e.g., *Houston & T. C. Ry. Co. v. East*, 81 S.W. 279, 280 (Tex. 1904); *Day*, 369 S.W.3d at 833–34; *Pecos Co. Water Control & Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503, 503 (Tex. App. 1954).

- (A) withdrawal of groundwater from a groundwater reservoir 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 a groundwater reservoir if the water produced is not used for a beneficial purpose;
- (C) escape of groundwater from a groundwater reservoir to any other reservoir or geologic strata that does not contain groundwater;
- (D) pollution or harmful alteration of groundwater in a groundwater reservoir by saltwater or by other deleterious matter admitted from another stratum or from the surface of the ground;
- (E) willfully or negligently causing, suffering, or allowing groundwater to escape into any river, creek, natural watercourse, depression, lake, reservoir, drain, sewer, street, highway, road, or road ditch . . . ;
- (F) groundwater pumped 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" also has the meaning assigned by Section 11.205.⁴⁸⁰

Section 11.205 adds that:

Unless the water from an artesian well is used for a purpose and in a manner in which it may be lawfully used on the owner's land, it is waste and unlawful to wilfully cause or knowingly permit the water to run off the owner's land or to percolate through the stratum above which the water is found.⁴⁸¹

⁴⁸⁰ WATER § 36.001(8) (West 2019). A definition for waste is not included in the TWDB definitions, although it is used throughout the rules. It is reasonable to assume that the Chapter 36 definition would apply to the TWDB regulations.

⁴⁸¹ *Id.* § 11.205. An artesian well is a one in which the aquifer is under sufficient pressure

In 1955, the Texas Supreme Court provided a waste analysis in *City of Corpus Christi v. City of Pleasanton*.⁴⁸² In the case, a bed and banks permit was requested to transport artesian groundwater over 118 miles to its end user.⁴⁸³ At issue were the carriage losses through evaporation and seepage, which were projected to total up to sixty-three–seventy-four percent.⁴⁸⁴ The challengers claimed that the lost water constituted waste and should not be permitted.⁴⁸⁵ Although the court agreed that waste is not permitted by law,⁴⁸⁶ it ultimately determined this did not qualify.⁴⁸⁷

In examining whether the facts justified a finding that water had been wasted, the court noted that no common-law limitation for the means of transporting the water to the place of use could be found and that the question of whether the use to which the water is put is lawful or unlawful cannot reasonably turn on whether some of the water put into the system escapes during transportation.⁴⁸⁸ The decision noted that the water transported was intended for a beneficial use, despite the amount lost in transport.⁴⁸⁹ The court concluded that the legislature could prohibit the use of any means of transportation of groundwater that allowed the escape of excessive amounts but that it had not done so.⁴⁹⁰

Although this case is often cited as binding on a waste determination,⁴⁹¹ new cases can easily be distinguished.⁴⁹² First, this case was decided sixty-six years ago and Texas is a very different place.⁴⁹³ At that time, only 8.66 million people lived in Texas.⁴⁹⁴ Currently, that number

from an overlying confining rock later that the water flows naturally without requiring a pump. U.S. GEOLOGICAL SURV., *Artesian Water and Artesian Wells*, https://www.usgs.gov/special-topic/water-science-school/science/artesian-water-and-artesian-wells?qt-science_center_objects=0#qt-science_center_objects [https://perma.cc/XR2W-27SN] (last visited Jan. 12, 2022).

⁴⁸² *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 799 (Tex. 1955).

⁴⁸³ *Id.* at 800.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 799.

⁴⁸⁶ *Id.* at 801.

⁴⁸⁷ *Id.* at 801–02.

⁴⁸⁸ *City of Corpus Christi*, 276 S.W.2d at 801–02.

⁴⁸⁹ *Id.* at 803–04.

⁴⁹⁰ *Id.* at 802–03.

⁴⁹¹ *See, e.g., City of San Marcos v. Tex. Comm'n on Env't Quality*, 128 S.W.3d 264, 271 (Tex. 2004).

⁴⁹² *Id.*

⁴⁹³ *See Corpus Christi*, 276 S.W.2d at 798.

⁴⁹⁴ TEX. STATE LIBR. & ARCHIVES COMM'N, *United States and Texas Populations 1850–2017* (Jan. 8, 2020), <https://www.tsl.texas.gov/ref/abouttx/census.html> [https://perma.cc/CEE2-NFEN].

totals almost 29 million.⁴⁹⁵ The value of water has changed since there has been increased demand with no additional supply,⁴⁹⁶ and the state better understands the science of this resource.⁴⁹⁷ Further, the *Corpus Christi* case involved rules related to artesian water and a bed and banks transfer;⁴⁹⁸ therefore, new cases should interpret these obligations based on current realities.

Waste re-emerged as an issue in a recent permit application dispute with a similar fact pattern. In February 2018, the Lower Colorado River Authority (“LCRA”) submitted eight permit applications to the Lost Pines Groundwater Conservation District (“Lost Pines”) to withdraw 25,000 acre-feet of water per year from eight wells in the Simsboro Formation in Bastrop County, Texas.⁴⁹⁹ LCRA also requested approval to transport some of that water using the bed and banks of the river.⁵⁰⁰ Draft permits were issued by the general manager (“GM”) and several parties objected.⁵⁰¹ “Environmental groups argued that the amount requested was more than the aquifer could safely sustain.”⁵⁰² Local landowners and the city of Elgin, who also had wells in the Simsboro, were concerned about water level impacts from the additional pumping and resulting well depletion.⁵⁰³ The objections led to a week-long contested case hearing at SOAH.⁵⁰⁴

The primary issue with the draft permits included a number of conditions.⁵⁰⁵ One of these prohibited the use of the bed and banks as a conduit for transport.⁵⁰⁶ In his denial of the request, the GM cited concerns

⁴⁹⁵ U.S. CENSUS BUREAU, *Quick Facts Texas*, <https://www.census.gov/quickfacts/fact/table/TX/PST045219#> [<https://perma.cc/B96Y-NKSN>] (last visited Jan. 12, 2022).

⁴⁹⁶ TEX. WATER DEV. BD., *WATER FOR TEXAS: REGIONAL WATER PLANNING IN TEXAS*, 6 (2017), <http://www.twdb.texas.gov/publications/shells/RegionalWaterPlanning.pdf> [<https://perma.cc/GVQ2-SS76>].

⁴⁹⁷ PETER G. GEORGE ET AL., *TEX. WATER DEV. BD. Report 380, AQUIFERS OF TEXAS 4* (2011).

⁴⁹⁸ *See Corpus Christi*, 276 S.W.2d at 803.

⁴⁹⁹ Application of Lower Colo. River Auth. For Operating and Transp. Permits for Eight Wells in Bastrop Cnty., Tex. Proposal for Decision at *1, SOAH No. 952-19-0705 (SOAH Hearing Mar. 31, 2020).

⁵⁰⁰ STATE OFF. ADMIN. HEARINGS, Application of Lower Colo. River Auth. For Operating and Transp. Permits for Eight Wells in Bastrop Cnty., Tex., No. 952-19-0705, at 1 (2020).

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ Brandon Mulder, *Court Sides with LCRA in Bastrop County Water Fight*, AUSTIN-AM. STATESMAN (Apr. 7, 2020, 10:59 AM), <https://www.statesman.com/news/20200407/court-sides-with-lcra-in-bastrop-county-water-fight> [<https://perma.cc/PEY3-QKD4>].

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ STATE OFF. ADMIN. HEARINGS, *supra* note 500, at 8.

about water loss through evaporation or carriage losses and stated that LCRA had not presented any plan to minimize losses through transport.⁵⁰⁷ The GM argued that inclusion of this condition was within the district's authority and obligation to prevent waste pursuant to Chapter 36.⁵⁰⁸ In his opinion, discharge of *any* amount of groundwater into the bed and banks would constitute waste as defined by Texas Water Code Section 36.001(8)(e).⁵⁰⁹

LCRA argued that the limitation was outside the authority of the district and that transport using a watercourse was not *per se* waste.⁵¹⁰ To make the latter argument, LRCA focused on the word "escape."⁵¹¹ In LCRA's view, when a permit to transport groundwater via bed and banks of a watercourse is obtained prior to discharge, the groundwater does not "escape" because ownership is maintained until a later diversion.⁵¹² Citing case law including *Corpus Christi v. Pleasanton*, LCRA reasoned that a bed and banks permit allowed water ownership to be retained after discharge, unlike in a situation where no permit was obtained.⁵¹³ Carriage losses were estimated to only be ten percent, which is less than losses common in pipes, which they stated can be up to twenty percent.⁵¹⁴

In their March 2020 opinion, the ALJs determined that the bed and banks condition was not appropriate and should be removed.⁵¹⁵ While they agreed that GCDs have a duty to ensure that groundwater is put to beneficial use and the authority to control waste of groundwater, they did not agree that any discharge into a watercourse met the waste threshold.⁵¹⁶ They determined that such a conclusion was overbroad to accomplish the District's stated purpose of preventing groundwater waste in transport.⁵¹⁷ They agreed with LCRA that "escape" was not applicable here because of the retained ownership.⁵¹⁸ Finally, the ALJs

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.* at 61–62.

⁵¹⁰ *Id.* at 63.

⁵¹¹ *Id.* (LCRA also argued that the permit amendment made this condition unnecessary and, pointing to a permit that did allow for bed and banks, they preferred that the district could be more restrictive on transporters than it is on in-district users).

⁵¹² STATE OFF. ADMIN. HEARINGS, *supra* note 500, at 63.

⁵¹³ *Id.* at 64.

⁵¹⁴ *Id.* at 65.

⁵¹⁵ *Id.*

⁵¹⁶ *Id.* at 65–66.

⁵¹⁷ *Id.* at 66–67.

⁵¹⁸ STATE OFF. ADMIN. HEARINGS, *supra* note 500, at 63.

stated that even if the condition had been more narrowly tailored to prevent waste, the condition should still be removed because Lost Pines presented no evidence to prove waste would occur.⁵¹⁹

Although this opinion may look like a reiteration of the *Corpus Christi* holding, there are important distinctions.⁵²⁰ Rather than determining that waste is not contemplated in a bed and banks transfer, the ALJs left the door open for such a requirement and provided important information about what evidence would need to be provided to support such a decision.⁵²¹ It can be inferred that a groundwater district presenting substantial evidence for denying a permit based on a waste concern would be fulfilling their statutory obligations.⁵²² The challenge for districts is predicting what evidence would suffice.⁵²³

While waste has not been litigated in the groundwater permitting context in Texas,⁵²⁴ predicting what may constitute waste can be inferred from surface water allocation regimes and groundwater law from other states.⁵²⁵ For example, Arizona does not include a definition of waste in the groundwater code;⁵²⁶ however, it does state that waste or withdrawn groundwater is prohibited specifically as it relates to water loss through “leaky casing, lack of casings, pipes, fittings, valves or pumps, either above or below the surface of the ground.”⁵²⁷ The danger of listing something this specific is the implication that anything not listed is permissive.

For agricultural users, such a definition can provide challenges depending on the irrigation methods used.⁵²⁸ Traditional watering practices such as flood irrigation could easily trigger a waste evaluation using Arizona’s definition.⁵²⁹ A process must be adopted that balances historic use with the cost of updating systems. One option to assess the extent of a beneficial allotment would be to look at water duty of a certain crop in a region. Water duty is the quantity of water required to satisfy the

⁵¹⁹ *Id.* at 65–66.

⁵²⁰ *Id.* at 64–65. SOAH did state that LCRA’s burden to show no waste was negated by their amended permits that no longer sought to transport water out of the district.

⁵²¹ *Id.*

⁵²² *See id.* at 65–68.

⁵²³ *Id.* at 65–66.

⁵²⁴ STATE OFF. ADMIN. HEARINGS, *supra* note 500, at 64–65.

⁵²⁵ *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-602 (West 2021).

⁵²⁶ *Id.* *See also* ARIZ. DEPT OF ENV’T QUALITY, GLOSSARY OF TERMS 21 (2021).

⁵²⁷ *See* ARIZ. REV. STAT. ANN. § 45-602 (West 2021).

⁵²⁸ STATE OFF. ADMIN. HEARINGS, *supra* note 500, at 66.

⁵²⁹ *See* ARIZ. REV. STAT. ANN. § 45-602 (West 2021).

irrigation water requirements in a given area.⁵³⁰ Embedded in this approach is an understanding that there is a limit to the amount of water that can be used beneficially for a certain purpose.⁵³¹ A challenge in calculating water duty is deciding how efficient the benchmark system needs to be while recognizing that new technologies can be very costly.⁵³² Rather than base beneficial use on drip or sprinkler irrigation, it should be based on reasonably efficient practices such as lined ditches, efficient application practices, and land leveling.⁵³³ Similar assessments can be made for municipal users to help advance conservation in city environments.⁵³⁴

What is considered wasteful might change based on current rainfall or groundwater storage levels. There is a question of whether to limit uses that would be wasteful even in times of plenty or implement cut-back measures during shortfall.⁵³⁵ This decision rests on both the geology of the aquifer and its ability to recharge, as well as if the policy goal is to be reactive or proactive.⁵³⁶ The obvious challenge with groundwater is that a late decision could lead to long term shortages if the aquifer has slow or no recharge.⁵³⁷ Groundwater and aquifer resilience depends heavily on avoided demand;⁵³⁸ therefore, a broader interpretation of waste

⁵³⁰ See *Water Rights Law: Prior Appropriation*, FINDLAW (Aug. 31, 2017), <https://corporate.findlaw.com/business-operations/water-rights-law-prior-appropriation.html> [https://perma.cc/7B5C-FA8Z].

⁵³¹ Jeff Gittins, *What Is Duty of Water?*, UTAH WATER L. & WATER RTS. (Sept. 30, 2010), <http://utahwaterrights.blogspot.com/2010/09/what-is-duty-of-water.html> [https://perma.cc/5YGR-JT48].

⁵³² See William J. Cosgrove, *Water Management: Current and Future Challenges and Research Directions*, 51 WATER RES. RSCH. 4823, 4832 (2015).

⁵³³ See ARIZ. REV. STAT. ANN. § 45-564(A)(1) (West 2021); see also Haseeb Jamal, *Methods of Improving and Factors Affecting Duty of Water*, ABOUTCIVIL (Oct. 14, 2017), <https://www.aboutcivil.org/duty-factors-affecting-improving-duty.html> [https://perma.cc/36LC-L9QD].

⁵³⁴ See, e.g., ARIZ. REV. STAT. ANN. § 45-564 (A)(1) (West 2021); Jamal, *supra* note 533.

⁵³⁵ See Timothy L. O'Brien, *Can the Southwest Survive With Less Water?*, BLOOMBERG (July 18, 2021), <https://www.bloomberg.com/graphics/2021-opinion-us-drought-southwest-arizona-water-crisis/> [https://perma.cc/4ZFG-SECW]; STATE OFF. ADMIN. HEARINGS, *supra* note 500, at 66–67.

⁵³⁶ See U.S. GEOLOGICAL SURV., *Aquifers and Groundwater*, https://www.usgs.gov/special-topic/water-science-school/science/aquifers-and-groundwater?qt-science_center_objects=0#qt-science_center_objects [https://perma.cc/PFE2-4ER2#qt-science_center_objects] (last visited Jan. 12, 2022); O'Brien, *supra* note 535.

⁵³⁷ U.S. GEOLOGICAL SURV., *supra* note 536.

⁵³⁸ Cf. INT'L ASS'N OF HYDROGEOLOGISTS, STRATEGIC OVERVIEW SERIES: CLIMATE-CHANGE ADAPTATION & GROUNDWATER 3–5 (2019), https://iah.org/wp-content/uploads/2019/07/IAH_Climate-ChangeAdaptationGdwtr.pdf [https://perma.cc/LD9P-GJYM] (discussing the importance of demand and supply management).

is important.⁵³⁹ Avoided demand has the added financial benefit of delaying the need to locate and import additional supply.⁵⁴⁰

While the court in *Corpus Christi* held that water loss during transport was an all-or-nothing proposition,⁵⁴¹ many other jurisdictions have found ways to apply waste limitations.⁵⁴² Chapter 36 clearly and repeatedly prohibits waste.⁵⁴³ As the dissent in *Corpus Christi* noted, the majority opinion “entirely overlooks the very purpose for which the conservation amendment and the statutes were passed”⁵⁴⁴ The legislature is not required to draft a detailed numeric-based definition to ensure that its intent is respected.⁵⁴⁵ What qualifies as waste is subject to the interpretation of districts and courts if their decisions are challenged.⁵⁴⁶ GCDs should have some leeway to promulgate rules about waste based on the characteristics of the aquifer and local conditions. Like beneficial use, our understanding of waste should change over time as values change. Population growth and increasing groundwater demand require that waste be reviewed and used as a tool to critically review use.⁵⁴⁷

Building on the *Lost Pines* decision,⁵⁴⁸ GCDs should have latitude to apply the waste prohibition in their permitting decisions so long as they can support their decision with substantial evidence. The repeated calls to avoid waste in statute provide a critical legal tool for districts to legally limit pumping.⁵⁴⁹ A district’s unwillingness to thoughtfully consider

⁵³⁹ See STATE OFF. ADMIN. HEARINGS, *supra* note 500, at 2, 45.

⁵⁴⁰ See O’Brien, *supra* note 535; see, e.g., Herrera Franco et al., *Groundwater Resilience Assessment in a Communal Coastal Aquifer System*, 12 SUSTAINABILITY 1, 3, 6–7 (2020); Timothy F. Brick, *The True Price of Imported Water*, SAN DIEGO UNION-TRIBUTE (Aug. 6, 2010, 12:00 AM), <https://www.sandiegouniontribune.com/sdut-true-price-imported-water-2010aug06-story.html> [<https://perma.cc/Y7G8-J5L2>].

⁵⁴¹ Moreover, if the escape of the water is an unlawful “use” within the meaning of the statutes, then the percentage of the escape through evaporation, seepage, etc. is wholly immaterial; the use to which the water is put cannot be a “little bit” unlawful on one occasion and a “whole lot” unlawful on another.

See *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955).

⁵⁴² *Id.* at 806–08.

⁵⁴³ See TEX. WATER CODE ANN. §§ 36.001(8)–(9) (West 2019); see also STATE OFF. ADMIN. HEARINGS, *supra* note 500, at 66–67.

⁵⁴⁴ *Corpus Christi*, 276 S.W.2d at 808.

⁵⁴⁵ *Id.* at 806–07.

⁵⁴⁶ See, e.g., *id.* at 800–01, 805–07.

⁵⁴⁷ See *supra* notes 527–30 and accompanying text (discussing changes in population and demand influencing groundwater value).

⁵⁴⁸ See *supra* notes 261–65 and accompanying text.

⁵⁴⁹ See *supra* notes 535–40 and accompanying text (discussing changes in population and demand influencing groundwater value).

waste and beneficial use raises important questions about whether they are meeting their statutory obligations and can create liability, particularly from those landowners who do not want to see excessive permitting.

4. GCDs' Chapter 36 Liability

While many recent lawsuits against GCDs have claimed Fifth Amendment and other constitutional violations based on perceived curtailment of a vested property right,⁵⁵⁰ districts are at increasing risk for challenges from litigants claiming the district has not fulfilled its statutorily required obligations.⁵⁵¹

A person, firm, corporation, or association of persons affected by and dissatisfied with any rule or order made by a district, including an appeal of a decision on a permit application, is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order.⁵⁵²

For qualifying litigants concerned about widespread drainage causing environmental degradation, surface water impacts, or aquifer mining, a suit could be brought to challenge a district's management plan itself or assert that permitting is inconsistent with the plan or the DFCs.⁵⁵³

In addition to the ability to file a claim as described above, Chapter 36 also provides specific guidance for appealing an adopted DFC.⁵⁵⁴

⁵⁵⁰ See *supra* Sections III.A–B.

⁵⁵¹ See TEX. WATER CODE ANN. §§ 36.251–.066(a) (West 2015) (exempting limited types of lawsuits and providing immunity to board members in their individual capacity). “The burden of proof is on the petitioner, and the challenged law, rule, order, or act shall be deemed prima facie valid.” *Id.* § 36.253.

⁵⁵² *Id.* § 36.251. If a GCD is sued and prevails, “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.” *Id.* § 36.066(g) (emphasis added). During the 2021 legislature session, Senator Perry introduced SB152, which would change the “shall” to “may.” S.B. 152, 87th Leg., Gen. Sess. (Tex. 2021) (as introduced on Mar. 3, 2021).

⁵⁵³ See TEXAS WATER CODE ANN. §§ 36.1071(a), (f)-1085 (West 2011).

⁵⁵⁴ *Id.* § 36.1083.

Not later than the 120th day after the date on which a district adopts a desired future condition under Section 36.108(d-4), an affected person may file a petition with the district requiring that the district contract with the office to conduct a hearing appealing the reasonableness of the desired future condition.

Id. § 36.1083(b).

One challenge of using the DFC to reliably protect groundwater as envisioned by the legislature is the statutory obligation to update it every five years.⁵⁵⁵ While the intent for this requirement may have been to build in flexibility and ensure integration of up-to-date science,⁵⁵⁶ it can create a moving goal post. If there is a challenge to a GCD for not meeting a DFC, it can be altered to more closely resemble current conditions.⁵⁵⁷ The ability to alter a long-term goal and potentially allow for more dewatering undermines the stated purpose and weakens the ability of those concerned to effectively challenge a district for not meeting the DFC requirements.⁵⁵⁸ It is also problematic that the TWDB approves DFCs based on their administrative completeness and whether they can be achieved.⁵⁵⁹ The efficacy of a DFC would be strengthened by a critical review of how the district's DFC actually meets the goals listed in the statute rather than reviewing for completeness.⁵⁶⁰ While GCDs have obligations to meet, courts can also be more protective of groundwater and the Chapter 36 goals within traditional Fifth Amendment challenges.

B. *Taking Another Look at Takings*

Despite a GCD's efforts to meet their Chapter 36 responsibilities, more Fifth Amendment claims are bound to arise.⁵⁶¹ Because each takings claim is evaluated independently as an ad hoc, factual inquiry,⁵⁶² a volume of jurisprudence is needed to fully understand the meeting point between permissible regulation and property rights. Currently, Texans only have the *Bragg* decision to assist in that assessment,⁵⁶³ however, inverse condemnation jurisprudence, groundwater management requirements, and recent court language demonstrate that GCDs should be given broad latitude in a compensation challenge.⁵⁶⁴

⁵⁵⁵ *Id.* § 36.108(d).

⁵⁵⁶ *See* WATER § 36.108(d) (West 2019).

⁵⁵⁷ *See id.* §§ 36.108(d), (d-3).

⁵⁵⁸ *See id.* § 36.108(d).

⁵⁵⁹ *See* 31 TEX. ADMIN. CODE § 356.54 (2021); BILL HUTCHINSON & JOE REYNOLDS, REP. ON APPEAL OF THE REASONABLENESS OF THE DESIRED FUTURE CONDITIONS ADOPTED BY THE GROUNDWATER CONSERVATION DIST. IN GROUNDWATER MGMT. AREA 1 FOR THE OGALLALA AND RITA BLANCA AQUIFERS 8–9 (Feb. 10, 2010), <https://www.twdb.texas.gov/groundwater/petitions/gma1-petitions.asp> [<https://perma.cc/8Z6C-83MC>].

⁵⁶⁰ *See* WATER § 36.108(c)(4) (West 2019).

⁵⁶¹ Ellis et al., *supra* note 272.

⁵⁶² *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

⁵⁶³ *See* Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118, 123–24, 126 (Tex. App. 2013).

⁵⁶⁴ *See, e.g., id.* at 138.

The *Day* decision instructs that Fifth Amendment challenges in Texas should follow federal takings jurisprudence.⁵⁶⁵ Inverse condemnation cases fall into three basic categories: physical invasion, total economic deprivation, and partial economic deprivation.⁵⁶⁶ Physical invasion is unlikely to be triggered by a groundwater permitting decision,⁵⁶⁷ so cases will primarily fall within the two economic deprivation categories, with the latter being more common.⁵⁶⁸ Total economic deprivation cases follow the *Lucas* case and partial deprivations follow *Penn Central*.⁵⁶⁹

A total economic deprivation is challenging in this context because there is almost always remaining value even if a permit is fully denied.⁵⁷⁰ One need look no further than *Bragg* to find an example where this is true.⁵⁷¹ All of the Braggs' requested water right was denied for the D'Hanis tract,⁵⁷² but the land still had value;⁵⁷³ therefore, *Lucas* was not applied.⁵⁷⁴ Additionally, landowners cannot legally be denied all access to water because the law exempts domestic and livestock uses.⁵⁷⁵ This exemption is not de minimis, allowing for 25,000 gallons a day to be pumped for these purposes.⁵⁷⁶ While that water cannot be sold or used for large-scale commercial application,⁵⁷⁷ it would still likely constitute enough value to fail the *Lucas* test.⁵⁷⁸

A potential exception to a traditional litigant who retains property rights in the surface estate even if denied a groundwater permit is someone who only purchases a severed groundwater estate.⁵⁷⁹ If an owner of a groundwater estate is denied a withdrawal permit, a successful

⁵⁶⁵ See *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 838 (Tex. 2012).

⁵⁶⁶ See *Chevron v. Lingle*, 544 U.S. 528, 528–29 (2005).

⁵⁶⁷ See, e.g., *Day*, 369 S.W.3d at 839.

⁵⁶⁸ See, e.g., *id.* at 838; see *Bragg*, 421 S.W.3d at 153.

⁵⁶⁹ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1004 (1992); see *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 105 (1978).

⁵⁷⁰ See *Lucas*, 505 U.S. at 1019. Under *Lucas*, the inquiry is (1) what constitutes a total deprivation of property interest and (2) the nature of the property interest alleged to be totally deprived. See *id.* at 1030–31.

⁵⁷¹ See generally *Bragg*, 421 S.W.3d at 128.

⁵⁷² See *id.* at 137–39.

⁵⁷³ See *id.*

⁵⁷⁴ *Id.* at 138–52.

⁵⁷⁵ TEX. WATER CODE ANN. § 36.117(b)(1) (West 2015).

⁵⁷⁶ *Id.* § 36.117(b)(1)(B).

⁵⁷⁷ See *id.* §§ 36.117(b)(1)–(3).

⁵⁷⁸ *Contra Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1003 (1992).

⁵⁷⁹ See *contra Bragg*, 421 S.W.3d at 151 (“Here, the water beneath the Braggs’ land is not the source of their business—they do not buy, sell, or lease water as a commodity.”).

takings claim is more likely under the *Lucas* test.⁵⁸⁰ This fact pattern would be analogous to *Pennsylvania Coal v. Mahon*.⁵⁸¹ In that case, a state statute prohibited coal mining that would result in removal of support causing subsidence and damaging homes.⁵⁸² The Pennsylvania Coal Company sued, arguing that the value of their property right was negated if the mineral could not be excavated.⁵⁸³ The court agreed stating, “[w]hat makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”⁵⁸⁴ As groundwater severance becomes more common, a similar takings argument may arise, but only if all water access is denied.⁵⁸⁵ If even a partial permit were granted, *Lucas* would not be available.⁵⁸⁶

An important caveat to a *Lucas* inquiry is that the government can avoid paying compensation, even after deprivation of all economic value, “if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”⁵⁸⁷ In other words, something that is not part of the bundle of sticks cannot be taken by a government regulation.⁵⁸⁸ When applied to groundwater, this means that a GCD could avoid paying compensation for denying access to water because the use is deemed too wasteful, or otherwise not beneficial.⁵⁸⁹ Someone with a vested right in groundwater has no more right to use it contrary to common law and the Chapter 36 restrictions than a landowner wishing to use their property in a way that creates a nuisance.⁵⁹⁰ The majority of groundwater takings cases will follow a *Penn Central* analysis.⁵⁹¹ The Supreme Court laid out three factors for courts to consider whether compensation was required for a partial economic deprivation resulting from a regulation.⁵⁹² These factors are: (1) “[t]he economic impact of the regulation on the claimant”; (2) “the extent

⁵⁸⁰ See *id.* at 138.

⁵⁸¹ See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922).

⁵⁸² *Id.* at 412–13.

⁵⁸³ *Id.*

⁵⁸⁴ *Id.* at 414.

⁵⁸⁵ See *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1003, 1026 (1992).

⁵⁸⁶ See *id.*

⁵⁸⁷ *Id.* at 1027.

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.* at 1029–30.

⁵⁹⁰ See *id.* at 1027–30; see discussion *supra* Section IV.A.3.

⁵⁹¹ See *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 138 (Tex. App. 2013).

⁵⁹² *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 104, 124 (1978).

to which the regulation has interfered with distinct investment-backed expectations”; and (3) “the character of the governmental action.”⁵⁹³ The court instructed that none of these factors are more important than the others.⁵⁹⁴ In essence, these factors provide a balancing test that weighs the impact on the individual against the importance of the government regulation causing the infringement.⁵⁹⁵ Courts have wide latitude in how they wish to stack the deck on either side and consider surrounding circumstances.

Penn Central, and the long line of subsequent land-use-related jurisprudence, makes clear that the government is given wide latitude to limit private rights when such action is supported by the police power and the harm is balanced by the importance of the government action.⁵⁹⁶ “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”⁵⁹⁷

Although the court in *Bragg* spent very little time contemplating the importance of protecting water resources when applying the “nature of the government action” prong,⁵⁹⁸ other courts like the one in *GG Ranch* appear to lean a different way.⁵⁹⁹ In its ruling, the district court stated:

The State of Texas has a compelling and legitimate interest in managing and protecting the Edwards Aquifer, which is the primary source of water for many Texas residents and vital to the state’s economy and welfare. . . . Water management and conservation are uniquely compelling state interests, and failure to protect water supplies could be catastrophic for the economic health of the State of Texas and the welfare of its residents. Simply stated, access to water is necessary to sustain life.⁶⁰⁰

⁵⁹³ *Id.*

⁵⁹⁴ *Id.*

⁵⁹⁵ *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power.”).

⁵⁹⁶ *Penn Cent.*, 438 U.S. at 104, 147–48.

⁵⁹⁷ *Id.* at 124.

⁵⁹⁸ *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 145 (Tex. App. 2013).

⁵⁹⁹ *GG Ranch, Ltd. v. Edwards Aquifer Auth.*, No. SA-14-CV-00848, 2015 BL 255526, slip op. at *5–6 (W.D. Tex. June 2, 2015).

⁶⁰⁰ *Id.* at *4.

Even the *Day* court recognized both the importance of and the legal authority for regulations.⁶⁰¹ If a court truly focused on the importance of water for life, property values, and the Texas economy, as denoted in Chapter 36 and the conservation amendment, and weighed that against a property impact to one individual, many district rules would not necessitate compensation.⁶⁰²

This paradigm shift toward the importance of the regulation is not inconsistent with courts in other jurisdictions making similar water-related determinations.⁶⁰³ States have successfully defended themselves against takings claims for canceling riparian rights when transitioning to a statutory system or when pumping was reduced to protect endangered species.⁶⁰⁴ If the purpose of a taking is to balance the rights of the individual with the importance or necessity of the regulation, it would be difficult to find something more important than protecting water resources on behalf of the larger community.⁶⁰⁵ “The weight of modern authority counsels against a court finding a taking of groundwater ‘rights’ based upon adoption of the public trust doctrine, even if adoption limits present and future groundwater use.”⁶⁰⁶

Another prong of the *Penn Central* test worth review is investment-backed expectations.⁶⁰⁷ While this is generally discussed in relation to the owner who is claiming the infringement,⁶⁰⁸ in this context it raises a question about the importance of the investment-backed expectations of an owner who wishes groundwater be maintained in place.⁶⁰⁹ By allowing the law to focus so specifically on the expectations of one owner, current law is essentially ignoring the expectations of their neighbors.

Bragg presents a useful hypothetical.⁶¹⁰ In that case, the court’s opinion focused on the expectation the family held when they purchased

⁶⁰¹ *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 840–41 (Tex. 2012).

⁶⁰² See Joseph Belza, *A Texas Takings Trap: How the Court in Edwards Aquifer Authority v. Bragg Fell into a Dangerous Pitfall of Takings Jurisprudence*, 43 B.C. ENV'T AFF. L. REV. 211, 216–19 (2016) (arguing that the *Bragg* court misapplied *Penn Central* by using the factors as a scorecard rather than a scale that considered the totality of the circumstances). “[N]o single *Penn Central* factor is determinative; all three must be evaluated together, as well as any other relevant considerations.” *Day*, 369 S.W.3d at 840.

⁶⁰³ Tuholske, *supra* note 420, at 234.

⁶⁰⁴ *Id.* at 234; see, e.g., *In re the Adjudication of the Water Rights of the Upper Guadalupe segment of the Guadalupe River Basin*, 642 S.W.2d 438, 446 (Tex. 1982).

⁶⁰⁵ Tuholske, *supra* note 420, at 235.

⁶⁰⁶ *Id.*

⁶⁰⁷ *Penn Cent. v. City of New York*, 438 U.S. 104, 124 (1978).

⁶⁰⁸ *Id.* at 136.

⁶⁰⁹ *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 142–43 (Tex. App. 2013).

⁶¹⁰ *Id.* at 124, 143.

property to cultivate a pecan farm with increasingly larger trees, which require more water.⁶¹¹ When they purchased the property, they expected to be able to access the water they needed without regulatory interference.⁶¹² If that pumping depleted a neighbor who purchased their property with the expectations of passing it down for generations, shouldn't those invested-backed expectations also be respected by the law?

While it is clear that in private areas there is no liability between users,⁶¹³ in a region regulated by a groundwater district it can be argued that all landowners' investment-backed expectations deserve representation and property rights protections through the permitting process.⁶¹⁴ While that does not mean that water levels cannot change, it may mean that a more wholistic approach of harm is considered.⁶¹⁵ Admittedly, this concept is inconsistent to traditional takings considerations because a regulatory taking usually originates when a government action, such as promulgation of rules, deprives an owner of a property interest.⁶¹⁶ Here, the deprivation caused by drainage might be due to a government inaction, such as a district's failure to regulate, thus infringing on a valid property interest.⁶¹⁷ Although the Fifth Amendment approach might be estopped on this basis,⁶¹⁸ the Chapter 36 rules requiring conservation and protection may accomplish the same task.⁶¹⁹

C. *Surface Water Impact Protection*

In addition to considering comparative groundwater rights among surface estate owners, the current regulatory regime places surface water rights holders at a distinct disadvantage when compared to groundwater rights holders.⁶²⁰ In Texas, there is no liability for diminution of surface water flow due to groundwater pumping.⁶²¹ However, “[t]he results of

⁶¹¹ *Id.* at 143.

⁶¹² *Id.*

⁶¹³ See TEX. WATER DEV. BD., *Groundwater Conservation Districts* (2019), https://www.twdb.texas.gov/mapping/doc/maps/GCDs_8x11.pdf?d=20583.600000023842 [<https://perma.cc/V3M6-EGSV>]; Lesikar et al., *supra* note 343, at 13.

⁶¹⁴ TEX. WATER CODE ANN. §§ 36.001(31), 36.0015(b) (West 2015).

⁶¹⁵ Lesikar et al., *supra* note 343, at 13.

⁶¹⁶ See *Penn Cent. v. City of New York*, 438 U.S. 104, 128–29 (1978).

⁶¹⁷ See *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 842 (Tex. 2012).

⁶¹⁸ *Penn Cent.*, 438 U.S. at 123.

⁶¹⁹ WATER § 36.101(a) (West 2019).

⁶²⁰ Lesikar et al., *supra* note 343, at 11.

⁶²¹ *Pecos Co. Water Control & Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503, 506–07 (Tex. App. 1954).

groundwater pumping on surface flows can be catastrophic.”⁶²² Lack of consideration for surface water rights during the groundwater permitting process can lead to devastating ecologic losses and render senior permits unusable.⁶²³ In Texas, the inability of surface water permit holders to access their water rights would have huge property and economic ramifications.⁶²⁴

Texas has changed a lot since 1954, and some may argue that the time has come for the legislature to listen to the El Paso Court of Appeals and change the law,⁶²⁵ however, until that time, surface water users have Chapter 36 to assist them.⁶²⁶ The obligatory GCD management plan must address “conjunctive surface water management issues.”⁶²⁷ In addition, it instructs that it be written in coordination with surface water managers.⁶²⁸ This concept again appears in the joint management expectations, which states that “districts shall consider . . . other environmental impacts, including impacts on spring flow and other interactions between groundwater and surface water” when selecting their DFC.⁶²⁹

These obligations do not create the correlative rights sought in the *Comanche Springs* case,⁶³⁰ but they do potentially provide a foothold for injured surface water rights holders because an “affected party” is permitted to challenge a GCD rule or appeal the reasonableness of a DFC.⁶³¹ It is an open question as to whether a surface water holder could survive a standing challenge in this context, but it is hard to imagine that courts would simply ignore damage to a senior water right caused by groundwater pumping and the state may finally pay some attention to a long overdue legal oversight.

CONCLUSION

Texas groundwater law is challenging. Through decades of case law and legislation, the state aims to vest property rights in groundwater

⁶²² Tuholske, *supra* note 420, at 202. For example, the Ipswich River in Massachusetts lost the majority of its base flow to municipal groundwater pumping. *Id.*

⁶²³ *See id.*

⁶²⁴ Lesikar et al., *supra* note 343, at 11.

⁶²⁵ “It may be that the answer to this unhappy situation is legislative.” *Pecos Co.*, 271 S.W.2d at 507.

⁶²⁶ *See* TEX. WATER CODE ANN. § 36.1071 (West 2015).

⁶²⁷ *Id.* § 36.1071(a)(4).

⁶²⁸ *Id.* § 36.1071(a).

⁶²⁹ *Id.* § 36.108(d)(4).

⁶³⁰ *Pecos Co.*, 271 S.W.2d at 504–05.

⁶³¹ WATER § 36.1083(b) (West 2015).

while also requiring GCDs to manage aquifers through management plans, desired future conditions, and permitting rules.⁶³² Often these two objectives are seen to be on a collision course. After the Texas Supreme Court decision in *Day*, which vested groundwater rights in place, property right advocates hailed the decision as a victory.⁶³³ However, in the almost ten years since that ruling, it is becoming clear that *Day* may have assisted some property rights more than others. The threat of a takings claim for a denied water right can create a perceived advantage for those who wish to pump quantities in contravention of a district's rules.⁶³⁴ Unfortunately, this leaves many other property interests unsupported, including other groundwater owners who have economic expectations tied to leaving water in the ground, surface water property rights holders, and the protection of related natural resources.⁶³⁵ A review of Texas constitutional and legislative authority demonstrates that this apparent conflict is more nuanced than it first appears.⁶³⁶

Day, while important, is not the only law that governs Texas groundwater.⁶³⁷ Since at least 1917, the state has repeatedly expressed the importance of protecting its natural resources going so far as to place them within the public trust.⁶³⁸ Groundwater is included in these protections.⁶³⁹ The conservation amendment placed these resources in trust of the state and authorized the creation GCDs to manage them on behalf of the public.⁶⁴⁰ In addition to this delegation of power, Chapter 36 of the Texas Water Code, as well as related TWDB regulations, enumerate specific obligations to meet the amendment's goals.⁶⁴¹ Primary within these are conservation, prevention of waste, and considering impacts to

⁶³² See discussion *supra* Introduction. See, e.g., *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 832–33 (Tex. 2012); WATER § 36.0015 (West 2015).

⁶³³ Cf. Jacqueline Lang Weaver, *The Federal Government as a Useful Enemy: Perspectives on the Bush Energy/Environmental Agenda From the Texas Oilfields*, 19 PACE ENV'T L. REV. 1, 39 (2001) (“The secular religion of private property rights has become so strong in Texas that [the oil industry advocacy group] itself is not powerful enough to sway legislative opinion in support of the public good . . .”).

⁶³⁴ See generally *supra* Sections III.A.1–2, IV.B.

⁶³⁵ See generally *supra* Section IV.B.

⁶³⁶ See *supra* Sections IV.A.1–4, IV.B.

⁶³⁷ See, e.g., *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 623 (Tex. 1996); *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 912 (Tex. 2008).

⁶³⁸ TEX. CONST. art. XVI, § 59(a).

⁶³⁹ See *id.*

⁶⁴⁰ TEX. WATER CODE ANN. § 36.0015 (West 2015).

⁶⁴¹ See *id.* § 36.1071; 31 TEX. ADMIN. CODE § 365.50; *supra* Section IV.A.

surface water and other natural resources.⁶⁴² These obligations were not overridden by *Day*. Instead, GCDs must function much like cities do in a zoning context,⁶⁴³ and are imbued with the police powers to infringe on property rights for the health, safety, and welfare of the community.⁶⁴⁴

As in the land use context, regulations can go “too far” requiring compensation,⁶⁴⁵ but that line must be determined by the courts.⁶⁴⁶ Judges are given latitude in how they weigh the infringement harm against the importance of the government regulation.⁶⁴⁷ This legal opportunity can shift some power back to those property owners who feel unrepresented in the current reality and provide GCDs legal support to continue making decisions that meet their Chapter 36 responsibilities. While many might have seen *Day* as the final word on groundwater rights, it actually just began a new legal conversation;⁶⁴⁸ one in which GCDs must continue to apply Chapter 36 and courts must review the property rights of other surface estate owners, surface water property rights holders, and the resource itself to ensure the same protection and longevity first envisioned by the drafters of the conservation amendment over one hundred years ago.⁶⁴⁹

⁶⁴² WATER §§ 36.0015(b), 36.1071 (West 2015); 31 TEX. ADMIN. CODE §§ 356.50, 356.54.

⁶⁴³ See *supra* notes 18, 100–04 and accompanying text; see, e.g., AUSTIN, TEX., CODE OF ORDINANCES, ch. 25-2, art. I, § 1.1 (2021).

⁶⁴⁴ See WATER § 36.0015(b) (West 2015).

⁶⁴⁵ See, e.g., Gibbons, *supra* note 192.

⁶⁴⁶ See generally Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 130–31 (1978); Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 839–40 (Tex. 2012).

⁶⁴⁷ See, e.g., discussion *supra* Section III.A.1; Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118, 145 (Tex. App. 2013).

⁶⁴⁸ See discussion *supra* Section III.A.

⁶⁴⁹ TEXAS CONST. art. XVI, § 56(a).