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November 17, 2010

**Via Certified Mail, Return Receipt Requested**

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Austin, Texas 78711-3087

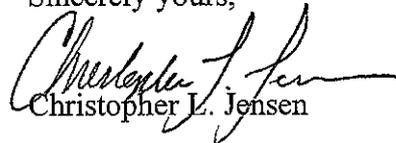
**Re: No. 2010-1611-MIS; Request for Inquiry filed by Mesa Water, L.P.**

Dear Clerk:

Per request from your office, enclosed please find the original and seven copies of Reply of Mesa Water, L.P. to Groundwater Conservation District Responses to Request for Inquiry. The Reply was previously e-filed with TCEQ on November 9, 2010 under filing confirmation number 781561942010313. Should you require anything further, please contact our office.

With appreciation for your time and attention to this matter, I am

Sincerely yours,

  
Christopher L. Jensen

/db  
Enclosures

cc: Andrew S. "Drew" Miller  
Gary R. McLaren  
F. Keith Good  
Monique M. Norman

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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2010 NOV 19 PM 2:41  
CHIEF CLERKS OFFICE

No. 2010-1611-MIS

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REQUEST FOR INQUIRY

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BEFORE THE

CHIEF CLERKS OFFICE

FILED BY

MESA WATER, L.P.

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**REPLY OF MESA WATER, L.P. TO GROUNDWATER  
CONSERVATION DISTRICT RESPONSES TO  
REQUEST FOR INQUIRY**

MESA WATER, L.P. ("Petitioner") files this Reply to the various Responses to its Request for Inquiry filed by Hemphill County Underground Water Conservation District, Panhandle Groundwater Conservation District, High Plains Underground Water Conservation District No. 1, and North Plains Groundwater Conservation District.

**I.  
Introduction**

Each of the four Groundwater Conservation Districts that comprise GMA1 has filed a Response to Mesa's Request for Inquiry. Several common threads run through those responses. Mesa files this Reply to address those common threads, and to request that the Commission grant its Request for Inquiry.

**II.  
Redundancy Argument**

Respondents argue generally that Mesa's Request for Inquiry is redundant to its Petition filed with the Texas Water Development Board ("TWDB"), and requests that the Commission summarily dismiss the Request for Inquiry because the issues raised therein have already been decided by TWDB. A brief review of the statutory DFC appeals processes provides a full

answer to this claim; the two appeals processes outlined in Section 36.108 are different and address different issues.

Texas Water Code § 36.108 provides two specific and separate appeals processes, one to this Commission and one to TWDB. Mesa has not assumed that the Legislature created redundant or superfluous processes, and a review of the statute reveals that to be true.<sup>1</sup> Indeed, the two processes address entirely different issues. In general, the TWDB appeals process addresses concerns about the formulation of DFCs, while the TCEQ process addresses implementation of the DFCs by individual groundwater districts. Under the two processes, the identities of the petitioners are different, the statutory grounds for petitioning are different, and the remedies are different. While some basic principles permeate Mesa's two petitions, the two processes involved are distinct.

Section 36.108(l) addresses the TWDB appellate procedure. There, the permissible petitioners include a person with a legally-defined interest in groundwater in the groundwater management area ("GMA"), a district in or adjacent to the groundwater management area, or a regional water planning group for a region in the groundwater management area. Thus, the identification of potential petitioners reveals a group with an interest that is general or global. For example, a regional water planning group's interest in DFCs relates to the managed available groundwater ("MAG") amount that will be incorporated into a regional water plan. That interest is affected by the formulation of the DFCs in general, as opposed to the implementation of the DFCs in specific districts.

The petition before TWDB is aimed directly at whether the desired future conditions established by the groundwater districts in a GMA are reasonable. Section 36.108(l) provides no

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<sup>1</sup> Hemphill County Underground Water Conservation District ("Hemphill") apparently concedes this point. See Response of Hemphill County Underground Water Conservation District to Request for Inquiry at pp. 11-14.

additional guidance for TWDB's consideration of reasonableness. However, TWDB's administrative rules, found at Texas Administrative Code Rule 356.45, outline six specific factors to consider along with a "catch-all" factor of "other relevant information." Each of the factors listed in Rule 356.45 addresses how the DFCs relate to the GMA as a whole, including such things as socio-economic impacts, environmental impacts, state policy and legislative directives, and the reasonable and prudent development of the state's resources. In other words, the appeals process designed into Section 36.108(l) allows the TWDB to test the reasonableness of the DFCs in terms of their formulation and broad impact.

Finally, the TWDB process allegedly has no end point or finality. As noted in the Staff Report of the Sunset Advisory Commission,<sup>2</sup> the TWDB process provides for no final resolution because the districts may, if they please, ignore any TWDB recommendations.<sup>3</sup>

By way of contrast, the appeals process outlined in § 36.108(f) mandates that TCEQ take a different focus on DFCs. First, the universe of those who may file a petition differs; a petition may be filed by a district or person with a legally-defined interest in the groundwater within the GMA. Districts in adjacent GMAs and regional water planning groups are not permitted to file under Section 36.108(f).

Second, instead of focusing on formulation of DFCs, the process focuses on implementation. A petition must assert that a district or districts refused to join in the planning process or the process failed to result in adequate planning, including the establishment of reasonable desired future conditions of the aquifers, and that:

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<sup>2</sup> A copy of the Staff Report of the Sunset Advisory Committee relating to TWDB is attached hereto as Exhibit 1.

<sup>3</sup> Mesa disagrees with this assessment due to the nature of the mandatory language found in § 36.108(n) and the principle of statutory construction that constrains against the assumption that the Legislature has created a pointless statute. However, if TWDB is correct, then the corollary is that any determination of the TWDB concerning any issue raised in the Mesa petition has no *res judicata* effect in this action. In other words, if TWDB's analysis of the finality of its rulings is correct, then Respondents are incorrect in claiming that the prior TWDB ruling precludes further review by TCEQ, as noted below.

- 1) A district in the groundwater management area has failed to adopt rules;
- 2) The rules adopted by a district are not designed to achieve the desired future conditions of the groundwater resources in the groundwater management area established during the joint planning process;
- 3) That groundwater in the management area is not adequately protected by the rules adopted by a district; or
- 4) That groundwater in the groundwater management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules.

In other words, the TCEQ inquiry looks at how (or whether) the districts have implemented the desired future conditions they adopted in the GMA process, while the TWDB petition process focuses on the reasonableness of the DFCs on a global basis.

Notably, Mesa's petition to TWDB did not raise issues as to whether the rules adopted by any individual district in GMA1 were not designed to achieve the DFCs of GMA1. Neither did the TWDB petition filed by Mesa question whether the groundwater in GMA1 is adequately protected by the rules adopted by a specific district. Finally, the petition filed by Mesa with TWDB did not question whether the groundwater in GMA1 is not adequately protected due to the failure of a district to enforce substantial compliance with its rules. Again, by way of contrast, each of those points is raised in the TCEQ Petition.

Finally, the remedies available under § 36.108 are different with respect to the two processes created there. As noted above, the TWDB process arguably has no finality; TWDB itself has repeatedly argued that it is not a regulatory body and has no regulatory authority. Clearly, TCEQ is a regulatory body and has regulatory authority. Pursuant to § 36.108(k), the Commission may take action under § 36.3011. Section 36.3011, entitled "Failure of District to

Conduct Joint Planning,” gives the Executive Director for the Commission the power and duty to take action to implement any or all of the Review Panel’s recommendations. Specifically, the Commission is empowered to take any action against a district it considers necessary in accordance with § 36.303. Section 36.303, in turn, authorizes the Commission to take action considered appropriate, including:

- 1) Issuing an order requiring the district to take certain actions or to refrain from taking certain actions;
- 2) Dissolving the board in accordance with §§ 36.305 and 36.307 and calling an election for the purpose of electing a new board;
- 3) Requesting the Attorney General to bring suit for the appointment of a receiver to collect the assets and carry on the business of the groundwater conservation district;  
or
- 4) Dissolving the district in accordance with §§ 36.304, 36.305, and 36.308.

The Commission should not assume that the Legislature created pointless or redundant provisions in § 36.108. Instead, the Commission should follow the intent of the Legislature expressed in the Water Code creating two separate appellate remedies, one aimed at the formulation of DFCs and the second aimed at the implementation of those DFCs by specific districts. Respondents are simply wrong in assuming that the TWDB petition filed by Mesa encompasses the entire range of appeals provided under § 36.108.

To the extent that Respondents’ various arguments suggest that the TWDB decision on Mesa’s petition precludes further inquiry,<sup>4</sup> Mesa notes that TWDB itself denies that its actions have any adjudicative impact. In fact, TWDB specifically claims that its action on the Mesa

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<sup>4</sup> Respondents conspicuously avoid the expression *res judicata* when arguing that the question of reasonableness has previously been decided.

petition “didn’t fix rights or liabilities, so wasn’t a reviewable ‘final order.’”<sup>5</sup> TWDB further claims that it “...merely commented on the [Respondents’] planning goals, without even making a recommendation...”<sup>6</sup> Thus, Respondents suggest in this forum that the TWDB decision has preclusive effect, while the TWDB takes the position that its decision is benign and results only in determinations that are aspirational or ephemeral.

Additionally, to the extent that Respondents’ suggest that the TWDB decision precludes further inquiry, the TWDB appeal process failed to afford Mesa due process. Specifically, Mesa was not permitted to object to irrelevant or untrustworthy evidence, was not permitted to cross-examine witnesses, and was not permitted to conduct discovery.<sup>7</sup> This defect in the TWDB appeal process was noted by the Staff Report of the Sunset Advisory Commission:

The technical nature of the DFC process requires the ability to evaluate the credibility of expert witnesses, to be able to question imprecise science, and to provide contrary arguments to the evidence and testimony. Without a contested case hearing subject to rules of evidence, such protections are impossible. Additionally, without a contested case hearing, only a limited record exists for further court review under substantial evidence, which risks courts having to begin the case anew under a trial de novo standard.<sup>8</sup>

Respondents’ implied claim that Mesa’s participation in the TWDB petition process precludes further inquiry by TCEQ is legally wrong.

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<sup>5</sup> See The TWDB’s First Amended Plea to the Jurisdiction, Cause No. D-1-GN-10-000819 in the 201<sup>st</sup> District Court of Travis County, Texas, attached as Exhibit 2. Mesa disagrees with TWDB’s analysis of its own role, but mentions TWDB’s position here to illustrate the fundamental flaws in the TWDB appeals process. On the other hand, if TCEQ believes that TWDB’s “action” rises to the level of a decision with *res judicata* implications, Mesa respectfully requests that TCEQ file an amicus brief to that effect with the Court referenced above.

<sup>6</sup> *Id.*

<sup>7</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”).

<sup>8</sup> Sunset Advisory Commission Report, p. 32.

### III. Premature Petition Argument

Respondents next globally argue that Mesa's Request for Inquiry is premature. They argue that the DFC process has only just begun, and that TWDB has not yet issued the "final" managed available groundwater ("MAG") values that will result from the DFCs adopted. Accordingly, Respondents argue, until TWDB issues final MAG numbers, they are not required to revise their management plans or their rules. Respondents argue that nothing has occurred in the process as yet that would invoke Mesa's ability to request an inquiry. Mesa respectfully submits that its Request for Inquiry is not at all premature. Respondents actually adopted desired future conditions for GMA1 in July, 2009. In the ensuing year, TWDB has issued a draft managed available groundwater report ("GAM Run 090-0026 MAG") dated June 18, 2010. In turn, the MAG numbers found in the draft TWDB report were reported to the Panhandle Water Planning Group, which injected those numbers into its Initially Prepared Regional Water Plan. In other words, TWDB's draft MAG numbers seem to be sufficient to discharge certain responsibilities connected with the state water plan; Mesa suggests that Respondents have sufficient information to understand the need, if perceived, to make changes to their management plans and rules.

Perhaps more importantly, § 36.108(d-2) requires each district in the management area to ensure that its management plan contains goals and objectives consistent with achieving the desired future conditions adopted during the joint planning process. Section 36.108 does not require the districts to ensure that their management plans achieve the MAGs or even include the MAGs. The process outlined in § 36.108(f) likewise does not mention managed available groundwater, instead referring to the adoption or not of rules designed to achieve the desired

future conditions adopted by the districts. Thus, the argument that MAG numbers are not yet available from TWDB does not address the requirements explicitly found in § 36.108.

Further, Respondents attempt to graft a prerequisite into the 36.108(f) that the Legislature chose not to include. The Legislature could have added a requirement that a petition for inquiry could only be filed following the issuance of the MAG by the TWDB. The Legislature did not do so. Accordingly, the TCEQ should not read into the statute a requirement the Legislature did not choose to include.

Finally, the Legislature's failure to add such a requirement makes sense. The districts outline a timeline which, if followed, would effectively preclude any appeal to the Commission. It should be recalled that the joint planning cycle is to occur every five years. In this instance, the districts used up four of the five years coming to an agreement on the DFCs. According to the districts, they do not yet have a MAG number they can use to fine tune their management plans and rules. According to Hemphill, those "final" MAG numbers will not be available from TWDB until June or July, 2011. Hemphill then kvetches that it will be required to study the MAG numbers and make any required changes to its management plan, then study its rules and make required changes. Hemphill projects this process to end no sooner than September, 2012. At that point, one might imagine the districts arguing that TCEQ should not take cognizance of a request for inquiry because, after all, the planning process is about to begin again, rendering any appeal untimely or irrelevant. This logic would effectively negate the TCEQ appeals process and deprive any potential petitioner of a meaningful appeal.

#### **IV. Respondents' Collateral Attacks on Mesa**

Finally, some Respondents urge the Commission to reject this Request for Inquiry because Mesa is a just generally bad. This is perhaps best illustrated in the Response filed by

Hemphill where it argues that TCEQ should “view Mesa’s petition in the context of Mesa’s larger strategy.”<sup>9</sup> According to Hemphill, Mesa’s strategy is to attack the required joint planning process and the results of the process in GMA1 on as many fronts as possible. According to Hemphill, Mesa’s strategy is to “paint a picture of failure of that process in order to *promote* its failure at an early stage.” Finally, Hemphill argues that Mesa is attempting to advance a legislative agenda “to weaken GCDs so that it can ultimately pump and sell the greatest volume of groundwater, free from the possibility of meaningful regulatory and management-based limits.”<sup>10</sup>

Collateral attacks of this nature have nothing to do with the merits of Mesa’s Request for Inquiry, which Respondents wholly fail to address.<sup>11</sup> Nevertheless, Mesa feels constrained to briefly respond to these baseless claims.

First, Mesa does not need to paint a picture of failure for the DFC process; others are occupying that palate. For example, the Staff Report of the Sunset Advisory Commission clearly indicates that the DFC process is troubled, at best, concluding that the TWDB appeal process is “fundamentally flawed.”<sup>12</sup> Mesa agrees, as does TWDB.<sup>13</sup> Surely Respondents do not suggest that the Sunset Advisory Commission and TWDB are somehow engaged in a strategy to destroy GCDs.

Second, Mesa does have a legislative agenda relating to the joint planning process. That legislative agenda is not, however, aimed at eliminating groundwater conservation districts or the

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<sup>9</sup> Notably, Hemphill offers no evidence to support its claim that Mesa has a “larger strategy;” if Mesa has such a strategy, it is to exhaust all administrative remedies, a task made more difficult by the desultory manner in which Section 36.108 is written. In that regard, see Exhibit 1.

<sup>10</sup> Hemphill fails to elucidate the relevancy of Mesa’s legislative agenda to the issues at hand.

<sup>11</sup> Respondents instead superficially claim that there is “no evidence” that would support an inquiry, without addressing the specific points of Mesa’s request.

<sup>12</sup> Sunset Advisory Report at p. 3.

<sup>13</sup> See Letter from J. Kevin Ward, Executive Director, TWDB to Sunset Advisory Commission, dated October 28, 2010, attached as Exhibit 3, at page 3.

regulatory process. In that regard, there are two primary legislative objectives that Mesa is pursuing. First, Mesa proposes the elimination of the “geographic area” language in § 36.108(d). Mesa believes that the geographic area language is being used by groundwater conservation districts to justify different DFCs based solely on political subdivisions and not on aquifer characteristics.<sup>14</sup> Mesa believes the geographic area language should be eliminated because the GCD’s improper and overly broad interpretation of the phrase promotes unequal treatment of groundwater owners sharing the same aquifer or subdivision of an aquifer.

Mesa also supports legislation that is designed to require groundwater districts to grant equal production rights per acre for each landowner in a single aquifer or subdivision of an aquifer. Again, this legislation is designed to promote equal treatment of all groundwater rights owners who have groundwater rights in the same aquifer or subdivision of an aquifer. Mesa has always promoted the equal treatment of groundwater rights owners, and is only opposed to actions by groundwater conservation districts that fail to recognize equal rights.

Finally, Hemphill accuses Mesa of wanting to “pump and sell the greatest volume of groundwater, free from the possibility of meaningful regulatory and management-based limits.” That statement is pure calumny. Respondents are or should be actually aware that Mesa is not opposed to regulation of its groundwater.<sup>15</sup> It is not Mesa’s desire to “pump and sell the greatest volume of groundwater, free from the possibility of meaningful regulatory and management-based limits.” Mesa has indicated that it will live with any production limits that apply equally

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<sup>14</sup> TWDB staff agrees that DFCs cannot be based solely on political subdivisions. See Memorandum dated March 10, 2010, attached as Exhibit 4.

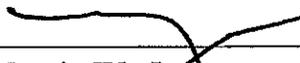
<sup>15</sup> See, for example, Blaney, *Pickens Wants Texas Agency to Nix Water Plan*, Associated Press (April 20, 2010), a copy of which is attached as Exhibit 5.

to other users of water in the same aquifer or subdivision of an aquifer. Mesa will, however, oppose any action that treats groundwater owners unequally.<sup>16</sup>

**V.  
Conclusion**

Mesa respectfully submits that its Request for Inquiry raises relevant, important and pressing issues that should be carefully examined by the Commission.

Respectfully submitted,  
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\_\_\_\_\_  
Marvin W. Jones

*Attorneys for Petitioner*

<sup>16</sup> Examples of conduct that Mesa opposes are attached as Exhibits 6 and 7.

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing document was sent to the following as signified below on this 9th day of November, 2010:

Andrew S. "Drew" Miller Deborah C. Trejo KEMP SMITH, LLP 816 Congress, Suite 1150 Austin, Texas 78701 (512) 320-5366 Telephone (512) 320-5341 Fax <i>Attorneys for Respondent Hemphill County                  Underground Water Conservation District</i>	<i>Certified Mail, Return Receipt Requested</i>	<input checked="" type="checkbox"/>
	<i>United States Regular Mail</i>	<input type="checkbox"/>
	<i>Overnight Mail</i>	<input type="checkbox"/>
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Gary R. McLaren PHILLIPS & MCLAREN, LLP 2708 82 <sup>nd</sup> Street Lubbock, Texas 79423 (806) 788-0609 Telephone (806) 785-2521 Fax <i>Attorneys for Respondent High Plains Underground                  Water Conservation District No. 1</i>	<i>Certified Mail, Return Receipt Requested</i>	<input checked="" type="checkbox"/>
	<i>United States Regular Mail</i>	<input type="checkbox"/>
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F. Keith Good LEMON, SHEARER, PHILLIPS & GOOD, PC 311 South Main P.O. Box 1066 Perryton, Texas 79070-1066 (806) 435-6544 Telephone (806) 435-4377 Fax fkgood@ptsi.net Email <i>Attorneys for Respondent North Plains                  Groundwater Conservation District</i>	<i>Certified Mail, Return Receipt Requested</i>	<input checked="" type="checkbox"/>
	<i>United States Regular Mail</i>	<input type="checkbox"/>
	<i>Overnight Mail</i>	<input type="checkbox"/>
	<i>Via Facsimile Transmission</i>	<input type="checkbox"/>
	<i>Via Hand Delivery</i>	<input type="checkbox"/>

Monique M. Norman Attorney at Law P.O. Box 50245 Austin, Texas 78763 (512) 459-9428 Telephone (512) 459-8671 Fax <i>Attorney for Respondent Panhandle Groundwater                  Conservation District</i>	<i>Certified Mail, Return Receipt Requested</i>	<input checked="" type="checkbox"/>
	<i>United States Regular Mail</i>	<input type="checkbox"/>
	<i>Overnight Mail</i>	<input type="checkbox"/>
	<i>Via Facsimile Transmission</i>	<input type="checkbox"/>
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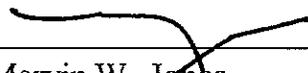
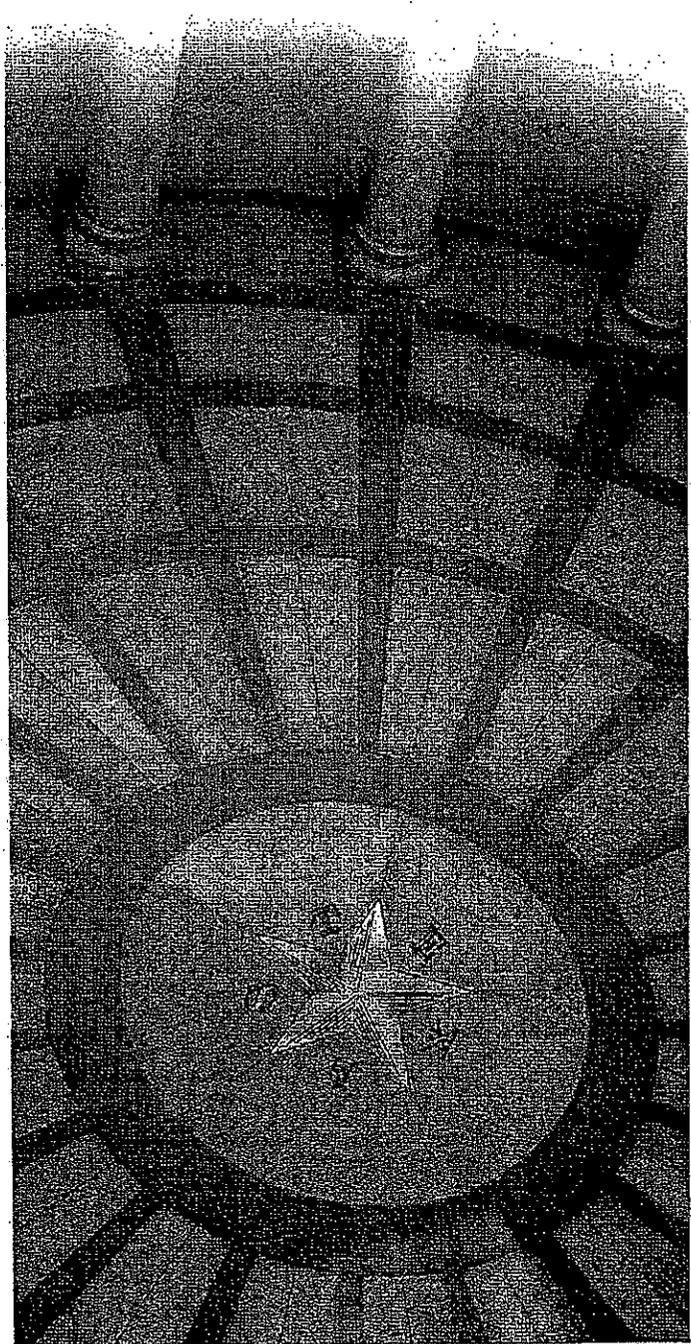
  
 \_\_\_\_\_  
 Marvin W. Jones  
 Attorney for Petitioner Mesa Water, LP

Exhibit 1

# SUNSET ADVISORY COMMISSION

## STAFF REPORT



*Texas Water  
Development Board*

October 2010

# *Sunset Advisory Commission*



*Senator Glenn Hegar, Jr., Chair*

*Representative Dennis Bonnen, Vice Chair*

Senator Juan "Chuy" Hinojosa

Representative Rafael Anchia

Senator Joan Huffman

Representative Byron Cook

Senator Robert Nichols

Representative Linda Harper-Brown

Senator John Whitmire

Representative Larry Taylor

Charles McMahan, Public Member

Lamont Jefferson, Public Member

*Ken Levine*

*Interim Director*

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In 1977, the Texas Legislature created the Sunset Advisory Commission to identify and eliminate waste, duplication, and inefficiency in government agencies. The 12-member Commission is a legislative body that reviews the policies and programs of more than 130 government agencies every 12 years. The Commission questions the need for each agency, looks for potential duplication of other public services or programs, and considers new and innovative changes to improve each agency's operations and activities. The Commission seeks public input through hearings on every agency under Sunset review and recommends actions on each agency to the full Legislature. In most cases, agencies under Sunset review are automatically abolished unless legislation is enacted to continue them.

*Texas Water Development Board*

SUNSET STAFF REPORT  
OCTOBER 2010

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# *Summary*

# Summary

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The Texas Water Development Board (Board) is not accustomed to being square in the eye of controversy. Since its creation through constitutional amendment in 1957 to issue water development bonds, the Board has enjoyed its position of providing funding for water projects and infrastructure. With the expansion of its water planning responsibilities in 1997, the Board has won over fans for its regional water planning process that involves local governments and stakeholders in a bottom-up approach that avoids rigid state control. Controversies related to the intractable nature of water issues have always surrounded the agency. Now, however, they threaten the Board's fundamental ability to support the development of the State's water resources on several fronts.

First, the Board's remaining bond authority may be exhausted as soon as the end of fiscal year 2011. Misunderstandings over the historical treatment of the Board's debt at the end of the last legislative session thwarted the agency's previous attempt to secure additional authority. Due to current economic conditions, many entities are unable to access the market on their own, creating an increased demand for financing through the Board's programs. Without additional bond authority, the Board will be unable to fulfill its constitutional mission to provide financial assistance through loans to political subdivisions to meet water and wastewater infrastructure needs.

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*Several threats exist to the development of the State's water resources.*

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Second, evolving processes associated with groundwater affect the Board's ability to effectively conduct statewide water planning and ultimately affect the management of this vital resource. Much of this controversy surrounds a joint planning process in which groundwater districts join together to make decisions about the future condition of aquifers they manage. The idea behind joint planning is to get local groundwater districts to work cooperatively, using acceptable scientific information, to guide decisions about an aquifer's desired future condition. While the joint planning process and groundwater districts, as distinct elements apart from the Board, are per se outside the scope of the current Sunset review, they were evaluated for the impact they can have on the Board's operations.

Specifically, as a framework for groundwater planning separate from the Board's regional water planning process, joint planning may affect the Board's ability to effectively conduct statewide water planning. In developing desired future conditions, no formal avenues exist for regional water planning groups to provide input regarding how groundwater availability affects future water needs or planning strategies. In addition, the Board's process for questioning the reasonableness of a desired future condition decision does not provide for a complete administrative process that ensures the basic elements of due process for those affected by these decisions and ultimately risks making the entire exercise meaningless.

The fragmentation of the current petition processes for questioning desired future conditions between the Board and the Texas Commission on Environmental Commission (TCEQ) raises questions about the separation of functions between the two agencies. The Board, in its technical assistance role, provides support for water planning of both surface water and groundwater, while the regulation of surface water and groundwater lies with TCEQ and groundwater conservation districts, respectively. A unified petition process would continue this same principle, keeping technical assistance for planning in place at the Board, while placing processes with regulatory underpinnings with the State's environmental regulatory agency.

Finally, other issues threaten the Board's ability to live up to its water development name. This report includes provisions to improve the Board's water planning efforts by better accounting for the implementation of water projects and to standardize the reporting of water conservation efforts. However, the report does not address more contentious policy issues regarding the extent to which the Board should be involved in ensuring sufficient water supplies for the State. The Board lacks authority and tools to accurately account for water use in key high-demand sectors, such as agriculture and industry. The Board also lacks means to actively develop water supplies, such as through the acquisition and protection of land for future development of surface water supplies. The Board continues to recommend unique reservoir sites and stream segments to the Legislature for statutory designation, but, ultimately, it lacks a mechanism to acquire such sites and associated mitigation areas to secure assets needed to meet future water needs.

This report also does not address continuation of the agency because the Board is not subject to abolishment under the Sunset Act. The following material summarizes Sunset staff recommendations on the Texas Water Development Board.

## Issues and Recommendations

### Issue 1

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#### ***The Board's Remaining Development Fund Bond Authority Is Insufficient to Fulfill Its Constitutional Responsibility.***

The Board was created in 1957 through constitutional amendment to provide financial assistance for water and wastewater projects throughout the state. However, because of increased demand for its financing programs, the Board's largest constitutional bond authority, Development Fund, will be insufficient to sustain the Board's responsibilities as soon as the end of this biennium. Without additional authority, the Board may not be able to meet the State's water and wastewater needs and the State will lose federal funds.

Authorizing the Board to issue additional bonds through an ongoing, evergreen bond authority will allow the Board to fulfill its constitutional mission while simplifying its bond authorization process by avoiding repeated and costly constitutional amendments. Further, specifying that the Board's bonds must be self-supporting until, and unless, the Legislature appropriates debt service would clarify the impact the bonds will have on the constitutional debt limit, allowing the State to more effectively manage its total debt.

## Key Recommendations

- Authorize the Board to issue Development Fund general obligation bonds on a continuing basis, in amounts such that the aggregate principal amount outstanding at any time does not exceed \$6 billion.
- Clarify that the Board's Development Fund general obligation bonds are not considered State debt payable from general revenue for purposes of calculating the constitutional debt limit until the Legislature appropriates debt service to the Board and the Board issues the debt.

## Issue 2

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### ***The Lack of Coordination Among Separate Water Planning Processes Impedes the Board's Statewide Water Planning.***

The separation between the regional water planning process and the development of desired future conditions (DFCs) for aquifers hurts the Board's ability to conduct statewide water planning, as regional water planning groups have no formal input in the amount of groundwater supplies available for meeting future water demands. Because groundwater management areas (GMAs) only include representatives of groundwater districts, decisions on groundwater availability are not fully vetted to determine impacts on water planning strategies and on the State's ability to meet future water needs. The inclusion of regional water planning groups on GMAs would ensure broader representation and formal input into the effects of the DFC on groundwater availability for water planning purposes, and provide the Board a more effective process for state water planning.

Specifying a point in time at which a DFC will be used in the water planning process could provide GMAs certainty that an adopted DFC would be used in the next round of water planning. Additionally, strengthened public notice requirements would ensure reasonable opportunity for stakeholders notice and comment regarding a proposed DFC.

## Key Recommendations

- Require the Board to certify that each groundwater management area include a voting representative from each regional water planning group whose boundaries overlap the area.
- Require regional water planning groups to use the desired future conditions in place at the time of adoption of the Board's State Water Plan in the next water planning cycle.
- Strengthen the public notice requirements for groundwater management area meetings and adoption of desired future conditions and require proof of notice be included in submission of conditions to the Board.

## Issue 3

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### ***The State's Processes to Petition an Aquifer's Desired Future Conditions Are Fundamentally Flawed.***

Processes for questioning desired future conditions (DFCs) at the Board and Texas Commission on Environmental Quality (TCEQ) lack standard components of administrative processes designed to ensure clear resolution, fairness, and due process for those who may be harmed. The Board struggles to make a determination of reasonableness strictly for planning purposes, as DFCs, ostensibly established

for groundwater planning purposes, ultimately serve a regulatory purpose to manage groundwater. Establishing the Board as the regulatory authority for judging the reasonableness of DFCs would cause unnecessary duplication and potentially cause further fragmentation with TCEQ, which already has significant authority over groundwater districts and the implementation of DFCs.

Unifying the DFC petition process and establishing it as a contested case hearing at the State Office of Administrative Hearings, similar to existing groundwater processes for priority groundwater management areas (PGMAs), would allow for a standard, more objective petition process. Full contested case hearings include elements of procedural due process, where they do not exist currently, and allow for substantial evidence review of the record, rather than the possibility of full de novo review. The Board would provide technical expertise to supplement any hydrogeologic knowledge needed in decision making, as it does already in PGMA cases.

### **Key Recommendation**

- Transfer the process to petition the reasonableness of a desired future condition from the Board to TCEQ, and modify TCEQ's existing petition process to unify elements relating to reasonableness and implementation of desired future conditions.

## **Issue 4**

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### ***Structural and Technical Barriers Prevent the Board From Providing Effective Leadership in Geographic Information Systems.***

The Texas Natural Resources Information System (TNRIS), housed within the Board, is responsible for acquisition of statewide data sets used to develop and disseminate geographic data products. However, the data center services contract administered by the Department of Information Resources (DIR) constrains TNRIS' ability to timely disseminate key geographic data sets, especially during an emergency. A full exemption from the data center services contract would provide TNRIS with flexibility to more effectively distribute geographic data and provide leadership on statewide geographic information system (GIS) matters. In addition, the Texas Geographic Information Council does not provide effective leadership or coordination in advancing the use of GIS, and its separate functions are no longer needed.

### **Key Recommendations**

- The Board should request a full exemption for TNRIS from the data center services contract at DIR.
- Clarify TNRIS' duties regarding coordinating and advancing GIS initiatives and require the Board to report TNRIS' progress and new GIS initiatives to the Legislature.
- Abolish the Texas Geographic Information Council.

## Issue 5

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### ***The Board Lacks Data to Determine Whether Implementation of Conservation and Other Water Management Strategies Is Meeting the State's Future Water Needs.***

As the State wraps up its third water planning cycle, opportunities exist for evaluating the State's progress in meeting future water needs. Compiling and tracking implementation of strategies or projects as part of the State Water Plan could answer questions about the extent to which the water planning process has facilitated meeting future water demands. Additionally, a lack of uniform reporting requirements for measuring municipal water conservation, through gallons per capita daily (GPCD) figures, prevents the State from effectively gauging progress of water conservation methods. Developing uniform requirements will help explain variation in water use across areas and may help the Board develop new ways to incentivize conservation efforts.

#### **Key Recommendations**

- As part of the State Water Plan, require the Board to evaluate the State's progress in meeting its water needs.
- Require the Board and TCEQ, in consultation with the Water Conservation Advisory Council, to develop uniform, detailed gallons per capita daily reporting requirements.

## Issue 6

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### ***The Board's Statute Does Not Reflect Standard Language Typically Applied Across-the-Board During Sunset Reviews.***

The Sunset Commission adopts across-the-board recommendations as standards for state agencies to reflect criteria in the Sunset Act designed to ensure open, responsive, and effective government. Updating the Board's complaint information requirements and requiring the Board to develop and implement a policy to encourage alternative procedures for rulemaking and dispute resolution would bring the Board's statute in line with current standards.

#### **Key Recommendation**

- Apply standard Sunset across-the-board requirements to the Texas Water Development Board.

## Fiscal Implication Summary

When fully implemented, the recommendations in this report would result in over \$2.6 million in savings to the General Revenue Fund over the next two years. The specific fiscal impact of each of these recommendations is summarized below.

- *Issue 1* – A constitutional amendment to allow the Board to issue additional bond authority would not have an immediate fiscal impact to state general revenue, beyond the State's one-time \$109,907 publication cost for placing the constitutional amendment on the ballot. Because the bond authority would be limited to self-supporting debt unless the Legislature appropriates funds for debt service, the fiscal impact for debt service cannot be determined.

- *Issue 3* – Unifying the petition process for desired future conditions would not have a significant cost to the State, but a precise fiscal impact cannot be fully determined at this time because the number of petitions or length of the hearings cannot be accurately estimated. A contested case hearing for a DFC petition would likely cost about \$7,000 per case. The \$66,000 salary of the full-time employee funded to aid in the Board’s petition process would be transferred from the Board to TCEQ to offset its increased costs associated with contested case hearings.
- *Issue 4* – Exempting TNRIS from the data center services contract would save the State about \$2.7 million in general revenue over the next biennium, due primarily to a reduction in geographic data storage costs.

*Agency at a Glance*

# Agency at a Glance

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The Texas Water Development Board was created in 1957 through a state constitutional amendment that authorized the Board to issue general obligation water development bonds through loans to political subdivisions.<sup>1</sup> Since the 1960s, the Board has assumed increased responsibility for ensuring sufficient water supplies for the state through its roles in water planning and in providing technical assistance and water-related data. The Board's mission is to provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas. To accomplish its goals for addressing the State's water needs, the Board performs the following activities.

- Provides financial assistance in the form of loans and grants through state and federal programs to Texas communities for the construction of water supply, wastewater treatment, flood control, and agricultural water conservation projects.
- Supports the development of regional water plans and prepares the State Water Plan for the development of the State's water resources.
- Collects, analyzes, and disseminates water-related data, conducts studies on surface water and groundwater resources, and develops and maintains surface water and groundwater availability models to support planning, conservation, and development of surface water and groundwater for Texas.

## Key Facts

- **Texas Water Development Board.** The Board's policy body consists of six members appointed by the Governor such that each member is from a different section of the state. Members serve staggered six-year terms and the Governor designates the chairman of the Board. The table, *Texas Water Development Board*, identifies current Board members.

**Texas Water Development Board**

Member	City	Term Expires
James E. Herring, Chair	Amarillo	2009
Jack Hunt, Vice Chair	Houston	2009
Thomas Weir Labatt III	San Antonio	2011
Lewis H. McMahan	Dallas	2011
Edward G. Vaughan	Boerne	2013
Joe M. Crutcher	Palestine	2013

- **Staff.** In fiscal year 2009, the Board employed 329 staff, the majority of whom are located in Austin. Twenty-two staff, mostly project inspectors, are spread among the Board's five field offices in El Paso, Harlingen, Houston, Mesquite, and San Antonio.

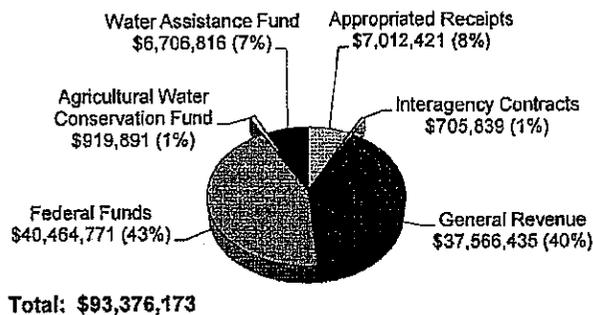
- **Funding.** In fiscal year 2009, the Board operated on revenues of \$93.4 million. This amount is more than its 2009 appropriation largely because the Board received additional federal funds for the Severe Repetitive Loss Program for flood control structures. As illustrated in the pie chart on the following page, *Revenue by Method of Finance*, federal funds represent the largest portion of the agency's expenditures, or 43 percent, of its operating budget, followed by General Revenue, representing 40 percent. The pie chart on the following page, *Expenditures by Strategy*, details the Board's actual expenditures for fiscal year 2009. The Board spent 44 percent of its appropriation on water resources planning.

**Program Proceeds.** The Board also receives program proceeds that are not appropriated by the Legislature. Program proceeds totaled \$1.6 billion for fiscal year 2009, with debt issuance proceeds representing \$1.1 billion, or 68 percent of the total, with the remainder comprising principal loan payments, interest and investment income, and federal grants. Program proceeds are used in addition to appropriated amounts for loans and grants to political subdivisions to finance water-related infrastructure.

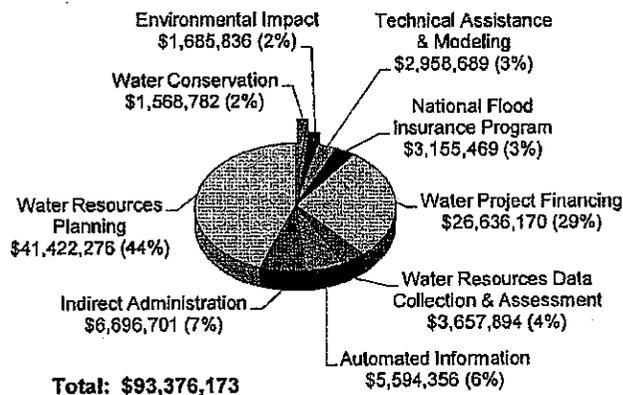
**Debt Service Appropriations.** The Board received a separate appropriation of \$71 million in fiscal year 2009 to pay debt service on not self-supporting general obligation water bonds. This appropriation funded projects from the Economically Distressed Areas Program, State Participation Program, Water Infrastructure Fund, and Agricultural Water Conservation Loan Program. Since 1957, the Board has been constitutionally authorized to issue \$5 billion in general obligation bonds.

- Financial Assistance.** The Board administers about a dozen state and federal financial assistance programs that provide funding in the form of loans and grants for the planning, acquisition, design, and construction of water and wastewater infrastructure projects, such as wastewater treatment plants and raw water pipelines. Eligible borrowers include political subdivisions, water supply corporations, and privately owned water systems. In fiscal year 2009, the Board committed \$965 million in financial assistance to 78 entities, funding 83 projects. The Board also provides grant funding to various entities for environmental research, flood protection, innovative water technologies, and water conservation efforts. The pie chart on the following page, *Commitments by Program*, shows the Board's total commitments in fiscal year 2009 by each financial assistance program.

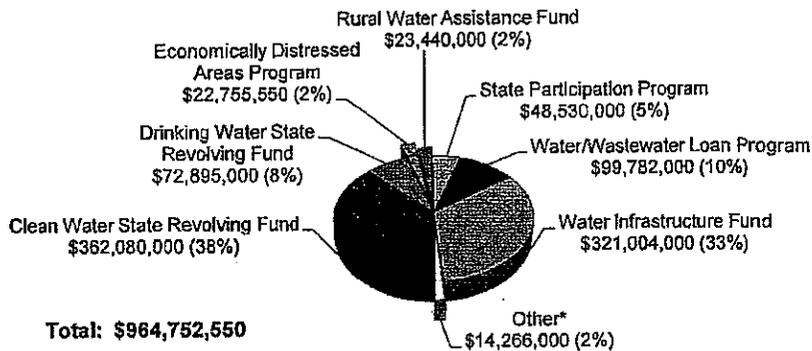
**Revenue by Method of Finance  
FY 2009**



**Expenditures by Strategy  
FY 2009**



### Commitments by Program FY 2009



\* Includes the Colonia Self Help Program, Colonia Wastewater Treatment Assistance Program, and Water Assistance Fund.

- **Water Planning.** In 1997, the Legislature established the regional water planning process as a local, grassroots approach to develop water management strategies to meet the State's future water needs. The Board incorporates plans from 16 regional water planning areas into a single comprehensive State Water Plan every five years. The Board is currently reviewing and approving regional plans for the preparation and completion of the 2012 State Water Plan. The 2007 State Water Plan indicates Texas will need an additional 8.8 million acre-feet of water to meet estimated water demands in 2060.
- **Texas Natural Resources Information System (TNRIS).** The Board houses and supports TNRIS, a centralized clearinghouse for geographic data, including natural resource, census, socioeconomic, and emergency management-related data. Through its Strategic Mapping Program, TNRIS produces and maintains large-scale, standardized digital base maps documenting land features, such as soils, elevation, geology, and hydrography, to assist users of geographic data, emergency responders, and the public. Through TNRIS, the Board also administers a state master purchasing contract for acquiring high priority imagery and data sets to coordinate data acquisition across state government, as well as federal, regional, and local governing organizations.
- **Groundwater.** The Board provides technical assistance and data, such as water level and quality information, as well as develops and runs groundwater availability models for groundwater conservation districts (districts), regional water planning groups, municipalities, well owners, and the public. The Board maintains groundwater models for all nine major aquifers and 11 of the 21 minor aquifers in the state. The Board maintains a database with information on more than 134,000 water wells across the state, and responded to 2,739 inquiries about groundwater in fiscal year 2009. The Board also accepts desired future conditions established by districts for each relevant aquifer in each of the State's 16 groundwater management areas.
- **Surface Water.** The Board collects and analyzes data used to determine the instream flow and freshwater inflow needs to support ecologically healthy streams, rivers, bays, and estuaries through processes for developing environmental flow recommendations. The Board currently funds data collection for 24 water quality monitoring stations, 12 tide-gauging stations, 91 stream gauges and 58 lake level monitoring stations. The Board also models surface water data and performs

hydrographic surveys for use in water planning and management. To date, the Board has completed 131 hydrographic surveys, including 95 of the 175 major reservoirs in the state, to determine total volume and sedimentation of Texas reservoirs.

- **Conservation.** The Board promotes conservation of water resources, primarily in municipal and agricultural sectors, through technical assistance and public awareness programs, like the Water I.Q. program. In fiscal year 2009, the Board had Water I.Q. usage agreements with 33 entities. The Board also provides assistance to the Water Conservation Advisory Council, which is administratively attached to the Board.

<sup>1</sup> Texas Constitution, art. III, sec. 49-c.

*Issues*

# Issue 1

## ***The Board's Remaining Development Fund Bond Authority Is Insufficient to Fulfill Its Constitutional Responsibility.***

### **Background**

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In 1957, Texas voters approved a constitutional amendment to create an agency, now the Texas Water Development Board, to provide financial assistance to political subdivisions to aid in "the conservation and development of the water resources of this state."<sup>1</sup> The Board has three separate constitutional bond authorities that support water development, economically distressed areas, and agricultural water conservation, respectively.<sup>2</sup> Each bond authority is approved by Texas voters for one-time use, meaning once issued, the authority is exhausted. The Board's largest bond authority, Development Fund, funds four programs – Water/Wastewater Loan Program, Water Infrastructure Fund, State Participation Program, and Rural Water Assistance Fund – as well as provides state match funds for the Board's Clean Water and Drinking Water State Revolving Funds (SRFs).<sup>3</sup> The textbox, *Financial Assistance Programs Supported by Water Development Fund Authority*, details each of these programs.

#### ***Financial Assistance Programs Supported by Water Development Fund Authority***

**Water/Wastewater Loan Program:** Provides loans for the planning, design, and construction of water supply, wastewater, and flood control projects.

**Water Infrastructure Fund:** Provides loans for the planning, design, and construction of state water plan projects. Projects must be consistent with recommended water management strategies in the most recent regional water plan or state water plan.

**State Participation Program:** Allows the Board to assume a temporary ownership interest in a regional water or wastewater project when the local sponsors are unable to assume debt for the optimally sized facility.

**Rural Water Assistance Fund:** Provides small rural utilities low interest rate loans to fund planning, design, and construction of water-related infrastructure and enhancement projects.

**State Revolving Funds:** Provides loans for the planning, design, and construction of wastewater treatment facilities (Clean Water SRF) or projects for public drinking water systems that facilitate compliance with drinking water regulations specified in the federal Safe Drinking Water Act (Drinking Water SRF).

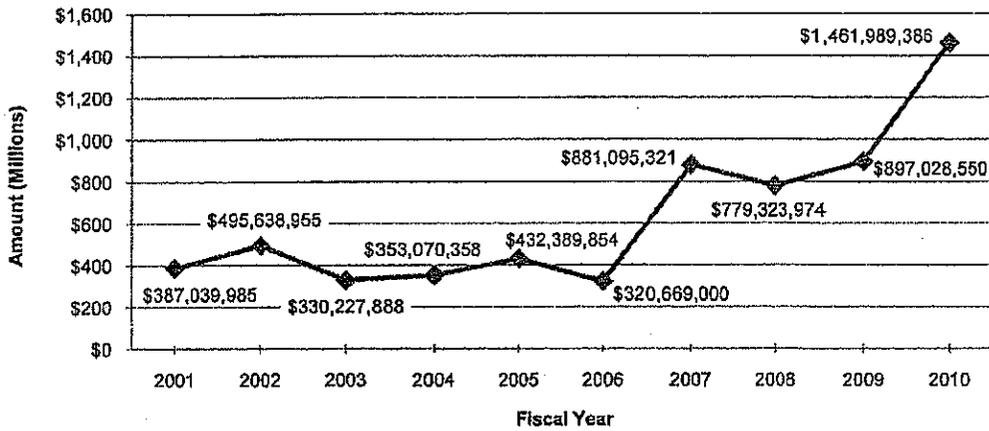
### **Findings**

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**Demand for the Board's financial assistance has increased to the extent the Board's bond authority will be insufficient as early as the end of this biennium.**

The addition of new funding mechanisms, such as the Water Infrastructure Fund, to facilitate state water plan implementation, coupled with declining market conditions, has dramatically increased demand for the Board's financial assistance. With additional water plan funds received in 2007, the Board more than quadrupled the financial commitments it provided from 2006 to 2010. In fiscal year 2010, the Board committed approximately \$1.5 billion in loans and grants to 92 different entities across all programs. The graph on the following page, *Total Commitments*, depicts the Board's increased total financial commitments over the past 10 fiscal years.

**Total Commitments, FYs 2001 – 2010**



**Development Fund Authority**

<b>Total Constitutional Authority</b>	<b>\$4,256,523,431</b>
Issued as of 8/26/2010	\$3,145,021,757
Projected Issuance through FY 2011	
• Water Infrastructure Fund & State Participation	\$384,065,311
• Water/Wastewater Loan Program	\$236,155,000
• State Revolving Fund Match*	\$225,000,000
<b>Total</b>	<b>\$3,990,242,068</b>
<b>Remaining Authority 8/31/2011</b>	<b>\$266,281,363</b>

\* Includes projections through fiscal year 2015 to ensure the Board has sufficient match funds to receive the federal capitalization grant.

The Board currently has approximately \$1.1 billion in Development Fund authority remaining and estimates it will have only \$266.3 million at the end of fiscal year 2011. Given the increased demand for financial assistance, the Board's remaining authority will not sustain it into the next biennium. The chart, *Development Fund Authority*, shows the Board's total receipt and projected use of its Development Fund bond authority.

**Without additional bond authority, the Board will not meet the State's water and wastewater needs.**

- **Cost-effective Financing.** Without the Board's cost-effective programs, some entities will not be able to finance vital water and wastewater projects. As the State's main financier of water and wastewater infrastructure, the Board provides cities, counties, districts, river authorities, and other local entities the best deal available to finance projects. These projects not only provide sustainable and affordable water, but resolve public health and environmental concerns resulting from failing sewer or septic systems or untreated or unsafe drinking water. Given the current economic downturn, political subdivisions have no assurance they will be able to obtain financing through the market at a cost-effective rate. Without the Board's assistance, some entities may pare down or completely forego water or wastewater projects, at the expense of water quality and public health, because projects are not economically feasible. The Board's

flexible financing assists all sizes and types of entities in funding vital water and wastewater projects across the State, from Tarrant Regional Water District serving approximately 4.4 million people to the Town of Buffalo Gap that serves a portion of its 463 residents.

- **Assistance for Disadvantaged Entities.** For disadvantaged entities, the Board serves as the lender of last resort. The Board's financial assistance is especially vital for disadvantaged entities that, without the Board, are unable to access the market. The Board provides a variety of financing options, including zero percent interest rates, deferred payment schedules, and/or short- and long-term loans, allowing disadvantaged communities to receive a tailored financing package that will meet their needs.
- **Maintenance of Federal Funding.** The State will lose federal funds for its two revolving funds if the Board does not have bonds for the required match to receive the federal capitalization grants. The Clean Water and Drinking Water SRF programs both require a 20 percent state match, for which the Board uses its Development Fund authority. State match funds totaled \$18.3 million in fiscal year 2010 and are projected to total \$225 million over the next five fiscal years, due to potential increases in the federal capitalization grant. Without the required match funds, the Board cannot even apply for the capitalization grant.
- **Implementation of State Water Plan Projects.** Without additional Development Fund authority, the Board will likely be unable to facilitate implementation of state water plan projects, preventing it from completing one of its key functions. Since inception of the regional water planning process, the Board has committed \$1.6 billion towards recommended water plan strategies. The State's 16 regional water planning groups estimate the cost to implement all 4,500 strategies and projects in the 2007 State Water Plan totals approximately \$30 billion. While many of these costs will be funded through conventional financing mechanisms, such as the open bond market, in 2008, regional water planning groups estimated \$17.1 billion of those needs will require financial assistance from the Board.

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*Without additional bond authority, the State will lose federal funds.*

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**The Board has a history of responsibly managing its loan portfolio.**

The Board effectively manages its \$5.1 billion loan portfolio using sound management policies, as evidenced by the following.

- The Board has had no defaults in the history of its Water/Wastewater Loan Program or SRF programs and only \$125,332 in write offs across all programs.
- Since 1998, the Board's total savings generated from refundings is \$143.1 million.<sup>4</sup> Refundings allow the Board to call bonds and reissue them at lower interest rates. From fiscal year 2006 to 2010, the Board's general revenue savings from refundings totaled approximately \$9 million.<sup>5</sup>

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*Over the past five years, the Board saved \$9 million in general revenue from refundings.*

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- The Board received interest rates consistent with a AAA rating on its general obligation bonds even before the State received its recent credit rating upgrade. The Board's Clean Water SRF revenue bonds also maintain a AAA rating. The Board's real interest rates vary by program, but averaged 3.71 percent in 2010 and have remained below 5 percent since 2002.

- The Board maintains low issuance costs. As the chart, *Average Issuance Costs*, depicts, the Board's bond issuance costs are comparable to those of the Texas Public Finance Authority (TPFA), which issues a similar number of bonds, and was lower than the statewide average in fiscal years 2007 and 2009.<sup>6</sup>

**Average Issuance Costs\***

	FY 07	FY 08	FY 09
TWDB	\$4.10	\$6.57	\$6.34
TPFA	\$5.91	\$4.46	\$5.99
Statewide Average	\$5.52	\$4.95	\$7.86

\* Issuance costs are per \$1,000 of bonds issued in amounts greater than \$100 million.

- In July 2010, the Board reclassified \$139.8 million of State Participation program debt from not self-supporting to self-supporting debt. Because of the program's deferred repayment structure, it is supported temporarily by general revenue until borrowers begin making repayments to the Board. This reclassification means the debt no longer requires payment from the State's General Revenue Fund and does not count toward the State's constitutional debt limit.

**Opportunities exist to simplify the Board's bond authorization process and mitigate default risk across all financial assistance programs.**

Since the Board's creation, Texas voters approved every addition to the Board's bond authority when given the opportunity. The chart, *Approved Development Fund Constitutional Bond Authority*, shows all the Board's bond

**Approved Development Fund Constitutional Bond Authority**

Date of Constitutional Amendment	Amount
1957	\$200,000,000
1962	\$200,000,000
1971	\$200,000,000
1985	\$980,000,000
1987	\$400,000,000
1989	\$250,000,000
2001*	\$2,026,523,431
<b>Total</b>	<b>\$4,256,523,431</b>

\* Includes restored authorization following the retirement of a contract.

authority receipts to date. Last Session, however, the joint resolution for a constitutional amendment to obtain a \$6 billion ongoing bond authority, known as evergreen authority, did not pass the Legislature and did not make it on the ballot. Unlike one-time authority the Board typically receives, the evergreen bond authority would allow the Board to issue bonds on a continuing basis as long as its total outstanding debt at any given time does not exceed \$6 billion. This cap would help the State responsibly manage its debt while still providing adequate funding for water and wastewater projects. The evergreen authority would also keep the Board from having to repeatedly seek constitutional amendments, which is time consuming and costly to add to the ballot.

In comparison, voters approved a constitutional amendment in November 2009, providing the Veterans' Land Board a \$4 billion evergreen bond authority. The Veterans' Land Board provides Texas veterans long-term, low interest rate loans for purchasing raw land, homes, and funding home improvements. At the end of fiscal year 2009, the Veterans' Land Board's outstanding debt totaled \$1.89 billion.

Opportunities also exist to clarify statutory authority allowing the Board to effectively mitigate default risk across all of its financial assistance programs. While the Board has statutory authority to request the Attorney General to take legal action to enforce specific bond document and loan agreement terms for its largest programs, this authority is inconsistent across all its programs. For example, in its Rural Water Assistance Fund program, the Board lacks clear statutory authority to compel a water supply corporation to perform the compliance activities outlined in bond and loan agreements, such as regular payments, reserve fund requirements, and audits. Explicit and consistent statutory authority to request Attorney General action would provide the Board with a more complete set of judicial remedies to protect the State's investment.

**Classification of the Board's bonds for treatment under the State's constitutional debt limit needs clarification.**

The Board's Development Fund debt has both self-supporting and not self-supporting components. In calculating the constitutional debt limit, the Constitution allows for bonds "reasonably expected to be paid from other revenue sources and that are not expected to create a general revenue draw" to be excluded from the calculation until "any portion of the bonds or agreements, subsequently requires use of the state's general revenue for payment."<sup>7</sup> As such, self-supporting debt is not factored into the constitutional debt limit. However, during consideration of the Board's bond authority last session, and given that State debt is approaching this limit, misunderstandings arose over how the Board's debt authority has previously been classified.

Historically, the Legislature has excluded the Board's Development Fund debt from the constitutional debt limit calculation at the time of voter authorization, because without debt service appropriations from the Legislature, only self-supporting debt may be issued. Both the Bond Review Board and the Legislative Budget Board consider the Board's Development Fund bonds self-supporting until, and unless, the Legislature appropriates funds for debt service, at which point they become not self-supporting and are included in the constitutional debt limit calculation. Statutory clarification could eliminate confusion over historic treatment of the Board's bond authority for purposes of calculating the debt limit.

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*Evergreen  
bond authority  
would save the  
State money by  
keeping the Board  
from having to  
repeatedly seek  
constitutional  
amendments.*

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*The Legislature  
has always  
excluded  
the Board's  
Development  
Fund bond  
authority from  
the constitutional  
debt limit  
calculations.*

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## Recommendations

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### ***Constitutional Amendment***

- 1.1 Authorize the Board to issue Development Fund general obligation bonds, at its discretion, on a continuing basis, in amounts such that the aggregate principal amount outstanding at any time does not exceed \$6 billion.**

This recommendation would allow the Board to issue additional general obligation bonds for one or more accounts of the Development Fund up to \$6 billion. This recommendation would require the Legislature to pass a joint resolution containing this evergreen authority and Texas voters to approve an amendment to the State Constitution.

### ***Change in Statute***

- 1.2 Clarify that the Board's Development Fund general obligation bonds are not considered state debt payable from general revenue for purposes of calculating the constitutional debt limit until the Legislature appropriates debt service to the Board and the Board issues the debt.**

This recommendation would clarify current practice whereby the Board's Development Fund bonds would be treated as state debt repayable with state general revenues only if the Legislature appropriates debt service to the Board, and, at the time of issuance, the bond resolution states that the bonds are to be repaid with state general revenues. This recommendation would require the Board, when requesting the Bond Review Board's approval of bond issues, to certify the debt service on the bonds is expected to be paid from either the state's general revenues or another revenue source. This recommendation would also require the Bond Review Board, during its approval of the Board's bond issues, to confirm that the Legislature appropriated debt service to support the issuance of any not self-supporting debt.

- 1.3 Authorize the Board to request the Attorney General take legal action to compel a recipient of any of the Board's financial assistance programs to cure or prevent default in payment.**

This recommendation would ensure the Board has full statutory authority across all funding programs to request the Attorney General compel borrowers to perform specific duties legally required of them in documents such as bond ordinances and loan and grant agreements. This recommendation would provide the Board consistent statutory authority across all the Board's financial assistance programs and all types of borrowing entities, including certain water supply corporations.

## Fiscal Implication Summary

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No immediate fiscal impact to state general revenue is anticipated, except for the State's one-time \$109,907 publication cost for placing the constitutional amendment on the ballot.<sup>8</sup> Because the bond authority would be limited to self-supporting debt unless the Legislature appropriates funds for debt service, the fiscal impact to the General Revenue Fund for debt service cannot be determined. Evergreen authority would save the State future publication costs for additional constitutional amendments, as the Board would issue bonds on an ongoing, instead of one-time, basis capped at \$6 billion.

- .....
- <sup>1</sup> Texas Constitution, art. III, sec. 49-c.
  - <sup>2</sup> Texas Constitution, art. III, secs. 49-d-8, 49-d-10, and 50-d.
  - <sup>3</sup> The term Development Fund, for purposes of this issue, is synonymous with Development Fund II. Development Fund II, Texas Constitution, art. III, sec. 49-d-8, was created by constitutional amendment in 1997 to maximize the Board's use of existing funds and allow more efficient operation of its bond programs. Development Fund II essentially replaced Development Fund and now serves all purposes previously served by Development Fund.
  - <sup>4</sup> Texas Water Development Board, *Summary of Savings from Refunding Transactions FY 1998 thru FY 2010*, (Austin, Texas, 2010).
  - <sup>5</sup> Texas Water Development Board, *Not Self-Supporting Debt Savings*, (Austin, Texas, 2010).
  - <sup>6</sup> Texas Bond Review Board, *Annual Report, Fiscal Years 2007-2009* (Austin, TX). Online. Available: [www.brb.state.tx.us/agency/publications.aspx](http://www.brb.state.tx.us/agency/publications.aspx). Accessed: August 9, 2010.
  - <sup>7</sup> Texas Constitution, art. III, sec. 49-j(b).
  - <sup>8</sup> Texas Secretary of State, *Legislative Appropriations Request, 2012-2013* (Austin, Texas, August 2010), p. 9. Online. Available: [www.sos.state.tx.us/about/lar/forms/3A-StrategyRequest.pdf](http://www.sos.state.tx.us/about/lar/forms/3A-StrategyRequest.pdf). Accessed: August 30, 2010.



# Issue 2

## ***The Lack of Coordination Among Separate Water Planning Processes Impedes the Board's Statewide Water Planning.***

### **Background**

The Board's ability to oversee statewide water planning to meet long-term water needs depends on sufficiently accounting for available groundwater supplies. In 2003, groundwater accounted for 59 percent of total water used by Texans.<sup>1</sup> Groundwater is also a vital source for maintaining surface water flows in many parts of the state. The State has two separate water planning entities based on similar, bottom-up processes. An overview of each planning process is provided below. These water planning processes also depend on a daunting array of acronyms that complicate the simple description and easy understanding of these matters. The textbox, *Acronyms for Water Planning*, lists and defines key terms related to the water planning processes for groundwater.

#### ***Acronyms for Water Planning***

**RWPG** (Regional Water Planning Group) – A planning group consisting of approximately 20 members representing a variety of interests who design strategies for both surface water and groundwater to meet future water demands in each regional planning area.

**District** (Groundwater Conservation District) – A local unit of government typically authorized by the Legislature and approved at the local level to manage and protect groundwater.

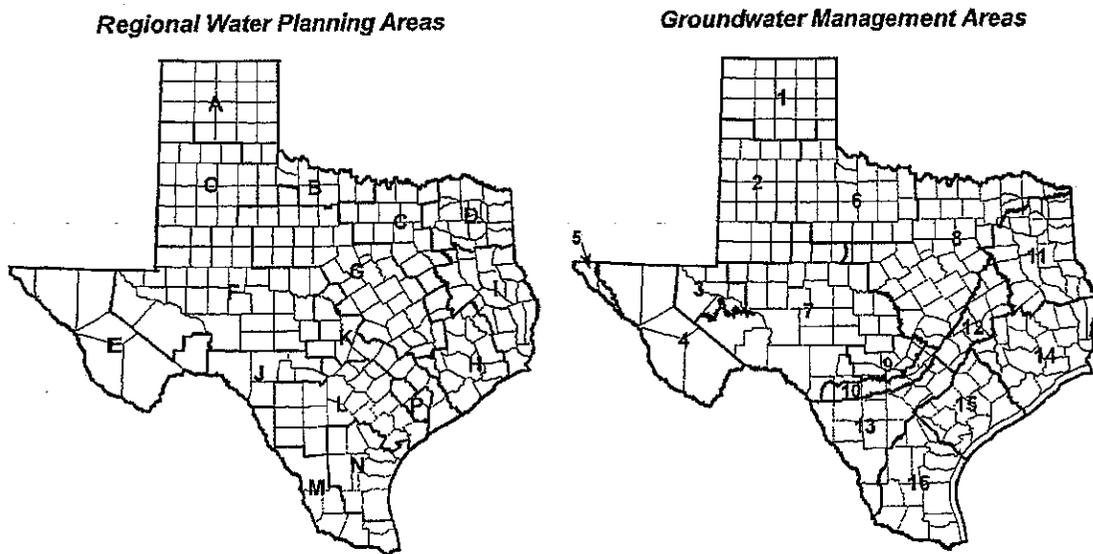
**GMA** (Groundwater Management Area) – An area of the state, generally conforming to major aquifer boundaries, used to manage groundwater. Each GMA is made up of local districts that jointly plan for groundwater use across the area.

**DFC** (Desired Future Condition) – A policy decision on the quantified condition of an aquifer at a certain future time decided collectively by all the districts in each groundwater management area.

**MAG** (Managed Available Groundwater) – The amount of groundwater that may be permitted for beneficial use while still managing each aquifer in accordance with the DFC. The MAG is calculated by the Board and reported to districts for regulatory and planning purposes and to regional water planning groups for planning purposes.

- **Water Planning.** Statute requires the Board to develop and implement a state water plan to make sure that sufficient water is available at a reasonable cost to ensure public health, safety and welfare.<sup>2</sup> The Board oversees a regional water planning process across 16 areas of the state, ultimately approving the resulting regional plans, which provide the basis for the Board's comprehensive State Water Plan. The Board designated regional water planning areas based on factors such as river basin and aquifer delineations, as well as water utility development patterns, political boundaries, socioeconomic characteristics, and public comment.<sup>3</sup> Regional water planning groups (RWPGs) develop planning strategies to ensure available surface water and groundwater supplies meet water demands over a 50-year horizon. The map on the following page, *Regional Water Planning Areas*, illustrates the boundaries of each regional water planning area.

- Joint Planning.** The State has 98 groundwater conservation districts (districts) that regulate the spacing and production of groundwater through permits and are the State's preferred method of groundwater management.<sup>4</sup> To promote joint planning of groundwater use, the Board designated boundaries for 16 groundwater management areas (GMAs) based on major aquifer boundaries to facilitate the most suitable management of groundwater in an area.<sup>5</sup> GMAs are not actual entities, but rather a collective group of districts within each area. Because GMAs serve a different purpose than regional water planning areas, their boundaries do not coincide. The map, *Groundwater Management Areas*, illustrates the boundaries of each groundwater management area. Because some major aquifers traverse the state, some aquifers have multiple GMAs.



The map on pages 22 and 23, shows each regional water planning area, groundwater management area, and groundwater conservation district, as well as the two subsidence districts in the state.

- Desired Future Conditions.** In 2005, the Legislature required districts in each groundwater management area to jointly plan for desired future conditions (DFCs) of each relevant aquifer in the area.<sup>6</sup> The DFC is a quantified condition of the aquifer at a certain future point in time. The following examples are ways to express an aquifer's desired future condition.
  - Water levels do not decline more than 100 feet in 50 years.
  - Spring flow is not allowed to fall below 10 cubic feet per second in times during the drought of record for perpetuity.
  - Fifty percent of the water in storage will be available in 50 years.

Groundwater management areas may adopt a uniform, average DFC for an aquifer across the GMA, or designate separate DFCs for each subdivision of an aquifer, geologic strata within the GMA, or geographic area overlying an aquifer.

The joint planning process is meant to encourage districts to collaboratively plan for groundwater use across the State's major aquifers. The joint planning process to establish DFCs is an independent process from the regional water planning process. Statute requires DFCs for each relevant aquifer in a groundwater management area to have been adopted by September 1, 2010.<sup>7</sup>

Based on the DFC, the Board calculates the managed available groundwater number (MAG), which is the amount of groundwater that may be permitted each year while still achieving the DFC. This number guides the water planning process and district permitting decisions, which ultimately affect the groundwater available to landowners, permit holders, water planning groups, and neighboring districts.

- **Differences in Purpose and Scope.** Both groundwater management areas and regional water planning groups have made policy decisions to determine availability of groundwater to meet future needs through a regional, grassroots approach to reflect their own local priorities. However, important differences exist in each entity's purpose and scope. Regional water planning groups plan to meet all future water needs using surface water and groundwater, while GMAs plan for future aquifer conditions through regulation of groundwater by districts.

Regional water planning groups, through broad stakeholder representation, offer valuable perspectives on water needs and supplies as a whole. Many districts, for their part, offer a wealth of hydrogeologic knowledge about the conditions of their aquifers, especially given the accumulation of such information and technical assistance from the Board through the DFC process. Districts may have insights not apparent to regional water planning groups regarding levels of pumping that can create adverse effects on the aquifer, such as curtailing spring flow or endangering wildlife species. Districts have provided groundwater availability numbers for many regional water planning groups for the current round of state water planning. However, differences between the two planning entities may affect future water planning efforts.

- **Groundwater Availability Numbers.** The source of groundwater availability numbers used in the water planning process and by districts across the state has changed over time. When the Legislature created the regional water planning process in 1997, the groundwater availability numbers in district management plans had to be consistent with groundwater availability numbers in regional water plans. Senate Bill 2 (2001) required regional water planning groups to consider districts' groundwater availability data when establishing their groundwater availability numbers. If these numbers conflicted, statute provided for a process in which the Board would resolve the conflict and allowed a district to appeal this decision in district court.<sup>8</sup>

In 2005, the Legislature required regional water planning groups to use the managed available groundwater number resulting from the DFC in the water planning process as the amount of groundwater available to meet future water needs.<sup>9</sup> The DFC, and the managed available groundwater derived from the DFC, serve as a planning tool for both districts and regional water planning groups. The 2016 regional water plans and the 2017 State Water Plan will use DFCs as the basis for groundwater availability for all regions for the first time. Because districts must issue permits for groundwater up to the managed available groundwater number, the DFC also serves in a regulatory capacity for districts.<sup>10</sup>

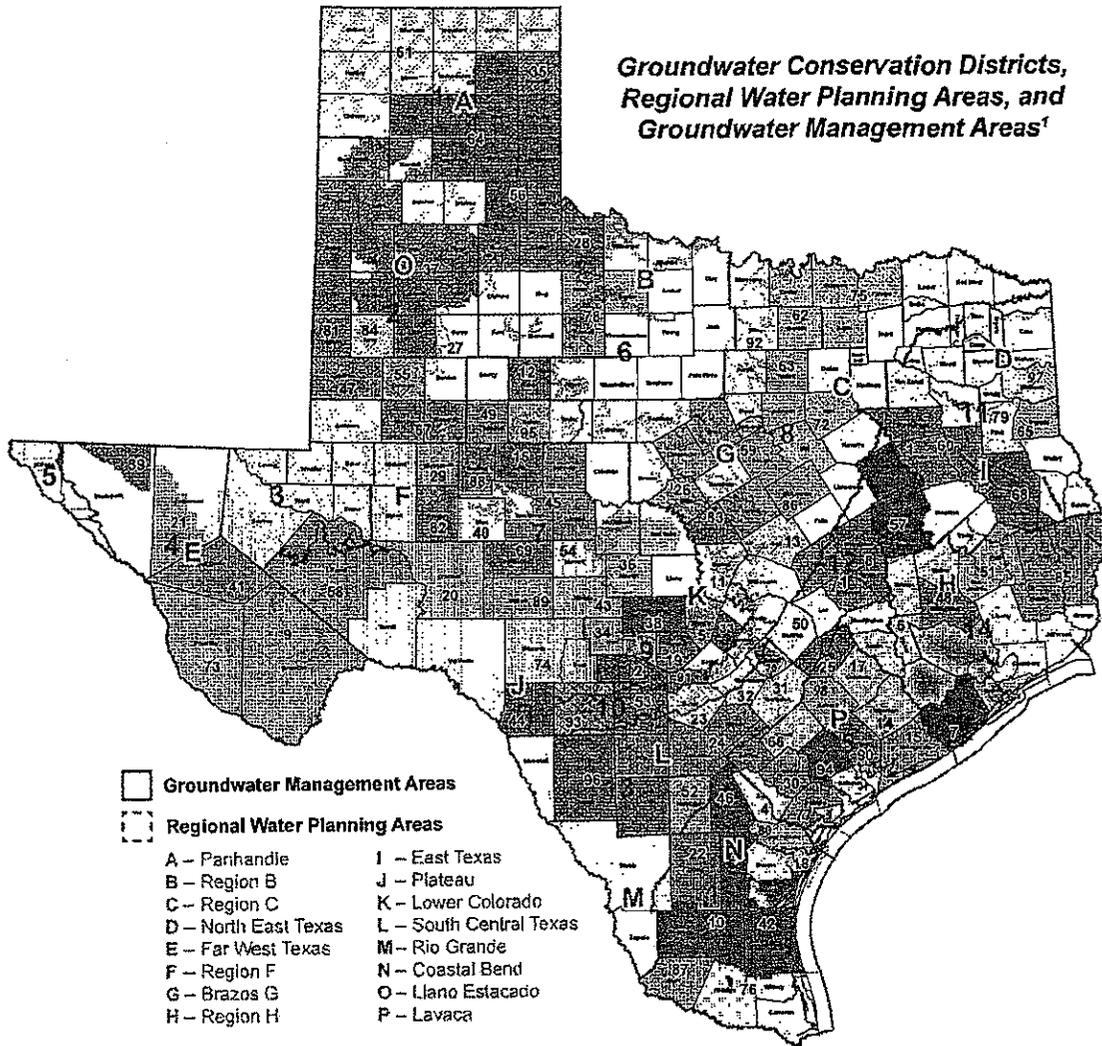
## Groundwater Conservation Districts

- |   |   |  |
|---|---|--|
| <ul style="list-style-type: none"> <li><input type="checkbox"/> 1. Anderson County UWCD</li> <li> 2. Bandera County River Authority &amp; Groundwater District</li> <li> 3. Barton Springs / Edwards Aquifer CD</li> <li><input type="checkbox"/> 4. Bee GCD</li> <li> 5. Blanco-Pedernales GCD</li> <li> 6. Bluebonnet GCD</li> <li> 7. Brazoria County GCD</li> <li> 8. Brazos Valley GCD</li> <li> 9. Brewster County GCD</li> <li> 10. Brush County GCD</li> <li><input type="checkbox"/> 11. Central Texas GCD</li> <li> 12. Clear Fork GCD</li> <li> 13. Clearwater UWCD</li> <li> 14. Coastal Bend GCD</li> <li> 15. Coastal Plains GCD</li> <li> 16. Coke County UWCD</li> <li> 17. Colorado County GCD</li> <li> 18. Corpus Christi ASRCD</li> <li> 19. Cow Creek GCD</li> <li> 20. Crockett County GCD</li> <li> 21. Culberson County GCD</li> <li> 22. Duval County GCD</li> <li> 23. Edwards Aquifer Authority</li> <li> 24. Evergreen UWCD</li> <li> 25. Fayette County GCD</li> <li> 26. Fox Crossing Water District</li> <li><input type="checkbox"/> 27. Garza County UWCD</li> <li> 28. Gateway GCD</li> <li> 29. Glasscock GCD</li> <li> 30. Goliad County GCD</li> <li> 31. Gonzales County UWCD</li> <li> 32. Guadalupe County GCD</li> <li> 33. Hays Trinity GCD</li> <li> 34. Headwaters GCD</li> </ul> | <ul style="list-style-type: none"> <li> 35. Hemphill County UWCD</li> <li> 36. Hickory UWCD No. 1</li> <li> 37. High Plains UWCD No.1</li> <li> 38. Hill County UWCD</li> <li> 39. Hudspeth County UWCD No. 1</li> <li><input type="checkbox"/> 40. Irion County WCD</li> <li> 41. Jeff Davis County UWCD</li> <li> 42. Kenedy County GCD</li> <li> 43. Kimble County GCD</li> <li> 44. Kinney County GCD</li> <li> 45. Lipan-Kickapoo WCD</li> <li> 46. Live Oak UWCD</li> <li> 47. Llano Estacado UWCD</li> <li> 48. Lone Star GCD</li> <li> 49. Lone Wolf GCD</li> <li><input type="checkbox"/> 50. Lost Pines GCD</li> <li> 51. Lower Trinity GCD</li> <li> 52. McMullen GCD</li> <li> 53. Medina County GCD</li> <li><input type="checkbox"/> 54. Menard County UWD</li> <li> 55. Mesa UWCD</li> <li> 56. Mesquite GCD</li> <li> 57. Mid-East Texas GCD</li> <li> 58. Middle Pecos GCD</li> <li> 59. Middle Trinity GCD</li> <li> 60. Neches &amp; Trinity Valleys GCD</li> <li><input type="checkbox"/> 61. North Plains GCD</li> <li> 62. North Texas GCD</li> <li> 63. Northern Trinity GCD</li> <li> 64. Panhandle GCD</li> <li> 65. Panola County GCD</li> <li> 66. Pecan Valley GCD</li> <li> 67. Permian Basin UWCD</li> <li> 68. Pineywoods GCD</li> </ul> | <ul style="list-style-type: none"> <li> 69. Plateau UWC and Supply District</li> <li> 70. Plum Creek CD</li> <li> 71. Post Oak Savannah GCD</li> <li> 72. Prairelands GCD</li> <li> 73. Presidio County UWCD</li> <li><input type="checkbox"/> 74. Real-Edwards C and R District</li> <li> 75. Red River GCD</li> <li> 76. Red Sand GCD</li> <li> 77. Refugio GCD</li> <li> 78. Rolling Plains GCD</li> <li><input type="checkbox"/> 79. Rusk County GCD</li> <li> 80. San Patricio County GCD</li> <li> 81. Sandy Land UWCD</li> <li> 82. Santa Rita UWCD</li> <li> 83. Saratoga UWCD</li> <li><input type="checkbox"/> 84. South Plains UWCD</li> <li> 85. Southeast Texas GCD</li> <li> 86. Southern Trinity GCD</li> <li> 87. Starr County GCD</li> <li> 88. Stearing County UWCD</li> <li> 89. Sutton County UWCD</li> <li> 90. Texana GCD</li> <li> 91. Trinity Glen Rose GCD</li> <li><input type="checkbox"/> 92. Upper Trinity GCD</li> <li> 93. Uvalde County UWCD</li> <li> 94. Victoria County GCD</li> <li> 95. Wes-Tex GCD</li> <li> 96. Wintergarden GCD</li> <li><input type="checkbox"/> 97. Harrison County GCD*</li> <li> 98. Lavaca County GCD*</li> </ul> |
|---|---|--|
- 
- Subsidence Districts**

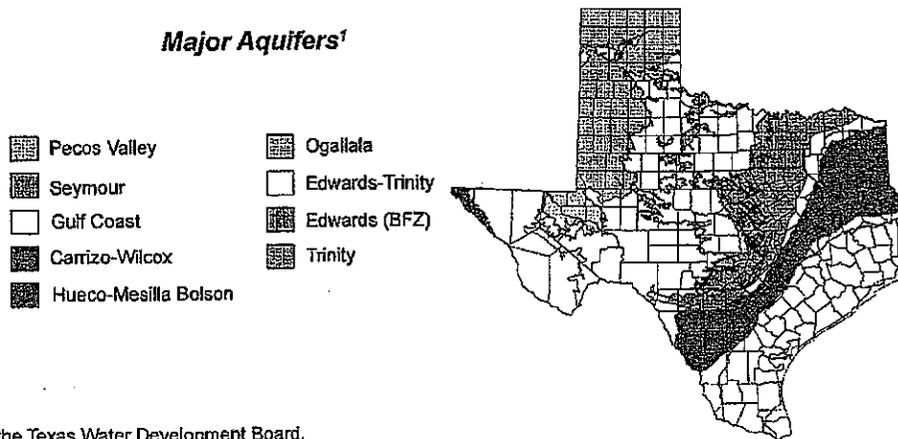
  - Fort Bend Subsidence District
  - Harris-Galveston Subsidence District

\* Confirmation Pending

**Groundwater Conservation Districts,  
Regional Water Planning Areas,  
and Groundwater Management Areas<sup>1</sup>**



**Major Aquifers<sup>1</sup>**



<sup>1</sup> Maps provided by the Texas Water Development Board.

## Findings

The disconnect between regional water planning groups and the development of desired future conditions harms the Board's ability to successfully plan to meet the State's future water needs.

*GMA's make groundwater availability decisions independent of the water planning process.*

Having GMAs drive groundwater decisions independent of the water planning process risks sacrificing the broader perspective presented by stakeholders that has been key to successful water planning. As Appendix A illustrates, GMA boundaries do not align with regional water planning boundaries. Districts may informally reach out to RWPGs with overlapping jurisdictions; however, nothing ensures coordination takes place between the entities in determining the amount of available groundwater for planning the State's water needs.

Having districts in the GMA make decisions about groundwater availability for water planning ultimately substitutes the districts' narrow interests in groundwater resources for the broad perspective of all water needs and uses that is the hallmark of the regional – and state – water planning process facilitated by the Board. The effect is for nearly half the state that relies mostly on groundwater, GMAs make decisions that are not fully or formally vetted to determine whether they meet future water demands.

- Planning Group Composition.** The composition of GMAs includes one representative from each district in the area, but does not include regional water planning groups. The chart, *Number of Districts and RWPGs Within Each GMA*, shows the number of districts in each GMA compared to the number of regional water planning groups that overlap with each GMA but do not have formal input in the DFC process.

**Number of Districts and RWPGs Within Each GMA**

GMA	Number of Districts	Number of RWPGs
1	4	1
2	7	2
3	1	1
4	5	1
5	0	1
6	4	5
7	20	5
8	12	6
9	9	3
10	9	3
11	6	4
12	5	4
13	9	3
14	6	3
15	13	4
16	10	2

In contrast, RWPGs include representatives from the public, counties, municipalities, industries, agricultural interests, environmental interests, small businesses, electric generating utilities, river authorities, water utilities, and water districts – including groundwater districts. The chart on the following page, *District Representation on RWPGs*, details the number of districts providing formal input on each RWPG. Some of the groundwater district representatives on these RWPGs may serve on a GMA, but this representation is not guaranteed and does not ensure that anything other than the districts' narrow groundwater interests are represented.

● **Impacts on Water Planning.**

The lack of RWPG participation in the DFC process potentially undermines the Board's state – and regional – water planning process by tying the RWPGs' hands on what planning options or decisions are available to them and within their control. Specifically, the DFC could disallow consideration and implementation of water planning projects to meet future growth in water demand because the available groundwater that results may not be sufficient for the project.

For example, if a new well field is included as a water management strategy in a regional water plan to meet an expected increase in population and water demand, and the DFC provides for less groundwater availability than in the previous water plan, enough groundwater may not be available for the project. This situation would prevent inclusion of the project strategy in the water plan and subsequent receipt of financial assistance from the Board. It could also prevent the project from receiving a permit from the district. Most importantly, the DFC could affect the amount of water that would be available to meet an area's future water needs. Any process with the potential for such a significant impact to an area merits input from planning groups whose fundamental mission is developing strategies to meet future water demands.

**District Representation on RWPGs**

RWPG	Number of District Representatives in Water District Slots	Actual Number of District Representatives on RWPGs
A	2	3
B	1	1
C	0	1
D	0	0
E	2	2
F	1	4
G	2	4
H	0	4
I	1	4
J	4	5
K	3	5
L	1	5
M	0	0
N	1	4
O	2	3
P	0	2

**Timing of the adoption of desired future conditions could result in the use of out-of-date information for broader planning purposes.**

While one GMA submitted its DFCs in time for consideration in the current round of water planning, all regional water planning groups will use DFCs as the basis for groundwater availability in the next round of water planning. Regional water planning groups begin planning for the next regional water plan as soon as their current regional water plan is adopted for incorporation into the State Water Plan, if not sooner. The textbox, *Timeline of DFC Development and Regional Water Planning Processes*, illustrates the next round of water planning and DFC establishment. The timeline shows that DFCs, which must be readopted at least once every

2010	First Round of DFCs Adopted
2012	State Water Plan Published
2012	RWPGs Begin Consideration of Water Availability for Next Round of Planning
2015	Second Round of DFCs Adopted
2015	Initially Prepared Regional Water Plans Due
2016	Regional Water Plans Adopted
2017	State Water Plan Published

five years, will not be established in time for consideration during the next round of regional water planning. In fact, the timeframes for completing DFCs always lag the regional water planning process such that groundwater availability numbers will be out of date for broader planning purposes. As a result, RWPGs will be making planning decisions based on managed available groundwater numbers that will likely change before the regional plans are even adopted. Without specifying a point in time at which a DFC will be used in the next round of water planning, GMAs lack certainty regarding the time by which a DFC would need to be readopted for use in the water planning process.

**Stakeholders may be unaware of the DFC process and the potential effects of DFCs on their groundwater resources.**

While some districts make great efforts to seek a broad range of stakeholder input, statute does not require districts to ensure key stakeholders, such as landowners, permit holders, cities, industries, local officials, or other members of the public are notified of GMA meetings. GMA meetings are subject to the open meeting requirements of the districts comprising the GMA.<sup>11</sup> However, statute only requires notice be posted at the county courthouse in each county within the district's boundaries and at the offices of the district at least 72 hours before the meeting and, if the district includes more than four counties, in the Texas Register.<sup>12</sup> Even for those GMA meetings that must be posted in the Texas Register, locating the notice is difficult, as the notice is posted under the name of the district, and not under the GMA, making it hard to identify the GMA meeting.

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*GMA meeting  
notice  
requirements  
are not sufficient  
to obtain  
stakeholder input.*

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The Board has rejected DFCs from two GMAs for posting errors, and GMAs had to postpone adoption of DFCs because of posting errors six times. For GMA meetings at which DFCs were not intended to be adopted, the number of posting errors is unknown. Posting errors make it difficult for stakeholders to obtain notice of GMA meetings. While some districts take proactive steps to notify stakeholders through electronic means, stakeholder notification by districts is inconsistent and varies widely across districts, making it difficult even for informed stakeholders to determine meeting dates and times. As a result, widespread notice to affected parties, including stakeholders outside the boundaries of the GMA, cannot be assured and stakeholders may be unaware of how the DFC could affect their groundwater supply.

Statute also does not require public hearings on the proposed DFC to gather stakeholder input. While most GMAs proactively held at least one GMA-wide hearing, short timeframes for notice regarding such a technical subject matter make it difficult to ensure stakeholders have time to fully assess the implications of the DFC.

## Recommendations

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### ***Change in Statute***

- 2.1 Require the Board to certify that each groundwater management area include a voting representative from each regional water planning group whose boundaries overlap the area.**

This recommendation would add representatives of each regional water planning group that overlaps with a groundwater management area as voting members of that groundwater management area. The Board, as a condition of accepting the DFC as administratively complete, would certify that a representative of each regional water planning group whose boundaries overlap the GMA is an eligible voting member of the GMA. The chart, *Number of Districts and RWPGs Within Each GMA*, on page 24 shows the specific number of regional planning groups that would send a voting member to each overlapping GMA under this recommendation. The chair of each regional water planning group would appoint a representative to serve as its voting member on the GMA where its boundaries overlap. The recommendation would prohibit members of a district's board of directors or general manager from serving as the regional planning group representative on the GMA to ensure stakeholder representation beyond districts.

- 2.2 Require regional water planning groups to use the desired future conditions in place at the time of adoption of the Board's State Water Plan in the next water planning cycle.**

This recommendation would require DFCs adopted before the State Water Plan due date to be used by regional water planning groups in the subsequent water planning cycle. The recommendation would allow GMAs to make changes to their DFC, if they choose, by a certain date, with assurance that the new managed available groundwater number will be used in the next regional – and state – water plan adopted by the Board. As a result, DFCs adopted at any point before January 5, 2012 would be used in the water planning cycle resulting in the 2017 State Water Plan.

- 2.3 Strengthen the public notice requirements for groundwater management area meetings and adoption of desired future conditions and require proof of notice be included in submission of conditions to the Board.**

This recommendation would require each GMA to provide uniform notice, instead of individual district-specific notices, posted in each district's office, the courthouse of each county wholly or partially in the GMA, the Texas Register, and each district's website, if they have a website, at least 10 days before the GMA meeting. Notice for any GMA meeting must include:

- the date, time, and location of the public meeting or hearing;
- a summary of the proposed action to be taken;
- names of each groundwater conservation district making up the GMA;
- the name, telephone number, and address of the person to whom questions or requests for additional information may be submitted; and
- information on how the public may submit comments.

Additionally, before a GMA adopts a DFC, this recommendation would require a 30-day public comment period, during which time each district would be required to conduct a public hearing on the proposed DFC in their district and make a copy of the proposed DFC and any supporting materials, such as groundwater availability model runs, available to the public in the district's office. Notice for the public hearing in each district would include the same elements as GMA meeting notices above, as well as the proposed DFC.

GMA meetings would be considered open meetings under Chapter 551 of the Texas Government Code. As a requirement for the Board to accept a DFC, this recommendation would mandate inclusion of proof of notice of the DFC adoption by the GMA. The Board could define additional methods for stakeholder notice in rule to ensure reasonable opportunity for notice to, and comment from, affected stakeholders, such as landowners, permit holders, local officials, and other members of the public.

## Fiscal Implication Summary

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Overall, the recommendations should have no significant fiscal impact. Modified posting requirements should not have a significant fiscal impact, as the requirements generally match current requirements for district and GMA meetings, except for posting notice on a district's website, which could be absorbed using each district's existing resources. Holding a 30-day public comment period and hearing should not result in additional costs as districts already post notices and hold district meetings, at which a district could hold a public hearing.

- 1 Texas Water Development Board, *2007 State Water Plan* (Austin, Texas, 2007), p. 176.
- 2 Texas Water Code, sec. 16.051.
- 3 Texas Water Code, sec. 16.053(b).
- 4 Texas Water Code, sec. 36.0015.
- 5 Texas Water Code, sec. 35.004.
- 6 Texas House Bill 1763, 79th Legislature (2005).
- 7 Texas Water Code, sec. 36.108(d).
- 8 Texas Water Code, sec. 36.1072(g).
- 9 Texas Water Code, sec. 36.1071(b).
- 10 Texas Water Code, sec. 36.1132.
- 11 Texas Water Code, sec. 36.108(d-1)(2).
- 12 Texas Government Code, secs. 551.053 and 551.054.

# Issue 3

## *The State's Processes to Petition an Aquifer's Desired Future Conditions Are Fundamentally Flawed.*

### Background

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The joint planning process for determining desired future conditions of aquifers reflects the State's interest in providing a common approach to planning and managing groundwater based on local interests and objective science. The textbox in Issue 2, *Acronyms for Water Planning*, lists and defines key terms related to the joint planning process for groundwater. Although the concept of joint planning for groundwater use across groundwater conservation districts (districts) has existed as a voluntary measure for some time, joint planning has evolved as a method of groundwater management beginning with the Board establishing groundwater management areas (GMAs) to facilitate joint planning in 2003.<sup>1</sup> GMAs, which generally align with major aquifer boundaries, are made up of districts who come together for planning purposes.

- **Desired Future Conditions (DFCs).** In 2005, the Legislature passed House Bill 1763, requiring districts in each GMA to jointly plan for desired future conditions of each relevant aquifer and submit those conditions to the Board. The joint planning process allows districts to coordinate planned groundwater pumping, using data and models from the Board and other sources, to gauge effects on groundwater levels aquifer-wide and avoid adverse effects to the aquifer. Districts within each GMA send one voting representative to GMA meetings, and were required to adopt DFCs for each relevant aquifer in the GMA by September 1, 2010.<sup>2</sup> Both the Board and the Texas Commission on Environmental Quality (TCEQ) have processes to petition (appeal) desired future conditions: processes exist to petition the reasonableness of a DFC to the Board, and to petition other elements, mostly related to the implementation, of the DFC to TCEQ.
- **Role of the Board.** The Board provides technical assistance to districts to encourage scientifically based decision making regarding the amount of groundwater available for use. In districts lacking resources to obtain their own technical expertise, the Board may be the only source of assistance regarding highly complex hydrological and geological data, such as results of groundwater availability model runs. Without this assistance, a district may not be able to make informed decisions about the conditions of its aquifers.

A person with a legally defined interest in groundwater in the GMA, a regional water planning group (RWPG) in the GMA, or a district in or adjacent to the GMA may file a petition with the Board to appeal the approval of a DFC and seek a determination of its reasonableness.<sup>3</sup> Petitions must be filed with the Board within one year of the date of the DFC adoption. The DFC reasonableness petition process at the Board is outlined in the flow chart in Appendix B, *Board Process to Petition the Reasonableness of a DFC*. When petitioned, the Board holds hearings and evaluates the reasonableness of the DFC. If the Board finds a DFC to be reasonable, it concludes the process. If the Board finds a DFC is not reasonable, the Board makes a recommendation to the GMA, which must conduct a public hearing and decide whether to accept the Board's recommended changes.

- **Role of TCEQ.** TCEQ has a petition process to ensure districts appropriately engage in the joint planning process and manage groundwater to achieve their DFCs. A person with a legally defined interest in groundwater within the GMA may file a petition with TCEQ if districts refuse to engage

in joint planning, or if their efforts fail to result in adequate planning, including establishment of reasonable future desired conditions of an aquifer.<sup>4</sup> Petitions filed with TCEQ must also provide evidence of any of the following:

- a district has failed to adopt rules;
- district rules are not designed to achieve the DFC;
- groundwater is not adequately protected by district rules; or
- groundwater is not protected because a district fails to enforce its rules.<sup>5</sup>

TCEQ's petition process is outlined in the flow chart in Appendix B, *TCEQ Process to Petition a District's Management to the DFC*. TCEQ may take action against a district based on findings and recommendations from a five-member review panel appointed by TCEQ to hold hearings and gather evidence related to the petition. Appeals of Commission orders are filed and heard in district court in any of the counties in which the land is located.<sup>6,7</sup>

TCEQ also regulates groundwater quality, and can create districts through establishment of priority groundwater management areas (PGMAs). TCEQ also has regulatory authority over districts that do not timely submit a groundwater management plan or achieve the goals in that plan. In such cases, TCEQ may take enforcement action, including dissolving districts, to achieve adequate management of groundwater in an area.

- **Filed Petitions.** The Board has made determinations of reasonableness for petitions of two sets of DFCs. The Board found a petitioned DFC in GMA 9, in the Hill Country, not reasonable, but despite the Board's finding, the GMA voted not to change its DFC for part of the relevant area of the GMA.<sup>8</sup> The Board found the petitioned DFCs in GMA 1, in the Panhandle, reasonable, but the Board's determination is currently in litigation under another section of law. A petition has also been filed with TCEQ petitioning the same set of DFCs in GMA 1.

## Findings

### **Desired future conditions can have significant impacts that justify the need for an administrative remedy.**

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*Desired future conditions serve as both a planning and regulatory mechanism.*

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Desired future conditions serve as both a planning and regulatory mechanism. Desired future conditions are joint decisions by locally run districts as to the planned condition of their aquifers in the future, which the Legislature requires to be used in the water planning process (as discussed in Issue 2). The process also has regulatory components on two levels. First, the DFC serves as a regulatory mechanism at a district level, as statute requires districts to issue permits up to the managed available groundwater determined by the DFC. Second, the process has quasi-regulatory hoops that GMAs must jump through at the state level. Statute requires action by GMAs to develop DFCs by certain time frames and provides appeal mechanisms for evaluating the reasonableness and implementation of these decisions.

Despite these regulatory underpinnings, the Board's process does not lead to a clear administrative conclusion as is common in other regulatory approaches. Without the ability to finally resolve petitions of the reasonableness of DFCs,

the State cannot ensure the fundamental fairness of the process – especially for those harmed to seek redress. Because of the link between DFCs and district permitting decisions, the DFC can directly affect the amount of groundwater available for use by landowners, current and potential permit holders, RWPGs, and other districts beyond the GMA. Those affected risk being deprived of basic due process protections for harm they may suffer as a result of the desired future condition. These protections are standard in other administrative processes.

As discussed in Issue 2, the DFC could also disallow consideration and implementation of water planning projects because the managed available groundwater that must be used for water planning purposes may not allow for sufficient available groundwater for the projects. The DFC could also prevent local entities from receiving Board financial assistance for planned water projects if the project strategy cannot be included in the next regional or state water plan.

**The Legislature already placed the State in the position of overseeing groundwater districts, including assessing the reasonableness and implementation of desired future conditions.**

The State protects groundwater through the creation and oversight of districts and the establishment of PGMA. The State, through TCEQ, exercises its oversight of districts through regulatory and enforcement powers that include dissolving a district or any other action to achieve comprehensive management of groundwater in an area. The Legislature also placed the State, through processes at the Board and TCEQ, in charge of assessing whether a DFC is reasonable and determining whether district implementation achieves a DFC, respectively. The State's interest in DFCs is to try to ensure the overall integrity of joint planning process as a way to maintain local control of groundwater with an awareness of broader interests and concerns, beyond just the narrow interests of the districts and GMAs involved. By placing the Board and TCEQ in charge of procedures to ensure these broader interests and concerns are met, the Legislature has already established the State's heightened interest in groundwater matters.

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*The State's  
interest in DFCs  
is to ensure the  
overall integrity  
of the joint  
planning process.*

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**The petition process at the Board lacks standard components of administrative processes.**

Over the past 33 years, Sunset staff has reviewed numerous state agencies whose functions include administrative petition, or appeal, processes and identified standard features and best practices of those processes. The elements listed below do not match standard components of administrative processes in state government.

- **No Clear Definition of Eligible Petitioners.** Statute provides for a person with a legally defined interest in the groundwater of the GMA, a district in or adjacent to the GMA, or a regional water planning group for a region in the GMA, to file a petition with the Board appealing the

approval of the DFC.<sup>9</sup> However, because statute does not say what a "legally defined interest" is, eligibility to file a petition with the Board is unclear. In determining petitioner eligibility, the Board lacks a standard to delineate who gets to participate in the petition process. Moreover, the requirement for a petitioner to have a legally defined interest does not necessarily mean they are affected, or harmed, by the DFC in a way that merits petitioning the decision. The term may also exclude persons who might be affected by the DFC, but may not meet the vague definition of a legally defined interest.

- **No Statutory Guidance for Decisions.** The Board's DFC petition process lacks statutory criteria for making a decision of reasonableness. The accompanying textbox lists the factors adopted by the Board through

**Board Rule Criteria for Determining the Reasonableness of a DFC**

- Whether the DFC is Physically Possible
- Socio-economic Impacts
- Environmental Impacts
- State Policy and Legislative Directives
- Impacts on Private Property
- Reasonable and Prudent Development of the State's Resources
- Other Relevant Information

rule to evaluate the reasonableness of a DFC. These factors are not in statute and the agency was not specifically directed to adopt them in rule. They do not carry the same weight as specific legislative directives in judicial review, and as a result may not withstand judicial scrutiny. Additionally, districts have no guidance in setting DFCs in the first place. Consideration of such reasonableness factors by the GMA when first adopting DFCs, and documentation of the DFC's impact on those factors, could promote a stakeholder process that results in a reasonable DFC that acknowledges and balances interests, improves decision making, and potentially reduces the number of petitions that may be filed.

- **No Contested Case Hearing.** While the Board's current process promotes informality and flexibility by allowing any evidence to be submitted, it offers no opportunity for parties to review evidence or conduct cross-examination, elements generally afforded as a matter of procedural due process. The technical nature of the DFC process requires the ability to evaluate the credibility of expert witnesses, to be able to question imprecise science, and to provide contrary arguments to the evidence and testimony. Without a contested case hearing subject to rules of evidence, such protections are impossible. Additionally, without a contested case hearing, only a limited record exists for further court review under substantial evidence, which risks courts having to begin the case anew under a trial de novo standard.

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*An incomplete DFC petition process wastes the Board's time and money and does not produce meaningful results.*

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- **No Final Resolution.** Under the current process, the Board makes a determination of reasonableness of the DFC, but it is merely a recommendation back to the GMA that is not final. While the GMA must hold a public hearing on the Board's recommendation, it does not have to accept the Board's recommendation or make any changes to its original DFC, even if the Board finds the DFC is not reasonable. The lack of a final resolution by the Board and the inability to enforce that

decision results in an incomplete process that potentially wastes the Board's time and resources, as the Board performs hearings that do not produce meaningful results.

- **No Clear Judicial Remedy.** Statute does not provide a clear judicial remedy for the Board's DFC petition process. Because of the regulatory implications of the DFC process at the district level, the lack of a clear avenue for appeal could result in denying petitioners' due process rights for the significant harm they can suffer from the loss of available groundwater. The Board is currently in litigation related to a petition appealing the DFC adopted by GMA 1, which the Board found to be reasonable. Because the Board's DFC petition process itself does not outline its own judicial remedy, this suit was instead filed under general provisions relating to a person being adversely affected by a Board decision.<sup>10</sup>

**Unlike at the Board, well-established regulatory functions and administrative processes relating to groundwater already exist at TCEQ.**

TCEQ is the regulatory entity for oversight of districts and protection of groundwater, including petitions related to joint planning and district management to achieve the DFC. Similarly, TCEQ is the only state entity with authority to initiate enforcement actions against districts, such as issuing administrative orders, dissolving a district board and calling for a new election, placing a district in receivership, dissolving the district entirely, or recommending to the Legislature other actions necessary to achieve comprehensive management in the district.<sup>11</sup> TCEQ may also take enforcement action against districts for certain Board requirements, such as failure to timely submit administratively complete groundwater management plans.<sup>12</sup> Beyond groundwater, TCEQ has well-established regulatory processes, including contested case hearings, for other elements of environmental regulation.

In comparison, the Board has no regulatory functions. Since the Legislature split the Texas Department of Water Resources into the Texas Water Development Board and Texas Water Commission (now TCEQ), the State has clearly separated functions between TCEQ as the regulatory arm and the Board as the financial assistance and planning arm for water.<sup>13</sup> This separation is in place to avoid conflicts of interest between the funding and planning of water projects and the permitting and regulation of those projects. The Board has never performed regulatory functions and lacks experience with regulatory mechanisms.

Establishing a full regulatory scheme at the Board would further fragment the regulation of groundwater. The Board provides valuable technical expertise that can be important to determinations of reasonableness and implementation of a DFC, but such technical expertise has historically supplemented regulatory decisions at TCEQ, such as in establishment of PGMA's.

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*The Board has  
no regulatory  
functions.*

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*The Board's  
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regulatory  
decisions at  
TCEQ.*

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*Giving the Board  
regulatory  
authority would  
fragment the  
oversight of  
groundwater.*

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If the Board had final decision-making authority for the reasonableness of a DFC, any enforcement of the Board's decision would ultimately have to be pursued through TCEQ in an additional administrative hearing process. Giving the Board final decision making and authority for enforcing reasonableness of DFCs or giving the Board regulatory authority for the entire DFC planning and implementation petition process – including the existing DFC petition process at TCEQ – would fragment the oversight of groundwater between two agencies, an inefficient use of state resources. The only way to avoid duplication and keep the Board involved in the DFC petition process would be to move all groundwater oversight and regulation to the Board, separating it from all other water – and all other environmental – regulation.

**TCEQ's desired future condition petition process also lacks standard components of administrative processes.**

As discussed earlier, the elements listed below do not match standard components of administrative petition, or appeal, processes observed by Sunset staff across state government.

- **No Definition of Eligible Petitioners.** Statute provides only that a district or person with a legally defined interest in groundwater within the GMA may file a petition requesting an inquiry by TCEQ regarding a district's implementation of provisions related to the DFC. Unlike for the Board, however, regional water planning groups and adjacent districts are not specifically listed as eligible petitioners in TCEQ's process, suggesting that they would not be eligible to file a petition. Regional water planning groups and adjacent districts are directly affected by the DFC and its implementation, as both depend on resulting groundwater availability for either planning or regulatory purposes. Just like for the Board, statute does not say what a "legally defined interest" is or require the petitioner to be affected or harmed by the DFC.
- **Required Evidence is Unrelated to Petition Basis.** Statute provides that petitioners may request an inquiry by TCEQ based on a district's failure to engage in joint planning in establishing a DFC. However, evidence required for petitions does not relate to, nor support the basis for, the petitions. Petitioners are unable to file petitions related to a district's failure to engage in joint planning without also providing evidence of failures related to district rules, which are totally separate from engaging in joint planning.<sup>14</sup>

Additionally, neither the Board nor TCEQ has a requirement for when a district must adopt rules or update its management plan to implement the DFC. The lack of a deadline for rule adoption makes it unclear when a valid petition can be filed with TCEQ, as petitions must include evidence of district rule failures.

- **No Statutory Guidance for Decisions.** TCEQ's DFC petition process lacks sufficient statutory criteria or definitions to guide TCEQ

determinations of whether evidence supports a petition related to the DFC. The terms "adequate planning," "reasonable future desired condition," and when groundwater is "adequately protected" all lack statutory definitions or factors that an agency would use to determine these standards.<sup>15</sup> Without statutory guidance, TCEQ decisions may not withstand judicial scrutiny, as factors TCEQ may use in its decision making are not express legislative directives.

- **No Contested Case Hearing.** While TCEQ's five-member review panel provides for public hearings and a report of findings and recommendations to TCEQ, it offers no opportunity for formal review of evidence or cross-examination, which, again, are elements generally included in procedural due process.

*No objective review.* Standard state administrative processes provide a forum for a recommendation for decision by an objective, disinterested party, usually an administrative law judge. A five-member panel that may potentially comprise board members or general managers of districts does not provide for an objective review of district rules or decisions.

*No contested case hearing experience.* If a five-member review panel is charged with conducting full contested case hearings, the members comprising the panel will not likely have experience in conducting a contested case hearing under the rules of evidence. As such, merely adding requirements for a contested case hearing, if conducted by a five-member review panel, may not work in practice.

*No formal transcript.* Under TCEQ's petition process, statute provides for a disinterested recording secretary to document the proceedings of the hearings. However, without a formal transcript by a court reporter, as is commonly used in contested case hearings, the court record may not satisfy the needed documentation required for substantial evidence review.

As a result of not having a full contested case hearing, a case may not qualify for substantial evidence review of state administrative decisions. Without a contested case hearing, TCEQ's petition process may be subject to appeal under a trial de novo standard, with no consideration given to the efforts or outcomes in the administrative process. Legitimate questions arise as to the merit of a non-contested case administrative process, given the lost time and resources if a decision is appealed and the case is tried anew.

- **Venue for Judicial Review.** Statute provides for appeals of TCEQ orders for DFC petitions to be in a district court of any of the counties where the land is located.<sup>16</sup> Most state contested case hearings are appealed to district court in Travis County; venues outside of Travis County are not common. Travis County district courts have considerable experience related to appeals of state administrative processes, and are generally regarded as objective venues for hearing state matters.

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*Without a contested case hearing, TCEQ's process does not provide for review of evidence or cross-examination.*

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*TCEQ's petition process appears to provide procedural advantages to districts.*

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- **Overall Process is Not Objective.** As currently structured by statute, TCEQ's process does not provide for an objective manner by which to evaluate a district's decision. Instead, the process appears to provide procedural advantages to districts. Notably, providing for a review panel that may potentially be made up of district board members or general managers to cast judgment on other district decisions allows for the panel to have an interest in the outcome of the case, as its decisions could be influenced by the panel's own practices. If a landowner were to appeal the Commission's decision, the venue is in a county where the land lies, where the district may have a hometown advantage.

## Recommendations

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### *Change in Statute*

#### **3.1 Require groundwater management areas to document consideration of factors or criteria that comprise a reasonable desired future condition and to submit that documentation to the Board.**

This recommendation would require districts in a GMA, in determining their DFC, to document the factors or criteria they considered that demonstrate the reasonableness of their DFC. Documentation would address any item identified by the agency responsible for defining a "reasonable" DFC. The Board would require that districts in a GMA include documentation of consideration of reasonableness factors and impacts of a DFC in writing for the submission of the DFC to be accepted as administratively complete. Districts could submit this documentation through such means as the DFC resolution.

#### **3.2 Transfer the process to petition the reasonableness of desired future conditions from the Board to TCEQ and modify TCEQ's existing petition process to unify elements relating to reasonableness and implementation of desired future conditions.**

This recommendation would eliminate the Board's petition process regarding the reasonableness of a DFC and move the process for determining the reasonableness of a DFC to TCEQ. TCEQ's existing DFC petition process would be amended as follows.

Affected persons may file a petition with TCEQ if the petition provides evidence of any of the following:

- failure of a district to engage in joint planning;
- the process fails to result in the establishment of reasonable desired future condition(s);
- failure of a district to adopt rules or update its management plan to implement the DFC within one year of the GMA's adoption of a DFC;
- the rules adopted by a district are not designed to achieve the DFC in the GMA;
- the groundwater in the groundwater management area is not adequately protected by the rules adopted by a district; or
- the groundwater in the groundwater management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules.

Affected person would be defined as a landowner in the GMA, a district in or adjacent to the GMA, a regional water planning group with a water management strategy in the GMA, a permit holder or permit applicant in the GMA, any holder of groundwater rights in the GMA, or any other affected person, as defined by TCEQ in rule. TCEQ would define what constitutes a reasonable DFC and adequate protection of groundwater, by rule, in a way that balances water demands with any adverse effects to the aquifer. TCEQ should consider any work completed on defining factors to determine a reasonable DFC, such as criteria in Board rule, as noted in the textbox on page 32, and the recommendations of other groups.

The TCEQ Executive Director shall administratively review the petition to ensure that evidence was submitted to support the petition and the petition is administratively complete. Not later than the 60th day after the petition is filed, the Executive Director shall either dismiss the petition if the Executive Director finds that no evidence was submitted to support the petition as required by statute, refer the petition for a contested case hearing at the State Office of Administrative Hearings (SOAH), or refer the petition to the Commission for decision. In all petition cases, the burden of proof is on the petitioner.

If, within the initial 60-day review of the petition, the Executive Director finds that a technical analysis is needed related to the hydrogeology of the area or matters within the Board's expertise, the Executive Director may request a study from the Board. If the Executive Director refers the petition to the Commission for decision, the Commission may request such a study from the Board.

In conducting the technical analysis, the Board shall consider any relevant information provided in the petition, as well as any groundwater availability models or other published studies or information the Board considers relevant. The study must be completed and delivered to TCEQ on or before the 120th day following the date of the request. If the matter has been referred to SOAH, the study shall also be delivered to SOAH for admission into the evidentiary record for consideration at the hearing. The relevant Board staff shall be available as an expert witness during the hearing if requested by any party or the administrative law judge.

The hearing shall be conducted by an administrative law judge as a contested case under the Administrative Procedure Act at SOAH. The Commission or Executive Director shall provide notice of the hearing to the petitioner and each district and regional water planning group in the GMA under procedures prescribed in rule. Evidentiary hearings shall be held at a location in the GMA. If the administrative law judge considers further information necessary, the judge may request such information from any source. The Board is not a party to these appeals. The Executive Director, on a case-by-case basis, shall determine whether to participate as a party to appeals, based on criteria TCEQ determines in rule. If the petition is referred by the Executive Director to the Commission, the Commission, on a case-by-case basis, shall determine whether the Executive Director will participate as a party.

After receiving the administrative law judge's findings of fact and conclusions of law, including recommended changes to the DFC if it is found not reasonable, the Commission shall issue an order stating its findings and conclusions, and may take other action against a district, as provided in law. Appeals of Commission decisions shall be filed in district court in Travis County under substantial evidence review.

The chart on the following pages, *Major Elements of a Unified DFC Petition Process*, compares each element of the DFC process proposed by Sunset staff with TCEQ's current process, with comments to further explain the recommendation.

**Major Elements of a Unified DFC Petition Process**

Element	TCEQ's Current Process	Sunset Proposed Process	Comments
Who Can File a Petition	A district or person with a legally defined interest in the groundwater within the GMA (§36.108(f), Texas Water Code).	An affected person, defined as a landowner in the GMA, a district in or adjacent to the GMA, a regional water planning group with a water management strategy in the GMA, a permit holder or permit applicant in the GMA, any holder of groundwater rights in the GMA, or any other affected person, as defined by TCEQ in rule.	Proposed language changes the eligible petitioners to a standard term with a specific definition, as the term "legally defined interest" lacks a statutory definition. The listed eligible petitioners generally tracks entities listed in current statute (§36.108(i)) and Board rule. The proposed language also requires petitioners to be affected by the DFC.
Basis for Filing Petitions	A petition may be filed with TCEQ requesting an inquiry if:	A petition may be filed with TCEQ requesting an inquiry upon evidence of any of the following:	
Engaging in Joint Planning	A district or districts refused to join in the planning process (§36.108(f)); or	A district or districts fail to engage in joint planning;	Allows for a petition to be filed without having to challenge the district for not having adopted rules, as the current process requires evidence that is not related to the petition basis.
Reasonableness of DFC	The process failed to result in adequate planning, including the establishment of reasonable future desired conditions (§36.108(f)); [Note: The petition process for determining reasonableness of DFCs rests with the Board as laid out in §36.108(i)-(n).] <i>In addition, a petition must provide evidence of any of the following:</i>	The process fails to result in establishment of reasonable DFCs; [Note: §36.108(i)-(n) would be repealed.]	Removes the Board's process for determining reasonableness of DFCs. TCEQ, as part of its existing DFC petition process, would accept petitions for the reasonableness of DFCs just as it would accept petitions for any other element related to the DFC. TCEQ would need to adopt rules to define a "reasonable" DFC. The provision for adequate planning is removed because it would be covered under a petition related to reasonableness of a DFC.
District Rule Adoption	A district in the GMA has failed to adopt rules (§36.108(f)(1));	A district in the GMA has failed to adopt rules or update its management plan to implement the DFC within one year of the GMA's adoption of the DFC;	Adds a timeframe for a district to adopt rules and update its management plan to implement DFCs. With no deadline for such rules, the validity of petitions at TCEQ is unclear.
Rules to Achieve DFC Rules to Protect Groundwater in the GMA	Rules adopted by a district are not designed to achieve the DFC (§36.108(f)(2)); Groundwater in a GMA is not adequately protected by district rules (§36.108(f)(3)); or	Same. Same.	TCEQ would need to adopt rules to define what constitutes "adequately protected" groundwater.

**Major Elements of a Unified DFC Petition Process**

Element	TCEQ's Current Process	Sunset Proposed Process	Comments
Enforcement of Rules	Groundwater in the GMA is not adequately protected due to failure of a district to enforce substantial compliance with its rules (§36.108(f)(4)).	Same.	
<b>Processing the Petition</b>			
Time Period for TCEQ Review	The Commission shall review the petition not later than 90 days after the date the petition is filed (§36.108(g)).	The Executive Director shall administratively review the petition not later than 60 days after the date the petition is filed.	Timeframe reduced to 60 days because of removal of the requirement to appoint a review panel and because the petition review is administrative.
Dismissal	The Commission shall dismiss the petition if it finds that the evidence is not adequate to show the conditions alleged in the petition exist (§36.108 (g)(1)). No equivalent provision.	The Commission or Executive Director shall dismiss the petition if it finds that no evidence was submitted to support the petition.	Clarifies that dismissal of a petition is based on an administrative, rather than substantive, review of the petition.
Technical Assistance		If, within TCEQ's 60-day review period, the Commission or Executive Director finds the need for a technical analysis of the hydrogeology of the area or other matters within the Board's expertise, the Commission or Executive Director may request a study from the Board. The Board must consider any relevant information provided by the petition, groundwater availability models, published studies, or any other information deemed relevant, and must submit a completed study to TCEQ and SOAH for inclusion in the court record within 120 days of the request. The Board shall serve as an expert witness if called by any party or the administrative law judge (ALJ).	Process for the Board to provide technical expertise is similar to its role in priority groundwater management area (PGMA) cases at TCEQ and the State Office of Administrative Hearings (SOAH). The Board would provide an analysis of hydrogeology related to the area, and TCEQ and SOAH would use this analysis, for example, to supplement evaluation of the subjective factors associated with the reasonableness or adequate protection of groundwater standards, according to TCEQ's definitions of these terms. As in PGMA cases, the Board would serve as an expert witness or provide additional information, as needed.
<b>Hearing Process</b>			
Who Conducts the Hearing	If the Commission does not dismiss the petition, it shall appoint a five-member review panel that may consist of directors or general managers of districts outside the GMA, with no more than two members from any one district. The Commission may appoint a disinterested person, who may be a Commission employee, to serve as a	If the Commission or Executive Director does not dismiss the petition, it shall refer the petition for a contested case hearing at SOAH. The hearing is to be conducted by an ALJ under APA, with TCEQ providing notice of the hearing to each district and regional water planning group in the GMA. The Board is not a party to the appeal. The Executive Director or the Commission, on a	The Sunset proposal is based on the PGMA process, which SOAH also conducts for TCEQ. Having an ALJ conduct hearings, instead of a review panel, provides for a disinterested party with experience in contested case hearings and applying rules of evidence. The Executive Director would not always need

**Major Elements of a Unified DFC Petition Process**

Element	TCEQ's Current Process	Sunset Proposed Process	Comments
Who Conducts the Hearing (continued)	nonvoting recording secretary for the panel (§36.108 (g)(2) and (h)).	case-by-case basis, shall determine whether the Executive Director participates as a party to appeals based on criteria TCEQ determines by rule.	to be a party; the petitioner and districts in the GMA would likely be the parties in most cases. However, cases involving adequate protection of groundwater or other broad policy questions affecting TCEQ could warrant the Executive Director's participation as a party.
Type of Hearing	Within 120 days of appointment, the review panel shall review the petition and any evidence relevant to the petition and, in a public meeting, adopt a report to be submitted to the Commission. The Commission may direct the review panel to conduct the public meeting at a location in the GMA. The review panel may negotiate a settlement or resolve the dispute by any lawful means (§36.108(i)).	Evidentiary hearings are to be held at a location in the GMA. The ALJ may request information determined necessary from any source.	Evidentiary hearings at SOAH, similar to the PGMA process, rather than public meetings before panels of district directors and general managers provide a clear record under the rules of evidence, encompassing discovery, cross-examination, and other due process protections. Evidentiary hearings support judicial review based on substantial evidence of the record, rather than a full de novo review.
Findings and Action	The review panel's report shall include a summary of all evidence taken in any hearing on the petition; a list of findings and recommended actions for the Commission to take; and any other information the panel considers appropriate (§36.108(j)).  The Commission may take action to implement a review panel's recommendation, including taking action against a district under sec. §36.3011.	After receiving the ALJ's findings of fact and conclusions of law, including recommended changes to the DFC if it is found not reasonable, the Commission shall issue an order stating its findings and conclusions, and may take action under sec. §36.3011. If found not reasonable, districts in a GMA would be required to revise their DFC in accordance with Commission order and resubmit the DFC to the Board.	Modifies Commission action based on findings of fact and conclusions of law from an ALJ, rather than a summary of evidence from a five-member review panel, to reflect standard practices resulting from contested case hearings.
Appeals	Appeals of Commission orders shall be in district court of any of the counties in which the land is located (§36.309).	Appeals of Commission orders shall be filed in district court in Travis County under substantial evidence review.	Changes the judicial venue and specifies a level of review to match standard contested case hearings at the state level.

## **Management Action**

### **3.3 TCEQ should promote mediation in desired future condition petition cases where appropriate.**

Under this recommendation, TCEQ should promote mediation as a means to resolve a petition in any DFC petition case it determines is an appropriate candidate for mediation. TCEQ should use procedures similar to those it currently uses in its other regulatory processes to make the parties aware of mediation options.

## **Fiscal Implication Summary**

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Recommendation 3.2, unifying the petition processes for DFC reasonableness and implementation, would not have a significant cost to the State. However, a precise fiscal impact cannot be fully determined at this time because the number of petitions or length of the hearings cannot be accurately estimated. Based on the process for deciding priority groundwater management area cases – the nearest and most similar type of contested case at TCEQ – which average approximately 50 hours of work for an administrative law judge at SOAH's billing rate of \$100 per hour, a reasonable estimate of SOAH's costs would be approximately \$5,000 per case. To conduct evidentiary hearings in the GMA, SOAH would also incur travel costs, depending on the location of the hearings.

TCEQ should not have significant costs associated with processing petitions, as it is already responsible for processing petitions for its own process. TCEQ could absorb the review of any additional petitions relating to the reasonableness of a DFC with existing resources, as the review would largely be administrative. TCEQ will have increased costs associated with being a party to any hearings, such as travel and compensating SOAH for its contested case hearings costs. However, TCEQ will have some minimal savings from no longer appointing and supporting five-member review panels to hear DFC petitions.

Because the Board would no longer accept petitions relating to the reasonableness of DFCs, it would no longer need the resources associated with the DFC petitions. No additional costs to the Board for its technical analyses would be needed, as costs for preparing the technical analyses could be absorbed with the Board's current resources.

In summary, a reasonable estimate of a contested case hearing for a DFC petition would be \$7,000 per case, including SOAH costs for an administrative law judge and travel costs for both SOAH and TCEQ staff – assuming TCEQ was a party to the case. In 2007, the Legislature funded one full-time employee to assist with the Board's DFC petitions, which took approximately 10 percent of the employee's time. As such, the \$66,000 salary of the full-time employee would be transferred from the Board to TCEQ to offset its costs associated with the petition process.

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- 1 Texas Senate Bill 2, 79th Legislature (2005).
  - 2 Texas Water Code, sec. 36.108(d).
  - 3 Texas Water Code, sec. 36.108(l).
  - 4 Texas Water Code, sec. 36.108(f).
  - 5 Ibid.
  - 6 Texas Water Code, sec. 36.309.
  - 7 The term "Commission," for purposes of this issue, refers to the policy body of the Texas Commission on Environmental Quality.
  - 8 GMA 9 voted not to change the DFC for Bandera and Kendall Counties and rejected the Board's recommended DFC for Kerr County by declaring the aquifer in Kerr County to be "not relevant."
  - 9 Texas Water Code, sec. 36.108(l).
  - 10 Texas Water Code, sec. 6.241.
  - 11 Texas Water Code, sec. 36.303.
  - 12 Texas Water Code, sec. 36.301.
  - 13 Texas Water Code, secs. 6.011 and 6.012.
  - 14 Texas Water Code, sec. 36.108(f).
  - 15 Texas Water Code, secs. 36.108(f) and (f)(4).
  - 16 Texas Water Code, sec. 36.309.

# Issue 4

## ***Structural and Technical Barriers Prevent the Board From Providing Effective Leadership in Geographic Information Systems.***

### **Background**

The Texas Natural Resources Information System (TNRIS) is a division within the Board that serves Texas agencies and citizens as the centralized information clearinghouse and referral center for geographic information system (GIS) data, including natural resource, census, socioeconomic, and emergency management-related data.<sup>1</sup> The Legislature established TNRIS within the Board in 1968 in keeping with the Board's responsibilities to gather and disseminate water-related data and maps. Today, TNRIS is responsible for acquisition and quality assurance of key statewide data sets used to develop and disseminate geographic data products, such as the State's common digital base maps. Base maps are statewide digital data sets containing related features for a common theme, or layer. The textbox, *Statewide Digital Base Map Layers*, describes TNRIS' six base map layers that are used and enhanced by other agencies to accomplish a wide range of activities. Other types of data TNRIS maintains include floodplain maps, historical imagery, hazard models for emergency management, and aerial photography.

#### ***Statewide Digital Base Map Layers***

- ***Political Boundaries.*** The Texas Legislative Council uses this data to create maps of legislative and other districts and proposed redistricting plans.
- ***Transportation.*** The Texas Department of Transportation uses this data to map roadways that it oversees.
- ***Hydrography.*** The General Land Office uses hydrography maps to model the tides' effect on the flow of water into bays and estuaries to predict how oil spills may spread to aid in its response.
- ***Soils.*** The Texas Animal Health Commission uses this information in combination with land cover data to track the behavior of animal disease outbreaks, such as anthrax.
- ***Orthoimagery.*** The Texas Commission on Environmental Quality conducts ambient air monitoring using imagery and mapping to pinpoint emission sources to support permitting decisions, enforcement actions, and air quality studies.
- ***Elevation.*** The Texas Water Development Board uses this data to review flood studies and models that define 100-year flood zones which become part of Digital Flood Insurance Rate Maps.

TNRIS operates within two separate environments: development and production. Its development environment contains raw, unprocessed data, such as digital photography. In this environment, TNRIS stores and maintains the raw data and manipulates it to make it available for more widespread use. Through this process, TNRIS produces user-friendly maps and other data products that it makes available through its production environment. These products include the digital base map layers, as discussed above, and other maps that TNRIS makes available to the public on its website.

- ***Emergency Management.*** TNRIS also serves an emergency response role, providing access to the latest and most accurate data critical to emergency responders in managing a crisis.<sup>2</sup> In preparation for hurricanes, TNRIS adapts and distributes a variety of geographic data in a time-sensitive environment to emergency responders. For example, TNRIS receives and enhances the

quality of Federal Emergency Management Agency (FEMA) data and uses the data to run hazard models that identify hurricane impact zones and response resource locations, such as points of distribution for food, water, ice, and fuel. The model combines a range of geographic data, including census, critical infrastructure, and commercial and residential development data, with storm event impact parameters, including hurricane path, wind speed, and storm surge. TNRIS must quickly disseminate critical data to prevent delays in emergency response.

- **Data Center Services Contract.** Since 2006, the Department of Information Resources (DIR) has managed the delivery of consolidated data center services to 27 state agencies and one university through a seven-year contract with IBM, through its consortium of providers, called Team for Texas. The contract includes consolidation of server and mainframe computer processing, print/mail functions, disaster recovery, security, and data center facility management. DIR included the management of the Board's data center in the contract. In December 2009, DIR granted TNRIS a partial exemption from the contract for its data and product development environment activities. The magnitude of the data involved in this development environment made it essential for TNRIS to have quick access to be able to manipulate the raw data for more widespread use. It could not manipulate this data remotely, as required under the contract. The exemption to the contract, however, does not extend to TNRIS' hardware resources related to its production environment, the mechanism by which TNRIS disseminates information to the public.
- **Texas Geographic Information Council (TGIC).** The Legislature created the TNRIS Task Force in 1972 as an interagency council to help define the nature of the geographic data TNRIS would collect and to provide coordination between TNRIS and state agencies. By 1997, the Task Force evolved into what is now the Texas Geographic Information Council to provide strategic planning and coordination in the acquisition and use of geo-spatial data and related technologies, such as that used by TNRIS.<sup>3</sup> As co-sponsors of TGIC, the Board and DIR provide administrative support and hold permanent positions on TGIC's governing body, the Steering Committee. TGIC comprises 43 members with representation from state, local, and federal government, as well as regional organizations and institutions of higher education.

## Findings

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**Despite its partial exemption from the data center services contract, TNRIS still faces constraints on its ability to effectively execute its duties.**

- **Characteristics of TNRIS' GIS data make it inappropriate for the data center services contract.** DIR acknowledged TNRIS' unique and dynamic use of GIS data was not appropriate for the data center's static environment when it granted TNRIS an exemption of its development environment. However, TNRIS' production environment continues to be negatively impacted by data center constraints. Specifically, the Board's cost of storage and services to support these typically large GIS data files under the contract is expensive, ranging from \$1.42 to \$2.39 per gigabyte over the past two fiscal years. The competitive market can deliver more flexible pricing and services for GIS data storage. For example, TNRIS indicates the competitive market can offer a rate of \$0.40 per gigabyte to house and service the same storage capacity TNRIS currently receives

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*TNRIS' production environment continues to be negatively affected by data center constraints.*

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under the data center services contract. Because the Board cannot afford data center services' costs of storage, 66 percent of TNRIS' current volume of ready-to-use final data products is not actually being stored under data center services. This data represents a \$14.2 million investment in raw data costs, \$5.6 million of which comes from the State. This data is instead housed at TNRIS only on portable hard drives, available for physical pick up or delivery, but not available for on-demand electronic web downloads. Even within the data center services network, the current lack of capacity slows the movement of large GIS files, preventing TNRIS personnel from rapidly uploading new data products for immediate and widespread use.

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*Sixty-six percent of the volume of TNRIS' final data products is not stored under data center services.*

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- **The lack of administrative control over system-level operations jeopardizes the reliability of TNRIS' services during emergency events.** Because TNRIS does not control its production environment, it indicates it cannot effectively disseminate key geographic data, such as maps and models, to emergency responders through its website. The large size of GIS data transfers requires TNRIS to rapidly upload data for immediate internet access if the transfers are to be successful. Such data transfers are most efficiently performed by using portable hard drives as a tool to directly upload data to servers, rather than transferring data remotely. Storage of TNRIS data in any arrangement that does not allow for administrative control and access could potentially delay the communication of important geographic data needed in an emergency. At such time, the capacity to respond is time-sensitive and highly dependent on TNRIS personnel's ability to quickly accomplish GIS data uploads to its website for immediate access to provide the best available statewide data for managing the crisis.

Since entering into the contract, TNRIS has experienced a number of challenges that affect its emergency response operations. Specifically, during Hurricane Ike in 2008, the Board's servers, including TNRIS', were powered down just as the hurricane made landfall. Because TNRIS lacks administrative control over its servers, it could not quickly restore the servers, which delayed TNRIS in providing information in response to an emergency event. The textbox on the following page, *Elements of Data Consolidation Preventing Effective Emergency Response*, describes the challenges TNRIS indicates affect the Board's emergency response duties in general.

**The Texas Geographic Information Council is ineffective and does not provide leadership or coordination for advancing statewide GIS initiatives.**

TGIC does not take an active role in advising decision makers about the availability and use of GIS information, and does not effectively advance the use of GIS data and technology for the support of state government operations or to address state policy needs. Moreover, as the following material shows, TGIC's statutory responsibilities are either already performed by TNRIS or are no longer needed.

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*TGIC's functions are either no longer needed or already performed by TNRIS.*

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### **Elements of Data Consolidation Preventing Effective Emergency Response**

- **Data Center Services Protocols** impose additional steps and paperwork that require third-party handling, causing administrative delays in the transfer of TNRIS data from disk to server, and distracts TNRIS personnel from emergency response activities.
- **Lack of Flexibility** through administrative control prevents TNRIS from scaling up additional resources to meet demands of the emergency event, such as allocating servers and storage as necessary to meet demand.
- **Loss of System Enhancement Capabilities** prevents TNRIS from completing real-time software and component upgrades essential to maintaining functioning systems during an event.
- **Lack of Consistent Backups** during normal operations has resulted in TNRIS maintaining redundant systems and data during emergency situations, defeating the purpose of data consolidation.
- **Uncertainty of Administrative Task Timing** prevents TNRIS from ensuring backups are in place ahead of security patches and updates, to prevent any disconnection of data transmission during an emergency as a result of the update.
- **Aging Hardware** as a result of delays in data center transformation, or transfer to the consolidated data centers, places TNRIS at risk of losing critical data, particularly during emergencies when demand for access increases.

- **Agency Guidance.** TGIC does not provide guidance to the Board regarding TNRIS' operations. Guidance to DIR on statewide GIS standards is also not needed because national and international standards exist to address the development, use, sharing, and dissemination of GIS data, as well as systems interoperability.<sup>4</sup>
- **Strategic Planning.** TGIC has only engaged in limited strategic planning efforts related to GIS, such as a Base Map Plan in 2007 addressing acquisition of more statewide digital base map layers. However, TNRIS, which houses the base maps as a part of its Strategic Mapping Program, already coordinates and prioritizes base map layer acquisition and is the more appropriate entity to report on updates and progress related to base map activity.
- **Data Acquisition.** TNRIS coordinates GIS acquisition without TGIC's guidance through the Board's administration of the High Priority Imagery and Data Sets (HPIDS) state master purchasing contract for geographic data. Before this contract, no GIS purchasing controls existed to prevent redundant data acquisitions across the state. Since the Council on Competitive Government awarded the contract to the Board, TGIC's guidance is no longer necessary.
- **Data Use.** While TGIC provides a forum for exchanging information on the use of GIS and promoting coordination of actual GIS data, this function is also accomplished through the Board's sponsorship of its annual GIS forum, as well as coordination of the HPIDS contract.

Statutorily intended to be a high-level decision-making body, TGIC has had limited executive involvement, and functions more as a user group guided by its co-sponsors, rather than objectively weighing GIS policy issues to effectively guide the work of its sponsoring agencies. A charter that governs

TGIC's structure and activity has not delivered either organizational or operational improvements. In recognition of its challenges, TGIC began considering changes to its structure in 2008. However, two years later, TGIC still has not implemented any changes. The textbox, *TGIC Organizational and Operational Challenges*, further details problems plaguing TGIC's effectiveness in executing its responsibilities.

#### ***TGIC Organizational and Operational Challenges***

- Forty-three member agencies make decision making, establishing a quorum, and voting difficult.
- Agency co-sponsorship by the Board and DIR provides competing visions for leading statewide GIS efforts.
- TGIC failed to meet its charter requirements for Steering Committee elections every two years, holding no elections in 2010.
- TGIC has no minutes from full council meetings.
- Neither the full Council nor its committees meet regularly or achieve meeting guidelines in its charter.
  - Charter requires the full Council to meet quarterly. However, the full Council has met only once since October 27, 2009.
  - Charter requires the Steering Committee to meet monthly, yet only two Steering Committee meetings have taken place in 2010.
  - The Technical Advisory Committee has not met since February 7, 2008.

#### **TNRIS lacks clear statutory direction to coordinate and advance GIS initiatives.**

While statute clearly establishes TNRIS as the State's centralized clearinghouse and referral center for geographic data, it does not clearly outline TNRIS' other responsibilities. The addition of significant functions and funding, detailed in the textbox, *TNRIS Initiatives*, has informally made TNRIS the State's leader in coordinating and acquiring geographic data. Stakeholders, such as state, local, and federal agencies, rely on and benefit from TNRIS' coordination of partnerships for the use and acquisition of GIS data, contributing to significant cost savings of \$1.9 million for the State since 2009. Despite this high-level recognition of TNRIS, it is still not clearly established as the State's leader on GIS matters.

#### ***TNRIS Initiatives***

**Strategic Mapping Program (StratMap)** – The Legislature, through Senate Bill 1 (1997), provided \$10 million to create a statewide compilation of digital base map layers, including political boundaries, transportation, hydrography, soils, orthoimagery, and elevation.

**Geospatial Emergency Management Support System (GEMSS)** – In recognition of the Board's role providing geographic data during emergencies, FEMA awarded the Board a grant to create a dedicated repository of comprehensive information about hurricanes impacting the Texas coast.

**High Priority Imagery and Data Sets (HPIDS)** – The Council on Competitive Government awarded the Board administration of the state master purchasing contract for high priority imagery and data sets, such as Light Detection And Ranging (LiDAR) elevation data and orthoimagery, or aerial photographs.

The lack of a clear leader for GIS in the state can create missed opportunities to more effectively incorporate GIS technology into state government. GIS technology is widely used, but other opportunities for the use of GIS data and technology could be realized to make state government more accessible to the public.

## Recommendations

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### ***Management Action***

- 4.1 The Board should request a full exemption for TNRIS from the data center services contract at DIR to accommodate its statutory emergency management responsibilities.**

The Board should pursue a full TNRIS exemption from the data center services contract at DIR to allow both TNRIS' development and production environments to operate outside the contract. The Board's other data center resources, such as email and accounting systems and geographic data outside of TNRIS, would remain in the contract.

### ***Change in Statute***

- 4.2 Clarify TNRIS' duties regarding coordinating and advancing GIS initiatives.**

In accordance with TNRIS' existing role as the centralized clearinghouse and referral center for state geographic data, this recommendation would designate the Director of TNRIS as the State Geographic Information Officer, reporting to the Board's Executive Administrator, responsible for:

- coordinating the acquisition and use of high priority imagery and data sets;
- establishing, supporting, and/or disseminating authoritative statewide geographic data sets;
- supporting geographic data needs of emergency management responders during emergencies;
- monitoring trends in geographic information technology; and
- supporting public access to state geographic data and resources.

- 4.3 Require the Board, in consultation with stakeholders, to report TNRIS' progress in executing its responsibilities and to propose new initiatives for geographic data to the Legislature.**

The Board shall, in consultation with stakeholders, submit a report at least once every five years to the Governor, Lieutenant Governor, and Speaker of the House of Representatives with recommendations related to:

- statewide geographic data acquisition needs and priorities, including updates on the progress in maintaining the statewide digital base maps;
- policy initiatives to address the acquisition, use, storage, and sharing of geographic data across state government;

- funding needs to acquire data, implement technologies, or pursue statewide policy initiatives related to geographic data; and
- opportunities for new initiatives to improve the efficiency, effectiveness, or accessibility of state government operations through the use of geographic data.

In fulfilling this requirement, the Board may establish advisory committees, as needed, to accomplish its functions or to obtain input from state agencies in preparing its report to the Legislature. In designating the membership of any advisory committees, the Board must consider inclusion of the major users of geographic data in state government. Advisory committees should include liaisons from other interests, such as federal or local agencies, and the state information technology agency.

#### 4.4 Abolish the Texas Geographic Information Council.

This recommendation would remove TGIC and its related functions from statute, as its functions are either no longer needed or already performed by the Board through TNRIS. This recommendation does not eliminate any of the Executive Administrator's statutory duties related to TNRIS operations and other duties related to geographic data. However, performing these duties will no longer require guidance from TGIC. Abolishing TGIC should not preclude DIR, or any other agency, from pursuing GIS initiatives, but they should coordinate those initiatives with TNRIS and other state agencies that may benefit from those efforts. This recommendation would create minimal savings from reduced staff time and report production.

### Fiscal Implication Summary

Exempting TNRIS from the data center services contract would enable the Board to store all of its desired production data and still realize approximately \$2.7 million in savings in general revenue over the next two years, due primarily to a reduction in data storage costs. The chart, *TNRIS Data Center Services Cost Comparisons*, compares TNRIS' anticipated data center services costs with TNRIS' estimated costs to store the data in house as a result of a full data center services exemption. These costs include services related to test and production servers, network, software licenses, backup service, and storage. Costs represented under a full TNRIS exemption reflect larger storage capacity to meet TNRIS' full storage needs. TNRIS would not need additional full-time employees or resources to store and service its data in house.

*TNRIS Data Center Services Cost Comparisons<sup>a</sup>*

	Data Center Services	TNRIS In House	Savings
FY 2012	\$1,855,924	\$921,044 <sup>b</sup>	\$934,880
FY 2013	\$2,060,870	\$268,705	\$1,792,165
<b>Two-year Total</b>	<b>\$3,916,794</b>	<b>\$1,189,749</b>	<b>\$2,727,045</b>

<sup>a</sup> This table reflects a two-year time period because the current data center services contract with IBM only extends through 2013.

<sup>b</sup> This figure includes TNRIS' anticipated costs of \$512,245 which include an initial investment in necessary hardware upgrades it indicates are not currently allowed under the data center services contract. The figure also includes DIR's estimated penalties of \$408,799 in outstanding liability payments for amortized transformation expenses.

The two-year savings estimate includes DIR's estimated costs of \$408,799 in fiscal year 2012 in outstanding liability payments for amortized transformation expenses based on the life of the contract. DIR is unable to estimate costs related to redistributing the lost volume from removing TNRIS from the contract among participating agencies, or costs related to returning the Board's assets, such as TNRIS' hardware, software, and associated software maintenance agreements, until the Board, DIR, and service provider staff can agree on a separation plan. Although TNRIS costs represent approximately 59 percent of the Board's data center services costs, the Board estimates its costs represent only 1.3 percent of the total data center services contract.<sup>5</sup> As a result, removing the remaining portion of TNRIS from the data center services contract should not significantly impact other agencies in the contract or the estimated \$2.7 million in savings.

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<sup>1</sup> Texas Water Code, sec. 16.021.

<sup>2</sup> Texas Water Code, sec. 16.021(a)(3).

<sup>3</sup> Texas Water Code, secs. 16.021(c) – (e).

<sup>4</sup> Open Geospatial Consortium, Inc, [www.opengeospatial.org/standards](http://www.opengeospatial.org/standards). Accessed: September 1, 2010; The Federal Geographic Data Committee, [www.fgdc.gov/standards](http://www.fgdc.gov/standards). Accessed: September 1, 2010.

<sup>5</sup> Texas Water Development Board, *Data Center Services Update* (Austin, Texas, May 2010).

# Issue 5

## ***The Board Lacks Data to Determine Whether Implementation of Conservation and Other Water Management Strategies Is Meeting the State's Future Water Needs.***

### **Background**

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In 1997, the Legislature established a bottom-up, regional process to plan for the State's future water needs.<sup>1</sup> The Board designated 16 regional water planning groups (RWPGs) responsible for developing a water plan to meet the region's estimated future water demand over a 50-year horizon. The Board compiles the regional plans into a single, comprehensive State Water Plan every five years outlining the State's total water supplies and demands. Regional water plans include a variety of water management strategies to develop new, or maximize existing, water supplies to meet future water needs of each city, water utility, county, and other water user groups. Examples of water management strategies include:

- implementing water conservation and drought management;
- developing new surface water and groundwater supplies;
- expanding and improving management of existing water supplies, such as optimizing reservoir systems or moving water from one area to another;
- increasing water reuse; and
- implementing innovative water initiatives such as desalination and aquifer storage and recovery.

Statute requires RWPGs, as part of their regional water plans, to recommend conservation strategies when applicable to the region.<sup>2</sup> Water conservation strategies can be an environmentally friendly and cost-effective way to manage existing water supplies, as conservation programs may eliminate the need for expensive and potentially environmentally damaging water infrastructure projects such as new reservoirs and pipelines. Water conservation strategies include social and technological approaches to reduce residential, commercial, and institutional water use, as well as irrigation and land management systems to reduce agriculture water use. Specifically for municipal water conservation strategies, RWPGs focus on reductions in water use per person. These gallons per capita daily figures (GPCD), as they are commonly known, are used for planning purposes to describe populations' water use.

In an effort to promote water conservation and to reduce the need for expensive infrastructure, statute requires certain entities to submit water conservation plans every five years to either the Board or the Texas Commission on Environmental Quality (TCEQ). The Board uses conservation plans to ensure its financial assistance applicants have strategies for reducing water consumption and improving water use efficiency, and TCEQ uses the plans during the water right application process to ensure applicants have and use plans to conserve appropriated water. In 2007, the Legislature required any entity submitting a conservation plan to either state agency to also begin submitting an annual report to the Board on progress implementing its conservation plan. To keep entities from having to produce two different documents, both agencies allow conservation plans submitted to one agency to be accepted by the other. The chart on the following page, *Water Conservation Plan Submittal*, outlines which entities submit conservation plans and subsequent reporting documents to the Board and TCEQ.

**Water Conservation Plan Submittal**

Entity	Water Conservation Plan & Annual Progress Report to the Board	Water Conservation Plan & Five-year Implementation Report to TCEQ
All Board financial assistance applicants	✓	
Select water rights applicants and permit holders*	✓	✓
Retail public water suppliers providing service to 3,300 or more connections	✓	

\* Includes all new water rights applicants; municipal, industrial/mining, and other non-agricultural water right holders of 1,000 acre-feet of water per year or more; and agricultural water right holders of 10,000 acre-feet of water per year or more.

**Findings**

**The Board lacks comprehensive data for assessing the extent to which water planning efforts help facilitate meeting the State's future water supply needs.**

Since the beginning of the state water planning process in 1997, the Board has worked diligently to establish and support the regional framework for anticipating water needs and developing strategies for meeting those needs. Because the Board was in the early stages of getting regional planning efforts operational and because of the long-term nature of the planning, it has not needed to track the implementation of water management strategies. In addition, it has not been specifically charged with doing so. As the Board completes the third round of planning and more water strategies are implemented, however, the Board has a greater need to see how strategy implementation affects the overall water planning process and whether the State is on track to meet future water demands.

*As the Board completes its third round of regional water planning, it should evaluate whether the State is on track to meet future water demands.*

Some individual RWPGs have information on the implementation status of certain water management strategies in their region. For example, Region C's 2011 Initially Prepared Plan includes a section outlining water suppliers' progress in implementing strategies from its 2006 Regional Plan. However, not all regions provide such implementation information, and what they do provide is not comprehensive of all recommended strategies represented across regional water plans for the Board to compile and include in the State Water Plan. The Board does track state water plan projects receiving its financial assistance, but has not assessed the impact of those projects, or others not receiving Board financial assistance, in meeting the water needs outlined in the State Water Plan. Without a compilation of all implementation data, the State misses the opportunity to evaluate whether newly developed water supply projects, conservation efforts, and other strategies are actually meeting future water needs.

**The Board lacks sufficient methods to measure implementation of water conservation strategies.**

In the 2007 State Water Plan, conservation strategies generated the largest portion, 23 percent or approximately two million acre-feet, of water required to meet the State's anticipated needs in 2060. While measuring conservation is acknowledged to be difficult and occurs inconsistently across the state, without specific metrics to measure all types of conservation, the Board cannot determine whether the implementation of conservation strategies affects water use and planning for future water needs.

Among water conservation strategies, municipal conservation strategies, which focus on reducing residential, commercial, and institutional water use, make up nearly one-third of all recommended conservation strategies in the 2007 State Plan. Calculating GPCD is the generally accepted method for measuring and comparing populations' water use. However, each local entity has its own unique method for calculating and reporting GPCD and the Board lacks uniform calculation methods for consistent municipal conservation data reporting. One entity's GPCD figure may combine residential, commercial, and industrial water use while another's may reflect only residential water use, making it difficult to compare water use. Without uniform reporting methods to explain variation in water use, the State cannot effectively gauge progress of water conservation efforts. For example, South Padre Island, Texas has a high GPCD figure – 666 in 2007 – relative to comparably sized Combes, Texas, which used an average 70 GPCD in 2007. Tourist locations, such as South Padre, tend to have higher GPCD figures because they have a substantial transient population that uses water, but does not count as part of the base population. An accurate comparison of whether a tourist city has more successful conservation efforts than a non-tourist city should include an examination of the residential GPCD figures separate from commercial figures.

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*Each local entity  
has a unique  
method for  
calculating and  
reporting GPCD.*

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Water conservation plan annual reports submitted to the Board and implementation reports submitted to TCEQ provide a useful mechanism to assist in tracking implementation of municipal conservation efforts, through reporting of GPCD data. However, without uniform GPCD calculations, these reporting mechanisms do not accurately reflect actual conservation efforts or water use. The first round of annual reports was due to the Board in May 2010, so Board staff have not yet had the opportunity to evaluate implementation data over time.

**Interest in strengthening reporting requirements regarding municipal water use and conservation efforts has grown in recent years.**

In 2007, the Legislature established the Water Conservation Advisory Council (preceded by the Water Conservation Implementation Task Force) to monitor the development and implementation of the State's water

conservation efforts.<sup>3</sup> The Council is composed of 23 Board-appointed members, all representing different interests, and reports directly to the Legislature. Appendix C lays out the Council's representation and current membership. The Council's 2008 report made seven recommendations to the Legislature outlined in the textbox, *2008 Water Conservation Advisory Council Recommendations*, regarding water conservation implementation and measurement, specifically focusing on GPCD methodologies.<sup>4</sup> The Council is considering similar recommendations regarding detailed methods for measuring municipal conservation in its upcoming 2010 report, as well as developing metrics needed to track conservation efforts in water use categories less influenced by population, such as agriculture and industrial water use.

#### **2008 Water Conservation Advisory Council Recommendations**

The Council made specific recommendations related to developing the following topics.

- Methodology, metrics, and standards for water conservation implementation measurement and reporting.
- Specific guidelines for how GPCD should be determined and how it should be applied to population-dependent water use only.
- Reporting guidelines for improved data collection.
- Expanded data collection efforts, including all water providers and water use categories.
- A pilot project for water use reporting.
- A pilot project for determining population figures appropriate for certain water use metrics.
- Necessary resources for the Council to sufficiently develop and implement tools to monitor implementation of water conservation strategies recommended in the regional water plans.

Several of the RWPGs' 2011 Initially Prepared Plans support the Council's efforts to improve data collection and recommend the Legislature continue supporting the Council's work. While the Legislature has not formally adopted any of the Council's recommendations, several may help the Board measure water conservation and quantify implementation efforts.

## **Recommendations**

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### ***Change in Statute***

#### **5.1 As part of the State Water Plan, require the Board to evaluate the State's progress in meeting its water needs.**

This recommendation would require the Board to evaluate the State's progress in meeting future water needs through such means as tracking water management strategies and/or projects implemented since the last State Water Plan and report this information to the Legislature as part of the Board's State Water Plan. The Board would work with RWPGs to obtain implementation data and should include a summary of progress toward meeting the State's water needs as part of all future State Water Plans. Additionally, the Board should continue its analysis of how many implemented state water plan projects received its financial assistance, and include that analysis in the State Water Plan.

**5.2 Require the Board and TCEQ, in consultation with the Water Conservation Advisory Council, to develop uniform, detailed gallons per capita daily reporting requirements.**

This recommendation would require the Board and TCEQ to work with the Water Conservation Advisory Council to develop uniform GPCD reporting requirements outlining how entities calculate and report municipal water use. The agencies should incorporate the uniform methodologies into their existing annual report and five-year implementation report requirements.

Because the Board and TCEQ would only be developing reporting methodologies to include as part of their current processes, no fiscal impact to the State is anticipated. While some larger entities that submit water conservation plans currently have advanced billing systems capable of reporting detailed GPCD data immediately, smaller entities and those with fewer resources may not have such advanced capabilities. As such, the Board and TCEQ should, at a minimum, require entities to report the most detailed level of data currently available and consider phasing in more detailed reporting as capabilities improve and billing systems evolve.

***Management Action***

**5.3 As additional tools and data evolve, the Board should continue exploring ways to develop metrics for additional water use sectors and incentivize water conservation efforts.**

The Board should continue working with the Advisory Council to develop metrics to track implementation and reporting of water conservation strategies for water use sectors beyond municipal use to optimize water planning across the state. Additionally, as the Council makes new recommendations, data collection capabilities evolve, and entities' reporting systems improve, the Board should continue exploring ways to incentivize conservation efforts. For example, in the future, the Board could consider restructuring its financial assistance incentives and/or adding new incentives based on trend data from the water conservation plans and corresponding annual reports.

**Fiscal Implication Summary**

These recommendations should have no significant fiscal impact, as they can be accomplished within current processes and existing resources.

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<sup>1</sup> Texas Senate Bill 1, 75th Legislature (1997).

<sup>2</sup> Texas Water Code, sec. 16.053(e).

<sup>3</sup> Texas Senate Bill 3, 80th Legislature (2007).

<sup>4</sup> Water Conservation Advisory Council, *A Report on Progress of Water Conservation in Texas* (Austin, Texas, December 2008), pp. 6-8. Online. Available: [www.savetexaswater.org/documents/WCAC\\_report.pdf](http://www.savetexaswater.org/documents/WCAC_report.pdf).



# Issue 6

## ***The Board's Statute Does Not Reflect Standard Language Typically Applied Across-the-Board During Sunset Reviews.***

### **Background**

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The Sunset Commission adopts across-the-board (ATB) recommendations as standards for state agencies, reflecting criteria in the Sunset Act designed to ensure open, responsive, and effective government. The Sunset Commission applies ATBs to every state agency reviewed, unless a clear reason to exempt the agency is identified. Some Sunset ATBs address policy issues related to an agency's policymaking body, such as requiring public membership on boards or allowing the Governor to designate the chair of a board. Other Sunset ATBs require agencies to set consistent policies in areas such as how to handle complaints and how to ensure public input.

### **Finding**

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**Two across-the-board recommendations are not fully reflected in the Board's statute.**

- **Complaints.** The Board's statute contains outdated language regarding complaint information requirements, which is limited to written complaints and only provides that procedures for complaint investigations and resolutions be made available to the person filing the complaint. While not a regulatory agency, the Board receives several types of complaints within its jurisdiction to resolve, such as complaints against employees or regarding its processes. The Board's statutory complaint provisions should be updated to current standards.
- **Alternative Dispute Resolution.** The Board's governing statute does not include a standard provision relating to alternative rulemaking and dispute resolution that the Sunset Commission routinely applies to agencies under review. Without this provision, the agency could miss ways to improve rulemaking and dispute resolution through more open, inclusive, and conciliatory processes designed to solve problems by building consensus rather than through contested proceedings.

### **Recommendation**

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#### ***Change in Statute***

#### **6.1 Apply standard Sunset across-the-board requirements to the Texas Water Development Board.**

The recommendation would update the Board's complaint information requirements to clarify that the Board must maintain complaint information on all complaints, not just written complaints, and must provide information on its complaint procedures to the public.

The recommendation would also ensure that the Board develops and implements a policy to encourage alternative procedures for rulemaking and dispute resolution, conforming to the extent possible, to model guidelines by the State Office of Administrative Hearings. The agency would also coordinate implementation of the policy, provide training as needed, and collect data concerning the effectiveness of these procedures. Because the recommendation only requires the agency to develop a policy for this alternative approach to solving problems, it would not require additional staffing or other expenses.

## **Fiscal Implication Summary**

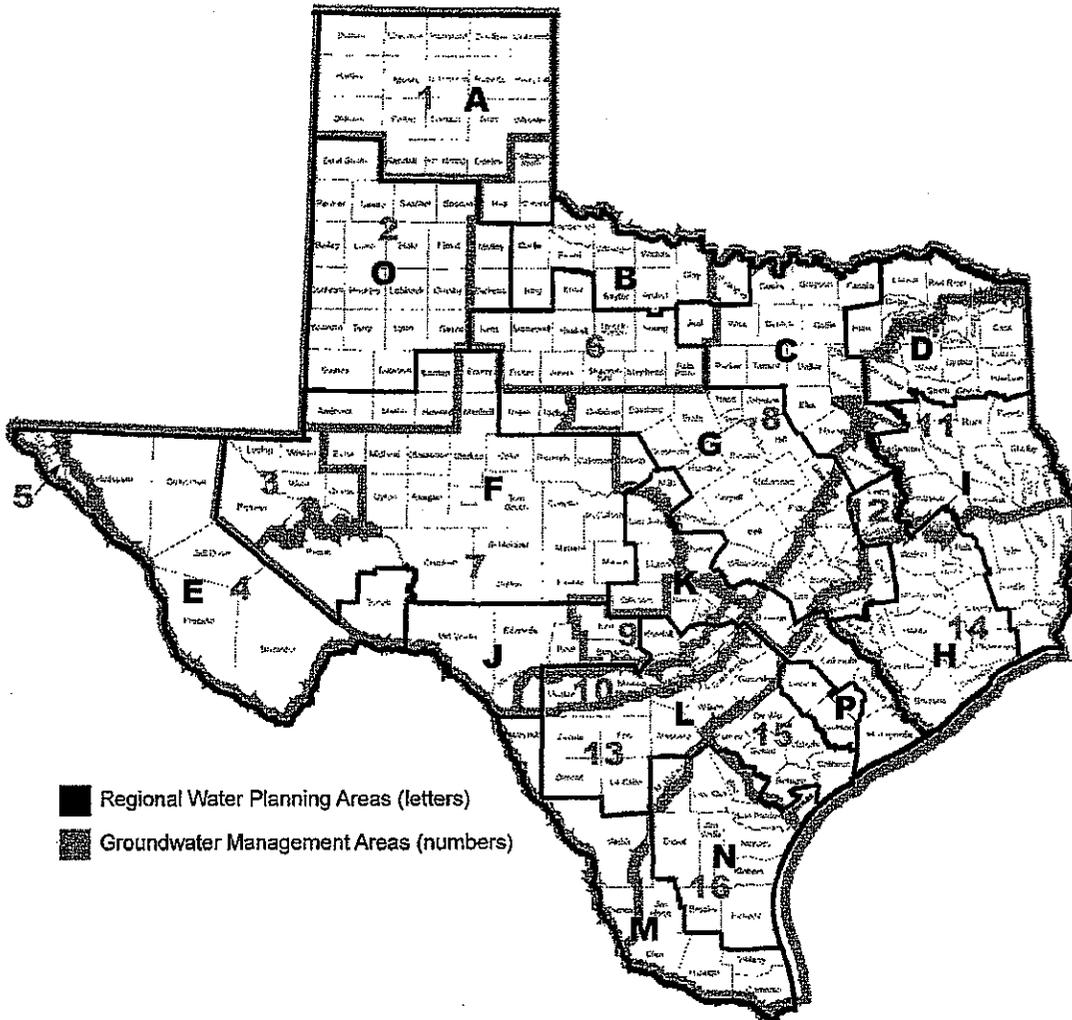
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This recommendation would not result in additional costs to the State.

*Appendices*

# Appendix A

## Groundwater Management and Regional Water Planning Areas

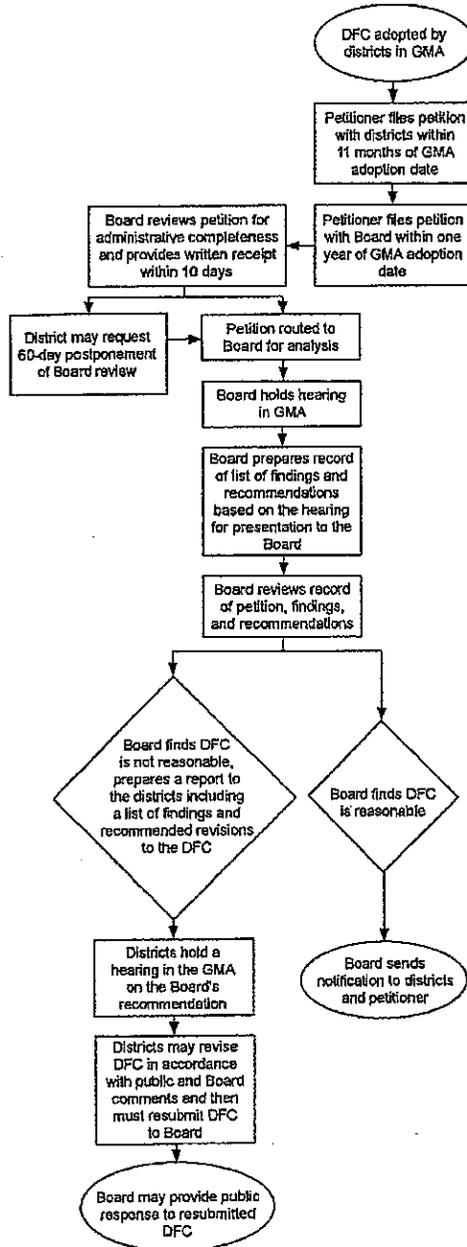




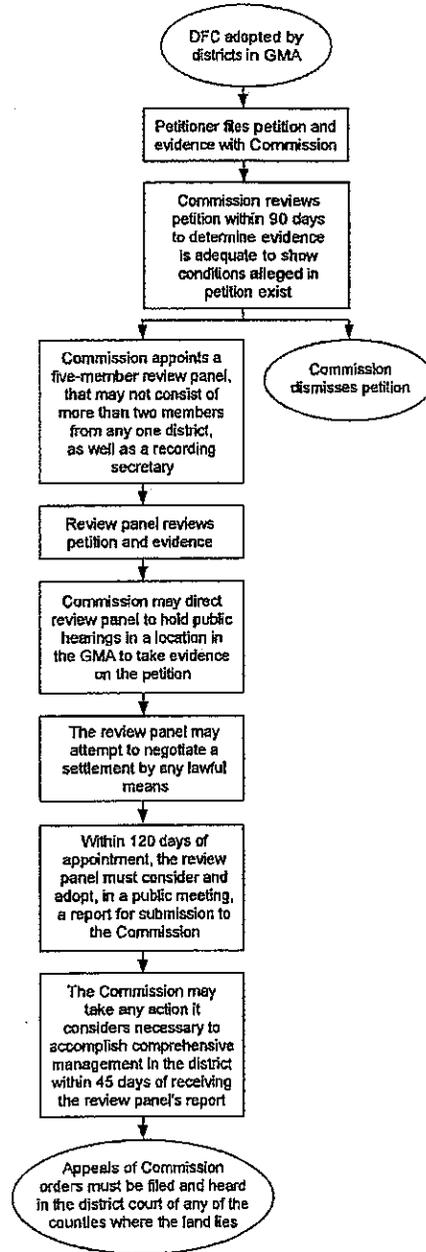
# Appendix B

## Petition Processes for Desired Future Conditions

### Board Process to Petition the Reasonableness of a DFC



### TCEQ Process to Petition a District's Management to the DFC





# Appendix C

## Water Conservation Advisory Council Membership

Interest Group	Member	Term Expires
Agricultural Groups	Wilson Scaling	2013
Electric Generation	Gary Spicer	2015
Environmental Groups	Ken Kramer	2015
Federal Agencies	Steven Bednarz	2011
Groundwater Conservation Districts	Luana Buckner	2013
Higher Education	Vivien Allen	2015
Institutional Water Users	H.W. Bill Hoffman	2013
Irrigation Districts	Wayne Halbert	2013
Landscape Irrigation and Horticulture	Kelly Hall	2011
Mining and Recovery of Minerals	Gene Montgomery	2013
Municipal Utility Districts	Donna Howe	2011
Municipalities	Karen Guz	2011
Professional Organization Focused on Water Conservation	Carole Baker	2013
Refining and Chemical Manufacturing	Karl Fennessey	2011
Regional Water Planning Groups	C.E. Williams	2015
River Authorities	James Parks	2015
Rural Water Users	Janet Adams	2015
Texas Commission on Environmental Quality	Scott Swanson	2011
Texas Department of Agriculture	Gary Walker	2011
Texas Parks and Wildlife Department	Cindy Loeffler	2015
Texas State Soil and Water Conservation Board	Richard Egg	2013
Texas Water Development Board	Robert Mace	2011
Water Control and Improvement Districts	James Oliver	2013



# Appendix D

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## Staff Review Activities

During the review of the Texas Water Development Board, Sunset staff engaged in the following activities that are standard to all Sunset reviews. Sunset staff worked extensively with agency personnel; attended Board meetings; met with staff from key legislative offices; conducted interviews and solicited written comments from interest groups and the public; reviewed agency documents and reports, state statutes, legislative reports, previous legislation, and literature; researched the organization and functions of similar state agencies in other states; and performed background and comparative research using the Internet.

In addition, Sunset staff also performed the following activities unique to this agency.

- Interviewed staff from the Texas Commission on Environmental Quality, Texas Bond Review Board, Department of Information Resources, Texas Department of Transportation, U.S. Geological Survey, Texas Parks and Wildlife Department, Texas Department of Rural Affairs, Office of the Attorney General, State Office of Administrative Hearings, Council on Competitive Government, and Office of the Secretary of State.
- Attended meetings of the Texas Geographic Information Council, Water Conservation Advisory Council, Taskforce on Uniform Model Subdivision Rules, Colonia Interagency Workgroup, and the Board's Design-Build Focus Group.
- Monitored interim legislative committee meetings.
- Toured Board-funded water supply and wastewater projects and economically distressed areas of the Rio Grande Valley.
- Attended a bay and basin expert science team meeting and a groundwater conservation district meeting.
- Attended meetings and interviewed representatives of regional water planning groups and groundwater management areas.
- Toured a regional water system project receiving Board funding and attended a construction progress meeting.



# SUNSET STAFF REVIEW OF THE TEXAS WATER DEVELOPMENT BOARD

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Exhibit 2

Cause No. D-1-GN-10-000819

MESA WATER, L.P. and G&J	§	IN THE DISTRICT COURT OF
RANCH, INC.,	§	
Plaintiffs,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
TEXAS WATER DEVELOPMENT	§	
BOARD,	§	
Defendant.	§	201 <sup>ST</sup> JUDICIAL DISTRICT

**THE TWDB'S FIRST AMENDED PLEA TO THE JURISDICTION**

TO THE HONORABLE SCOTT JENKINS:

The Texas Water Development Board (TWDB) asks the Court to find that it lacks jurisdiction over this suit because the TWDB merely advised local groundwater conservation districts as they planned for future rule-making and permitting activities

**SUMMARY OF THE ARGUMENT**

1. The Legislature vested authority to regulate withdrawals of groundwater in local groundwater districts, which are charged with first planning to meet future groundwater needs, then adopting their own rules, and then issuing (or not issuing) groundwater-withdrawal permits for existing and future uses. The TWDB provides science-based technical assistance for the local groundwater districts' planning activities. Plaintiffs allege that TWDB's comments to districts in the Panhandle were arbitrary and deprived the Plaintiffs of vested property rights.

2. A state agency generally is immune from suit unless the legislature has waived immunity. The statute that waives immunity for TWDB actions applies only to final orders: orders that fix rights or liabilities as the culmination of the administrative process.

3. Here, the TWDB reviewed the local groundwater districts' planning goals (called desired future conditions) and decided not to recommend changes. The TWDB action didn't fix rights or liabilities, so wasn't a reviewable "final order."

4. The Plaintiffs weren't injured by the TWDB's action. At most, the action satisfied one statutory-checklist item before the four groundwater districts in the Panhandle may adopt rules that might require the Plaintiffs to obtain permits from the districts. The Plaintiffs' rights might be adversely affected in a particularized, concrete way in the future once the districts have adopted rules and have decided whether to issue permits to the Plaintiffs.

5. Finally, because the TWDB merely commented on the local districts' planning goals without even making a recommendation, the "action" could not have taken any property from the Plaintiffs. The Plaintiffs cannot state valid takings claims against the TWDB, because there was neither a physical invasion of their property nor a regulatory command, let alone a command severely restricting economic uses of their property.

#### LEGAL AND FACTUAL CONTEXT OF THE CASE

**I. The statutes establish the TWDB as a technical advisor for groundwater management — not the regulator.**

**A. Introduction: In the beginning, there were local districts.**

6. The Texas Legislature enacted laws to manage use of *surface* water in 1889 and created the Board of Water Engineers in 1913 as a statewide agency to issue permits to appropriate the State's surface water.<sup>1</sup>

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<sup>1</sup> Ronald Kaiser, *Handbook of Texas Water Law: Problems and Needs*, pp. 6–7, Milestones in Texas Water Law; Tex. Water Res. Inst., TR-189 (1987). Available at <http://twri.tamu.edu/reports/2002/tr189/tr189.pdf> (accessed 7/27/2010). App. 7 is a copy of the milestones chart.

7. In contrast, when the legislature addressed management of *groundwater* in 1949, it authorized creation of *local* groundwater conservation districts rather than a statewide agency.<sup>2</sup> Local business and community leaders from the Panhandle promoted the local-control law to prevent regulation by a statewide agency.<sup>3</sup> Local landowners could create a district by petitioning the Board of Water Engineers, which would designate the initial boundaries of a district and set a local election at which the voters in each individual precinct would opt into or out of the district.<sup>4</sup> Three of the four districts whose collective action is challenged in this suit were the first three districts created under the law: the High Plains Underground Water Conservation District (created in 1951), and the North Plains and the Panhandle Groundwater Conservation Districts (created in 1955).<sup>5</sup>

8. The legislature has collected statutes pertinent to groundwater districts in Water Code Chapter 36. It states unequivocally: “Groundwater conservation districts . . . are the state’s preferred method of groundwater management *through rules developed, adopted, and promulgated by a district* in accordance with the provisions of this chapter.”<sup>6</sup> Thus the legislature anchored groundwater management in local control by local groundwater districts.

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<sup>2</sup> Act of May 23, 1949, 51<sup>st</sup> Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 55, *repealed by* Act of April 12, 1971, 62<sup>nd</sup> Leg., R.S., ch. 58, § 2, 1971 Tex. Gen. Laws 658.

<sup>3</sup> Donald E. Green, *Land of the Underground Rain: Irrigation in the Texas High Plains, 1910–1970*, pp. 173–78, University of Texas Press (1973).

<sup>4</sup> *Id.* at 177–78. The Board of Water Engineers is a predecessor to the TCEQ.

<sup>5</sup> Monique Norman, “Groundwater Management Area Joint Planning,” *Essentials of Texas Water Resources*, Mary K. Sahs, ed., p. 452 State Bar of Texas Env’tl. & Nat. Res. Law Section (2009) (cited herein as “Norman, ‘GMA Joint Planning,’ p. 452”). Ms. Norman is an attorney in private practice and represented the Panhandle District during the TWDB’s hearing on the Plaintiffs’ petition.

The legislature created the Hemphill District in 1997. Act of May 8, 1995, 74<sup>th</sup> Leg., R.S., ch. 157, 1995 Tex. Gen. Laws 1007.

<sup>6</sup> Tex. Water Code § 36.0015 (emphasis added). App. 4 includes copies of cited statutes.

**B. The TWDB was created as a financier for surface-water development and became the state's surface-water planner.**

9. Following the record drought of the 1950s, the legislature created the TWDB in 1957 to administer the constitutionally created Water Development Fund.<sup>7</sup> The TWDB issued bonds and deposited the proceeds in the Fund, then used the Fund to provide financial assistance for water conservation and development projects (such as reservoirs) undertaken by river authorities, cities, and other local governments. The legislature also enacted the Texas Water Planning Act of 1957<sup>8</sup> and transferred water-planning functions to the TWDB in 1965.<sup>9</sup> Initially, the state water plan addressed surface-water resources.

10. Groundwater-management planning developed differently. Initially, each landowner determined whether sufficient groundwater was available for withdrawals. In 1989, the legislature required groundwater districts to develop comprehensive groundwater-management plans and to submit them to the TCEQ.<sup>10</sup> The plans generally had to provide for the most efficient use of groundwater and to prevent waste and subsidence.

**C. The TWDB only recently became a technical advisor for local groundwater-management planning.**

11. The legislature overhauled water planning in 1997.<sup>11</sup> The TWDB now "provide[s] technical assistance to a [groundwater conservation] district in the development of the

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<sup>7</sup> Act of May 21, 1957, 55<sup>th</sup> Leg., R.S., ch. 425, § 3, 1957 Tex. Gen. Laws 1268, 1269.

<sup>8</sup> Act of Nov. 12, 1957, 55<sup>th</sup> Leg., 1<sup>st</sup> C.S., ch. 11, 1957 Tex. Gen. Laws 23.

<sup>9</sup> Act of May 27, 1965, 59<sup>th</sup> Leg., R.S., ch. 297, § 3, 1965 Tex. Gen. Laws 587, 590.

<sup>10</sup> Norman, "GMA Joint Planning," pp. 452-53. (More precisely, in 1989, the plans were submitted to the Texas Water Commission, which became the TNRCC and later the TCEQ.)

<sup>11</sup> Act of June 1, 1997, 75<sup>th</sup> Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610.

management plan . . . .”<sup>12</sup> And a district must use the TWDB’s groundwater modeling data to develop the district’s management plan.<sup>13</sup> A district now submits its completed plan to the TWDB for review, and the TWDB must approve the plan if it is “administratively complete,” that is, if it includes all the required elements.<sup>14</sup> Even though the TWDB provides technical advice and science-based modeling to the districts, the TWDB does *not* review or approve the substantive merits of a district’s plan. That remains within the local district’s discretion.

12. While the TWDB helps the districts develop management plans, the TCEQ has exclusive jurisdiction over the administrative creation of groundwater districts.<sup>15</sup> The TCEQ also assists new districts during their initial operational phase.<sup>16</sup> That is, the TWDB helps districts plan, whereas the TCEQ helps districts implement and enforce the plans.

**D. Since 2005, the TWDB may review and comment on districts’ planning goals and calculates the “managed available groundwater” based on those goals.**

13. In 2005, the legislature added a new twist, which is at the root of this litigation. It required each district’s groundwater-management plan to include “desired future conditions” of groundwater resources (“DFCs”),<sup>17</sup> required districts in a management area to develop the DFCs jointly, and allowed an interested person to ask the TWDB to review the DFCs.<sup>18</sup> The

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<sup>12</sup> Tex. Water Code § 36.1071(c); *accord* Tex. Water Code § 36.1071(d).

<sup>13</sup> Tex. Water Code § 36.1071(h).

<sup>14</sup> Tex. Water Code § 36.1072(a), (b).

<sup>15</sup> Tex. Water Code §§ 36.011–016.

<sup>16</sup> Tex. Water Code § 36.1071(d).

<sup>17</sup> Act of May 24, 2005, 79<sup>th</sup> Leg., R.S., ch. 970, § 5, 2005 Tex. Gen. Laws 3247, 3251 (cited herein as “H.B. 1763 (2005) § 5”) *codified at* Tex. Water Code § 36.1071(a)(8). App. 6 is a copy of H.B. 1763 (2005).

<sup>18</sup> H.B. 1763 (2005) § 8, *codified at* Tex. Water Code § 36.108(d)–(d-2), (l)–(o).

Plaintiffs objected to different DFCs being approved for different geographic areas of the 18-county management area of the Panhandle. They complain here that TWDB should have rejected all but one DFC for the whole area.

14. The legislation did not define “desired future conditions” except to note that the districts’ plans must address them “in a quantitative manner.”<sup>19</sup> The TWDB’s rules define the term as the “desired, quantified condition of groundwater resources (such as water levels, water quality, spring flows, or volumes) for a specified aquifer . . . at a specified time or times in the future . . . .”<sup>20</sup> Examples of possible desired future conditions include:

- spring flows won’t ever fall below 25 cubic feet per second;
- water quality won’t degrade beyond 1,000 milligrams per liter of total dissolved solids in the next 50 years; or
- 80 percent of the water stored in the aquifer will be available in 50 years.

15. At the legislature’s direction, the TWDB has designated groundwater management areas.<sup>21</sup> If a management area includes parts of two or more groundwater districts, those districts review each other’s plans annually. The new law requires the districts every five years to establish desired future conditions for the parts of aquifers in the management area.<sup>22</sup>

16. The districts must consider “uses or conditions of an aquifer . . . that differ substantially from one geographic area to another” of the management area.<sup>23</sup> The districts

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<sup>19</sup> H.B. 1763 (2005) § 5, *codified at* Tex. Water Code § 36.1071(a)(8).

<sup>20</sup> 31 Tex. Admin. Code § 356.2(8). App. 5 includes copies of cited rules.

<sup>21</sup> *See* Tex. Water Code § 35.004(a).

<sup>22</sup> H.B. 1763 (2005) § 8, *codified at* Tex. Water Code § 36.108(d)–(d-2).

<sup>23</sup> *Id.*, *codified at* Tex. Water Code § 36.108(d).

may set different DFCs (1) for each aquifer (or each geologically or hydrologically separate subdivision of an aquifer), or (2) for each geographic area overlying any part of an aquifer. If the districts set different DFCs for different geographic areas, the DFCs must be physically possible, individually and collectively.<sup>24</sup>

17. If someone with an interest in groundwater objects to the DFCs, the person may ask the TWDB to review and comment on them.<sup>25</sup> If the TWDB thinks that the DFCs should be revised, the Agency reports its findings and recommendations to the districts.<sup>26</sup> The districts then prepare draft revisions based on the TWDB's recommendations and hold a public hearing in the management area. After considering the TWDB's and the public's comments on the draft revisions, the districts finally revise the DFCs and forward them to the TWDB.

18. When the TWDB has the districts' final DFCs, it uses its groundwater models to calculate the "managed available groundwater" in the management area based on the DFCs and sends the data to districts and regional water-planning groups in the management area.

19. In contrast to the TWDB's role of providing comments and calculations for districts to consider, the TCEQ may order a district to act or refrain from acting, may dissolve a district or its board, or may seek appointment of a receiver to manage a district if the district fails to submit plans to the TWDB, fails to develop DFCs, fails to adopt rules, or fails to adopt rules to achieve the DFCs.<sup>27</sup>

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<sup>24</sup> 31 Tex. Admin. Code § 356.2(8).

<sup>25</sup> H.B. 1763 (2005) § 8, *codified at* Tex. Water Code § 36.108(l)-(o).

<sup>26</sup> *See also* 31 Tex. Admin. Code § 356.46.

<sup>27</sup> H.B. 1763 (2005), §§ 8, 13, *codified at* Tex. Water Code §§ 36.108(f)-(k), 36.3011. *See also* Tex. Water Code § 36.303 (actions by the TCEQ).

20. With respect to groundwater districts, the TCEQ enforces while the TWDB advises.

**E. The individual districts — not the TWDB — will adopt rules to implement their individual groundwater management plans that include DFCs.**

21. The 2005 legislation added DFCs and “managed available groundwater” (MAG) to the districts’ toolboxes.<sup>28</sup> DFCs are planning tools; MAGs are regulatory tools.

22. These new tools may affect a groundwater user in the future after districts have taken further actions. Each district must incorporate the final DFCs into its groundwater management plan.<sup>29</sup> Then each district must adopt rules to implement its management plan, including rules designed to achieve the DFCs.<sup>30</sup> Each district must adopt rules specifying what activities within the district will require a permit from the district.<sup>31</sup> Finally, after it has adopted procedural and substantive rules, has accepted permit applications, and has begun to issue permits, the district “to the extent possible” will issue permits “up to the point that the total volume of groundwater permitted equals the managed available groundwater.”<sup>32</sup>

23. That is, at the end of the long planning and rule-making road, the *districts* will use the calculated MAG (which is based on *their* DFCs) as a cap on the volume of groundwater for which *they* will issue permits for activities *they* have determined warrant permitting — to the extent it’s possible.

24. The districts are the deciders; the TWDB is their technical advisor.

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<sup>28</sup> H.B. 1763 (2005), §§ 8, 11, *codified at* Tex. Water Code §§ 36.108(o), 36.1132.

<sup>29</sup> *Id.*, § 8, *codified at* Tex. Water Code § 36.108(d-2).

<sup>30</sup> *Id.*, § 8, *codified at* Tex. Water Code § 36.108(f)(2).

<sup>31</sup> *Id.*, § 10, *codified at* Tex. Water Code § 36.114(a).

<sup>32</sup> *Id.*, § 11, *codified at* Tex. Water Code § 36.1132.

**II. The facts of this case show that the TWDB did not determine the Plaintiffs' rights or liabilities; at this point, no one has.**

25. The TWDB designated an 18-county region in the Panhandle area as Groundwater Management Area 1 (GMA 1).<sup>33</sup> The area comprised all or part of four groundwater conservation districts: the High Plains Underground Water Conservation District No. 1 (part) (High Plains District); North Plains Groundwater Conservation District (all) (North Plains District); Panhandle Groundwater Conservation District (all) (Panhandle District); and Hemphill County Underground Water Conservation District (all) (Hemphill District).

26. Representatives of the four districts began developing their DFCs in January 2006 and met nineteen times during the next three and a half years.<sup>34</sup> They requested and received from the TWDB seven different groundwater-availability modeling runs to evaluate the impact of different, potential DFCs.<sup>35</sup> The North Plains District recommended two different DFCs for two geographic areas within that district based on differences in intensity of groundwater use (in both current and future demand) across the district.<sup>36</sup> The High Plains District recommended one of those two DFCs for the area within its district to continue the future economic viability of irrigated agriculture.<sup>37</sup> The area of the Hemphill District has low historic and projected demand for groundwater and the community wanted to maintain

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<sup>33</sup> See Record of Administrative Decision (ROAD) Item 51 (staff report), Attachment A at 2. App. 2 is a copy of Item 51.

The TWDB asks the Court to take judicial notice of the certified copy of the agency record filed with the Court on June 23, 2010.

<sup>34</sup> ROAD Item 23 (response of North Plains District) at 1 & Exhibit A.

<sup>35</sup> See ROAD Item 46 (Hemphill District's post-hearing reply) at 3; Item 51 (staff report) at 8.

<sup>36</sup> ROAD Item 23, Exhibit C.

<sup>37</sup> ROAD Item 25.

aquifer-fed spring flows and to minimize adverse environmental impacts within the district.<sup>38</sup>

27. The district representatives considered these different uses and conditions across the planning area and on July 7, 2009, unanimously adopted the DFCs for the area.<sup>39</sup> The districts set three different planning goals for three parts of the management area:

- 40% volume in storage remaining in 50 years in four northwestern counties of the North Plains District, characterized by intensive irrigated-agriculture use and high historic demand;
- 50% volume in storage remaining in 50 years throughout the remainder of the North Plains District, in all of the Panhandle District, and in all of the High Plains District within GMA 1, characterized by less intensive irrigated-agriculture use; and
- 80% volume in storage remaining in 50 years in the Hemphill District, characterized by virtually no irrigated-agricultural use, by low historic demand, and reliance on aquifer-fed spring flows.<sup>40</sup>

28. Mesa Water, L.P. and G&J Ranch, Inc. (together, Mesa) filed petitions claiming that the DFCs were not reasonable.<sup>41</sup> As required by statute,<sup>42</sup> the petitions included evidence to support the claims. The TWDB convened a hearing in GMA 1 and took testimony and responses regarding the petition.<sup>43</sup> The record remained open for 10 business days so interested persons could submit additional written evidence and briefs.<sup>44</sup>

29. The TWDB staff reviewed the pleadings, evidence, testimony, and exhibits and prepared a report analyzing the factors the Board would consider when it took up the matter,

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<sup>38</sup> ROAD Item 27 (Hemphill District's response) at 10–11 & Exhibit H (affidavit) ¶ 10; Items 36–39, 41–43.

<sup>39</sup> See ROAD Item 1 (Mesa's petition), Exhibit 1 (GMA 1 resolution). App. 1 is a copy of the resolution.

<sup>40</sup> ROAD Item 51 (staff report) at 1, 5–6, Attachments A & B (technical and socioeconomic analyses).

<sup>41</sup> ROAD Items 1 & 2. Because the petitions are nearly identical, the TWDB will cite to Item 1 hereafter.

<sup>42</sup> Tex. Water Code § 36.108(l).

<sup>43</sup> ROAD Items 23, 25, 27, 28, 30 (meeting notice), 31 (transcripts and exhibits).

<sup>44</sup> ROAD Items 35–46; 31 Tex. Admin. Code § 356.44(f).

which was distributed to Mesa and the districts.<sup>45</sup> The staff's report showed that the weight of the factors favored the districts' DFCs. The staff recommended that the Board *not* find that the DFCs were unreasonable (*i.e.*, that the Board not recommend revisions).

30. The Board met at a public meeting and heard from the staff, Mesa, and the districts.<sup>46</sup> After public deliberations, the Board voted 5-1 to approve the staff's recommendation.<sup>47</sup>

31. Importantly, the Board did not issue a written order fixing rights or liabilities. It did not direct any party to do anything.

### ARGUMENTS AND AUTHORITY

#### III. The Court lacks jurisdiction because the Board's recommendation (or non-recommendation) is not a reviewable "final order."

32. Generally, a state agency is immune from suit, unless the legislature has clearly and unambiguously waived sovereign immunity. In *Tooke v. City of Mexia*, the Texas Supreme Court reiterated the venerable legal precept that "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent."<sup>48</sup>

33. Mesa cites Water Code § 6.241 as the jurisdictional basis of its lawsuit.<sup>49</sup> That statute states: "A person affected by a ruling, order, decision, or other act of the board may file a petition to review, set aside, modify, or suspend the act of the board." Although the courts

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<sup>45</sup> ROAD Items 51, 52; *see* 31 Tex. Admin. Code § 356.45.

<sup>46</sup> ROAD Item 52, third attachment (procedures for the meeting); Item 53 (video recording of the meeting).

<sup>47</sup> ROAD Item 54 (signed minutes of the meeting). App. 3 is a copy of the signed minutes.

<sup>48</sup> 197 S.W.3d 325, 331 (Tex. 2006) *quoting Hosner v. DeYoung* 1 Tex. 764, 769 (1847) (holding that statutes enabling a city to "sue and be sued" or to "plead and be impleaded" were not clear, unambiguous waivers of governmental immunity).

<sup>49</sup> Plaintiffs' First Amended Original Petition ¶ 16.

have not construed the scope of this statute authorizing judicial review of TWDB actions, the courts have construed an *identical* statute authorizing judicial review of TCEQ actions.<sup>50</sup> The case law construing one statute may be applied directly to the other.<sup>51</sup>

34. Despite the statutes' apparent breadth, they authorize review only of final, regulatory actions. In *TNRCC v. IT-Davy*, the Texas Supreme Court held that the language of the statutes does not authorize review of *every* ruling, order, decision, or act of the agency, but rather only authorizes review of *regulatory* decisions.<sup>52</sup> The courts, therefore, lacked jurisdiction over a suit challenging the TNRCC's actions on a contract.

35. Similarly, the Dallas Court of Appeals acknowledged that the language of the statutes is very broad, but held that the legislature intended the language to comport with the general rule that courts will review only an agency's final actions.<sup>53</sup> The courts, therefore, lacked jurisdiction over the preliminary approval of a wastewater-processing plant.

36. "Final order" is a term of art that doesn't reach the TWDB's action here. In *Sun Oil Co. v. Railroad Commission*, the Texas Supreme Court held that a similarly broad statute did not authorize judicial review of the agency's order, because the order did not grant or withhold a right or privilege or impose liability on the plaintiffs.<sup>54</sup>

37. The commission conducted an administrative hearing to investigate the shipping

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<sup>50</sup> Compare Tex. Water Code § 5.351 with Tex. Water Code § 6.241.

<sup>51</sup> See, e.g., *Tex. Nat. Res. Conserv. Comm'n v. IT-Davy*, 74 S.W.3d 849, 858–59 (Tex. 2002) (the Texas Supreme Court applied the case law of an *analogous* statute to interpret Tex. Water Code § 5.351).

<sup>52</sup> *Id.*

<sup>53</sup> *Payne v. Tex. Water Quality Bd.*, 483 S.W.2d 63, 64 (Tex. Civ. App.—Dallas 1972, no writ).

<sup>54</sup> *Sun Oil Co. v. R.R. Comm'n*, 158 Tex. 292, 297, 311 S.W.2d 235, 238 (1958).

practices of certain oil companies. The commission's order found that through "devious methods" the oil companies sought to evade higher intrastate-shipping rates and that the practices involved intrastate shipping subject the commission's jurisdiction.

38. The oil companies sued to challenge the order. The supreme court noted that the literal language of the statute authorizing review of commission actions would "permit of an appeal from anything whatever that the Commission might or might not do," but the court concluded that the statute "is undoubtedly not intended to be free of all limitation."<sup>55</sup>

39. The court held that statute did not authorize judicial review of the order, because the order did not fix liability on the oil companies.<sup>56</sup> The commission would have to initiate additional administrative proceedings before any liability would accrue to the companies. The companies were in the same position after the order as they were before it, except that "they now have good reason to believe that they will be proceeded against."

40. Like the Railroad Commission's findings in *Sun Oil Co.*, the TWDB's action neither imposed liabilities on Mesa nor granted or withheld rights or privileges. Like the oil companies, any adverse consequences that Mesa may fear must await future rule-making and future actions *by the districts* — not the TWDB.

41. In *Moody v. Texas Water Commission*, the Austin Court of Appeals held that the courts lacked jurisdiction over a suit challenging a decision of the Texas Water Commission because the decision merely recommended that a federal flood-control reservoir was

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<sup>55</sup> *Sun Oil Co.*, 158 Tex. at 293-94, 311 S.W.2d at 236.

<sup>56</sup> *Sun Oil Co.*, 158 Tex. at 297, 311 S.W.2d at 238.

feasible.<sup>57</sup> The Army Corps of Engineers proposed a dam that would inundate the plaintiffs' land. The Corps submitted its proposal to the governor, who referred it to the commission, which was responsible for state water planning then. After a public hearing, the commission entered an order approving the feasibility of the project. The governor forwarded the order to the Corps, and the plaintiffs sued the commission to reverse its order.

42. The district court dismissed the suit for want of jurisdiction. The appellate court affirmed, holding that courts only review final orders of agencies and that the commission's order was merely a recommendation to the Corps.<sup>58</sup> The order was not conclusive and did not commit the Corps to constructing the dam.

43. The TWDB's decision to not suggest revisions to the districts' DFCs — its non-recommendation — was even less conclusive than the water commission's order in *Moody*. And even if the Board had recommended revisions, the districts could have rejected or modified the draft revisions following a local public hearing.<sup>59</sup> So, like the water commission's recommendation to the Corps, the TWDB's recommendation to the districts would not have been conclusive and would not have bound the districts.

44. More recently, the Texas Supreme Court opined that "courts should treat as final a decision which is definitive, promulgated in a formal manner and one with which the agency expects compliance."<sup>60</sup> The supreme court noted that "[a]dministrative orders are generally

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<sup>57</sup> *Moody v. Tex. Water Comm'n*, 373 S.W.2d 793, 797 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.).

<sup>58</sup> *Moody*, 373 S.W.2d at 797.

<sup>59</sup> Tex. Water Code § 36.108(n); 31 Tex. Admin. Code § 356.46(e).

<sup>60</sup> *Tex.-N. Mex. Power Co. v. Tex. Indus. Energy Consumers*, 806 S.W.2d 230, 232 (Tex. 1991) (internal citations and quotation marks omitted).

final and appealable if they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.”<sup>61</sup>

45. Under the case law, therefore, the Court lacks jurisdiction because the TWDB’s non-recommendation to the districts was not a reviewable order, especially with respect to Mesa. The TWDB didn’t expect Mesa or the districts to do anything to comply. The decision didn’t determine a right of Mesa or fix a liability. Any consequences that Mesa fears may happen must await the future actions of the local groundwater districts.

**IV. The TWDB’s action did not grant or deny rights or impose liabilities on the Mesa, so the Court also lacks jurisdiction because the claims aren’t ripe or because Mesa lacks standing.**

**A. Mesa’s claims of harm are contingent on future actions, so the claims are not ripe.**

46. Courts sometimes analyze final-order issues through the lens of ripeness. For example, in *Texas Utility Electric Co. v. Public Citizen, Inc.*, the Austin Court of Appeals melded both concepts when it concluded that the Public Utility Commission’s determination that Texas Utility’s applications to build four power plants were feasible and reasonable was not a final order, so Public Citizen’s lawsuit challenging the commission’s interpretation of its rules was not ripe.<sup>62</sup> Although the commission’s order ended a phase of the proceeding, the administrative process had not run its course, because the commission would have to consider individual amendments to Texas Utility’s certificate of convenience and necessity for each power plant before the company could begin construction.

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<sup>61</sup> *Id.*

<sup>62</sup> *Tex. Util. Elec. Co. v. Pub. Citizen, Inc.*, 897 S.W.2d 443, 446–47, 448 (Tex. App.—Austin 1995, no writ).

47. Similarly, in *Monk v. Huston*, the federal appeals court concluded that plaintiffs' due-process claims were not ripe because the TNRCC had not yet granted or denied the waste company's permit application.<sup>63</sup> Even if the landowners had a vested property right, they wouldn't be adversely affected until a permit was issued, so their claims were speculative.

48. In *Waco ISD v. Gibson*, the Texas Supreme Court held that the parents' challenge to the school board's new student-retention policy was not ripe, because at the time the suit was filed, the policy had not been applied to retain any particular student.<sup>64</sup> The supreme court opined that ripeness "focuses on whether the case involves uncertain or contingent events that may not occur as anticipated or may not occur at all."<sup>65</sup> So even though the plaintiffs believed an adverse impact was coming — "[t]hey feel it coming . . ." in the words of the district court — the claim was not ripe because the policy had not been applied.

49. The *Gibson* case is especially apt here. The DFCs adopted by the districts are *planning goals*: aspirations guiding future rule-making and permitting decisions. They are more ephemeral and less concrete than the school board's student-retention policy. Even though Mesa may believe that an adverse effect is coming, the adverse consequence is contingent on future events that may or may not occur.

- The districts' rules may or may not require or allow Mesa to apply for groundwater-withdrawal permits.
- If Mesa applies for permits to withdraw groundwater from different properties in different counties, the managed-available-groundwater (MAG) volume for the various

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<sup>63</sup> *Monk v. Huston*, 340 F.3d 279, 282–83 (5<sup>th</sup> Cir., 2003).

<sup>64</sup> *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851–52 (Tex. 2000).

<sup>65</sup> *Gibson*, 22 S.W.3d at 852 (internal quotations and citations omitted).

properties may or may not affect Mesa's permits.

- Even if a MAG volume is too low to fully grant Mesa's request, we don't know yet how the districts will elect to implement the MAG.

50. It may well be that Mesa will have ripe claims someday. But that day is not today.

And in any event, the claims will not lie against the TWDB.

**B. Mesa lacks standing because it has not suffered a concrete, particularized injury and because its alleged injury would be the same as that experienced by the public at large.**

**1. The harm (should it occur) would be traceable to third-parties not before this Court.**

51. The Supreme Court has identified three elements that constitute the "irreducible constitutional minimum of standing":

First, the plaintiff must have suffered an "*injury in fact*" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) *actual or imminent, not "conjectural or hypothetical."* Second, there must be causal connection between the injury and the conduct complained of — *the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court.* Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision.<sup>66</sup>

Mesa's lawsuit fails at least the first two elements. First, as described above, the adverse consequences Mesa fears are contingent of the future actions of groundwater districts that might not play out as Mesa expects. The consequences are neither actual nor imminent.

52. Second, the adverse consequences (should they occur) would be directly traceable to the actions of the various districts, which are not before the Court today. The injury that

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<sup>66</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotations and citations omitted, emphasis added); accord *Save Our Springs Alliance v. City of Dripping Springs*, 304 S.W.3d 871, 878 (Tex. App.—Austin 2010, pet. filed).

Mesa fears would be traceable to the districts' individual regulatory decisions, not to the TWDB's advice and comments on the districts' planning goals.

**2. The harm Mesa alleges is common to the public at large, so cannot support standing.**

53. In *South Texas Water Authority v. Lomas*, the Texas Supreme Court reiterated an essential element of judicial standing: “[T]o have standing an individual must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.”<sup>67</sup> The supreme court held that the courts lacked jurisdiction over a suit by a Kingsville resident and an association of residents in which they alleged that the regional water authority's rates unfairly discriminated against them. The supreme court held that because the alleged effect was suffered by the whole community, the plaintiffs lacked standing. Nothing indicated that the individual was treated any differently than any other Kingsville resident.

54. Similarly, in *Brown v. Todd*, the Texas Supreme Court held that the courts lacked jurisdiction over a citizen's suit challenging the mayor's executive order that allegedly reversed a successful public referendum.<sup>68</sup> The citizen's alleged injury as a voter on the prevailing side was indistinguishable from the injury sustained by anyone else who had voted in favor of the referendum, so could not support standing.

55. Here, Mesa claims that the present market-value of its rights to future groundwater withdrawals in Hemphill County decreased because the applicable DFC sets a goal of

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<sup>67</sup> *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007); accord *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001) (“Our decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large.”)

<sup>68</sup> *Brown*, 53 S.W.3d at 302; see also *id.* at 305–06 (councilman's alleged injury not particularized either).

preserving more groundwater than the DFC applicable within neighboring districts (80% remaining after 50 years, as opposed to 50% or 40% remaining). But even accepting the allegation *arguendo*, that injury would be sustained by every person who claims a right to withdraw groundwater in Hemphill County. It's an injury sustained by the public at large, so cannot support judicial standing.

56. In another case directly on point, *Tx DOT v. City of Sunset Valley*, the Texas Supreme Court held that claims based on geographically disparate treatment cannot support an equal-protection claim.<sup>69</sup> The alleged injury is sustained by everyone within the geographic area, so cannot support standing. The plaintiff must show that he or she was intentionally singled out from the crowd and treated differently from others similarly situated.

57. Similarly, an appellate court upheld the boundaries of a groundwater district by persons within the district who complained of unfair discrimination because the district did not include the whole aquifer.<sup>70</sup> The court wrote: "First, it is well established that constitutional equal protection relates to persons as such, and not to areas. States have wide discretion in determining whether laws shall operate statewide or only within certain counties . . . ." <sup>71</sup> The Texas Supreme Court expressly affirmed that holding.<sup>72</sup>

58. Although Mesa does not use the term "equal protection" in its petition, its claims sound in that constitutional safeguard. Mesa claims that the DFCs adopted by the districts

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<sup>69</sup> *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646–47 (Tex. 2004).

<sup>70</sup> *Beckendorff v. Harris-Galveston Subsidence Dist.*, 558 S.W.2d 75, 81 (Tex. Civ. App.–Houston [14<sup>th</sup> Dist.] 1977) *holding affirmed, but writ ref'd n.r.e. on other grounds* 563 S.W.2d 239, 240 (Tex. 1978).

<sup>71</sup> *Beckendorff*, 558 S.W.2d at 81 (internal quotations omitted).

<sup>72</sup> 563 S.W.2d 239, 240 (Tex. 1978) *writ ref'd n.r.e. on other grounds*.

(and commented on by the TWDB) unreasonably and arbitrarily discriminate among persons who hold rights to withdraw water from different counties and that those persons should be treated alike because they all would withdraw water from the same aquifer.

59. The Court, therefore, lacks jurisdiction because Mesa's claims are not ripe and because Mesa lacks standing to complain about harm sustained by the public at large.

**V. Because Mesa cannot state a valid taking claim, sovereign immunity bars Mesa's claim, which must be dismissed for lack of jurisdiction.**

**A. Introduction.**

60. Mesa alleges that the DFCs adopted by the districts take their property without compensation in violation of the state and federal constitutions. Mesa contends specifically that the differing DFCs diminish the present market-value of groundwater rights in Hemphill County and threaten drainage of groundwater to neighboring counties. Because this allegedly condemns property, Mesa asserts that TWDB was precluded from validly finding multiple DFCs to be reasonable.

61. To the extent Mesa seeks to adjudicate a taking claim based on the DFCs, jurisdiction is lacking. Even assuming *arguendo* that Mesa has the property interests alleged, Mesa cannot state a facially viable taking claim, either directly against the TWDB or against the Agency as a proxy for the future actions of the districts. Thus, Mesa's claim is barred by the TWDB's sovereign immunity and must be dismissed.

**B. Sovereign immunity bars facially invalid takings claims.**

62. As set out above, sovereign immunity generally shields the TWDB from suit.

Although this immunity does not extend to a constitutionally based taking claim,<sup>73</sup> the claim must be facially valid. The courts require Mesa to articulate in the pleadings a viable taking claim against the TWDB, *i.e.*, allegations that demonstrate a legally cognizable taking claim. Otherwise, sovereign immunity obtains and jurisdiction is lacking to adjudicate the claim.<sup>74</sup>

63. In *State v. Holland*, for example, the Texas General Land Office contracted to use an oil-spill-cleaning process, but declined to pay royalties to Holland, the process's patent holder. Although Holland plainly framed his claim against the agency as a taking under Tex. Const. art. 1, § 17, the supreme court reversed the lower court rulings denying the agency's plea to the jurisdiction. The court observed that, as described in Holland's pleadings, the agency was acting under color of contract and in that capacity could not, as a matter of takings law, be liable for a constitutional taking. Since a viable taking claim did not lie against the agency, sovereign immunity applied and the courts lacked jurisdiction over the claim.<sup>75</sup> This result harmonizes with current plea-to-the-jurisdiction practice: if the pleadings and undisputed evidence negate jurisdiction, then the plea should be granted.<sup>76</sup>

**C. Mesa cannot plead a legally cognizable taking claim against the TWDB.**

**1. Local groundwater districts — not the TWDB — regulate groundwater under Chapter 36.**

64. As detailed in the Legal and Factual Context section, the groundwater regulation

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<sup>73</sup> *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007).

<sup>74</sup> *Id.* at 643-644.

<sup>75</sup> *Id.*; *see also, e.g., City of Garden Ridge v. Ray*, No. 03-06-00197-CV, 2007 WL 486395, at \*3 (Tex. App.—Austin Feb. 15, 2007, no pet.) (mem. op.) (dismissing taking claim because, “[w]hen a plaintiff does not allege a valid claim under the takings clause . . . sovereign immunity does apply.”)

<sup>76</sup> *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004).

scheme under Chapter 36 is anchored in local control by the respective groundwater districts. Mesa complains specifically in this suit about the alleged taking effect of adopting a different DFC for the Hemphill District than the other districts. These DFCs are the creatures of Hemphill and the other districts, not the TWDB. The districts — not the TWDB — determined the goals with respect to the groundwater resource within their jurisdictions and articulated those goals through locally adopted DFCs. Under Chapter 36, it will be up to Hemphill and the other districts individually — not the TWDB — to implement these general planning goals through specific rules, permits, spacing orders, and other regulatory measures applied to the water users within the district.

65. The TWDB's role in the DFC process is informational rather than regulatory and is not specific to any particular property. Although the TWDB staff quantifies the available groundwater based on the DFCs, the starting point for the calculation and the eventual application of the TWDB data remain with the districts. This is true regarding DFC applicable within the Hemphill District.

66. And while the legislature authorized the TWDB to review the "reasonableness" of a district's DFCs, the review is advisory. When opining whether the districts' DFCs are reasonable, the TWDB dictates no particular DFC to the districts and exercises no direct regulatory authority over the groundwater. The review process does not convert the TWDB into the districts' overlord. At all times, the direct authority and control over the groundwater resources rests with the districts. The districts remain the deciders.

**2. TWDB's action is not a current, direct restriction on Mesa's use of its property.**

67. Under the current legislative scheme, any viable taking claim based on the DFCs can run only against the districts — the entities having the direct regulatory control over the subject property. The TWDB's review of the districts' DFCs does not qualify as the kind of regulatory action giving rise to taking liability. The Austin Court of Appeals recently applied this principle to negate a taking claim against the TWDB regarding a planning activity.

68. In *State v. Hearts Bluff Game Ranch, Inc.*,<sup>77</sup> plaintiff Hearts Bluff alleged it owned land intended for mitigation banking, wherein land is used to offset adverse environmental impacts from development projects elsewhere. The Army Corps of Engineers must approve the land use for banking. However, concurrent state-level planning activities involving the TWDB promoted designation of the Hearts Bluff land as a future reservoir site. When the Corps denied the mitigation-banking permit, Hearts Bluff sued the TWDB for a taking under the state and federal constitutions. The TWDB filed a plea to the jurisdiction contending that Hearts Bluff's petition failed to allege a viable taking claim, thus leaving intact the agency's sovereign immunity. The Austin Court of Appeals agreed.<sup>78</sup>

69. Central to the TWDB's argument and the court's decision in *Hearts Bluff* was the lack of any current, direct restriction of the subject property by the TWDB. The court reviewed the relevant takings case law and explained that:

[I]mplicit in the test for inverse condemnation are two understood requirements: (1) the governmental entity against whom the claim is brought

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<sup>77</sup> 313 S.W.3d 479 (Tex. App.—Austin 2010, pet. filed).

<sup>78</sup> *Id.* at 486–90.

must possess — or have possessed during the relevant time period — the regulatory power that effected the taking, and (2) the governmental entity’s exercise of its own regulatory authority must have imposed the current, direct restriction that gave rise to the taking.<sup>79</sup>

Observing from the pleadings and jurisdictional facts that the Corps rather than the TWDB had the final say in the mitigation-banking matter, the court concluded that a viable taking claim did not lie against the TWDB, despite the TWDB’s demonstrated support for Corps’s action.<sup>80</sup> Accordingly, absent a facially valid taking claim, sovereign immunity applied and the courts lacked jurisdiction over the claim.<sup>81</sup>

70. The guidepost in the *Hearts Bluff* analysis was the Texas Supreme Court’s decision in *Westgate, Ltd. v. State*,<sup>82</sup> in which a landowner claimed substantial economic damage (particularly lost profits) tied to a state agency’s announcement that it planned to expand a highway through the landowner’s shopping center. However, the court rejected the theory that the agency’s actions gave rise to a taking, since they imposed no “direct restriction on the use of the property.”<sup>83</sup>

71. In other words, a taking claim is not a catch-all cause of action for every public act

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<sup>79</sup> *Id.* at 487.

<sup>80</sup> *Id.* at 488–89.

<sup>81</sup> *Id.* at 489–90.

<sup>82</sup> 843 S.W.2d 448 (Tex. 1992).

<sup>83</sup> *Id.* at 453; see also, e.g., *Tex. Bay Cherry Hill v. City of Forth Worth*, 257 S.W.3d 379, 396 (Tex. App.—Fort Worth 2008, no pet.) (“[T]he Plan currently exists only on paper, and unless and until the Plan is implemented, [the plaintiff] cannot allege facts that constitute a regulatory taking.”) Similarly, the Austin court of appeals, in *Buffalo Equities, Ltd. v. City of Austin*, No. 03-05-00356-CV, 2008 WL 1990295 at \*7–\*8 (Tex. App.—Austin May 9, 2008, no pet.) (mem. op.), dismissed a taking claim based on a city employee’s letter opining that a developer’s plans would not comply with zoning restrictions. Although viewed through the lens of ripeness rather than lack of direct, regulatory effect, the result was the same — no jurisdiction.

that may adversely affect private-property interests. Rather, an inverse condemnation action provides redress for specific kinds of direct-regulatory or physical governmental-incursions.

72. Federal taking holdings are in accord.<sup>84</sup> For example, in *Breneman v. United States*,<sup>85</sup> a landowner sued the Federal Aviation Administration, in part for the agency's administrative finding that the owner's construction of a hill and fence would constitute hazards to air navigation. These federal hazard-determinations, alleged the owner, caused a state transportation agency to deny the owner a state permit to construct the hill. The owner brought a federal taking claim against the FAA. In dismissing the claim, the federal court agreed with the FAA's description of its hazard determinations as "advisory" and without "enforceable legal effect." The court reasoned that, absent direct FAA authority to regulate construction activity, no takings liability could be assigned to the FAA for the state agency's permit denial, notwithstanding the FAA's apparent influence on the decision.<sup>86</sup> This holding compels the conclusion that Mesa's taking challenge here has no legal legs.

**3. Taking liability may not be imputed to the TWDB or otherwise applied to invalidate its decision.**

73. If the TWDB's own planning activities cannot create taking liability, someone else's potential taking liability may not be imputed to the TWDB. Even assuming *arguendo* that the differences between the DFCs constitute a current, direct restriction on Mesa's property,

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<sup>84</sup> Texas courts interpreting the state Takings Clause at Tex. Const. art. 1, § 17, may look for guidance to federal decisions interpreting the "comparable" federal Takings Clause at U.S. Const. amend. 5. *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 56 (Tex. 2007), citing *Sheffield Devel. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004).

<sup>85</sup> 57 Fed.Cl. 571 (2003), *aff'd* 97 Fed.Appx. 329 (Fed. Cir. 2004), *cert. denied* 543 U.S. 1021 (2004).

<sup>86</sup> *Id.* at 583-85.

the TWDB's advisory support for the DFCs does not render them a restriction imposed by the TWDB. And neither does TWDB's acquiescence give rise to some kind of "enabler" liability for a taking or otherwise invalidate the TWDB's decision. Relevant case law points in a contrary direction.

74. In *City of Keller v. Wilson*,<sup>87</sup> landowners were flooded by storm-water runoff from a new residential subdivision development. They sued the municipality that approved the developer's drainage plan, asserting a taking. The supreme court reversed a jury verdict in favor of the landowners because there was no evidence of the requisite takings intent on the part of the city.<sup>88</sup> In her concurrence, Justice O'Neill further observed that the city's "mere approval" of the developer's drainage plan could not give rise to takings liability by virtue of the subsequent flooding.<sup>89</sup> From a legal causation perspective, Justice O'Neill regarded the nexus between the city's plan approval and the flooding of the downstream properties as too indirect. "[T]he City's mere approval of the private development plans did not result in a taking for public use, as the constitutional standard requires. . . . The City did not appropriate or even regulate the use of the Wilson's land, nor did it design the drainage plan for the proposed subdivisions." Accordingly, city approval "did not transfer responsibility for the content of those plans from the developer to the City."<sup>90</sup>

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<sup>87</sup> 168 S.W.3d 802 (Tex. 2005).

<sup>88</sup> *Id.* at 829–30. The general elements for a taking claim under Tex. Const. art. 1, § 17 are: (1) the government intentionally performed certain acts, (2) that resulted in a "taking" of property, (3) for public use. *General Servs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001); *accord Hearts Bluff*, 313 S.W.3d at 486.

<sup>89</sup> *City of Keller*, 168 S.W.2d at 833–35.

<sup>90</sup> *Id.*

75. In the same vein, the Austin Court of Appeals rejected an analogous takings argument in *FPL Farming, Ltd. v. TNRCC*.<sup>91</sup> A neighboring landowner challenged the agency's decision to permit a nonhazardous-waste-injection well, over the neighbor's objection that a subsurface trespass would occur.<sup>92</sup> The appellate court rejected the claim, agreeing with the trial court that the agency's approval of the permit did not authorize a taking. The court reasoned that the permit itself imposed no restriction on the landowner's property, and the landowner had recourse against the permittee should subsurface migration occur.<sup>93</sup>

76. A like attempt to impute takings liability failed in *State v. Sledge*.<sup>94</sup> A landowner complained about the deposit of dredged material on his property and sued for a taking. Although the deposits were made by the Army Corps of Engineers, the landowner sued the State of Texas on the theory that the state sponsored the deposits by contracting with the Corps to facilitate the dredging. The Beaumont Court of Appeals rejected the notion that the state could be vicariously liable under takings law for the Corps's actions, despite the State's cooperation in the dredging operations. Nothing in the State's activities, including the contract with the federal government, waived the state's sovereign immunity from the landowner's facially invalid taking claim.<sup>95</sup>

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<sup>91</sup> No. 03-02-00477-CV, 2003 WL 247183 (Tex. App.—Austin Feb. 6, 2003, pet. denied) (mem. op.).

<sup>92</sup> However, in subsequent litigation, a jury found the landowner's subsurface trespass claims meritless. See *FPL Farming Ltd. v. Env'tl. Processing Sys., L.C.*, 305 S.W.3d 739 (Tex. App.—Beaumont 2009, pet. filed).

<sup>93</sup> *FPL Farming*, 2003 WL 247183 at \*5. See also *Berkley v. R.R. Comm'n*, 282 S.W.3d 240, 242–43 (Tex. App.—Amarillo 2009, no pet.) (noting the “limited effect” of permits, opining that administrative permitting does not adjudicate property rights, and holding that the RRC permit did not authorize a trespass or taking).

<sup>94</sup> 36 S.W.3d 152 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

<sup>95</sup> *Id.* at 157-58. Consistent with these authorities, *Domel v. City of Georgetown*, 6 S.W.3d 349 (Tex. App.—Austin 1999, pet. denied) illustrated the proper approach. The riparian landowners properly directed their taking claim against the wastewater-permit-receiving city – not the permit-issuing agency.

77. As these precedents demonstrate, Mesa is misguided in the contention that, by authorizing a taking, the TWDB's decision is invalid.<sup>96</sup> This misstep derives from Mesa's misconception of the fundamental nature of a taking claim. Typically, a taking claim is for compensation, not for invalidation. The constitutional infraction is not taking private property for a public use, but rather failing to pay for it.

[T]he Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power. In other words, it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.<sup>97</sup>

Thus, the Takings Clause "presupposes that the government has acted in pursuit of a valid public purpose."<sup>98</sup> So even if Mesa's takings argument were correct, that result would not necessarily invalidate the TWDB's decision or block its implementation.<sup>99</sup> Rather, the result would set up a claim to compensate the Plaintiffs for the value of their property interests acquired by the government via an act of inverse condemnation.

78. Mesa may attempt to fall back on its suggestion of a private-purpose taking to support

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<sup>96</sup> Of course, Mesa assumes that the DFCs have already effected a taking of groundwater rights or will do so. But whether a set of facts constitutes a taking is a question of law. *City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234, 241 (Tex. 2002). The Court is not bound by Mesa's legal conclusions.

<sup>97</sup> *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 536–37 (2005) (internal citations and quotations omitted).

<sup>98</sup> *Id.* at 543; accord *Combs v. B.A.R.D. Industries, Inc.*, 299 S.W.3d 463, 470–71, 72–73 (Tex. App.—Austin 2009, no pet.) (dismissing a taking claim based on allegations of "unlawful" Comptroller action because valid taking claims presume authorized government acts).

<sup>99</sup> See, e.g., *Hardwicke v. City of Lubbock*, 150 S.W.3d 708, 713–15 (Tex. App.—Amarillo 2004, no pet.) (analyzing landowner's request for declaratory and injunctive relief against city's reinvestment zone condemnation activities alleged to serve no public use). Declaratory and injunctive relief are not the usual remedies for a taking. The Supreme Court has said that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). See also, e.g., *City of Anson v. Harper*, 216 S.W.3d 384, 396 (Tex. App.—Eastland 2006, no pet.) (rejecting attempt in a taking suit to enjoin city's construction of a landfill).

the request for declaratory relief.<sup>100</sup> Although equitable relief may be available under a proper private-purpose claim,<sup>101</sup> Mesa fails to allege a legally sufficient taking claim that links the actions of the TWDB with any direct impact on the Mesa's property rights. That required nexus is simply absent under the terms of Chapter 36 and Mesa's pleadings. Thus, whatever species of taking claim Mesa has lodged, its legal deficiencies negate jurisdiction.

4. **Neither Water Code § 6.241 nor the UDJA provide jurisdiction for a facially invalid taking claim.**

79. The constitution itself serves to waive the sovereign's immunity from inverse condemnation actions.<sup>102</sup> If, as held in the cited authorities, there is no jurisdiction over a legally deficient claim under the Taking Clause, neither is there jurisdiction under Water Code § 6.241. The statute does not authorize review of the non-final order, and it would be irrational to allow a taking claim not legally cognizable under takings law to create jurisdiction under the statute. Moreover, Section 6.241 contemplates setting aside TWDB decisions, which is not the office of a typical taking claim.<sup>103</sup> Section 6.241 should not be misconstrued to salvage jurisdiction for Mesa's otherwise dismissible claim.

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<sup>100</sup> Plaintiffs' First Amended Original Petition, ¶¶ 10, 21.i., j.

<sup>101</sup> A claim of private-purpose taking departs from a true taking claim and more resembles a challenge based on unauthorized, *ultra vires* government action. Justice O'Connor, in explaining how a just-compensation-taking claim assumes an *authorized* government act, contrasted a private-purpose-taking claim: "Conversely, if a governmental action is found to be impermissible — for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process — that is the end of the inquiry. No amount of compensation can authorize such action." *Lingle*, 544 U.S. at 543.

<sup>102</sup> *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980).

<sup>103</sup> *Cf. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128-29 (1985) (explaining that "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those instances where a taking has occurred.")

80. Similarly, neither is the UDJA a jurisdictional safety net for Mesa's facially defective taking claim. The Texas Supreme Court has held repeatedly that the UDJA is itself not a grant of jurisdiction, but rather is a procedural device for deciding cases already within a court's jurisdiction.<sup>104</sup> As observed previously, the remedy characteristic of a takings claim is compensation, not a declaration of a taking.<sup>105</sup> An inverse condemnation action subsumes a taking declaration, making a separate UDJA claim redundant surplusage.<sup>106</sup>

#### **D. Conclusion**

81. The TWDB action that Mesa challenged directly regulates nothing, either currently or in the future. The TWDB's determination that the districts' DFCs needed no revision is at most an advisory opinion concerning the planning goals of a separate governmental entity that have yet to be implemented. Under the relevant authorities, Mesa is legally unable to connect any takings liability with TWDB's action. Thus Mesa's pleadings negate the Court's jurisdiction over the takings claim. Since sovereign immunity applies to bar adjudication of Mesa's claim, it must be dismissed for want of jurisdiction.

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<sup>104</sup> *IT-Davy*, 74 S.W.3d at 855 citing *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994); *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

<sup>105</sup> *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) (noting that the Taking Clause "waives immunity only when one seeks adequate compensation for property lost to the State"); *MBP Corp. v. Bd. of Trustees of Galveston Wharf*, 297 S.W.3d 483, 491 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("[T]he appropriate recovery under a constitutional-takings claim is 'adequate compensation.'").

<sup>106</sup> See, e.g., *State v. Allodial L.P.*, 280 S.W.3d 922, 928 (Tex. App.—Dallas 2009, no pet.), citing *Tex. Parks & Wildlife Dep't v. Callaway*, 971 S.W.2d 145, 151-52 (Tex. App.—Austin 1998, no pet.) (dismissing declaratory judgment claim that mirrored taking claim); *City of Houston v. Tex. Land & Cattle Co.*, 138 S.W.3d 382, 392 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (same).

## CONCLUSION

82. The Texas Legislature vested authority to regulate groundwater withdrawals in local groundwater conservation districts, not the TWDB. The Agency respects that choice. It offers advice and comments about the districts' planning goals, not commands or controls. The TWDB's decision *not* to recommend changes to those goals did not fix rights or liabilities. Its advice, therefore, is not a reviewable final order, did not affect the Mesa (if at all) any differently than the public at large, and could not have taken vested property rights. Mesa might suffer a legal injury and have a claim someday, but the claim would lie against a local groundwater district, not the TWDB.

## PRAYER

The TWDB respectfully asks the Court to dismiss this suit for lack of jurisdiction.  
Defendant further prays for all other relief to which it may be entitled.

Respectfully submitted,

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ATTORNEYS FOR TWDB



Exhibit 3



OCT 28 2010



# TEXAS WATER DEVELOPMENT BOARD

James E. Herring, *Chairman*  
Lewis H. McMahan, *Member*  
Edward G. Vaughan, *Member*

J. Kevin Ward  
*Executive Administrator*

Jack Hunt, *Vice Chairman*  
Thomas Weir Labatt III, *Member*  
Joe M. Crutcher, *Member*

October 28, 2010

Sunset Advisory Commission  
P. O. Box 13066  
Austin, Texas 78711

Re: Sunset Advisory Commission Staff Report on the Texas Water Development Board

Dear Commission Members:

The Texas Water Development Board (Board) appreciates the opportunity to review the Sunset Advisory Commission Staff Report (staff report) and to offer these comments on the Findings and Recommendations. The Board also appreciates the courtesies extended by the Sunset Advisory Commission staff during the course of their review of the agency.

## Agency at a Glance

The Board concurs with the profile of its financing, planning, and science activities.

The Board appreciates the Sunset Commission staff's thorough review and accurate profile of the Texas Water Development Board's purposes and activities.

## Issue 1: The Board's Remaining Development Fund Bond Authority is Insufficient to fulfill its Constitutional Responsibility.

The Board concurs with the statements under **Background** and with each of the **Findings**.

## Recommendations

### Constitutional Amendment

- 1.1 Authorize the Board to issue Development Fund general obligation bonds, at its discretion, on a continuing basis, in amounts such that the aggregate principal amount outstanding at any time does not exceed \$6 billion.**

#### *Our Mission*

*To provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas.*

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The Board concurs with this recommendation.

### **Change in Statute**

- 1.2 **Clarify that the Board's Development Fund general obligation bonds are not considered State debt payable from general revenue for purposes of calculating the constitutional debt limit, until the Legislature appropriates debt service to the Board and the Board issues the debt.**

The Board concurs with this recommendation.

- 1.3 **Authorize the Board to request the Attorney General take legal action to compel a recipient of any of the Board's financial assistance programs to cure or prevent default in payment.**

The Board concurs with this recommendation.

### **Issue 2: The lack of coordination among separate water planning processes impedes the Board's statewide water planning.**

The Board has no disagreement with the statement of the Issue.

The Board generally concurs with the findings under Issue 2.

In addition, the Board wishes to state its appreciation for the precision of this Finding: "**Stakeholders may be unaware of the DFC process and the potential effects of DFCs on their groundwater resources.**" (Emphasis added.) For reasons discussed more fully in Issue 3, the Board does not believe the DFC process has any effect on the rights of persons with legally defined interests in groundwater because, in the final analysis, under the process described in Section 36.108, Water Code, the Board makes no final determination of the desired future condition (as the Sunset Commission notes in Issue 3).

### **Recommendations**

#### **Change in Statute**

- 2.1 **Require the Board to certify that each groundwater management area include a voting representative from each regional water planning group whose boundaries overlap the area.**

The Board concurs with this recommendation. The Board also notes that the recommendation may not go far enough and may prove to be ineffective in ensuring an adequate voice for regional water planning interests in the determination of desired future conditions, as noted by Vice Chairman Jack Hunt at the Board's meeting on October 21, 2010.

- 2.2 Require regional water planning groups to use the desired future conditions in place at the time of adoption of the Board's State Water Plan in the next water planning cycle.**

The Board concurs with this recommendation.

- 2.3 Strengthen the public notice requirements for groundwater management area meetings and adoption of desired future conditions and require proof of notice be included in submission of conditions to the Board.**

The Board concurs with this recommendation.

**Issue 3: The State's processes to petition desired future conditions are fundamentally flawed.**

As a general matter, the Board agrees with the statement of Issue 3.

The Board agrees with the Sunset Commission staff report's statement at page 32 that any determination that a desired future condition (DFC) is unreasonable "is merely a recommendation" and groundwater conservation districts in a groundwater management area (GMA) do "not have to accept the Board's recommendation or make any changes to its original DFC . . ."

The Board disagrees, at page 35, that "without a contested case hearing, only a limited record exists for further court review under substantial evidence" and that there is a risk of "courts having to begin the case anew under a trial de novo standard." The Board's position in the litigation referenced in the staff report is that a substantial evidence review is appropriate and is required, even in the absence of a contested hearing under Chapter 2001, Government Code. *Texas State Board of Examiners in Optometry v. Carp*, 388 S.W. 2d 409, 414-415 (Tex. 1965); *Gerst v. Nixon*, 411 S.W. 2d 350, 353-354 (Tex. 1966).

In point of fact, it is the position of the Board in this litigation that no judicial review is authorized for the Board's decisions in DFC appeals—a position that the Board believes to be consistent with the Finding No Clear Judicial Remedy at page 33.

## **Recommendations**

### **Change in Statute**

- 3.1 Require groundwater management areas to document consideration of factors or criteria that comprise a reasonable DFC and to submit that documentation to the Board.**

The Board concurs with this recommendation.

- 3.2 Transfer the petition process regarding the reasonableness of a DFC from the Board to the Commission, and modify the Commission's existing DFC petition process to unify elements relating to reasonableness and implementation of DFCs.**

The Board concurs with this recommendation that the petition process should be transferred to an appropriate quasi-judicial forum. In addition, and consistent with the Sunset Commission's observation at page 35 that "[w]ithout statutory guidance, ... decisions [on desired future conditions] may not withstand judicial scrutiny", it is the Board's position that factors that must be considered by groundwater conservation districts in establishing desired future conditions should be set forth in statute. The Board recommends these factors include the criteria under current Board rules set forth in the textbox at page 32.

- 3.3 The Commission should promote mediation in DFC petition cases where appropriate.**

This recommendation is not applicable to the Board.

### **Issue 4: Structural and technical barriers prevent the Board from providing effective leadership in geographic information systems.**

The Board concurs with the statements under **Background** and with each of the **Findings**.

## **Recommendations**

### **Management Action**

- 4.1 The Board should request a full TNRIS exemption from the data center services contract at DIR to accommodate its statutory emergency management responsibilities.**

The Board concurs but notes that a request for exemption of the entire agency, including the Texas Natural Resources Information System, already has been filed with the Department of Information Resources (see Attachment 1) and the request has been denied (see Attachment 2). As the Board notes in the discussion of the Board's new issue and Recommendation 7.1 to include the entire agency in exemption from the Data Services Contract (below), any exemption should be statutory.

#### **Change in Statute**

- 4.2 Clarify TNRIS' duties regarding coordinating and advancing GIS initiatives.**

The Board concurs with this recommendation.

- 4.3 Require the Board, in consultation with stakeholders, to report TNRIS' progress in executing its responsibilities and to propose new initiatives for geographic data to the Legislature.**

The Board concurs with this recommendation.

- 4.4 Abolish the Texas Geographic Information Council.**

The Board concurs with this recommendation.

**Issue 5: The Board lacks data to determine whether implementation of conservation and other water management strategies is meeting the state's future water needs.**

The Board concurs with the statements under **Background** and with each of the **Findings**.

#### **Recommendations**

##### **Change in Statute**

- 5.1 As part of the state water plan, require the Board to evaluate the State's progress in meeting its water needs.**

The Board concurs with this recommendation, to the extent that water plan projects continue to be funded.

- 5.2 Require the Board and Commission, in consultation with the Water Conservation Advisory Council, to develop uniform, detailed gallons per capita daily reporting requirements.**

The Board concurs with this recommendation.

### **Management Action**

- 5.3 As additional tools and data evolve, the Board should continue exploring ways to develop metrics for additional water use sectors and incentivize water conservation efforts.**

The Board concurs with this recommendation.

### **Fiscal Implication Summary**

- Issue 6: The Board's statute does not reflect standard language typically applied across-the-board during Sunset reviews.**

### **Background**

The Board does not disagree with the statements under **Background** or with the **Findings**, given that the Sunset Commission staff's discussion and findings recognize that many of the current, standard "across-the-board" requirements are appropriate to regulatory agencies and, accordingly, ill-suited to the Texas Water Development Board. (As noted at page 33, "[s]ince the Legislature split the Texas Department of Water Resources into the Texas Water Development Board and the Texas Water Commission (now TCEQ), the State has clearly separated functions between TCEQ as the regulatory arm and the Board as the financial assistance and planning arm for water.")

### **Recommendation**

#### **Change in Statute.**

**6.1 Apply standard Sunset across-the-board requirements to the Texas Water Development Board.**

The Board concurs with this recommendation, with appreciation that the Sunset Commission staff report clarifies that the across-the-board requirement for alternative dispute resolution training and process is intended to be applied only to internal functions of the agency, such as personnel matters, consistent with current practice, and will not be interpreted to authorize contests to Board decisions on financial assistance applications.

**Additional Issue: Exemption from Data Services Consolidation by Department of Information Resources.**

**Recommendation**

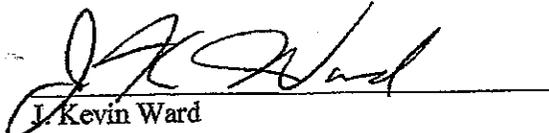
**7.1 Statutorily exempt the Texas Water Development Board from the Data Center Services (DCS) consolidation mandate.**

As mandated by HB 1516 of the 79<sup>th</sup> Legislative Session, the Board entered into an interagency contract with the Department of Information Resources (DIR) to have a selected service provider manage the agency's data center to include servers, network storage, systems administration and agency data for disaster recovery. As the Sunset Commission staff report notes on pages 43-47, the data that the Board maintains is critical and essential to the current and future management of water in Texas. The Texas Natural Resources Information System is especially critical in maintaining important geographic information systems data used by state, local, and federal emergency management decision makers in emergency response situations as well as a multitude of planning activities. Inadequate services provided under this contract adversely impact and jeopardize the agency's data and critical emergency response functions.

On July 15, 2010 the Board requested an exemption of all servers and related infrastructure from the DCS contract. (Attachment 1.) DIR denied this request. (Attachment 2.) Accordingly, the Board recommends a statutory exemption from this contract due to the jeopardy to maintenance and use of critical data, the extremely high cost of doing business under the DCS, and the numerous concerns associated with poor performance by the DCS contractor.

Sunset Advisory Commission  
October 28, 2010  
Page 8 of 8

Respectfully Submitted,

  
J. Kevin Ward  
Executive Administrator

**Attachments**

cc: James E. Herring, Chairman, Texas Water Development Board  
Jack Hunt, Vice Chairman, Texas Water Development Board  
Joe M. Crutcher, Member, Texas Water Development Board  
Thomas Weir Labatt III, Member, Texas Water Development Board  
Lewis H. McMahan, Member, Texas Water Development Board  
Edward G. Vaughan, Member, Texas Water Development Board

# **Attachment 1**



# TEXAS WATER DEVELOPMENT BOARD



James E. Herring, *Chairman*  
Lewis H. McMahan, *Member*  
Edward G. Vaughan, *Member*

J. Kevin Ward  
*Executive Administrator*

Jack Hunt, *Vice Chairman*  
Thomas Weir Labatt III, *Member*  
Joe M. Crutcher, *Member*

July 15, 2010

Ms. Karen W. Robinson  
Executive Director  
Department of Information Resources  
300 West 15<sup>th</sup> Street, Suite 1300  
Austin, TX 78701

Re: Request for Exemption from the Data Center Services Contract

Dear Ms. Robinson:

As discussed in prior meetings with the Department of Information Resources (DIR), the Texas Water Development Board (TWDB) continues to experience a number of concerns with IBM Team for Texas (TFT) performance on the Data Center Services (DCS) contract mandated by House Bill 1516, 79<sup>th</sup> Regular Legislative Session. The TWDB has provided information during the Sunset Self-Evaluation process related to these concerns and further respectfully submits this request for your consideration to allow the TWDB to be fully exempted from the DCS contract.

The critical emergency response role Texas Natural Resources Information Systems (TNRIS), a division of the TWDB, provides to emergency respondents during natural or man-made disasters is currently compromised under DCS. This is the TWDB's main area of concern related to DCS. TNRIS is the state's clearinghouse for natural resource data and data related to emergency management (Texas Water Code, § 16.021). The critical role that TNRIS provides requires maximum flexibility and real-time system enhancements which cannot and are not being met by DCS managed services. Staff of your agency and IBM have agreed that most of the critical data service functions managed by TNRIS during emergency management events require a highly dynamic and flexible operational platform versus the steady state operational platform provided by DCS and therefore are not compatible with DCS managed services. No suitable solution to the anticipated degradation of state services has ever been developed by IBM or DIR to address this paramount issue.

DIR and IBM have acknowledged that the TNRIS systems do not "fit" the data center model. The data center is designed for "steady state" computing. TNRIS' systems and data are "dynamic" and need to change very rapidly, at will, especially during an emergency. DIR has approved the exemption of the TNRIS development environment from the DCS contract upon transformation, but flexibility in on line data delivery is essential during an emergency event. Although DIR has agreed to exempt TNRIS' data development operations from DCS, the TWDB is requesting consideration for a full exemption of all servers and related infrastructure from the DCS contract.

In addition to our main concern of not being able to provide adequate emergency response resources to emergency management personnel, government and the general public during a natural or man-made disaster, the TWDB continues to experience a number of problems with the services currently provided through the DCS contract by IBM TFT as follows:

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Ms. Karen Robinson  
July 15, 2010  
Page 2

- Since IBM has been managing TWDB's data center, the agency has experienced critical system outages and data backup failures, and because the TWDB's servers have not yet been transformed (moved to the state data center) and related hardware and software is aging, future failures are probable.
- TWDB was taken off line during Hurricane Ike in 2008 when IBM powered down agency servers that included TNRIS services. This severely undermined the ability of TNRIS systems and personnel to respond to that event.
- The majority of agency systems are five years old or older, are out of warranty and have not been refreshed since we entered into this contract. These systems need to be replaced to avoid failures which could impact emergency responders and agency business.
- TIT's poor performance in maintaining agency servers and aging hardware are evident by their inability to upgrade software in a timely fashion, failure to maintain critical patches on TWDB's XioTech Storage Area Network (SAN), consistent unsuccessful server backups, and incorrect invoice charges for decommissioned TWDB servers.
- A high level of TWDB oversight and resources are required as a result of the cumbersome and more difficult process for achieving resolution and results on various issues which include monitoring incidents, change requests, backups, invoices, and special projects that require TIT's involvement. As a result there are concerns that there is an insufficient number of TIT's staff available to support the contract.
- Costs under the DCS contract are excessive compared to market rates, and recent unanticipated cost increases contribute to significant unfunded budget needs in the current and future biennia.

In recent years, the state has faced greater frequency and magnitude of natural disasters and we believe it is in the best interest of Texas to strengthen the capacity to deliver timely, large-scale data services during these catastrophic events independent of the DCS management structure. Also, during periods before and after these events, allowing TNRIS operations to maintain responsibility for all of its data resources and computing environment will position the state to better respond to future events particularly with the increased demand for geographic and location based data and information for mitigating, planning, responding, and recovering from natural disasters. Therefore, the TWDB respectfully requests your consideration and approval for the TWDB's request to be fully exempted from DCS.

Respectfully,



J. Kevin Ward  
Executive Administrator

c: The Honorable Rick Perry, Governor  
Mr. Ed Robertson, Governor's Office  
Mr. Ed Swedberg, DIR  
TWDB Board Members

## **Attachment 2**



**TEXAS DEPARTMENT OF INFORMATION RESOURCES**

P.O. Box 13564 ♦ Austin, TX 78711-3564 ♦ www.dir.texas.gov  
Tel: (512) 475-4700 ♦ Fax: (512) 475-4759

RECEIVED

AUG 30 2010

August 27, 2010

TWDB

KAREN W. ROBINSON  
*Executive Director*

Mr. J. Kevin Ward  
Texas Water Development Board  
P.O. Box 13231  
1700 Congress Avenue  
Austin, TX 78711-3231

DIR BOARD OF DIRECTORS

Dear Mr. Ward:

CHARLES BACARISSE  
*Chair*

The Department of Information Resources (DIR) has reviewed your July 15, 2010 letter requesting Texas Water Development Board (TWDB) to be fully exempted from the Data Center Services (DCS) program.

RAMÓN F. BAEZ

ROSEMARY R.  
MARTINEZ

We do acknowledge the special concerns of TWDB; specifically that Texas Natural Resources Information Systems (TNRIS) plays a critical role to the state during emergency management response. However, there is insufficient justification for granting an exemption from DCS. DIR maintains that TWDB should continue to be supported within DCS and continue to advance the state strategic direction as specified by HB1516.

THE HONORABLE  
DEBRA MCCARTT

RICHARD S. MOORE

P. KEITH MORROW

ROBERT E.  
PICKERING, JR.

ADAM JONES  
*Ex Officio*

BRAD LIVINGSTON  
*Ex Officio*

CARTER SMITH  
*Ex Officio*

The DCS service provider, IBM, is positioned to support the state in the event of an emergency. IBM provides increased support and responds to agency requests submitted through the Remedy request system, in accordance with Exhibit 2.1, Section 12.0 Crisis Management of the DCS Master Services Agreement. In 2008, as documented in the request system, TWDB staff directed IBM to power down specific servers in preparation for Hurricane Ike. Once reported by TNRIS as an error, IBM responded to the new request as a Priority 1 incident and the servers were promptly brought back online.

TWDB is an important partner in the DCS program and is appropriately part of consolidation into the state datacenter, including the TNRIS production servers. DIR understands the special considerations for GIS environments and has granted an exemption for the TNRIS development environment to accommodate the developer's dynamic data requirements.

DIR recognizes IBM's performance issues and is taking actions under the current contract and through reprocurement to change the service delivery model. We ask for your agency's participation during this reprocurement process to ensure we appropriately consider emergency management response requirements. During the transition period, DIR continues to work with the agencies and IBM to improve and monitor service delivery. We ask that you actively engage with the DCS Business Executive and IT Leadership Committees as they make key decisions and provide guidance on the future of DCS services.

If you have any questions regarding this communication, please contact DIR's Data Center Services Manager, Sally Ward, (512-463-9003) or email ([sally.ward@dir.state.tx.us](mailto:sally.ward@dir.state.tx.us)).

Sincerely,

A handwritten signature in black ink, appearing to read 'Karen Robinson', written in a cursive style.

**Karen Robinson**  
**Executive Director, Department of Information Resources**

Exhibit 4



# TEXAS WATER DEVELOPMENT BOARD



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Edward G. Vaughan, *Member*

J. Kevin Ward  
*Executive Administrator*

Jack Hunt, *Vice Chairman*  
Thomas Weir Labatt III, *Member*  
Joe M. Crutcher, *Member*

**TO:** Board Members

**THROUGH:** Robert E. Mace, Deputy Executive Administrator, Water Science and Conservation

**FROM:** William R. Hutchison, Director, Groundwater Resources Division  
Kenneth L. Petersen, General Counsel

**DATE:** March 10, 2010

**SUBJECT:** Briefing and discussion on: (a) status of joint planning in groundwater management areas; and (b) use of "geographic areas" in establishing desired future conditions.

## ACTION REQUESTED

No action requested; this is a discussion item.

## BACKGROUND

Key background points are:

- Groundwater management areas are required to submit desired future conditions to the Texas Water Development Board (TWDB) by September 1, 2010.
- Once desired future conditions are submitted, Groundwater Resources Division staff develops values of managed available groundwater based on the desired future condition.
- Groundwater conservation districts are required to include the desired future condition and managed available groundwater number in their groundwater management plans and permitting.
- Regional water planning groups are required to use the managed available groundwater values in their regional water plans if they are received in a timely manner.
- Once adopted, desired future conditions can be challenged by petitioning the TWDB.
- If the Board finds that the desired future condition is reasonable, the petition process ends.
- If the Board finds that the desired future condition is not reasonable, TWDB staff issues written findings to the petitioner and the groundwater conservation districts which include a list of findings and recommended changes to the desired future condition.
- The groundwater conservation districts are then required to prepare a revised desired future condition, to hold a public hearing, and to submit the revised future condition to the Board.
- TWDB will then provide public notice of the revised desired future condition and may provide a public response to the districts' revised conditions, at which point the petition process is concluded.

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## **KEY ISSUES**

### **(a) Status of joint planning in groundwater management areas**

The status of desired future conditions, managed available groundwater determinations, and active petitions is shown in the attachment. Progress during the first two months of 2010 includes:

- The groundwater conservation districts in Groundwater Management Area 11 adopted a set of preliminary desired future conditions that will generally result in managed available groundwater values that are about the same as the 2007 State Water Plan groundwater availability estimates. It is expected that formal adoption will occur at their April meeting after a series of public meetings being organized by individual groundwater conservation districts
- The groundwater conservation districts in Groundwater Management Area 12 adopted a set of preliminary desired future conditions. It is expected that formal adoption will occur at their April meeting.

### **(b) Use of "geographic areas" in establishing desired future conditions**

Section 36.108(d) provides that groundwater conservation districts "shall consider uses or conditions of an aquifer within the management area that differ substantially from one geographic area to another" when establishing desired future conditions. However, the law does not define "geographic area" and there is no guidance to the districts either on how to delineate a geographic area or on how to measure "substantial" differences between geographic areas in either uses or conditions. Under Section 36.108(d)(2), districts may establish different desired future conditions within a management area for "each geographic area overlying an aquifer in whole or in part ... within the boundaries of the management area."

The question has been presented whether groundwater conservation districts within a groundwater management area (GMA) may delineate different "geographic areas" within the GMA by use of county (or other political subdivision) boundaries. Staff believes this approach is legally defensible provided the districts are using the political subdivision boundaries to locate discernible and substantial differences in uses or conditions within the GMA and not for any other purposes. It should be emphasized that employing geographic areas that are not based on clear and substantial differences in uses or aquifer conditions is not supportable, regardless of how those geographic areas are drawn.

As noted, there is no definition of "geographic" or "geographic area" in Chapter 36, Water Code, nor are there any such definitions in the Code Construction Act which is generally applicable to statutory schemes. Webster's Third New International Dictionary (Unabridged, 1993) recognizes "political geography" as one form of geography (in addition to "mathematical geography," "physical geography," "economic geography," "commercial geography" and "bio-geography"). The argument that the omission of "political subdivision boundaries" from Section 36.108(d) is not

Board Members  
March 10, 2010  
Page 3 of 5

persuasive, as long as the groundwater conservation districts do not appear to be using county or other political subdivision lines to gerrymander DFCs for purposes other than accommodating discernible, substantial differences in uses or aquifer conditions within the GMA. (Known as the doctrine of *expressio unius est exclusio alterius*, the courts have stated that this approach to statutory construction is simply an aid to determine legislative intent and that it should not be mechanically applied. *Mid-Century Insurance Co. of Texas v. Kidd*, 1999 WL 450908 (Tex. 1999).

Attachment

**Status of Desired Future Conditions, Managed Available Groundwater Determinations, and Active Petitions**

**Status of Desired Future Condition Adoptions**

Statute requires that groundwater conservation districts submit desired future conditions to the TWDB by September 1, 2010. To date, districts in four groundwater management areas have adopted desired future conditions. Districts in one area (Groundwater Management Area 8) have submitted conditions for all of its aquifers. Desired future conditions adopted thus far are:

***Groundwater Management Area 1***

- Ogallala Aquifer
- Rita Blanca Aquifer

***Groundwater Management Area 8***

- Blossom Aquifer
- Brazos River Alluvium Aquifer
- Edwards (Balcones Fault Zone) Aquifer
- Ellenberger-San Saba Aquifer
- Hickory Aquifer
- Marble Falls Aquifer
- Nacatoch Aquifer
- Trinity Aquifer
- Woodbine Aquifer

***Groundwater Management Area 9***

- Edwards Group of the Edwards-Trinity (Plateau) Aquifer
- Ellenberger Aquifer
- Hickory Aquifer
- Marble Falls Aquifer

***Groundwater Management Area 10***

- San Antonio Segment (excluding Kinney County) of the Edwards (Balcones Fault Zone) Aquifer

**Status of Managed Available Groundwater Determinations**

Statute requires that the TWDB provide managed available groundwater numbers based on the adopted desired future conditions to groundwater conservation districts and regional water planning groups. Final managed available groundwater numbers provided thus far are:

***Groundwater Management Area 8***

- Blossom Aquifer
- Brazos River Alluvium Aquifer
- Edwards (Balcones Fault Zone) Aquifer
- Ellenburger-San Saba Aquifer
- Hickory Aquifer
- Marble Falls Aquifer
- Trinity Aquifer
- Woodbine Aquifer

***Groundwater Management Area 9***

- Edwards Group of the Edwards-Trinity (Plateau) Aquifer

Groundwater Resources Division staff sends draft managed available groundwater numbers to the districts in the groundwater management area for review. Once comments are addressed and received from the districts, Groundwater Resources Division staff brings the numbers to the Board for review. As requested by the Board, this review will include a side-by-side comparison of managed available groundwater numbers with current state water plan and water use numbers as well as estimates of drainable water in place and a maximum sustained pumping level.

**Status of Active Petitions**

To date, TWDB has received two administratively complete petitions challenging the desired future conditions for the Ogallala Aquifer adopted by the districts in Groundwater Management Area 1. TWDB has also received three administratively complete petitions concerning desired future conditions in Groundwater Management Area 9. The process for Groundwater Management Area 1 is complete because the Board found the desired future conditions to be reasonable. The process for Groundwater Management Area 9 is ongoing after the Board's finding that the desired future conditions were not reasonable. The Board's recommended desired future condition has been discussed at a Groundwater Management Area 9 meeting, and a public hearing has been held. No action on the recommendation has been taken to date.

Exhibit 5

# THE DAILY CALLER

PRINT PAGE

## Pickens wants Texas agency to nix water plan

By BETSY BLANEY 6:39 PM 04/20/2010

ADVERTISEMENT

LUBBOCK, Texas (AP) — Billionaire T. Boone Pickens wants a court to derail state approval of a water management plan that he claims would take \$10 million off the value of his groundwater rights in the Texas Panhandle.

Pickens' attorney, Marty Jones, said Tuesday that the oilman filed a lawsuit against the Texas Water Development Board last month.

The suit came after the board endorsed a plan that Pickens claims will take as many as 18,000 acre feet of water a year from the Ogallala Aquifer under land belonging to him and another rancher. One acre foot equals about 326,000 gallons.

The lawsuit says the combined plans of three groundwater conservation districts in the Panhandle management area will devalue Mesa Water LP's rights and those of a nearby rancher.

Pickens, who has been trying for years to sell water from the Panhandle to thirsty cities to the south, wants a Travis County court to declare the plan unreasonable. That would force the districts to revise their proposals.

The Texas Attorney General's Office, which is representing the water board, filed a response to Pickens' suit denying each claim.

Lawmakers told each conservation district — Texas has about 95 of them — to establish by Sept. 1 their own "desired future conditions."

According to Texas' water code, "the districts may establish different desired future conditions for each aquifer, subdivision of an aquifer, or geologic strata located in whole or in part within the boundaries of the management area." Or they may use "each geographic area overlying an aquifer in whole or in part or subdivision of an aquifer within the boundaries of the management area."

But "it doesn't define different geographic areas," Jones said.

"We want to ensure equitable treatment for all the people who have water rights in the same aquifer," Jones said. "Boone has never opposed regulation of groundwater. In fact, it protects his interests today."

C.E. Williams, general manager of the Panhandle Groundwater Conservation District that lies within the water management area, said the planning had many steps.

"We've gone through the process and we feel the process worked," he said. "We view it as being complete."

The Ogallala Aquifer lies beneath about 225,000 square miles in the Great Plains, particularly the High Plains of Texas, New Mexico, Oklahoma, Kansas, Colorado, and Nebraska.

If implemented, the lawsuit says, the plans of three Panhandle conservation districts would cause a reversal in the natural flow of the aquifer beneath land owned by Pickens and rancher George Arrington. In that case, Pickens and Arrington would lose up to 18,000 acre feet of water annually during the 50 years in which the districts' plans would be in effect.

One district's plan calls for 40 percent of the aquifer in four counties to be remaining in 50 years. A second, which takes in 13 other Panhandle counties, calls for 50 percent of the aquifer to still be there at that time.

The district that deals with Pickens' and Arrington's water rights in Hemphill County says there must be 80 percent of the aquifer's water remaining in 50 years.

If Pickens decided to sell Mesa's 8,000 acres of water rights, the rules in Hemphill County make it a money-losing proposition, Jones said.

"The market value is shot," he said. "It's just that nobody wants to buy it with 20 percent (of the groundwater) that's available."

Exhibit 6

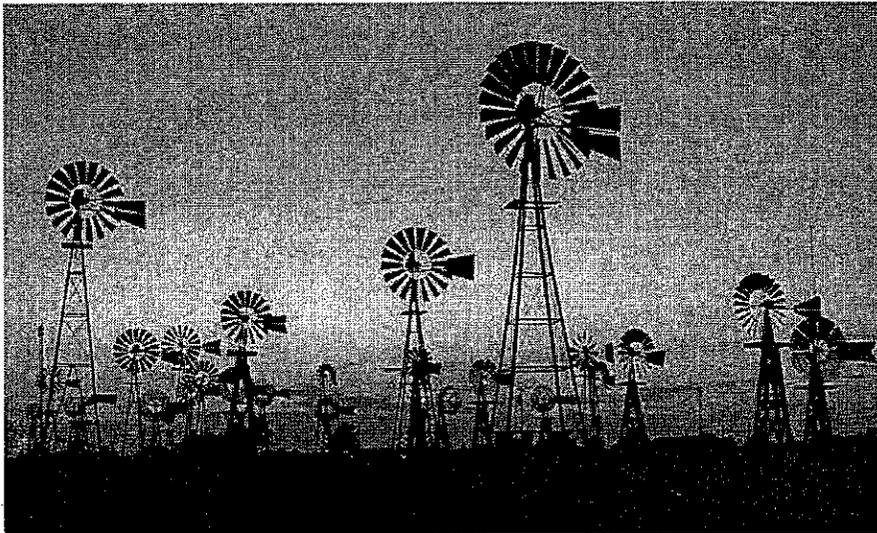
[Print this Article](#)

## Cash Flow

**A tiny Texas town takes on T. Boone Pickens--and tries to save its water.**

by [FORREST WILDER](#)

Published on: Thursday, September 09, 2010



*iStock photo*

[Hear Forrest Wilder's interview with KUT's Jennifer Stayton about this story.](#)

**GEORGE ARRINGTON, 77, HAS MADE AND LOST AND REMADE** a small fortune in oil. But in his semi-retirement, it's water that keeps him up at night. Arrington knows what to do with oil: Locate, extract, sell. If things go right, the checks roll in, and nobody complains. Water, he says, should be no different.

"It's so darn similar to oil and gas, it's unbelievable," Arrington says. Trouble is, his friends and neighbors—many of whom make a nice living off of oil and gas production—don't feel the same way.

It's a sizzling August day, and we're bouncing around in the independent oilman's blessedly air-conditioned Suburban, navigating the caliche roads and two-track paths on his 7,000-acre cattle ranch in Hemphill County, a square of rolling hills, red bluffs, and cottonwood-lined streams in the windswept northeastern corner of the Panhandle—pretty country that can startle visitors who expect this part of the state to be flat, dry, and monotonous.

Arrington lives with his wife Jean in [Canadian](#), the county's only town, to be close to his modest Arrington Oil headquarters. He grew up on his ranch and knows it well. The property has been in his family for more than a century. His great-grandfather, a Texas Ranger, purchased the first parcel in 1890 as the region emerged from a haze of buffalo-slaughtering and Indian-killing.

From the truck, Arrington points out a grassy buffalo wallow, one of the subtle topographical depressions that served as hiding places for Army soldiers ambushed by Kiowa and Comanche during the nearby Buffalo Wallow Fight of 1874.

They don't fight like that in Hemphill County anymore. But Arrington's on the warpath against his neighbors, who he claims have confiscated 80 percent of the water beneath his land and robbed him of a million dollars. "I'm not in this for publicity," Arrington says. "I'm not in this for any other reason than to protect my property rights."

In contrast to the rest of the Panhandle, the people of Hemphill County have decided their water is more valuable in the ground than out. In parts of the Panhandle, widespread pumping has dramatically depleted the Ogallala Aquifer—a vast water reservoir underlying parts of eight states. Like the oceans, the Ogallala was once thought to have a limitless yield. Farmers imagined it to be a subterranean river that flowed freely across great distances. We now know better. Studies of the aquifer show that it barely recharges and moves slowly through beds of sand and gravel.

In some counties, two-thirds of the groundwater is already gone, used over the past six decades to irrigate corn, sorghum, and wheat. The Texas Water Development Board predicts that one-third of Texas' portion of the Ogallala will be left in 2060.

In Hemphill County, where the rugged terrain makes irrigated farming difficult, water conservation has preserved Canadian's reputation as the "Oasis of the Texas Panhandle."

Around Canadian, the still-full aquifer feeds numerous seeps, springs, creeks, and the Washita and Canadian rivers, which in turn support wildlife, including threatened species like the lesser prairie chicken and Arkansas River shiner, defiant clusters of cottonwood and willow, and a small but growing-nature tourism industry that boosters in Canadian—a civically sophisticated and progressive community—are promoting as an alternative to declining oil production.

"The people in Hemphill County think differently," says Wilbur Killebrew, a Canadian native who lives in neighboring Roberts County. "We want to preserve the land as long as we can and to have a supply of water for as long as we can."

It's a bold bid to keep their community from drying up and blowing away, the fate and destiny of many High Plains towns. It puts them in the crosshairs of powerful oil-baron-turned-water-marketer T. Boone Pickens, who plans to pump water to urban Texas. And it has landed Hemphill County in the middle of a heated debate over property rights—one that's increasingly being fought all over the state as water supplies become constrained. "It's a little place with big conflicts," says Drew Miller, an Austin attorney who represents the Hemphill County Underground Water Conservation District.

Arrington has made common cause with Pickens. A few years ago, Mesa Water Inc., Pickens' water company, bought half of Arrington's water rights for \$1 million. Mesa placed an option on the other half, but Arrington claims actions by the Hemphill County Underground Water Conservation District "renders the value of my water worthless." What's worse, he goes to church with four of the five board members, who he claims refuse to discuss the issue with him.

"Democracy is dead in Hemphill County," he says as we rumble over a cattle guard.

The water district, one of 98 in the state, is run by a locally elected board that regulates groundwater in Hemphill County. Last year, the board voted to keep 80 percent of the Ogallala beneath the county intact over the next 50 years. Arrington's ranch is just a few miles from Roberts County, where the goal is to drain half of the aquifer by 2060. Roberts County—home to the vast majority of Pickens' water

holdings—is ground zero for Panhandle water mining. Arrington worries that the free-for-all across the county line will dewater his property.

“In other words, they’re saying you’re going to get your ass drained,” Arrington says, his usually amicable face turning sour. “There’s no way to protect yourself.”

Arrington would prefer to drain his property himself, even if it means ruining the thing that he loves the most. Like a lot of landowners in Hemphill, Arrington is proud of his and his son Mike’s efforts to preserve the land and surface water. They even make some money off of it: The Arrington homestead, a two-story, prefabricated house hauled in pieces to its present location by train and wagon in 1919, serves as a bed-and-breakfast for nature enthusiasts.

The oilman gives a looping tour of the ranch’s numerous water features: the trickling Washita River; the small cattle-watering holes fed by springs; the green-tinged fields naturally irrigated by a shallow water table; the stands of giant cottonwood and willow; and the deep creek behind Mike Arrington’s house. (Mike, George’s son, runs the ranch.)

“Nobody loves springs in Hemphill County more than George Arrington,” George Arrington declares. He and Mike, he says, have gone to considerable effort uncovering springs, clearing invasive Russian olive trees and implementing eco-friendly rangeland management techniques. “We love water. We like water. And we want water to be here forever. In other words, we’re interested in conservation. But wise conservation is when everyone is treated the same. When you start discriminating against people, it’s not conservation; it’s confiscation.”

Arrington believes in the Rule of Capture, the fundamental groundwater law in Texas that says you can pump as much as you like, even if your neighbor’s well runs dry. “If we didn’t sell our water rights, we would just sit there and rub our big fat bellies and get drained,” he says. One day, Arrington says, his neighbors are going to “wake up and realize, hey these sons of bitches are draining all our water.” Then, he says, it will be too late.

**IN 2005**, belatedly recognizing the state’s need for long-term water planning, the Texas Legislature created a complex groundwater planning process. The Legislature carved the state up into 16 groundwater management areas, based roughly on the boundaries of major aquifers, and ordered Texas’ 98 groundwater conservation districts—locally-controlled regulatory boards—to work on how they want their shared aquifers to look in 50 years. The process of setting so-called “desired future conditions” is clunky and complicated, but has the virtue of forcing communities to consider the future.

In the Panhandle, as in the rest of the state, the result has been a patchwork of goals for how much water remains. Groundwater Management Area 1, the northern half of the Ogallala, decided to split its aquifer into three portions and set a target for each area. In the far northwestern corner, where irrigators dominate, the groundwater planners expect to have only 40 percent of the water left in 60 years. In 13 other counties, where irrigated farming is also widespread, the goal is to drain 50 percent of the aquifer in 50 years.

These districts have long operated under the principle of “managed depletion.” Managed depletion takes as a given that the aquifer will wither away, but eases the economic and social pain of a dying agricultural economy by gradually decreasing pumping. It’s a slower way to get to zero. The idea can also be understood in biblical terms: A day of reckoning is coming, but it can be postponed for a while.

Hemphill County, on the other hand, has never had much pumping and isn’t interested in water ranching.

The Hemphill County groundwater district set a benchmark of 80 percent left in 50 years. The stringent rule has kept the barbarians from crashing the gate. It has made the area off-limits for water marketers like Pickens or wholesale water suppliers like the Canadian River Municipal Water Authority, the No. 1 owner of groundwater rights in the state.

That doesn't sit well with Boone Pickens and Mesa Water. Mesa Water, Arrington, and private property legal activists like the Pacific Legal Foundation are attacking the edifice of regulation in Texas. They contend that groundwater is a vested, private property right and is owned by the landowner "in place" beneath the ground—like oil and gas. From this radical legal theory flows the notion that pumping limits imposed on landowners could constitute a "taking" of property without compensation. "Now because of this rule, all the buyers have disappeared," says Arrington. "It's like the water dried up, if you like. No market."

In April, Mesa and Arrington filed suit against the Texas Water Development Board, claiming that Hemphill County can't set a different desired future condition than the other groundwater districts over the Ogallala Aquifer.

Mark Meek, a county commissioner, disputes the idea that regulating groundwater based on principles of sustainability interferes with private property rights. "If this natural resource leaves, the only ones that are going to benefit are those who sold their water," says Meek. "As far as the rest of the community, it's going to be detrimental."

By law, the district can't directly prevent Mesa or Arrington or anyone else from exporting water if an end-user is found. But pumping limits prevents the company from maximizing production.

Mesa is "breathing down the necks of this water district, which is the most conservation-oriented in the Texas Panhandle," says Laurie Ezzell Brown, editor of the *Canadian Record* and a frequent Mesa critic. "They've challenged everything we've done. They threaten lawsuits at every turn."

The conflict has broader resonance in a state coming to terms with the limits of its water supplies. "It seems the entire state has one of two problems, and both lead to litigation: Either there's too much water, or there's not enough," says Greg Ellis, executive director of the Texas Association of Groundwater Districts. "Those areas that have too little water are going to be fighting over available supplies and fighting to go find alternative supplies somewhere else. Those areas that have too much water, you're going to see people fighting over who gets to get rich over supplying water to those areas that don't have enough."

Pickens figured out the "get-rich" part a decade ago. At least he thought he did.

**PICKENS DIDN'T INVENT** water mining in the Ogallala; he just made it big business. In the 1980s, the Southwestern Public Services Co., a regional power company, purchased 100,000 acres of groundwater rights in Roberts County, the county west of Hemphill. The utility wasn't engaging in water marketing, though; it needed the supply for a proposed nuclear power plant.

The project never got off the ground, and the utility needed to unload its investment. In 1997, the Canadian River Municipal Water Authority, which provides drinking water to Amarillo and Lubbock and nine smaller cities, bought 43,000 acres from Southwestern Public Services for \$14.5 million.

A few years later, Salem Abraham, a prominent Hemphill County businessman and philanthropist, was making his own play. Abraham pooled his water rights with other Roberts County landowners into a 72,000-acre package, which they sold to Amarillo in 1999 for \$20 million.

Pickens watched this with a mixture of unease and interest. The Canadian River authority wells were close enough to his 68,000-acre ranch that pumping would partially drain his property. The choice was clear: Pump or be pumped.

In a sense, Pickens was following the Rule of Capture to its logical conclusion: To defend your property, you must pump first and faster.

In 1999, Pickens formed Mesa Water and began buying water rights from neighbors in Roberts and surrounding counties. His first purchase was the remaining 65,000 acres held by Southwestern Public Service. Mesa's entrance set off a bidding war between the river authority and Mesa. Today most of the water in Roberts County is spoken for. Mesa has amassed enough water rights to supply about 200,000 acre-feet, or 65 billion gallons, of water each year to urban Texas.

Pickens' business proposition has never been that hard to understand: Buy water and wait until some booming city (Dallas, San Antonio) is thirsty and desperate enough to pay the asking price. Estimated revenues over 30 years: \$1 billion. "There are people who will buy the water when they need it," he told *Business Week* in 2008. "And the people who have the water want to sell it. That's the blood, guts and feathers of the thing."

Mesa never quite cracked Hemphill County. "We set here in Hemphill County and seen how it works," said Mark Meek, a county commissioner. "We like what we have—we like the creeks, we like the springs, we like the big cottonwood trees, the scenery and the fall foliage. And you know, there's not many places left like that. We just could not understand how large water exports fit this picture."

Marty Jones, an Amarillo attorney who represents Mesa Water and Arrington, concedes that the Mesa pipeline-to-Dallas idea has never been popular in the area. But he bristles at the notion that Pickens is stealing the Panhandle's water. "It's private property," says Jones. "If the Panhandle wishes to keep it here, there's a simple solution, and that's to have [the Canadian River Municipal Water Authority], who's already set up to do this, purchase it. Or the city of Amarillo purchase it. They're big enough. It wouldn't make a dime's worth of difference in a water bill. There's a very simple solution—they simply purchase it. But they don't take it."

Someday they might. Mesa Water and the Canadian River authority have been in on-again, off-again negotiations for a year. The wholesale water supplier already has what Mesa desires: a pipeline and a market. The authority owns a 358-mile aqueduct that runs south from Roberts County to Amarillo and then to Lubbock, Tahoka, and Lamesa.

"I hope someday we end up with [Mesa's water]," says Kent Satterwhite, general manager of the Canadian River authority. "That would nearly double our supply."

For the time being, Mesa says it still prefers to sell to a big city downstate. Does Dallas or El Paso or San Antonio need Pickens' water? No buyer has come forward yet, and the costs of building a pipeline are exorbitant. Amy Hardberger, an attorney and water specialist with the Environmental Defense Fund of Texas, thinks construction costs and the energy involved with moving water could sink the project. "I think it's somewhat overly simplistic to say if a city needs water badly enough, they will buy it," she says. "Something has to get it there." Satterwhite agrees.

"There's just so many more feasible options for the cities they're talking about," he says. "It doesn't seem to make any sense whatsoever."

Dallas-Fort Worth could find cheaper, more accessible water in East Texas or Oklahoma. The Metroplex cities could tap existing reservoirs, or try the cheapest option: water conservation. San Antonio, over 500

miles from Roberts County, is exploring the costs of desalinating seawater from the Gulf of Mexico.

Besides, Satterwhite argues, Mesa isn't offering a renewable supply. "It would only be a 20- or 30-year supply, and then it's over," he says. "They'd drain this area completely."

Regardless of whether Mesa's water ends up in Amarillo or Dallas, the result will be the same: The Panhandle will become that much drier.

**THE DAY AFTER VISITING** with Arrington, I meet up with Jim Bill Anderson at his 5,280-acre spread on the Canadian River, a working cattle ranch that's won accolades for preserving native prairie grasses and wildlife.

In many respects, Anderson and Arrington are cut from the same cloth: They're Canadian natives, large landowners, politically conservative, protective of private property. They attend the same church. But Anderson takes a different view of groundwater. He dresses like a cowboy—blue jeans, white Stetson, and boots—but the 59-year-old is fluent in the science of the aquifer, the complexities of groundwater regulation, and the subtleties of Hemphill County's ecology. A member of the Hemphill County Underground Water Conservation District, Anderson confesses to being a reluctant regulator.

"When I was growing up, no one would ever have thought we'd be regulating water, but the pressures of population, that's where it's coming from," Anderson says as we cruise his ranch in a bulky feeder truck. "It's hard for me as a regulator because I want to be left alone more than anyone. But it's not the Wild West anymore. I wish it was."

Where Arrington sees profit in mining the aquifer, Anderson sees a percentage in leaving it underground. "I'm not happy that George is stressed out over it," he says. "But the local people and the board don't want the springs and streams dewatered, and they sure don't want it exported to Dallas."

"There's no do-over, there's no whoops," says Anderson, "unless they pump water back from Dallas and put it back in the aquifer."

The fundamental question in the Panhandle is, when? When does the water run out? It is a fact of nature that it will. People only get to choose when. "At the bottom of this hill we're going down, there is a brick wall," says Anderson. "When it's gone, it's gone. People say it might be 20 years from now. Well, good Lord, my grandson is only 4 years old."

Near the end of the tour, Anderson drives to the edge of a bluff overlooking the Canadian River. It's a beautiful view of a lush river valley. Wide red sandbars hug the edges of the stream as it executes a lazy turn. Meadows of native prairie grass, dotted here and there with trees, roll down to the water's edge.

The Spanish explorers who trekked the area hundreds of years ago would have found a scene much like this one. Whether it survives for another few hundred is an open question.

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Exhibit 7

# NOT FOR SALE

As your State Representative, I will fight to protect our precious underground water resources from being sold to other areas of the state.

Let me be clear—Our water is **NOT FOR SALE!**  
**NOT** to T. Boone Pickens! **NOT** to anyone!

*Victor E. Iral*

Republican  
**Iral**  
FOR STATE REPRESENTATIVE  
District 87 across Curran, Meany, Polzer and Starman Counties

REPUBLICAN PRIMARY TUESDAY, MARCH 2, 2010  
Early Voting Ends on Friday, February 26th

**Our Water is Priceless!**

Published at 1100 N. 10th St., Williston, ND 58801-1000. Phone: 701-535-1100



# Strong Republican Leadership to Enhance & Protect Our Local Quality of Life

## Responsiveness To Citizen Needs

- 1 Regularly seek citizen input
- 2 Hold regularly-scheduled annual town hall meetings in every county
- 3 Appoint legislative citizen advisory committees



- 4 Have all citizen phone calls returned immediately within 24 hours

## Support Public Education & Higher Education

- 5 Strongly support local community control
- 6 Oppose unfunded state/federal mandates
- 7 Support teacher pay raises to national average and state funded teacher health insurance plan
- 8 Oppose state regulation of home schooling
- 9 Strongly support higher education including: Texas Tech University School of Medicine at Amarillo, West Texas A&M University & Amarillo College
- 10 Support expanding the Texas Tech University School of Medicine at Amarillo from a two-year medical school training program to a full four-year medical school

## Local Jobs & Agriculture

- 22 Support local economic development districts



- 23 Oppose abusive & frivolous lawsuits
- 24 Protect tax exemptions for small businesses
- 25 Protect ranch & farm tax exemptions/abatements
- 26 Support strong funding for local state highways and farm-to-market road system
- 27 Improve broadband internet service to rural Texas

## Protect Our Panhandle Water Supply

- 28 Oppose the sale of our underground water to T. Boone Pickens, his Mesa Water company or any other entity to be used in other areas of the state
- 29 Support groundwater conservation districts & regional water planning



## Preserving Palo Duro Canyon

- 30 Strongly oppose allowing electric transmission lines to be built over Palo Duro Canyon.

## Strengthen Penalties for Crime & Drugs

- 31 Favor Texas death penalty for capital crimes
- 32 Mandatory life in prison for drug smugglers
- 33 Use "civil commitment" to keep sex offenders & child molesters in prison
- 34 Increase penalties for identity theft
- 35 Regularly ride with DPS officers & local law enforcement

## Private Property Owner Rights

- 36 Support/protect private property owner rights
- 37 Protect against the abuse of eminent domain

## Lower Property Taxes, Fair Appraisals

- 38 Strongly oppose a state income tax
- 39 Support property tax appraisal reform
- 40 Protect school property tax reductions

## Stand Up for Conservative Values

- 41 Support voluntary prayer & pledges in schools
- 42 Support Pro-Life legislation
- 43 Strongly support Republican and Tea Party values

## Consumer Protections

- 44 Advocate for lower electric and phone utility costs
- 45 Work with TX Dept. of Insurance to expand options for lower cost homeowner, health & auto insurance



## Protect 2nd Amendment Rights

- 46 Support right-to-carry handgun law
- 47 Oppose mandatory gun registration
- 48 Support voluntary child safety lock program
- 49 Support and protect the Castle Doctrine



## Straightforward On All Issues

50 I will take a straightforward stand on all issues, and before I vote on any piece of legislation, I will ask myself:

**"How will it affect our Panhandle families?"**

Victor Leal

Republican

# Leal

TEXAS STATE REPRESENTATIVE

**"I have a true passion to serve. Our family has successfully operated restaurants and businesses in the Panhandle for over 50 years. We listen to our guests, work hard on service and deliver on results. I will apply this same responsive work ethic to protect our family values, improve local quality of life, and lower taxes."**

**REPUBLICAN PRIMARY  
TUESDAY, MARCH 2, 2010  
Early Voting February 16 - 26, 2010**

TEXAS STATE REPRESENTATIVE

# Meet Victor



## Dedicated Family Man

- Married 23 years to wife Debbie
- Two sons Roman & Noah
- CEO of Lou's Mexican Restaurants, a family business since 1977 with over 250 employees in Amarillo & across the Panhandle
- Provides scholarships for restaurant employees
- Avid cyclist, Member of International Christian Cyclists
- Graduated from Panhandle public schools/ Attended Southwest Texas State University

## Proven Community Service

- Amarillo Gate-Net Board Member
- Former Board Member, Amarillo Chamber of Commerce & Leadership Amarillo
- Amarillo United Way Campaign Volunteer
- Current Board Member, America Supports You—Texas
- Past Texas Municipal League Region 3 Vice President & President Elect

- Former Rural Panhandle Mayor
- Served on Rural Hospital Board of Directors
- Past Board Member, Region 17 Education Service Center
- Member of the National Federation of Independent Business & the Texas Restaurant Association

## Active Amarillo/Panhandle Republican Leader

- Former Republican Governor's Appointee to the Texas Tax Reform Commission, the Texas Economic Development Corporation & the Texas Facilities Commission
- Served on Texas Senate Advisory Committee on Long Term Health Care and Insurance
- Board member, Texas State History Museum Foundation
- NRA member
- Concealed handgun permit holder

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*Victor E. Kel*

**Our Water is Priceless!**

# Victor Leal's 50 Point Action Plan

Empowering Republican Leadership to Enhance & Protect Our Local Quality of Life

## Transparency To Citizens

• Seek citizen input  
• Quarterly-scheduled annual meetings in every county  
• Legislative citizen committees  
• Citizen phone calls returned daily within 24 hours

## Ethical Education & Education

• Support local  
• Budget control  
• Funded state/federal

• Capping pay raise to  
• Repeal and state funded  
• Health insurance plan  
• Strict regulation of home

• Support higher education  
• Texas Tech University  
• Medicine at Amarillo,  
• A&M University &  
• College



• Model training program to  
• Prepare medical school

## Immigration

• Increased funding for  
• Security  
• Full city/county jail  
• Homebased Security/  
• Background checks

- 13 Require a valid photo ID to vote
- 14 Prosecute Employers who knowingly hire illegal aliens
- 15 Oppose amnesty for illegal immigrants
- 16 Oppose drivers license for illegal immigrants

## Health Care Reform

- 17 Strongly oppose President Obama's and the Democrat's proposed government run national health care reform
- 18 Protect patient rights from government intrusion
- 19 Oppose rationing of care, especially as it pertains to care for seniors
- 20 Support Texas patient protections from HMO abuses
- 21 Support proper funding for nursing homes and senior centers

## Local Jobs & Agriculture

- 22 Support local economic development districts
- 23 Oppose abusive & frivolous lawsuits
- 24 Protect tax exemptions for small businesses
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"How will it affect our Panhandle families?"

Victor Leal

## REQUIRING A PHOTO I.D. TO VOTE SHOULD BE AS COMMON AS SHOWING ONE TO CASH A CHECK



To prevent voter fraud, safeguard against identity theft, and protect the integrity of our elections, Victor Leal supports legislation that requires a valid Texas Photo ID to vote.

During the next legislative session, Victor will also author comprehensive illegal immigration reform, calling for citizenship E-Verification of

all Texas employees and license holders as well as a uniform statewide policy for immigration background checks on all inmates in city and county jails.

Victor also strongly supports the Texas Department of Public Safety new policy requiring non-citizens to prove they are in the United States legally before they can obtain or renew a Texas drivers license. Though this policy was initially struck down by a district court ruling a year ago, it was recently reinstated by the Court of Appeals.



Victor Leal  
FOR STATE REPRESENTATIVE  
Districts 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

ICampaign.com

CAMPAIGN HOTLINE: 806-331-VOTE

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