State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

July 11, 2014

Anne Idsal, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: **SOAH Docket No.582-14-0597; TCEQ Docket No 2013-1467-WR; In Re: In the Matter of the Recommendation by the Executive Director to Add Portions of Briscoe, Hale, and Swisher County Priority Groundwater Management Area in High Plains Underground Water Conservation District No. 1**

Dear Ms. Isdal:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than July 31, 2014. Any replies to exceptions or briefs must be filed in the same manner no later than August 11, 2014.

This matter has been designated **TCEQ Docket No 2013-1467-WR; SOAH Docket No. 582-14-0597**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at http://www14.tceq.state.tx.us/epic/efiling/ or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Paul D. Keeper

Administrative Law Judge

PK/mm
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: BRISCOE, HALE AND SWISHER COUNTY PRIORITY GROUNDWATER MANAGEMENT AREA

SOAH DOCKET NUMBER: 582-14-0597

REFERRING AGENCY CASE: 2013-1467-WR

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ PAUL D. KEEPER

REPRESENTATIVE / ADDRESS | **PARTIES**

CHRISTIAAN SIANO
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-173 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-6743 (PH)
(512) 239-0606 (FAX)
christiaan.siano@tceq.texas.gov

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ELI MARTINEZ
PUBLIC INTEREST COUNSEL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
12100 PARK 35 CIRCLE, MC-103, BUILDING F
AUSTIN, TX 78753
(512) 239-3974 (PH)
(512) 239-6377 (FAX)
eli.martinez@tceq.texas.gov

TCEQ PUBLIC INTEREST COUNSEL

BRENDA HUTSON
804 PULITZER
SILVERTON, TX 79257
(806) 352-2371 (PH)
(806) 823-2433 (FAX)
brenda.briscoenews@gmail.com

COURTESY COPY

JASON COLEMAN
HIGH PLAINS GROUNDWATER CONSERVATION
DISTRICT NO. 1
2930 AVENUE G
LUBBOCK, TX 79411
(806) 762-0181 (PH)
jason.colemam@hpwd.com

HIGH PLAINS GROUNDWATER CONSERVATION
DISTRICT NO. 1

WYATT L. BROOKS
BURDETT MORGAN WILLIAMSON & BOYKEN, LLP
3423 S. SONCY ROAD, SUITE 300
AMARILLO, TX 79119
(806) 358-8116 (PH)
(806) 350-7642 (FAX)

BUD ZIEGLER

LELAND STUKEY

JAMES ALAN PATTON

JOHN BURSON

KYLE FUSTON

JERRY LEATHERMAN

JIMMY BURSON

DON BROWN

TOMMY BURSON

GARY WEAKS

SOAH DOCKET NO. 582-14-0597
TCEQ DOCKET NO. 2013-1467-WR

IN THE MATTER OF THE RECOMMENDATION BY THE EXECUTIVE DIRECTOR TO ADD PORTIONS OF BRISCOE, HALE, AND SWISHER COUNTY PRIORITY GROUNDWATER MANAGEMENT AREA IN HIGH PLAINS UNDERGROUND WATER CONSERVATION DISTRICT NO. 1	§	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The Executive Director of the Texas Commission on Environmental Quality (Commission) petitioned the Commission to create or add a groundwater conservation district in the 406 square miles of Briscoe County within the Briscoe, Hale, and Swisher County Priority Groundwater Management Area (Briscoe PGMA), an area that is not included in a groundwater conservation district (Non-Managed Area).[1] As part of the petition, the Executive Director recommended in his report (Report) that the Commission authorize the inclusion of the Non-Managed Area as part of the High Plains Underground Water Conservation District No. 1 (District).

A group of Briscoe County landowners, the Aligned Parties, opposed the Executive Director's petition.[2]

The State Office of Administrative Hearings (SOAH) administrative law judge (ALJ) recommends that the Commission grant the Executive Director's petition and reject the Aligned Parties' challenges.

---

[1] ED Ex. 1 at 3. The Non-Managed Area, on the western side of the county, constitutes about half of the county's total area.

[2] The Aligned Parties were Gary Weaks, Brad Ziegler, Leland Stukey, James Alan Patton, John Burson, Kyle Fuston, Jerry Leatherman, Perry Brunson, Jimmy Burson, Don Brown, and Tommy Burson. At the preliminary hearing, the ALJ admitted County Judge Wayne Nance as an Aligned Party, but on March 27, 2014, the ALJ confirmed that he had granted Judge Nance's request to be dismissed as a party.

I. JURISDICTION, NOTICE, AND STANDING

The Aligned Parties filed a motion challenging the Commission's jurisdiction. They based their challenge on: (1) the holding in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012) (*Edwards*), asserting that the holding establishes their ownership rights to the groundwater in place on their properties; (2) their alleged failure to receive notice about or to be heard about the 1990 designation of the PGMA (as described in more detail in Section IV); (3) the alleged failure of the notice to describe an impact on their private property rights; and (4) the ALJ's alleged failure to give the parties the opportunity to contest jurisdiction after proper notice.

The ALJ denied the motion relating to the holding in *Edwards* because the Aligned Parties were asserting a constitutional challenge to the Commission's authority. Jurisdiction over constitutional questions vests exclusively in the judicial branch.[3]

The Commission has jurisdiction to consider the Executive Director's Report and recommendation. Specifically, Texas Water Code (Code) § 35.008(b) authorizes the Commission to call an evidentiary hearing, and Code § 35.008(j) authorizes the Commission to adopt rules regarding the addition of all or part of the land in a priority groundwater management area. The Commission has adopted rules for that purpose, and the provisions of 30 Texas Administrative Code § 293.19(b)(6) state that in PGMAs designated before September 1, 2001, the Executive Director is to: (1) identify the areas in the PGMA that have not created a groundwater conservation district; and (2) petition the Commission "for the creation of a district by preparing a report and filing the report with the chief clerk."

However, if the Commission finds that that the areas in the PGMA that have not created a groundwater conservation district should be added to an existing district, then the Commission "shall issue an order recommending the addition of the identified areas to the existing district"

[3] *City of Dallas v. Stewart*, 361 S.W.3d 562, 579 (Tex. 2012).

and the Commission and the Executive Director "shall follow the procedures provided under [30 Texas Administrative Code] § 294.44.[4]

With respect to SOAH's jurisdiction, the Commission may refer any matter to SOAH for a hearing.[5] The provisions of Texas Administrative Code § 294.44 make reference to the provisions of 30 Texas Administrative Code § 294.42, a rule that authorizes the Executive Director, on behalf of the Commission, to refer the evidentiary hearing directly to SOAH.[6] In addition, the provisions of Texas Government Code § 2003.021(b)(2) authorize SOAH to conduct administrative hearings in matters for which SOAH is required to conduct the hearing under law other than the Texas Administrative Procedure Act.[7] SOAH has jurisdiction to conduct the hearing and to issue a proposal for decision.

As discussed in Section VI, the ALJ concludes that the balance of the Aligned Parties' challenges should be rejected because the Executive Director established at the preliminary hearing that notice was effective and the Aligned Parties have had the opportunity to contest jurisdiction.

II. PROCEDURAL HISTORY

On October 29 and 30, 2013, the Executive Director published notice about a December 3, 2013 preliminary hearing. The notice appeared in two local newspapers, the *Valley Tribune* and *Caprock Courier*. The Executive Director also sent copies of the notice and the Report to the Briscoe County Clerk, the Silverton public library, the Briscoe County judge, the Briscoe County commissioners, state river authorities, state agencies, state water districts, other state and local elected officials, university officials, non-governmental entities, private

---

[4] 30 Tex. Admin. Code § 293.19(d).

[5] Code § 5.311(a).

[6] 30 Tex. Admin. Code § 294.42(b)(1).

[7] Tex. Gov't Code ch. 2001.

environmental advocacy groups, farm associations, trade associations, federal agencies, and other potential stakeholders.[8]

On October 14, 2013, on behalf of the Commission, the Executive Director referred this matter to SOAH for a hearing on the merits. On December 3, 2013, the ALJ held a preliminary hearing in Silverton, Texas. At the conclusion of the preliminary hearing, the ALJ ruled that the Commission has jurisdiction to consider the matter and that SOAH has jurisdiction to conduct a hearing on the merits and to issue a proposal for decision.[9] The ALJ admitted the Office of Public Interest Counsel (OPIC) as a party in support of the Executive Director's recommendation, the District as a party without a position on the recommendation, and the Aligned Parties in opposition to the recommendation. The ALJ also adopted the parties' proposed prehearing schedule and set April 8, 2014, as the date of the hearing on the merits in Silverton.[10]

On February 27, 2014, the Aligned Parties filed a Plea to the Jurisdiction and Motion for Summary Disposition. On March 6, 2014, the Executive Director filed a response opposing the motion. On March 19, 2014, the ALJ denied the plea and motion.[11]

On April 4, 2014, the Aligned Parties filed suit against the Commission in the 353rd Judicial Court of Travis County to halt the administrative proceeding.[12] The Aligned Parties asked the court to declare that: (1) the Commission may not require the Aligned Parties' properties to be included in an existing groundwater conservation district or in the formation of a

---

[8] ED Ex. C.

[9] ED Exs. A, B, and C.

[10] Code § 35.008(e) provides that the evidentiary hearing shall be concluded not later than the 75th day after the date notice of the hearing is published. The parties proposed a later date to accommodate their need to prepare for the hearing.

[11] On SOAH's docket, the date of the filing of the Aligned Parties' motion and supplemental motion is after the date of Order No. 2. The Aligned Parties did not file their motions at SOAH, as required by the Commission's rule at 30 Texas Administrative Code § 1.11(b). The ALJ learned of the filing, requested and received a copy, and ruled on the motion, all before the motion was made part of SOAH's digital filing system. The Aligned Parties did timely file their materials at the Commission.

[12] *Gary Weaks et al. v. Texas Commission on Environmental Quality*; Cause No. D-1-GN-14-001013 in the 353rd Judicial District Court of Travis County, Texas. The Aligned Parties did not offer the petition in evidence but did attach a copy of the original petition to their Post-Hearing Brief.

new district; and (2) the ALJ should dismiss the administrative proceeding. As of the date of the issuance of this proposal for decision, no party had filed a status report about the court's action, if any.

On April 8, 2014, the ALJ convened the hearing on the merits at the Briscoe County Courthouse in Silverton.[13] Appearing for the parties were attorney Christiaan Siano for the Executive Director; attorney Eli Martinez for OPIC; and attorney Wayne L. Brooks for the Aligned Parties. The record closed on May 13, 2014, with the filing of response briefs.

III. APPLICABLE LAWS

Article XVI, section 59 of the Texas Constitution authorizes the government of the State of Texas to conserve and develop the state's resources, including by the creation of conservation districts for "the reclamation and irrigation of [the State's] arid, semiarid and other lands needing irrigation . . . ."[14] Chapter 35 of the Code authorizes the Texas Water Development Board (Board), with assistance and cooperation from the Commission, to designate groundwater management areas covering all major and minor aquifers in the state.[15]

Chapter 35 also authorizes the Commission to designate *priority* groundwater management areas, or PGMAs. The purpose of a PGMA is to protect "areas of the state that are experiencing or that are expected to experience, within the immediately following 50-year period, critical groundwater problems, including shortages of surface water or groundwater . . . ."[16]

In exercising its management authority over groundwater management areas and PGMAs, the Commission may call an evidentiary hearing to determine whether: (1) to create one or more districts to manage groundwater in all or part of a PGMA; (2) to add all or part of

[13] Code § 35.008(c).

[14] Tex. Const. art. XVI, § 59(a).

[15] Code § 35.004(a). Code chapter 36 provides the legal mechanisms by which groundwater conservation districts may be created. Code § 36.0015.

[16] Code § 35.007(a).

the land in the PGMA to an existing district; or (3) to adopt some combination of the two.[17] In determining the best course of action, the Commission is required to consider matters of feasibility and practicability.[18] The process is initiated by the Executive Director's preparing a report (Report) that is to be considered in a SOAH-conducted evidentiary hearing in the affected county.[19] Although the subject of the hearing is limited to the consideration of the Report,[20] affected persons, including "landowners, well owners, and other users of groundwater in the proposed priority groundwater management area," may give testimony and other forms of evidence.[21]

The legislature gave the Commission rulemaking authority to govern its choice of options.[22] In reviewing the Executive Director's recommendation in the Report, the Commission is to consider evidence about three factors:[23]

> (A) whether the recommended district creation action can effectively manage groundwater resources under the authorities provided in [Code], Chapter 36;
>
> (B) whether the boundaries of the recommended district creation action provide for the effective management of groundwater resources; and
>
> (C) whether the recommended district creation action can be adequately funded to finance required or authorized groundwater management planning, regulatory, and district operation functions under [Code], Chapter 36.[24]

After completing its review, the Commission is to issue an order making recommendations about the three options listed in Code § 35.008(b)(2): creating a new district

---

[17] Code § 35.008(b)(2).

[18] *Id.*

[19] Code § 35.008(c); 30 Tex. Admin. Code § 293.19(b)(6).

[20] 30 Tex. Admin. Code § 293.19(b)(7).

[21] Code § 35.008(d).

[22] Code § 35.008(j).

[23] Code § 35.008(b)(2); 30 Tex. Admin. Code § 293.19(b)(7).

[24] 30 Tex. Admin. Code § 293.19(b)(7).

to manage the groundwater, adding the area to be managed to an existing groundwater management district, or implementing some combination of the two.[25]

IV. BACKGROUND

In 1951, the District was the first groundwater conservation district (created as an "underground water conservation district") in the state.[26] It has continued to manage the groundwater of the area since its creation.[27]

In 1985, the Texas legislature authorized the Texas Department of Water Resources to designate areas of the state that were experiencing or were expected to experience "critical groundwater problems" in the next twenty years.[28] The areas were known as "critical areas."

In February 1990, the Board published a report recommending to the Texas Water Commission that Briscoe, Hale, and Swisher Counties be designated as a critical area.[29] On June 29, 1990, the Water Commission adopted the recommendation, excluding parts of Briscoe and Hale Counties.[30] In 1997, the legislature amended the Code to rename "critical areas" as "priority groundwater management areas."[31] Effective February 21, 1999, the Commission adopted new rules that designated the Briscoe, Hale, and Swisher County Critical Area as the Briscoe PGMA.[32]

---

[25] Code § 35.008(g).

[26] Russell S. Johnson, Chapter 4, Groundwater Law and Regulation - Essentials of Texas Water Resources, Environmental and Natural Resources Law Section, State Bar of Texas at 113 (2008).

[27] The District encompasses all of Bailey, Cochran, Hale, Lamb, Lubbock, Lynn, Parmer, and Swisher Counties, as well as portions of Armstrong, Castro, Crosby, Deaf Smith, Floyd, Hockley, Potter, and Randall Counties.

[28] ED Ex. 1 at 3.

[29] ED Ex. 2 at 32.

[30] 31 Tex. Admin. Code § 294.21; 15 Tex. Reg. 3741-51 (June 29, 1990), adopting rules proposed at 15 Tex. Reg. 2577-90 (May 4, 1990). The portion of Briscoe County not designated as a critical area was the area south of the Caprock Escarpment.

[31] Section 4.10 of SB 1.

[32] 30 Tex. Admin. Code § 294.31; 24 Tex. Reg. 967 (February 12, 1999).

In September 2013, the Executive Director issued its "Report for Briscoe, Hale and Swisher County Priority Groundwater Management Area—Western Briscoe County."[33] The Report, prepared by Peggy G. Hunka, P.G., of the Commission's Water Availability Division, recommended that the Commission extend the jurisdiction of the District to include the remaining Non-Managed Area within the PGMA, located entirely within Briscoe County.[34]

In making the recommendation, the Report also examined the feasibility and practicability of an alternative approach—the creation of a new groundwater conservation district.[35] The Report rejected the alternative because it concluded that the creation of a new district would not meet the factors outlined in 30 Texas Administrative Code § 293.19(b)(7), including the requirement for effective management of the area's groundwater resources and the availability of adequate funding to finance a new district's required functions.

V. EVIDENCE

At the April 8, 2014 hearing on the merits, the Executive Director presented the testimony of Ms. Hunka, including a copy of the Report.[36] The Executive Director also offered in evidence the 1990 Texas Water Development Board report that recommended the designation of Briscoe, Hale, and Swisher Counties as a critical area under the former provisions of the Code,[37] as well as copies of the Regional Water Plan for the Llano Estacado Regional Water Planning Area for 2006[38] and 2010.[39]

---

[33] The Report is included in the evidence as an attachment to Ms. Hunka's testimony at ED Exhibit 1. The Report is paginated separately from Ms. Hunka's prefiled testimony.

[34] The Report, at ten pages, concisely identifies the facts that comply with the relevant elements of the rule. ED Ex. 1. 30 Tex. Admin. Code § 293.19(b)(2).

[35] ED Ex. 1 at 8.

[36] ED Ex. 1 and Corrected Transcript (Tr.) 18-19. The transcript was issued on April 23, 2014, and a corrected transcript was issued on July 1, 2014, after the briefing period had passed.

[37] ED Ex. 2.

[38] ED Ex. 3.

[39] ED Ex. 4.

The Aligned Parties' offered the testimony of Gary Weaks, the Aligned Parties' designated representative,[40] plus the 2001 Regional Water Plan for the Llano Estacado Regional Water Planning Area.[41] they also offered an April 2, 2014 resolution adopted by the Briscoe County Commissioners Court in opposition to the Executive Director's petition, finding that:

A. The groundwater underlying the lands of Briscoe County, Texas was forever relinquished by the State of Texas pursuant to patents lawfully issued;

B. The private landowners owning land in Briscoe County are the true and lawful owners of the groundwater in place under their property;

C. Such landowners have exercised reasonable prudence in accordance with their enlightened self-interest in making use of their groundwater;

D. The landowners of Briscoe County have preserved the groundwater and managed same in a manner that is equal to the regulation of surrounding groundwater conservation districts; and

E. Attempts to impose top-down central planning and control of privately owned groundwater essentially abolishes critical characteristics of private property in violation of the State and Federal Constitutions.[42]

Mr. Weaks testified about his family's history of prudent water management on their farm in Parmer County[43] and his objection to the intrusion of regulations that result in overproduction of a resource.[44] Mr. Weaks's testimony focused on the relative consistency of the water volume in his wells[45] and his stewardship and love of his land.[46]

---

[40] Aligned Parties Ex. 1 and Tr. 61-66.

[41] Aligned Parties Ex. 3.

[42] Aligned Parties Ex. 2.

[43] Tr. at 64 and 82. The issue in this administrative hearing focuses on the conditions in Briscoe County. However, the groundwater management problems are similar in Parmer County, adjacent to Briscoe County.

[44] Tr. at 65.

[45] Tr. at 74.

[46] Tr. at 82.

OPIC presented no independent evidence. Although admitted as a party, the District did not participate in the hearing on the merits.

VI. ANALYSIS

A. The Executive Director's Report

In the Report, the Executive Director recommended that the Commission include the Non-Managed Area within the District in light of the three feasibility and practicability requirements listed in 30 Texas Administrative Code § 293.19(b)(7). The ALJ considers this recommendation.

1. Effective Management of Groundwater Resources by the District

The rule requires the Commission to determine whether the recommended action will result in the effective management of groundwater resources under the authority of Code chapter 36.[47] The 163 separate statutes in chapter 36 require a groundwater conservation district to comply with a complex array of statutory duties. The duties include a district's obligation to create a management plan that addresses at least these issues:

- providing the most efficient use of groundwater;
- controlling and preventing waste of groundwater;
- controlling and preventing subsidence;
- addressing conjunctive surface water management issues;
- addressing natural resource issues;
- addressing drought conditions;
- addressing conservation, recharge enhancement, rainwater harvesting, precipitation enhancement, or brush control, where appropriate and cost-effective; and

[47] 30 Tex. Admin. Code § 293.19(b)(7)(A).

- addressing the desired future conditions adopted by a district under section 36.108.[48]

The "desired future conditions" listed in the final bullet-point must include the district's identification of a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater and control of subsidence in the management area.[49] In establishing the desired future conditions, a district must consider:

- aquifer uses or conditions within the management area, including conditions that differ substantially from one geographic area to another;
- the water supply needs and water management strategies included in the state water plan;
- hydrological conditions, including for each aquifer in the management area the total estimated recoverable storage as provided by the Board's executive administrator, and the average annual recharge, inflows, and discharge;
- other environmental impacts, including impacts on spring flow and other interactions between groundwater and surface water;
- the impact on subsidence;
- socioeconomic impacts reasonably expected to occur;
- the impact on the interests and rights in private property, including ownership and the rights of management area landowners and their lessees and assigns in groundwater as recognized under section 36.002;
- the feasibility of achieving the desired future condition; and
- any other information relevant to the specific desired future conditions.[50]

The Executive Director proved that the District has complied with these and its other statutory duties, including: (1) obtaining approval from the Board for the District's groundwater management plan; (2) managing all or part of thirteen counties within its Groundwater Management Area 2 in the southern part of its jurisdiction and part of three additional counties in Groundwater Management Area 1 in the northern part; and (3) adopting rules and policies to

---

[48] Code § 36.1071.

[49] Code § 36.108(d-2).

[50] Code § 36.108(d).

govern its operation.[51] As the oldest existing groundwater conservation district in the State of Texas, the District has developed joint planning relationships with the surrounding districts that draw groundwater from the same aquifers.[52] In short, the District has demonstrated its compliance with the broad array of laws and policies that govern its operation.

The Executive Director proved that the creation of a new groundwater conservation district is not a reasonable alternative to including the Non-Managed Area within the District. To address that issue, the Report compared the option of adding the Non-Managed Area to the District to the option of creating a new underground water district. Although the creation of a new district may be feasible—that is, technically "capable of being accomplished"[53]—the option fails to comply with the requirement of practicability. The absence of practicability may be shown by noting that: (1) the Executive Director's recommended action would add only 406 square miles to the District's existing total managed area of 11,850 square miles, an increase of about 3%; and (2) the creation of a new district in this limited geographical area would require the election of a qualified board of bonded directors, plus the hiring of staff. As will be discussed, the relative expense of maintaining a new district would not be reasonable.

The Aligned Parties addressed few, if any, of these issues. The Aligned Parties argued neither for the creation of a new district nor for the addition of the Non-Managed Area to the District. Instead, the Aligned Parties' proposal was that the Commission should take no action, an alternative that is discussed more completely in subsection VI.B. The Aligned Parties' argument fails to address the options that are required and available to the Commission under law.

The Executive Director's evidence proved that its recommended action would satisfy the requirements of 30 Texas Administrative Code § 293.19(b)(7)(A).

---

[51] ED Ex. 1, Report at 5 and 8.

[52] Groundwater conservation districts that border on Briscoe County include the District and Panhandle, Mesquite, and Gateway Groundwater Conservation Districts. ED Ex. 1, Report at 3.

[53] Bryan A. Garner, Garner's Modern American Usage (3rd ed. 2009) at 348.

2. Effective Management within the Boundaries of the Recommended District

The Executive Director showed that the boundaries of the Non-Managed Area are contiguous to the District's existing boundaries on the Non-Managed Area's western and southern sides. That contiguity makes the addition of the Non-Managed Area to the District a practical choice among the possible alternatives. In addition, the major and minor aquifers, including the Ogallala, underlie both the existing District managed lands and the Non-Managed Area.[54] The addition of the Non-Managed Area to the District's jurisdiction would result in a single groundwater management program for most of the Ogallala aquifer south of the Canadian River.[55]

These practicalities are also reflected in the principles adopted by the legislature in chapter 36. For example, Code § 36.012(c) requires that the boundaries of a groundwater conservation district be coterminous with or inside the boundaries of a management area or a PGMA. The addition of the Non-Managed Area to the District would establish the boundary of the District as coterminous with the boundary of the Briscoe, Swisher, and Hale PGMA.

The Aligned Parties did not argue that the addition of the Non-Managed Area to the District would fail to produce effective management of groundwater resources in the area. Instead, as discussed in greater detail in subsection VI.B., the Aligned Parties argued that their rights as landowners should permit them to determine the manner in which to conserve the groundwater resource beneath their own properties.

The Executive Director's evidence proved that its recommended action would satisfy the requirements of 30 Texas Administrative Code § 293.19(b)(7)(B).

---

[54] ED Ex. 1 at 7; Aligned Parties Ex. 4 at 4-11.

[55] ED Ex. 1 at 7.

3. Adequate Funding to Finance Operations[56]

By considering the feasibility of the proposed addition of the Non-Managed Area to the District as a funding issue, the Executive Director demonstrated that the recommendation satisfies the funding requirements of the rule.[57]

A groundwater conservation district may be funded through taxes, fees, or a combination.[58] The District currently relies on taxes alone to fund its operations, and its current tax rate is $0.00754 per $100 valuation.[59] Based on a $66 million valuation of the Non-Managed Area, the resulting total additional revenue generated at that valuation rate would be about $5,000. The District's 2012 budget was about $2.8 million.

Based on the operational costs of other districts, the Executive Director estimated that a new district for the Non-Managed Area would require an annual budget of $125,000 to $278,000. To generate that level of annual required revenue, a new district with $66 million in assessed valuation would need to impose a tax rate ranging between $0.1899 and $0.4224 per $100, a tax rate 25 to 56 times higher than that currently imposed by the District.

Although it would be technically possible to create and operate a new groundwater management district under these conditions, the option disregards the cost of creating and operating another taxing district in an area with stressed resources. The option is not appropriate under the circumstances.

The Aligned Parties did not argue how groundwater management should be achieved or funded in the Non-Managed Area. The Executive Director's evidence proved that its recommended action would satisfy the requirements of 30 Texas Administrative Code § 293.19(b)(7)(C).

---

[56] 30 Tex. Admin. Code § 293.19(b)(7).

[57] 30 Tex. Admin. Code § 293.19(b)(7)(C).

[58] Code §§ 36.201(a) and 36.205.

[59] ED Ex. 1, Report at 6.

B. Aligned Parties' Arguments

In their post-hearing brief, the Aligned Parties raised five arguments. None addressed the issues required in Code chapters 35 or 36 to be addressed in the hearing on the merits. Further, the ALJ has no authority to rule on most of the Aligned Parties' arguments because the legislature has not delegated that authority to SOAH.

1. No Showing to Support Exercise of the State's Police Power

The Aligned Parties argued that the Executive Director failed to prove need for "the exercise of regulations by the state of Texas," and they argued that the Executive Director had made "no showing sufficient to justify encroachment on their rights . . . as required to support exercise of the police power of the State."[60]

The provisions of Code § 35.008(g) requires that the Commission recommend that any new PGMA be covered by a new and/or existing district. For a PGMA created before September 1, 1997—including the Briscoe PGMA—the legislature has given the Commission the authority to adopt rules about adding the PGMA to a new and/or existing district.[61] The Executive Director proved that the Report and referral of the matter to SOAH come within those rules. The Executive Director proved that the Commission is exercising its authority as required by law.

The Aligned Parties failed to demonstrate that their second issue, relating to the alleged encroachment of their rights, is an issue that the Executive Director must address in the administrative hearing on the merits. Code § 35.008(b)(2) lists the relevant issues, and matters relating to allegations about encroachment is not among them.

In making their argument, the Aligned Parties relied on *Edwards* and *State v. Smith*, a 1932 Waco Court of Civil Appeals decision addressing the state's right to prohibit the planting

[60] Aligned Parties Post-Hearing Brief at 1.

[61] Code § 35.008(j).

of cotton as a public nuisance.[62] Although the impact of the holding in *Edwards* on this proceeding has been addressed, the impact of the holding in *State v. Smith* has not. In the 82 years since its issuance, *State v. Smith* has been of limited precedential value, cited in only two published Texas appellate decisions relating to public nuisances.[63] The issues in this administrative hearing do not include matters relating to a public nuisance. The case has little precedential value in evaluating the administrative issues in this proceeding.

More recent Texas appellate holdings specifically construe the state's authority to regulate underground water resources. In 1999 in *Sipriano v. Great Spring Waters of America, Inc.*,[64] and in 2012 in *Edwards*,[65] the Texas Supreme Court recognized that the legislature "expressly stated that 'groundwater conservation districts . . . are the state's preferred method of groundwater management.'"[66]

The ALJ need not determine whether the Executive Director's proof was sufficient to justify encroachment on the Aligned Parties' rights. The Commission should reject each of the Aligned Parties' arguments for the purposes of this administrative proceeding.

2. Failure to Prove Notice

The Aligned Parties argued that the notice of hearing given by the Executive Director "gave no notice to private water holders, but only noticed holders of public water . . . ."[67]

---

[62] 47 S.W.2d 642, 644 (Tex. Civ. App.—Waco 1932, no writ).

[63] *Mosheim v. Rollins*, 79 S.W.2d 672, 675 (Tex. Civ. App.—San Antonio 1935, writ dism'd w.o.j) (declining to declare the planting of Bermuda grass to be a public nuisance); *Sheppard v. Giebel*, 110 S.W.2d 166, 171 (Tex. Civ. App.—Austin 1937, no writ) (holding unconstitutional a statute declaring "gramophones" and other vending machines as public nuisances).

[64] 1 S.W.3d 75, 79 (Tex. 1999).

[65] 369 S.W.3d at 835.

[66] In a concurring opinion in *Sipriano*, Justice Hecht wrote, "Actually, such districts are not just the preferred method of groundwater management, they are the only method presently available." 1 S.W.3d at 81.

[67] Aligned Parties Post-Hearing Brief at 6.

The public notice provisions that govern this proceeding are established by Commission rule.[68] Under the rule, the Commission's chief clerk is to send notice to the following stakeholders:

> the governing body of each county, regional water planning group, adjacent [groundwater conservation districts], municipality, river authority, water district, or other entity that supplies public drinking water, including each holder of a certificate of convenience and necessity issued by the commission and each irrigation district located either in whole or in part in the proposed district.[69]

At the preliminary hearing on December 3, 2013, no person present objected to notice. At the hearing on the merits, no party proved that the Executive Director failed to comply with the applicable notice requirements. If the Aligned Parties believe that the notice requirements established by the Commission's rules fail to meet a constitutional minimum, then the Aligned Parties may raise that argument in a forum that has the authority to make that determination. The ALJ does not have that authority.[70] Otherwise, the ALJ has determined that the Commission satisfied the notice requirements established by Commission rule.

3. Commission's Lack of Standing to Exercise Authority

The Aligned Parties argued that the Commission (and not the Executive Director) "has not shown by evidence that the [Commission] has standing concerning such private property [referring to the Aligned Parties' property] relinquished by the State of Texas many years ago."

The Aligned Parties' standing issue challenges the Commission's authority to exercise powers delegated by the Texas legislature. If that is the argument, then the Aligned Parties are not raising an evidentiary issue but a constitutional challenge to the Commission's authority under Code chapters 35 and 36. The ALJ lacks the authority to decide such an issue.[71]

---

[68] 30 Tex. Admin. Code §§ 293.19(b)(3).

[69] *Id.*

[70] *Edwards*, 369 S.W.3d at 844.

[71] *Id.*

4. Absence of Compliance with Constitutional Requirements

The Aligned Parties argued that the Executive Director has shown no compliance with the requirements of Texas Constitution article XVI, section 59(d) and (e). The language of the section states that "[n]o law creating a conservation and reclamation district shall be passed" unless a notice given to the Governor, Lieutenant Governor, Speaker of the House, and the commissioners court of each affected county.[72]

The Executive Director's recommendation to the Commission would not constitute the passage of a law creating a conservation or reclamation district. If the Aligned Parties wish to challenge the Executive Director's compliance with the Texas Constitution's notice requirements in subsections (d) and (e), they may raise that challenge in another forum. The ALJ has no authority to rule on the matter.

5. Failure of Proof

The Aligned Parties argued that the Executive Director failed to: (1) offer proof that the proposed regulation by a water district "would cause any positive change on the groundwater resources of the area" or (2) provide confirmation about "what water [the Commission is] attempting to place in a water district, public only or private also."[73]

As to the first assertion, neither the provisions of Code chapters 35 or 36 nor the Commission's rules in chapters 293 or 294 of title 30 of the Texas Administrative Code require the Executive Director to prove that "positive change on the groundwater resources of the area" will be achieved by the Commission's adoption of the Executive Director's recommendation. The Executive Director did not fail to prove the Aligned Parties' first assertion because no requirement of law requires the submission of evidence about the matter.

---

[72] Aligned Parties Post-Hearing Brief at 5.

[73] Aligned Parties Post-Hearing Brief at 5-6.

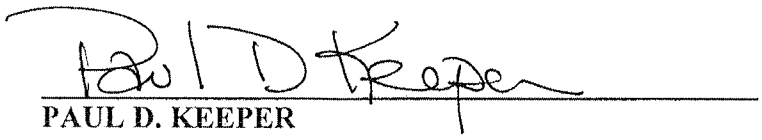
As to the second assertion, the notice required for the addition of areas for PGMAs created before September 1, 2001, (including the Briscoe PGMA) must include specific types of information.[74] However, nothing in the notice requirements require the Executive Director to confirm "what water [the Commission is] attempting to place in a water district, public only or private also." Similarly, nothing in the rules governing the information to be included in the Report require the type of information about which the Aligned Parties complain.

If the Aligned Parties are asserting that the allegedly missing evidence is required by the Texas or United States Constitution, then the Aligned Parties may raise the matter in another forum. The ALJ has no authority to rule on the Aligned Parties' objection in this proceeding.

VII. RECOMMENDATION

The ALJ recommends that the Commission adopt the Executive Director's recommendations in the Report to add the Non-Managed Area to the District.

SIGNED July 11, 2014.



PAUL D. KEEPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

[74] 30 Tex. Admin. Code §§ 293.19(b).

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER **Recommending the Addition of Portions of Briscoe County in the Briscoe, Hale, and Swisher County Priority Groundwater Management Area to High Plains Underground Water Conservation District No. 1**

TCEQ DOCKET NO. 2013-1467-WR; SOAH DOCKET NO. 582-14-0597

On _____, 2014, the Texas Commission on Environmental Quality (Commission) considered the Executive Director's Report for Briscoe, Hale, and Swisher County Priority Groundwater Management Area–Western Briscoe County (Report) and the Executive Director's recommendation that the western portions of Briscoe County within the Briscoe, Hale, and Swisher County Priority Groundwater Management Area (Briscoe PGMA) be added to the High Plains Underground Water Conservation District No. 1 (District). The State Office of Administrative Hearings (SOAH) administrative law judge (ALJ) presented a Proposal for Decision that recommended that the Commission approve the ED's recommendation. After considering the ALJ's Proposal for Decision, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

Procedural History

1. In September 2013, the Executive Director issued a Report for Briscoe, Hale and Swisher County Priority Groundwater Management Area—Western Briscoe County (Report).

2. On October 14, 2013, the Executive Director referred this matter to SOAH for a hearing on the merits.

3. On October 29 and 30, 2013, the Executive Director published notice about the December 3, 2013 preliminary hearing in two local newspapers, the *Valley Tribune* and *Caprock Courier*.

4. The Executive Director sent copies of the notice and the Report to the Briscoe County Clerk, the Silverton public library, the Briscoe County judge, the Briscoe County commissioners, state river authorities, state agencies, state districts, other state and local elected officials, federal agencies, and other potential stakeholders.

5. On December 3, 2013, the ALJ held a preliminary hearing in Silverton, Texas.

6. At the preliminary hearing, the ALJ admitted as parties the Executive Director; the Office of Public Interest Counsel (OPIC); the District; and the Aligned Parties, Gary Weaks, Brad Ziegler, Leland Stukey, James Alan Patton, John Burson, Kyle Fuston, Jerry Leatherman, Perry Brunson, Jimmy Burson, Don Brown, Tommy Burson, and County Judge Wayne Nance. County Judge Nance later withdrew as a party.

7. The ALJ adopted the parties' proposed prehearing schedule, and set April 8, 2014, as the date of the hearing on the merits in Silverton.

8. On April 8, 2014, the ALJ convened the hearing on the merits at the Briscoe County Courthouse in Silverton, Texas. Appearing for the parties were attorney Christiaan Siano for the Executive Director; attorney Eli Martinez for OPIC; and attorney Wayne L. Brooks for the Aligned Parties.

9. The ALJ closed the record on May 13, 2014, with the filing of response briefs.

Briscoe PGMA

10. On June 29, 1990, the Texas Water Commission designated all of Briscoe County, except the area south of the Caprock Escarpment, as a Critical Area based on a study prepared in conjunction with the Texas Water Development Board (Board).

11. In 1997, the Texas legislature amended the Texas Water Code (Code) to rename "critical areas" as "priority groundwater management areas."

12. In 1999, the Commission adopted new rules that designated the Briscoe Critical Area as the Briscoe PGMA.

13. The Report considered the alternatives permitted by statute and recommended that the Commission extend the jurisdiction of the District to include the remaining 406 square miles of western Briscoe County (Non-Managed Area) that is within the Briscoe PGMA but that is not part of any groundwater conservation district.

Area Within the Briscoe PGMA Without GCD Management

14. The Ogallala aquifer underlies most of Briscoe County.

15. The District encompasses Bailey, Cochran, Hale, Lamb, Lubbock, Lynn, Parmer, and Swisher Counties, as well as portions of Armstrong, Castro, Crosby, Deaf Smith, Floyd, Hockley, Potter, and Randall Counties.

16. The District has adopted a groundwater management plan that has been approved by the Board.

17. The District has adopted rules and policies as required by law.

18. The District has joint planning relationships with the surrounding districts also involved in the management of their areas' resources within the associated aquifers.

Effective Management and Adequate Funding for Groundwater Resources

19. The option of creating a new groundwater conservation district to manage the Non-Managed Area's groundwater is not practicable because the new district would encompass only 406 square miles, would require the election of a new qualified board of bonded trustees, and would require the hiring of staff.

20. The boundaries of the Non-Managed Area are contiguous to the District's existing boundaries on the Non-Managed Area's western and southern sides.

21. The contiguity makes the addition of the Non-Managed Area to the District a practical choice among the possible alternatives.

22. The major and minor aquifers within the Briscoe PGMA, including the Ogallala, underlie both the existing District managed lands and the Non-Managed Area.

23. The addition of the Non-Managed Area to the District's jurisdiction would result in a single groundwater management program for most of the Ogallala aquifer south of the Canadian River.

24. The District currently relies on taxes to fund its operations, and its current tax rate is $0.00754 per $100 valuation.

25. Based on a $66 million valuation of the Non-Managed Area, the resulting total revenue generated at that valuation rate would be about $4,974.

26. The District's 2012 budget was about $2.8 million, or about $238 per square mile.

27. The Executive Director estimated the costs for operating a new district as ranging between $125,000 and $278,000.

28. To generate that level of annual required revenue, a new district with $66 million in assessed valuation would need to impose a tax rate ranging between $0.1899 and $0.4224 per $100, a rate 25 to 56 times higher than that currently imposed by the District.

29. Adding the Non-Managed Area to the District is the most feasible and practicable option for protection and management of the groundwater resources.

30. The expansion of the District to provide effective groundwater management to the Non-Managed Area can be adequately funded.

II. CONCLUSIONS OF LAW

Jurisdiction and Notice

1. The Commission has jurisdiction to identify areas of the state that are experiencing critical groundwater problems. Code § 35.007(a).

2. The Commission has jurisdiction to call an evidentiary hearing to consider whether all or part of the land in a PGMA should be added to an existing district. Code § 35.008(b)(2).

3. SOAH has jurisdiction to conduct the hearing and to issue a proposal for decision. Tex. Gov't Code § 2003.042(a)(6).

4. The Executive Director provided the required notice of the evidentiary hearing. Code § 35.009 and 30 Tex. Admin. Code §§ 293.18(e) and 293.21(d).

Evidentiary Hearing

5. The April 8, 2014 evidentiary hearing was held in Briscoe County in accordance with the requirements of Code § 35.008(c), 30 Texas Administrative Code § 293.19, and 1 Texas Administrative Code chapter 155.

6. The SOAH hearing was limited to the consideration of the Executive Director's Report and recommendation. 30 Tex. Admin. Code § 293.19(b)(7).

Adding the Area to the District

7. The addition of the area within the Briscoe PGMA that is not part of the District (Non-Managed Area) to the District will result in the effective management of the Non-Managed Area's groundwater resources. 30 Tex. Admin. Code § 293.19(b)(7)(A).

8. The boundaries of the District will provide for the effective management of groundwater resources in the Non-Managed Area. 30 Tex. Admin. Code § 293.19(b)(7)(B).

9. The addition of the Non-Managed Area to the District can be adequately funded to finance required or authorized groundwater management planning, regulatory, and district operation functions under Code chapter 36. 30 Tex. Admin. Code § 293.19(b)(7)(C).

10. The addition of the Non-Managed Area to the District is feasible and practicable. Code § 35.008(b)(2).

11. The Non-Managed Area should be added to the District's jurisdiction. Code § 35.008(b)(2).

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The Commission recommends that the western portion of Briscoe County within the Briscoe, Swisher, and Hale County Priority Groundwater Management Area be added to the High Plains Underground Water Conservation District No. 1.

2. The Commission directs the District to hold a vote about adding the Non-Managed Area not later than 120 days of receipt of this order, then advise the Commission of the outcome in accordance with Texas Water Code § 35.013.

3. All other motions, requests for entry of specific findings of fact or conclusions of law and any other requests for general or specific relief not expressly granted herein are hereby denied for want of merit.

4. The effective date of this Order is the date the Order is final as provided by Texas Government Code § 2001.144.

5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

6. The Chief Clerk shall forward a copy of this Order to each party.

Issue Date: _____

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____

Bryan W. Shaw, Ph.D.
Chairman