

# Southern Trinity Groundwater Conservation District

Legal issues: Past, Present and  
Future

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## Creation of the District

The McLennan County Groundwater Conservation District (GCD) was created in 2007 by the Texas Legislature, Act of May 26, 2007, 80<sup>th</sup> Leg., R.S., ch. 1345, 2007 Tex. Gen. Laws 4594 (Act), to conserve and manage groundwater withdrawals in all of McLennan County.

*The District's organic act has been codified in Texas Special District Local Laws Code, Chapter 8821.*

# Groundwater in McLennan County

In 2008, the Texas Commission on Environmental Quality (TCEQ) designated McLennan County, along with Somervell, Bosque, Hill and Coryell Counties, as part of the Central Texas–Trinity Aquifer Priority Groundwater Management Area (PGMA) – an area expected to experience critical groundwater problems within the next 25 years.

# Amendments to the Act

In 2009, the Act creating the District was amended to rename the District to be the Southern Trinity Groundwater Conservation District.

The Act initially required the District to add another county to its boundaries by September 1, 2011, or TCEQ would begin dissolution of the District. Act § 8821.107 (2007). The District met with adjoining counties but all counties within the Central Texas–Trinity Aquifer PGMA were within a GCD already, and no adjacent county was willing to join into a GCD with the District. In 2011, the Act was amended to repeal § 8821.107.

# Powers and Duties of a Groundwater Conservation District

The District has “all of the rights, powers, privileges, authority, functions, and duties,” provided by Chapter 36, Texas Water Code to GCDs. Act § 8821.101.

GCDs are created “to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater . . .” within their jurisdictions. Tex. Water Code § 36.0015.

# GCDs Are Required to Adopt Management Plan

Section 36.1071(a) of the Texas Water Code requires GCDs to, in coordination with surface water management entities in the region, to develop a management plan, which addresses the following applicable management goals:

- (1) providing the most efficient use of groundwater;
- (2) controlling and preventing waste of groundwater;
- (3) controlling and preventing subsidence;
- (4) addressing conjunctive surface water management issues;
- (5) addressing natural resource issues;
- (6) addressing drought conditions;
- (7) addressing conservation, recharge enhancement, rainwater harvesting, precipitation enhancement, or brush control, where appropriate and cost-effective; and
- (8) addressing the desired future conditions adopted by the District under Section 36.108.

# *District management plan requirements*

The Texas Water Code requires that GCDs review and readopt their management plan *with or without revisions* at least once every five years. Tex. Water Code § 36.1072(e).

The Texas Water Code requires that the management plan use the best data available to the GCD and that it be forwarded to the regional water planning group for use in its planning process. Tex. Water Code § 36.1071(b).

Texas Water Code § 36.1071(h) requires that GCDs use groundwater availability modeling information provided by the Texas Water Development Board, together with available site-specific information, in developing the plan.

# District adoption of management plans

The District adopted its first management plan on January 7, 2010.

The District re-adopted its management plan on April 23, 2015.



# GCDs Required to Participate in Joint Planning and Propose for Adoption Desired Future Conditions (DFCs) for Aquifers

GCDs located within the same groundwater management area (GMA) of the State are required to meet at least annually to conduct joint planning with other GCDs in the same GMA. Tex. Water Code § 36.108(c). As part of this joint planning, GCDs are to review their management plans. *Id.*

GCDs are required to propose for adoption a “desired future condition” for aquifers within their jurisdiction, in order to provide for “the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater” in the District. Tex. Water Code § 36.108(d), (d-2).

# Desired Future Conditions for Trinity and Brazos River Alluvium Aquifers in McLennan County

Trinity Aquifer – not more than 508 feet of drawdown from the Hensell and Hosston formations through 2060.

Brazos River Alluvium Aquifer – the aquifer will maintain 82% of estimated saturated thickness through 2060.

# Modeled Available Groundwater (MAG) in District

Once the DFC for an aquifer is established, the Texas Water Development Board (TWDB) provides a modeled available groundwater amount for aquifers within each county.

The MAG for the Trinity Aquifer in the district is 20,690 acre-feet per year for the Hensell and Hosston formations.

The MAG for the Brazos River Alluvium Aquifer is 15,023 acre-feet per year.

# *GCDs Are Required to Adopt Rules*

The District is required to adopt rules necessary to implement its management plan. Tex. Water Code §§ 36.101(b), 36.1071(f).

*Section 36.101(a) of the Texas Water Code provides that “[a] district may make and enforce rules, including rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater and to carry out the powers and duties provided by [Chapter 36].”*

# Considerations in Adopting Rules

In adopting a rule, a district is required to:

- (1) consider all groundwater uses and needs;
- (2) develop rules that are fair and impartial;
- (3) consider the groundwater ownership and rights described by Section 36.002;
- (4) consider the public interest in conservation, preservation, protection, recharging, and prevention of waste of groundwater ... and in controlling subsidence caused by withdrawal of groundwater ... ;
- (5) consider the goals developed as part of the district's management plan under Section 36.1071; and
- (6) not discriminate between land that is irrigated for production and land that was irrigated for production and enrolled or participating in a federal conservation program." Tex. Water Code § 36.101(a).

# District Rulemaking

The District first adopted rules on December 6, 2007.

The District's rules have been amended several times in response to changes to Chapter 36 of the Water Code and to accommodate management strategies to maximize use of the Brazos River Alluvium Aquifer and to manage groundwater withdrawals from the Trinity Aquifer within the Hensell and Hosston Management zones.

# District Required to Permit Well Drilling and Operation

Tex. Water Code § 36.113 mandates that GCDs “require a permit for the drilling, equipping, operating, or completing of wells or well pumps.”

Chapter 36 specifically exempts certain wells from permitting requirements and authorizes districts to create other exemptions. Tex. Water Code § 36.117.

Districts are to “issue permits up to the point that the total volume of exempt and permitted groundwater production will achieve an applicable” DFC. Tex. Water Code § 36.1132(a).

# District Permitting

By the end of 2010, the District completed issuance of Historical Use Production Permits for existing non-exempt groundwater users in the county.

In 2013, the District began issuance of Non-Historical Use Production Permits.



## District Enforcement

Over the course of the last 11 years, the District has identified several entities not in compliance with the District's rules and permitting requirements.

Generally, the District has informed these entities of their non-compliance and worked with the entities to settle the violations and come into compliance with the District's rules.

On two occasions, the District has initiated lawsuits to bring entities into compliance.

# Demand > Supply

Historic demand for groundwater from the Trinity Aquifer in McLennan County and the finite supply of water from the Trinity Aquifer have resulted in current aquifer conditions.

The District has issued permits for almost all of the Modeled Available Groundwater for the Trinity Aquifer.

As a result of the District's rules and requiring permits for non-exempt withdrawals, use of the Trinity Aquifer has declined.

# Encouraging conservation and use of alternative water supplies

District rules impose fees based on actual groundwater production, not authorization, encouraging the conservation of groundwater.

NHUPPs require permittees to first use available alternative water supplies prior to pumping under their NHUPP and require permittees to conserve groundwater.

District rules authorize the transfer of water from one permittee to another permittee for the same purpose of use, which could provide a source of groundwater for some new uses in limited circumstances. However, the Trinity Aquifer has limited additional groundwater available for transfer.

## *Background Legal Principles Related to Groundwater*

- Generally under Texas law, groundwater rights are one of many rights in the bundle of rights that a landowner has based on his or her ownership of land.
- Presumed to run with land unless severed or separately conveyed.
- Once groundwater is withdrawn, it becomes personal property.
- “Groundwater” vs. “groundwater rights”

# The Rule of Capture announced in *East* (1904)

- Rule of capture grants landowners the right to capture the water beneath their property if water is available, regardless of the effects of that pumping on neighboring wells.
- It applies unless it has been modified or repealed by statute or district regulation.
- It provides the context in which individual groundwater rights and groundwater district regulation occur in Texas

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

The *Day* case - decided by the Texas Supreme Court in February 2012 – considered whether or not landowners with a right to pump groundwater from beneath their land could sue the Edwards Aquifer Authority (EAA), a GCD, for restricting their pumping rights under the EAA Act.

Although the *Day* court notes the importance of the regulation of groundwater by GCDs, the court announced for the first time the rule in Texas that landowners own groundwater in place beneath their property and have a constitutionally protected interest in that groundwater.

- The *Day* court also held that, under the *common law rule of capture*, groundwater and oil and gas would be treated identically.

[The Texas Supreme Court affirmed the applicability of oil and gas law to groundwater in *City of Lubbock v. Coyote Lake Ranch, LLC*, 498 S.W.3d 53 (Tex. 2016), which held that the accommodation doctrine applies to groundwater and remanded to the trial court to determine the accommodation required.]

- Ultimately, the Texas Supreme Court remanded *Day* to the trial court for a determination under the *Penn Central* factors as to whether the EAA Act's regulatory scheme, which supplanted the common law rule of capture, caused a taking of the plaintiffs' property for which payment was required.
- In doing so, the *Day* court recited the familiar essential elements of a takings claim against a GCD, which requires that a claimant establish that a GCD's regulation is functionally equivalent to "the classic taking in which government directly appropriates private property or ousts the owner from his domain."
- Under *Day*, most landowners will have standing to sue for a taking where regulation deprives them of this property right but that does not mean they will prevail on a takings claim.



# Other Litigation

- Cases are currently pending in state and federal district courts challenging GCD permitting decisions and rules.
- The Texas Attorney General has provided opinions on the validity of GCD rulemaking and actions on several occasions.

# Forecasting

- The District's actions are required to be reasonable.
- If the District continues to base its policy decisions on sound science and to comply with its legal requirements, it will continue to be on the best footing possible to withstand an uncertain future of limited supply and increasing demand.
- It is likely that the Texas Legislature will continue to legislate in the area of district management of groundwater so the District will need to stay tuned for changes to its powers and duties.