The Appropriate Consideration of a Water Supplier's Service Area When Groundwater Resources Are Allocated Based on Surface Ownership

Texas Water Code Section 36.116(c) currently grants groundwater conservation districts ("GCDs") the permissive authority to consider the service needs or service area of a retail public utility when regulating groundwater production by tract size or acreage. Legislation was filed in prior sessions that proposed to mandate the use of retail water utilities' service area as production acreage in the permitting of groundwater wells. **Texas Alliance of Groundwater Districts supports maintaining the current language in the Texas Water Code §36.116(c).**

Background

The Texas Legislature and Texas Supreme Court have established relevant factors for GCDs to take into account when establishing a permitting framework. Current statute provides GCDs the flexibility to consider the interplay and balance between limited groundwater availability, private property rights associated with groundwater, takings liability, requirement of public water suppliers to provide water within their service area, and best available science.

Current provisions in statute are the result of a 2001 compromise in SB2 and states:

> **Texas Water Code §36.116(c):** In regulating the production of groundwater based on tract size or acreage, a district may consider the service needs or service area of a retail public utility. For the purposes of this subsection, "retail public utility" shall have the meaning provided by Section 13.002 (*emphasis added).*

The Texas Legislature and courts have determined that groundwater rights are real property rights, and the courts have held that landowners whose groundwater interests are restricted could be entitled to compensation depending on the nature and effect of the regulation. In *EAA v. Day/McDaniel,* the Texas Supreme Court's commentary on the possibility of takings liability is helpful:

> "[G]roundwater regulation need not result in takings liability. The Legislature's general approach to such regulation has been to require that all relevant factors be taken into account. The Legislature can discharge its responsibility under the Conservation Amendment [of the Texas Constitution] without triggering the Takings Clause. But the Takings Clause ensures that the problems of a limited public resource – the water supply – are shared by the public, not foisted onto a few."

Considerations

If current law is changed to mandate, rather than allow a GCD to consider the service needs or area of a retail public utility, it may impact and confuse issues of groundwater rights and ownership. One potential issue includes interpreting the mandate to allow retail public utilities to drill wells and use the

surrounding water rights within their service area in their permit without having to purchase or legally control the water rights surrounding the well. This scenario would disrupt existing permit-allocation frameworks, groundwater rights with significant investment backed expectations, as well as existing well-spacing regulation intended to protect existing water well owners.

In addition to significantly impacting existing regulatory systems, a change in current statute would likely result in an increase in lawsuits brought against GCDs. If a GCD is mandated to issue a permit based on the utility's service needs or service area or, conversely, requires the utility to purchase or lease all the water rights from adjoining property owners to support its continued production of groundwater, it is expected that additional conflicts of interpretation and litigation will result.

Maintaining the flexibility of the current statute in considering retail public utilities' service needs and service area allows GCDs to:

1) base their regulations on the best available science,
2) consider *all* the relevant factors for permitting,
3) treat all groundwater producers fairly, and
4) protect and balance the private property rights of both private landowners and retail public utilities.