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The Path of Least Resistance: The Effects of Groundwater Law's Failure to Evolve with Changing Times Comment.

Bruce E. Toppin III

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COMMENTS

THE PATH OF LEAST RESISTANCE: THE EFFECTS OF GROUNDWATER LAW'S FAILURE TO EVOLVE WITH CHANGING TIMES

BRUCE E. TOPPIN III

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I. INTRODUCTION

Water—the most important natural resource on earth. More so than oil, gas, or any other mineral to which we have grown attached, without water mankind simply could not survive. Groundwater is a type of fresh water stored in natural cavities within the earth's crust. Pulitzer Prize winning author Paul Horgan eloquently encapsulated the preciousness of this water coming from beneath the ground in his book, *Great River: The Rio Grande in North American History*:

Gods and heroes were born out of springs, and ever afterward came and went between the above and below worlds through their pools. . . . There was every reason to sanctify them—*physical*, as life depended upon water; *spiritual*, as they had natural mystery which suggested supernatural qualities; for how could it be that when water fell as rain, or snow, and ran away, or dried up, there should be other water which came and came, secretly and sweetly, out of the ground and never failed?¹

Despite its seemingly endless supply, groundwater is a finite resource. In Texas, groundwater is becoming highly sought-after, and development of proper management and conservation models is crucial to preserve the resource for future generations. Long ago, Texans recognized the importance of groundwater regulation,² and lawmakers have since taken steps to ensure the longevity of the resource.³ However, the legislature's chosen regulatory method has, to say the least, met with limited success.⁴

1. GUNNAR BRUNE, SPRINGS OF TEXAS 24 (1981) (quoting 1 PAUL HORGAN, GREAT RIVER: THE RIO GRANDE IN NORTH AMERICAN HISTORY 35-36 (1954)) (emphasis added).

2. TEX. CONST. art. XVI, § 59(a). “[D]ocumented droughts in 1910 and 1917 spurred the passage of [a]rticle [XVI], [s]ection 59 of the Texas Constitution, which is commonly referred to as the ‘Conservation Amendment,’ imposing the duty to preserve Texas’s natural resources on the Texas Legislature.” Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 42 (2004); see *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 623 (Tex. 1996) (reaffirming that the legislature, under the Conservation Amendment, has the responsibility of “preserv[ing] and conserv[ing] water resources for the benefit of all Texans”).

3. See TEX. WATER CODE ANN. § 36.0015 (Vernon Supp. 2006) (establishing legislative policy for management of groundwater resources). See generally Act of May 30, 2005, 79th Leg., R.S., ch. 970, 2005 Tex. Gen. Laws 3247 (establishing Groundwater Management Area Councils (GMACs) and granting greater supervisory authority to the Texas Water Development Board (TWDB) in order to align regulatory strategies of neighboring conservation districts); Act of May 28, 2003, 78th Leg., R.S., ch. 1032, 2003 Tex. Gen. Laws 2979 (refining the Texas Property Code to recognize groundwater rights as a right in real property which can only be taken by a political subdivision through condemnation proceedings); Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991 (reiterating legislative support of groundwater conservation districts (GCDs) by: (1) establishing various committees and councils to maintain awareness of groundwater issues; (2) further enhancing GCDs’ regulatory authority; and (3) creating two separate funds to enable GCDs to adequately comply with statewide management initiatives); Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (revising the Texas Water Code to provide legislative support to a system of localized groundwater management by authorizing a network of GCDs).

4. E.g., Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 93-94 (2004) (expressing that “[w]hile much progress has been made in modernizing and improving GCDs [sic], much remains to be done”); Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save*

Over the past decade, Texas lawmakers enacted a bevy of laws which, in part, were intended to give teeth to a groundwater management system that historically has been more bark than bite.⁵ While major advances in groundwater regulation have undoubtedly taken place, the current system remains flawed and will require significant remodeling if Texas is to adequately allocate its water needs for both current and future generations of Texans.

Groundwater, defined as “water percolating below the surface of the earth,”⁶ is simply water contained beneath the earth’s surface that does not flow through underground channels.⁷ In Texas, ownership of groundwater is governed by the common law doctrine of absolute ownership,⁸

Texas’s Most Precious Resource, 35 TEX. TECH L. REV. 101, 125-27 (2004) (commenting on the issues pertaining to groundwater that demand attention).

5. See Act of May 30, 2005, 79th Leg., R.S., ch. 970, 2005 Tex. Gen. Laws 3247 (creating GMACs and delegating authority to the TWDB); Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991 (enacting legislation to further support GCDs); Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (amending the Texas Water Code). Senate Bill 1 was the 75th Legislature’s answer to a floundering system of groundwater management. See Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (amending the Texas Water Code and authorizing a network of GCDs). Senate Bill 1 strengthened support for localized regulation by providing GCDs with additional statutory authority to regulate groundwater production and created a method in which certain “priority” areas would be required to establish conservation districts to manage groundwater resources. *Id.* The 77th Legislature enacted Senate Bill 2 four years later and provided potential financing solutions to districts with limited funding opportunities. Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991. Furthermore, Senate Bill 2 granted conservation districts with additional authority to manage groundwater resources by limiting production quantities. *Id.* House Bill 1763 included some proposed Water Code amendments from Senate Bill 3, because Senate Bill 3 never passed. Act of May 30, 2005, 79th Leg., R.S., ch. 970, 2005 Tex. Gen. Laws 3247. The highlights of the bill included the establishment of GMACs for the purpose of encouraging all districts overlying a common aquifer to adopt comparable management regulations. *Id.* Additionally, House Bill 1763 granted the TWDB the authority to hear disputes over proposed management plans and recommend solutions to aid districts in aligning their management strategies with the state water plan. *Id.*

6. TEX. WATER CODE ANN. § 36.001 (Vernon Supp. 2006).

7. *Bartley v. Sone*, 527 S.W.2d 754, 760 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.); see *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 236-37 (Tex. App.—Austin 1989, writ denied) (defining water flowing through well-defined subterranean channels as “hav[ing] all of the characteristics of surface water courses, such as beds, banks forming a channel, and a current of water”).

8. See *Acton v. Blundell*, 12 M. & W. 324, 152 Eng. Rep. 1223 (1843) (upholding the English doctrine of absolute ownership); see also *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 282 (1904) (citing *Acton*, in adopting the English doctrine of absolute ownership). See generally Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1 (2004) (describing, in great detail, the origins of common law groundwater ownership under the doctrine of absolute ownership).

which is commonly mislabeled as the rule of capture.⁹ The Supreme Court of Texas first applied absolute ownership to groundwater rights in *Houston & Texas Central Railroad Co. v. East*.¹⁰ The absolute ownership doctrine still governs groundwater ownership today, but its application has been judicially altered to limit the rights of landowners who wish to pump water from beneath their lands.¹¹ Texas lawmakers also contributed to the restrictions on landowners' absolute ownership rights to groundwater¹² under the authority of the "Conservation Amendment" of the Texas Constitution.¹³ The legislature chose to control groundwater production and use through a statewide framework of localized regulation.¹⁴ This decentralized management concept led to the creation of groundwater conservation districts, which today regulate all aspects of the groundwater industry.¹⁵

Groundwater conservation districts, or GCDs, were the legislature's regulatory method of choice because lawmakers felt that different regions of the state would have distinct needs and objectives surrounding ground-

9. See generally Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1 (2004) (chronicling the roots of the doctrine of absolute ownership of groundwater and how it historically has been mislabeled as the rule of capture). This Comment does not attempt to unravel the complex and extensive history of how the doctrine of absolute ownership came to be referred to as the rule of capture. This author speculates that Texas courts, when applying *Houston & Texas Central Railroad Co. v. East*, 98 Tex. 146, 81 S.W. 279, 282 (1904), and its progeny, are somewhat unenthusiastic about painting such a broad stroke of landowner rights when dealing with groundwater ownership.

10. 98 Tex. 146, 81 S.W. 279, 282 (1904) (applying, for the first time in Texas, the English doctrine of absolute ownership as articulated in *Acton v. Blundell*, 12 M. & W. 324, 152 Eng. Rep. 1223 (1843)).

11. See *Friendswood Dev. Co. v. Smith-Sw. Indus.*, 576 S.W.2d 21, 30 (Tex. 1978) (enunciating that "if the landowner's manner of withdrawing ground water from his land is negligent, willfully wasteful, or for the purpose of malicious injury, and such conduct is a proximate cause of the subsidence of the land of others, he will be liable for the consequences of his conduct"); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798, 803 (1955) (declaring that only water used for unlawful purposes would be considered waste and therefore subject to civil penalty); *Cantwell v. Zinser*, 208 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1948, no writ) (proclaiming that "waste of natural resources is against the public policy of this [s]tate").

12. See, e.g., *Barshop v. Medina County*, 925 S.W.2d 618, 638 (Tex. 1996) (upholding the authority of the Texas Legislature to pass the Edwards Aquifer Authority Act, which regulates the amount of groundwater that may be pumped from the Balcones Fault Zone Aquifer (Edwards Aquifer)).

13. TEX. CONST. art. XVI, § 59(a).

14. See TEX. WATER CODE ANN. § 36.0015 (Vernon Supp. 2006) (delineating groundwater conservation districts as the "state's preferred method of groundwater management").

15. TEX. WATER CODE ANN. § 36.0015 (Vernon Supp. 2006).

water management and conservation.¹⁶ Since the creation of the first conservation district in 1951, the High Plains Underground Water Conservation District No. 1,¹⁷ Texas lawmakers have continued to make remedial amendments to the Texas Water Code (the Water Code).¹⁸ Undoubtedly, decentralized regulation addresses local concerns over groundwater supplies, but this method leaves many critical statewide issues unaddressed.

Texas's water needs historically have been for agricultural use, but the state's water needs trend more and more toward municipal and industrial uses. For example, agricultural use presently accounts for roughly 80% of all groundwater pumping in Texas,¹⁹ with municipal and industrial use accounting for the remaining 20%.²⁰ However, municipal and industrial needs for groundwater are dramatically increasing as Texas's population continues to rise.²¹ Experts estimate that as early as the year 2040, municipal and industrial use will exceed agricultural use of groundwater resources.²² These shifting trends indicate the existence of a strong market for water exportation in the near future. Yet with the state of ground-

16. See Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 252 (2001) (recognizing that "[t]he legislature has demonstrated its preference for . . . [a decentralized regulatory] approach by authorizing the creation of a number of districts").

17. Act of Feb. 23, 1953, 53rd Leg., R.S., ch. 10, 1953 Tex. Gen. Laws 17. While the High Plains Underground Water Conservation District No. 1 was officially adopted by the 53rd legislature in 1953, the district was actually created in 1951 by the affirmative vote of thirteen counties. High Plains Underground Water Conservation District No. 1, About Us, http://www.hpwd.com/about_us.asp (last visited Nov. 1, 2006) (on file with the *St. Mary's Law Journal*).

18. See Act of May 30, 2005, 79th Leg., R.S., ch. 970, 2005 Tex. Gen. Laws 3247 (adopting House Bill 1763, which included portions of the original Senate Bill 3); Act of May 28, 2003, 78th Leg., R.S., ch. 1032, 2003 Tex. Gen. Laws 2979 (enacting House Bill 803); Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991 (adopting Senate Bill 2); Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (enacting Senate Bill 1); Act of May 19, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559 (adopting House Bill 162, which established groundwater conservation districts), *repealed by* Act of May 29, 1995, 74th Leg., R.S., ch. 933, § 6, 1995 Tex. Gen. Laws 4673, 4701.

19. BRUCE J. LESIKAR ET AL., TEX. COOP. EXTENSION, QUESTIONS ABOUT GROUND-WATER CONSERVATION DISTRICTS IN TEXAS 3 fig.2 (2002).

20. *Id.*

21. See *id.* (restating Texas Water Development Board studies indicating that over the next twenty-five years, cities and industry will overtake agriculture as the leading users of groundwater).

22. BRUCE J. LESIKAR ET AL., TEX. COOP. EXTENSION, QUESTIONS ABOUT GROUND-WATER CONSERVATION DISTRICTS IN TEXAS 3 (2002); Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 259 (2001).

water regulation as it is, considerable obstacles face both the buyers and sellers in this attractive market. Some areas of the state, with either relatively limited water resources or rapidly expanding populations, rely heavily on groundwater for municipal and industrial use.²³ Many of these areas, including the cities of El Paso, San Antonio, and the Dallas/Fort Worth metroplex, are currently exploring water markets in other regions in an attempt to satisfy their growing water needs.²⁴

To alleviate many of the problems currently facing groundwater regulation, in addition to planning for future issues, Texas lawmakers must replace the current regulatory strategy with one that can adequately address the needs and concerns of the entire state. For instance, the oil and gas industry is regulated by the Texas Railroad Commission.²⁵ This central administrative body is vested with both the authority to prescribe rules governing the oil and gas trade and adjudicate disputes that arise under these rules.²⁶ The legislature recognized that oil and gas regulation was a process that required an intimate knowledge of the industry to effectively manage and conserve resources.²⁷ Groundwater and oil and gas are alike in many aspects and should be regulated in a similar fashion. Texas lawmakers must recognize that the most effective way to eliminate discordant groundwater management practices is to appoint one central regulatory body to oversee all aspects of groundwater marketing, production, transportation, and conservation.

23. See 45 DOUGLAS G. CAROOM ET AL., TEXAS PRACTICE SERIES: ENVIRONMENTAL LAW § 14.19 (2d ed. 2005) (explaining that in water marketing, the “need to develop effective water markets and to transport water from areas of potential supply to areas of demand is evident”).

24. Dylan O. Drummond, *Texas Groundwater Law in the Twenty-First Century: A Compendium of Historical Approaches, Current Problems, and Future Solutions Focusing on the High Plains Aquifer and the Panhandle*, 4 TEX. TECH J. TEX. ADMIN. LAW 173, 219 (2003) (discussing recent attempts to market “water rights to interested municipalities statewide, including Dallas-Fort Worth, El Paso, and San Antonio”).

25. Act of March 31, 1919, 36th Leg., R.S., ch. 155, 1919 Tex. Gen. Laws 285, *repealed* by Act of May 24, 1977, 65th Leg., R.S., ch. 871, art. I, § 2(a)(2), 1977 Tex. Gen. Laws 2349, 2689, *amended* by Act of May 24, 1977, 65th Leg., R.S., ch. 871, art. II, § 5, 1977 Tex. Gen. Laws 2349, 2694; *see also* R.R. Comm’n v. Shell Oil Co., 146 Tex. 286, 206 S.W.2d 235, 241 (1947) (enunciating that the Conservation Act of 1919 appointed the Texas Railroad Commission to regulate all aspects of the oil and gas industry).

26. 16 TEX. ADMIN. CODE § 3.37 (2006); *id.* § 3.38 (2006); TEX. NAT. RES. CODE ANN. § 85.041-.042 (Vernon 2001); *id.* § 85.201-.202; *id.* § 86.001; *id.* § 86.011; *id.* § 86.041-.042; *id.* § 86.082-.083.

27. See Cullen M. “Mike” Godfrey, *A Brief History of the Oil and Gas Practice in Texas*, 68 TEX. B.J. 812, 813 (2005) (suggesting that the massive oil boom in Texas of the early 1900s prompted the legislature to assign the Railroad Commission to the task of regulating the oil and gas industry).

This Comment proposes that, in so much as the current strategy of localized regulation has failed to meet expectations of lawmakers and citizens alike, the legislature should appoint one centralized governing body to regulate all facets of groundwater use. The Texas Railroad Commission, because of its experience regulating the oil and gas industry, is an excellent model for a proposed centralized legislative body to govern groundwater regulation. This discussion begins with Part II, which provides a detailed history of groundwater rights in Texas and a current interpretation of the absolute ownership doctrine, or rule of capture, as it applies today. Part III chronicles past legislative attempts to remedy issues that have surfaced as groundwater has become more sought after as a valuable commodity. Part IV of this Comment addresses current challenges facing the present system of decentralized regulation. Part V serves as a foundation for changing the regulatory scheme of groundwater management by comparing the similar characteristics between oil and gas, and groundwater. Part VI describes in greater detail the attributes of the Texas Railroad Commission as they pertain to governing the oil and gas industry. Finally, Part VII proposes several changes beneficial to all of those impacted by the current groundwater regulatory model.

II. ABSOLUTE OWNERSHIP?: COMMON LAW EVOLUTION OF THE RULE OF CAPTURE

Ownership rights to groundwater were first adjudicated in Texas over one hundred years ago in *Houston & Texas Central Railroad Co. v. East*. The Supreme Court of Texas held that the defendant, Houston & Texas Central Railroad Company (the Railroad), was not liable for damages caused to an adjacent landowner's land as a result of the defendant's pumping groundwater from beneath its property.²⁸ Prior to the suit, the Railroad drilled a sixty-six foot deep well adjacent to land owned by the plaintiff, East.²⁹ The Railroad's pumping caused East's well to dry up, thus prompting the suit.³⁰ Despite that this well was the plaintiff's only source of water for his household, the court refused to hold the Railroad liable for East's injuries.³¹ The court primarily drew its reasoning from the English case of *Acton v. Blundell*,³² which first delineated the rule of

28. *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 280-82 (1904).

29. *Id.* at 280; see Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 42 (2004) (illuminating the harmful circumstances that caused the plaintiff to file suit against the Houston & Texas Central Railroad Company).

30. *East*, 81 S.W. at 280.

31. *Id.*

32. 12 M. & W. 324, 152 Eng. Rep. 1223 (1843).

capture as it has come to be known.³³ Justice Williams adopted the English doctrine that the surface estate owner is also the absolute owner of water percolating beneath the surface of his land.³⁴ This absolute right of use affords the landowner the ability to make whatever application of the water he chooses, irrespective of any harm that may befall neighboring landowners.³⁵ Prior to *East*, the *Acton* decision was applied in New York, Ohio, Pennsylvania, and Virginia to resolve groundwater ownership disputes, so the concept of absolute ownership was not a complete novelty in the United States.³⁶ While Justice Williams did not specifically reference the rule of capture in his opinion, the court's acceptance of *Acton* clearly established a precedent for application of the rule of capture doctrine in future disputes.³⁷

The Supreme Court of Texas next ruled on groundwater ownership rights in 1927 in *Texas Co. v. Burkett*.³⁸ In *Texas Co.*, the court heard a contract dispute in which the landowner, Burkett, leased all of his water

33. *Acton v. Blundell*, 12 M. & W. 324, 152 Eng. Rep. 1223, 1235 (1843) (defining the rule of capture for the first time as it applied under English law).

[T]he person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

Id.

34. *See East*, 81 S.W. at 281 (quoting *Pixley v. Clark*, 35 N.Y. 520, 535 (1866) for common law support of the general doctrine).

35. *See id.* (relying on *Acton*, 152 Eng. Rep. at 1235, and *Pixley*, 35 N.Y. at 535, which established the common law doctrine of the rule of capture).

36. *See Pixley*, 35 N.Y. at 531 (announcing that groundwater percolating beneath the earth is governed by the rule of capture as adopted in *Acton*, 152 Eng. Rep. at 1223; however, the facts of the principal case dealt with surface water despite the defendant's contention to the contrary); *Frazier v. Brown*, 12 Ohio St. 294, 311 (1861) (determining that "[i]n the absence of express contract, and of positive authorized legislation, as between proprietors of adjoining lands," a landowner is not liable for damages to adjoining lands as a result of groundwater production); *Wheatley v. Baugh*, 25 Pa. 528, 534 (1855) (recognizing that "there is a material difference between hidden veins of water under the ground and water-courses flowing on the surface"; the former not requiring an owner to take notice or rectify any harm that may be caused to neighboring landowners which may result from groundwater production, so long as it is not done in malice); *Miller v. Black Rock Springs Improvement Co.*, 40 S.E. 27, 32 (Va. 1901) (concluding that the water in appellant's ditch was derived from percolating groundwater; thus, under the rule of capture, appellant was not liable for drying up his neighbor's spring, so long as the water was used for a lawful purpose).

37. *See East*, 81 S.W. at 281-82 (relying on *Acton*, 152 Eng. Rep. at 1235 for the rule of capture).

38. 117 Tex. 16, 296 S.W. 273, 273 (1927).

rights to Texas Company for one year for \$5,000.³⁹ While the court chose not to explicate directly on ownership rights of groundwater, it did acknowledge that groundwater is an interest in property, and therefore, is “subject to barter and sale as any other species of property.”⁴⁰ In addition, *Texas Co.* further contributed to the evolution of groundwater rights by clarifying exactly what type of water constitutes groundwater.⁴¹ In its holding, the court declared that ordinary percolating waters are subject to absolute ownership “[by] the owner of the surface of the soil.”⁴² The court defined percolating groundwater as water that was neither “add[ing] perceptibly to the general volume of water in the bed of [a] stream,” nor “of sufficient magnitude to be of any value to riparian proprietors.”⁴³ These two distinctions would help shape the future of legislative groundwater regulation in the years to come.⁴⁴

Nine years later, the Texas Commission of Appeals echoed the high court’s decision in *Texas Co.* when deciding *Evans v. Ropte*.⁴⁵ The issue in this case centered again on a contract dispute, but this time for the right to sell a brand of mineral water.⁴⁶ With the right to sell the water came the implication of a right to enter onto the land for the purpose of obtaining the water.⁴⁷ This right was, and still is, considered an incident of the right to produce the groundwater—similar to the mineral incidents of oil and gas production.⁴⁸ The court correctly determined that the con-

39. See *Tex. Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 273-74 (1927) (hearing a contract dispute case over water rights).

40. *Id.* at 278.

41. See *id.* (finding the waters to be “neither surface water nor subsurface streams with defined channels, nor riparian water in any form, and therefore were the exclusive property of Burkett”).

42. *Id.*

43. *Id.*

44. See TEX. WATER CODE ANN. § 36.001 (Vernon Supp. 2006) (defining groundwater as “water percolating below the surface of the earth”); *id.* § 36.0015 (creating groundwater conservation districts for the purpose of regulating groundwater production and conservation); Act of May 28, 2003, 78th Leg., R.S., ch. 1032, § 1, sec. 21.0121, 2003 Tex. Gen. Laws 2979, 2980 (acknowledging groundwater as a property right by requiring political subdivisions to pay damage claims to landowners whose lands are taken through condemnation).

45. 128 Tex. 75, 96 S.W.2d 973, 974 (1936).

46. See *Evans v. Ropte*, 128 Tex. 75, 96 S.W.2d 973, 973-74 (1936) (hearing a contract dispute case centered on the right to sell a certain brand of water).

47. *Id.* at 974.

48. See *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972) (expressing that water is part of the surface estate); *Evans*, 96 S.W.2d at 974 (holding the right to sell the water grants the holder an easement, which includes the right to enter the land and do everything necessary to take and appropriate the waters); see also *Stanolind Oil & Gas Co. v. Wimberly*, 181 S.W.2d 942, 944 (Tex. Civ. App.—El Paso 1944, no writ) (indicating that an incident of a mineral estate “[is] the right of ingress and egress, and the right to use so

tract in question conveyed a property right.⁴⁹ In its reasoning, the *Evans* Court expressed that it is “almost universally recognized that a right created by a grant to enter upon land and take and appropriate the waters of a spring or well thereon amounts to an interest in real estate.”⁵⁰ This decision further emphasizes Texas courts’ recognition, at this early point in time, of landowners’ absolute right to draw unlimited amounts of water from underneath their lands.⁵¹

Before World War II, Texas courts firmly established that landowners possessed a right to draw water from beneath their land, irrespective of any detrimental effects on surrounding landowners.⁵² However, restrictions would soon be placed upon groundwater ownership rights in Texas. The first case that adopted limitations upon groundwater ownership came in 1948 in *Cantwell v. Zinser*.⁵³ The Austin Civil Court of Appeals clearly resonated the Supreme Court of Texas’s adoption of the rule of capture in *East*, then further refined the rule to preclude waste of groundwater as “against the public policy of this [s]tate.”⁵⁴ The *Cantwell* Court acknowledged that *East* gave landowners an absolute ownership right to groundwater, but had fallen short of restricting that right to preclude the wasteful use of groundwater simply because the issue of waste was not before the *East* Court.⁵⁵

Seven years after *Cantwell*, the Supreme Court of Texas was presented the opportunity to definitively rule on the issue of waste in *City of Corpus Christi v. City of Pleasanton*.⁵⁶ In that case, the City of Corpus Christi contracted to purchase groundwater from the Lower Nueces River Water Supply District.⁵⁷ The wells that provided the water were 118 miles from the settling basin at Calallen.⁵⁸ In order to transport the water, the dis-

much of the surface of the land as might be reasonably necessary to enforce and enjoy the mineral estate so acquired”).

49. *Evans*, 96 S.W.2d at 975.

50. *Id.* at 974.

51. *Id.*

52. *See id.* (emphasizing that the right to take water was practically unlimited); *Tex. Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 278 (1927) (finding ordinary percolating waters exclusive property of the surface owner); *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 281 (1904) (noting the possible exception to absolute use for malicious or wanton conduct).

53. 208 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1948, no writ).

54. *Cantwell v. Zinser*, 208 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1948, no writ).

55. *See id.* (citing *East*, 81 S.W. at 279).

56. 154 Tex. 289, 276 S.W.2d 798 (1955).

57. *See City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798, 799 (1955) (allowing the defendant to transport groundwater down a natural watercourse, despite that a vast majority of the water was lost during the transportation process).

58. *Id.* at 799-800.

tract pumped the water into the Nueces River, which fed into Lake Corpus Christi and ultimately into the settling basin.⁵⁹ During this process, “as much as 63 to 74% of the water” was lost to evaporation, transpiration, and seepage.⁶⁰ The plaintiff, city of Pleasanton, contended that this substantial loss constituted waste, thus violating article 846 of the Texas Penal Code.⁶¹ The court, however, disagreed, recognizing that the legislature had not declared such natural methods of water transportation unlawful.⁶² More importantly, the court suggested that the legislature was free to forbid this method of transportation, but had not elected to do so.⁶³ This case evinces Texas courts’ reluctance to place common law limitations on the rule of capture; rather, they viewed the regulation of groundwater resources as primarily a legislative function.

The next quarter century provided for little adjustment to the rule of capture. Texas courts were not faced with many opportunities to further define groundwater ownership rights, and when they were, few or no changes took place.⁶⁴ In 1972, the Supreme Court of Texas once again stressed, in *Sun Oil Co. v. Whitaker*,⁶⁵ that the right to draw water from beneath the ground is a property right that runs with the surface estate.⁶⁶ In 1978, in *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*,⁶⁷ the high court further expounded upon the rights of landowners to draw unlimited amounts of water from beneath the ground, but restricted such production to preclude use that was “negligent, willfully wasteful, or for the purpose of malicious injury.”⁶⁸ In *Friendswood*, the court refused to apply the American rule of reasonable use to groundwater production, instead opting to remain steadfast to the English rule of absolute ownership as applied in *East*.⁶⁹

59. *Id.* at 799.

60. *Id.* at 800.

61. *Id.*

62. *City of Corpus Christi*, 276 S.W.2d at 803.

63. *Id.*

64. See *Friendswood Dev. Co. v. Smith-Sw. Indus.*, 576 S.W.2d 21, 27 (Tex. 1978) (refusing to apply the American rule of reasonable use to groundwater production, instead reaffirming the rule of capture as it was applied in *East*); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 812 (Tex. 1972) (reaffirming the rights of a lessee to produce as much groundwater as necessary for use in repressuring and secondary recovery of oil and gas operations).

65. 483 S.W.2d 808 (Tex. 1972).

66. *Sun Oil Co.*, 483 S.W.2d at 811 (declaring that “[w]ater, unsevered expressly by conveyance or reservation, has been held to be part of the surface estate”).

67. 576 S.W.2d 21 (Tex. 1978).

68. *Friendswood Dev. Co.*, 576 S.W.2d at 27 (declaring that groundwater could be drawn from the ground with relative impunity so long as such use was not negligent, reckless, or intentionally harmful to neighboring landowners).

69. *Id.* at 27.

The next major decision in the chronology of groundwater ownership rights came in *Sipriano v. Great Spring Waters of America, Inc.*,⁷⁰ where the Supreme Court of Texas again stood behind the rule of capture.⁷¹ *Sipriano* is particularly noteworthy because it was the supreme court's first opportunity to amend the rule of capture in the wake of the 75th Legislature's adoption of Senate Bill 1. As will be discussed later, this bill attempted to strengthen localized groundwater management by granting groundwater conservation districts considerably greater regulatory authority.⁷² In *Sipriano*, the plaintiff, Bart Sipriano, sought damages in tort for negligent drainage of his water wells.⁷³ However, the court granted Great Spring's motion for summary judgment and dismissed the action.⁷⁴ This is another example where Texas courts refused to replace the doctrine of absolute ownership adopted in *East* with the doctrine of reasonable use—the American rule.⁷⁵ The *Sipriano* Court acknowledged that article XVI of the Texas Constitution “placed the duty to preserve Texas's natural resources on the [s]tate,”⁷⁶ and by enacting Senate Bill 1, the legislature adopted the procedures it felt would most efficiently and effectively manage groundwater resources.⁷⁷ While *Sipriano* recognized the courts' authority to alter the rule of capture when necessary,⁷⁸ it also reiterated that “[i]t would be improper for courts to intercede . . . by changing the common-law framework within which the [l]egislature has

70. 1 S.W.3d 75 (Tex. 1999).

71. See *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 80 (Tex. 1999) (reiterating that the Texas Constitution empowered the legislature to regulate the natural resources of the state, and if the legislature chooses to remain committed to the rule of capture, then it is not the position of the courts to usurp that authority).

72. Tex. S.B. 1, 75th Leg., R.S. (1997).

73. *Sipriano*, 1 S.W.3d at 75.

74. See *id.* at 80-81 (affirming the judgment of the court of appeals).

75. See *id.* at 75 (refusing to abandon the rule of capture for the reasonable use rule); see also *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 236 (Tex. App.—Austin 1989, writ denied) (reemphasizing that “groundwater percolating beneath the soil is the property of the owner of the surface” and is “treated as a part of the soil where found and belong[s] absolutely to the surface owner”). Additionally, the *Denis* Court declined to accept the appellants' argument that because the groundwater fed directly to the springs supplying Kickapoo Creek, it was part of an underground stream and therefore owned by the state. *Denis*, 771 S.W.2d at 237.

76. *Sipriano*, 1 S.W.3d at 77.

77. See *id.* at 79 (attempting to “improve on the [s]tate's water management”).

78. See *id.* at 80 (recognizing the common law's ability to change to conform to society's needs); *Friendswood Dev. Co. v. Smith-Sw. Indus.*, 576 S.W.2d 21, 30 (Tex. 1978) (recognizing an exception to the rule of capture for negligent use of groundwater that is the proximate cause of subsidence of an adjacent property owner's land); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798, 803 (1955) (concluding that the rule of capture is only constrained by a landowner's willful waste of groundwater resources).

attempted to craft regulations to meet this state's groundwater-conservation needs."⁷⁹

Most recently, in 2004, the Austin Court of Appeals presided over *City of San Marcos v. Texas Commission on Environmental Quality*,⁸⁰ and again modified the rule of capture.⁸¹ In 1995, the City of San Marcos applied for a permit to pump its effluent wastewater, which originated as privately owned groundwater, into the San Marcos River.⁸² The city then intended to divert approximately the same quantity of the river water and effluent mixture out of the San Marcos River approximately three miles downstream.⁸³ The city contended that once the water was pumped out of the ground it was reduced to private ownership, and that ownership remained intact unless the city manifested an intention to abandon the water.⁸⁴ The court of appeals agreed that:

[I]f the [c]ity . . . were immediately discharging or channeling its captured groundwater into the river after pumping it from the aquifer, and then releasing it downstream to be diverted at a point where the water would be directed to its place of beneficial use . . . the [c]ity would specifically be exercising its right to transport its captured groundwater to the place of use.⁸⁵

However, because the water was put to use prior to transporting the water downstream, it ceased to be groundwater.⁸⁶ Accordingly, the court felt it necessary to limit groundwater transportation through natural waterways to include only water that came immediately from the ground

79. *Sipriano*, 1 S.W.3d at 80.

80. 128 S.W.3d 264 (Tex. App.—Austin 2004, pet. denied).

81. *See City of San Marcos v. Tex. Comm'n on Env'tl. Quality*, 128 S.W.3d 264, 278 (Tex. App.—Austin 2004, pet. denied) (distinguishing between groundwater pumped directly from the ground into a natural stream for transportation to a downstream diversion point, and groundwater that has been put to a municipal use and *then* transported to a downstream diversion point).

82. *Id.* at 266.

83. *Id.*

84. *Id.* at 270.

85. *Id.* at 274; *see also Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 238 (Tex. App.—Austin 1989, writ denied) (allowing a landowner to withdraw groundwater, transport it down a natural watercourse, then divert a comparable amount for irrigation, despite contentions that the water was state-owned because it contributed “perceptibly” to the level of the watercourse); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798, 803 (1955) (permitting a municipality to transport groundwater through a natural waterway, despite that up to 74% of the original water was lost during the course of transportation).

86. *City of San Marcos*, 128 S.W.3d at 274.

and had not yet been put to use.⁸⁷ In other words, groundwater which was put to use and then subsequently released from the dominion and control of its owner, transformed into surface water, and thus became property of the state.

In summary, the rule of capture in Texas has changed somewhat since the landmark 1904 case of *Houston & Texas Central Railroad Co. v. East*.⁸⁸ Over the past century, groundwater rights evolved from an absolute right of ownership to a more restricted right, where all users' needs are considered. In its infancy, the rule of capture permitted landowners to make whatever use of their groundwater resources they chose, irrespective of the impact upon any surrounding landowners.⁸⁹ Midway through the twentieth century, the Supreme Court of Texas recognized the need to place limitations on landowners' rights to draw water from beneath their lands with relative impunity.⁹⁰ Despite these restrictions, the Texas high court has remained steadfastly reluctant to preempt legislative action by placing judicial limitations upon the rule of capture.⁹¹

87. *See id.* (construing narrowly the right that "gives the owner of the captured groundwater the right to freely flow it down a state watercourse and then subsequently divert the water without obtaining an appropriation permit").

88. *See generally* *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 282 (1904) (adopting the doctrine of absolute ownership, as articulated in *Acton v. Blundell*, 12 M. & W. 324, 152 Eng. Rep. 1223 (1843)).

89. *See East*, 81 S.W. at 281 (noting that "percolating water" below the ground is treated in the same manner as the land; the owner of the soil being the absolute owner of any water that may reside beneath it); *see also* *Evans v. Ropte*, 128 Tex. 75, 96 S.W.2d 973, 974 (1936) (reaffirming that "a right created by a grant to enter upon land and take and appropriate the waters of a spring or well thereon amounts to an interest in real estate"); *Tex. Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 278 (1927) (concluding that the contract reputed by Texas Company referenced percolating groundwater and therefore conveyed an exclusive property right held by the owner of the surface estate).

90. *See* *Friendswood Dev. Co. v. Smith-Sw. Indus.*, 576 S.W.2d 21, 30 (Tex. 1978) (modifying the rule of capture to preclude a user from producing groundwater in a tortious manner; whether it be negligent, willfully wasteful, or intentionally malicious, one who produces groundwater in such a fashion is subject to liability for any resultant injuries); *City of Corpus Christi*, 276 S.W.2d at 803 (emphasizing that a user is not liable for producing water that is not necessarily put to a *beneficial* use; rather, he must only put the water to a *lawful* use); *Cantwell v. Zinser*, 208 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1948, no writ) (precluding a landowner from wastefully drawing groundwater to the detriment of adjacent landowners).

91. *See, e.g.,* *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 80 (Tex. 1999) (explaining that the legislature adopted regulations for groundwater and it would be "improper for courts to intercede"). *But see* *S. Plains Lamesa R.R., Ltd. v. High Plains Underground Water Conservation Dist. No. 1*, 52 S.W.3d 770, 779-80 (Tex. App.—Amarillo 2001, no pet.) (explaining that legislative action was required to grant groundwater conservation districts the authority to limit groundwater withdrawals based on tract size). Consequently, the Texas Legislature used the forty days remaining in the 2001 regular session to amend Senate Bill 2 to allow this method of groundwater regulation. *See* Act of May 27,

Texas lawmakers in turn have responded over the past ten years with sweeping legislation intended to strengthen a conservation strategy that has repeatedly fallen short of expectations since its inception.⁹²

III. LEGISLATIVE RESPONSES TO GROUNDWATER CONSERVATION NEEDS

The Texas Legislature possesses the duty of protecting Texas's groundwater resources under article XVI, section 59(a) of the Texas Constitution.⁹³ The legislature, as far back as 1949, has taken steps to regulate groundwater production.⁹⁴ This early groundwater legislation employed

2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991, 2084 (adding further support for GCDs); *see also* Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 91-92 (2004) (indicating that due to the Amarillo Court of Appeals's mandate, the legislature went back and amended Senate Bill 2 to grant GCDs the ability to limit groundwater production according to acreage or tract size). Lawmakers responded by amending section 36.116 of the Water Code to empower districts with the authority to limit groundwater production "based on acreage or tract size." TEX. WATER CODE ANN. § 36.116 (Vernon Supp. 2006).

92. *See generally* Act of May 30, 2005, 79th Leg., R.S., ch. 970, 2005 Tex. Gen. Laws 3247 (adopting Article 2 of the original Senate Bill 3, which created GMACs in order to afford the TWDB an enhanced ability to supervise the management practices of local conservation districts); Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991 (allowing, *inter alia*, groundwater conservation districts to regulate groundwater production based on tract size, regulate well spacing, and consider historic use when issuing production permits); Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (overhauling a stagnant Water Code by establishing regional planning groups, reemphasizing the localized approach to groundwater management by giving districts more statutory authority to adopt more stringent management standards, and granting districts the authority to require water exporters to apply for, and obtain, transportation permits).

93. TEX. CONST. art. XVI, § 59(a). The Conservation Amendment provides that:

The conservation and development of all of the natural resources of this [s]tate, and development of parks and recreational facilities, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the [l]egislature shall pass all such laws as may be appropriate thereto.

Id.

94. *See generally* Act of May 19, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559 (granting to local groups of citizens concerned about managing groundwater resources the authority to establish groundwater conservation districts for the first time), *repealed by* Act of May 29, 1995, 74th Leg., R.S., ch. 933, § 6, 1995 Tex. Gen. Laws 4673, 4701; *see also* BRUCE J. LESIKAR ET AL., TEX. COOP. EXTENSION, QUESTIONS ABOUT GROUNDWATER

management techniques that ultimately evolved into the current strategy in use today, which entrusts management authority to local GCDs.⁹⁵

In 1975, lawmakers created the first legislatively proposed groundwater district, the Harris-Galveston Coastal Subsidence District.⁹⁶ The constitutionality of the legislature's authority to create such districts was quickly challenged in *Beckendorff v. Harris-Galveston Coastal Subsidence District*.⁹⁷ In *Beckendorff*, the Fourteenth District Court of Appeals disagreed with the plaintiffs' challenge that article XVI, section 59(a) of the Texas Constitution did not "authorize the creation of a conservation and reclamation district for the purpose of controlling subsidence."⁹⁸ As such, the court affirmed the constitutionality of the act.⁹⁹

Even with the constitutionality question put to bed, these early districts possessed very little authority to manage groundwater resources effectively, primarily due to the lack of a coherent statewide management plan and inadequate regulatory guidelines.¹⁰⁰ The Texas Legislature's first major response to this faltering management system was Senate Bill 1, which took effect in June of 1997.¹⁰¹

CONSERVATION DISTRICTS IN TEXAS 13 (2002) (noting that in 1949 the legislature passed a law authorizing creation of groundwater conservation districts); Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 104 (2004) (indicating that drought conditions in the mid-twentieth century prompted the legislature to authorize the voluntary creation of groundwater conservation districts).

95. See Act of May 19, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559 (confering statutory authority to create groundwater conservation districts upon individual groups of citizens), *repealed by* Act of May 29, 1995, 74th Leg., R.S., ch. 933, § 6, 1995 Tex. Gen. Laws 4673, 4701.

96. Act of April 23, 1975, 63rd Leg., R.S., ch. 284, 1975 Tex. Gen. Laws 672.

97. 558 S.W.2d 75 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

98. *Beckendorff v. Harris-Galveston Coastal Subsidence Dist.*, 558 S.W.2d 75, 78 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (affirming the legislature's authority to create statutory groundwater conservation districts for the purpose of managing and conserving groundwater resources).

99. See *id.* at 78-82 (determining that neither article XVI, section 59, nor the due process or equal protection clauses found in the Texas Constitution preclude legislative creation of groundwater districts).

100. Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 104 (2004).

101. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610; see also Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 104 (2004) (elaborating on the modifications that Senate Bill 1 made to the Texas Water Code).

A. *Senate Bill 1: The Legislature's First Major Attempt to Revamp the Water Code*

Senate Bill 1 was once characterized as “a comprehensive water resource planning, management, and development bill . . . contain[ing] the most exhaustive rewrite of Texas water law in the last thirty years.”¹⁰² Its main goal, from a groundwater management standpoint, was to promote and strengthen localized management systems that, because of noncomprehensive legislative support, failed to manage and preserve the state’s groundwater resources adequately.¹⁰³ Prior legislation consistently took a different path, avoiding the conservation issue, instead opting to focus more on development of new water resources.¹⁰⁴ To the contrary, Senate Bill 1 directly aimed its sights on sustaining existing water supplies.¹⁰⁵ The bill’s primary aims relating to groundwater were: “(1) more aggressive management of [the] resource at the local level, (2) more resources for management, and (3) more accountability when that management is undertaken.”¹⁰⁶

In accordance with the legislature’s commitment to decentralization, Senate Bill 1 divided the state into sixteen “regional water planning

102. Martin Hubert, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs*, 30 TEX. TECH L. REV. 53, 54 (1999).

103. See Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 1.01, sec. 16.051, 1997 Tex. Gen. Laws 3610, 3610 (requiring adoption of “a comprehensive state water plan that incorporates the regional water plans . . . for the orderly development, management, and conservation of water resources . . . of the entire state”); see also Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY'S L.J. 1281, 1287 (1986) (asserting that previous legislation failed to “authorize any state agency to establish standards for district regulations or otherwise assure their adequacy,” basically forcing state agencies to “rely upon the carrot of financial assistance for water projects” when attempting to promote regulation strategies to local districts); Edward P. Woodruff, Jr. & James Peter Williams, Jr., Comment, *The Texas Groundwater District Act of 1949: Analysis and Criticism*, 30 TEX. L. REV. 862, 868 (1952) (explaining that many of the problems that surfaced under the Texas Groundwater District Act of 1949 were due to the latent ambiguity of certain regulatory terms).

104. See Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 104 (2004) (noting that while “early groundwater conservation districts had a limited impact on groundwater conservation efforts,” the water law reforms instituted by Senate Bill 1 “provided the framework for modern groundwater conservation”).

105. Martin Hubert, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs*, 30 TEX. TECH L. REV. 53, 65 (1999); Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 104 (2004).

106. Martin Hubert, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs*, 30 TEX. TECH L. REV. 53, 65 (1999).

group[s].”¹⁰⁷ Completely independent of the smaller and more numerous groundwater conservation districts, these groups were charged with projecting both surface and groundwater needs for their respective regions.¹⁰⁸ Each planning group is required, every five years, to submit to the Texas Water Development Board (the TWDB) a regional water plan detailing the region’s current and future water needs.¹⁰⁹ The TWDB then consolidates these various plans into one “state water plan.”¹¹⁰ The state water plan is essentially a five-year blueprint for the management of all water resources throughout the entire state of Texas.¹¹¹ Not surprisingly, these major changes quickly led to problems with groundwater ownership rights.¹¹²

Senate Bill 1 greatly enhanced the ability of local groundwater conservation districts to regulate water production but, at the same time, fell

107. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 1.02, sec. 16.053, 1997 Tex. Gen. Laws 3610, 3611 (current version at TEX. WATER CODE ANN. § 16.053 (Vernon 2000 & Supp. 2006)).

108. See Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas’s Most Precious Resource*, 35 TEX. TECH L. REV. 101, 108 (2004) (noting that Senate Bill 1 required regional water planning groups to “work in conjunction with groundwater conservation districts . . . to identify area groundwater demands and availability”).

109. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 1.02, sec. 16.053(b), (d)-(e), 1997 Tex. Gen. Laws 3610, 3611-12 (current version at TEX. WATER CODE ANN. § 16.053(b), (d)-(e) (Vernon 2000 & Supp. 2006)).

110. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 1.02, sec. 16.053(i), 1997 Tex. Gen. Laws 3610, 3611-12 (current version at TEX. WATER CODE ANN. § 16.053(i) (Vernon 2000 & Supp. 2006)).

111. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 1.01, sec. 16.051(a), 1997 Tex. Gen. Laws 3610, 3610 (current version at TEX. WATER CODE ANN. § 16.051(a) (Vernon 2000 & Supp. 2006)). Section 16.051 of the State Water Plan for “[d]rought, conservation, development, and management” provides that:

Not later than January 5, 2002, and before the end of each successive five-year period after that date, the board shall adopt a comprehensive state water plan that incorporates the regional water plans approved under [s]ection 16.053 of this code. The state water plan shall provide for the orderly development, management, and conservation of water resources and preparation for and response to drought conditions, in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the entire state.

Id.; see also 73 TEX. JUR. 3D *Water* § 11 (2003) (explaining that “[t]he state water plan is to provide for the orderly development, management, and conservation of water resources and preparation for and response to drought conditions, in order that sufficient water will be available at a reasonable cost”).

112. Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas’s Most Precious Resource*, 35 TEX. TECH L. REV. 101, 110 (2004).

short of the mark in several key areas.¹¹³ While Senate Bill 1 purported to encourage creation of groundwater conservation districts, it did little to entice local groups to form organized districts.¹¹⁴ Local leaders faced complicated administrative barriers when initially trying to form new districts,¹¹⁵ and of the districts created, many lacked the necessary funding and guidance to adequately regulate groundwater resources.¹¹⁶

Senate Bill 1 also failed to remedy the fact that many areas of the state overlying groundwater reservoirs had yet to form conservation districts and remained governed only by the rule of capture.¹¹⁷ As of 2005, despite the existence of eighty-nine groundwater conservation districts, some regions of the state remain unregulated.¹¹⁸ These groundwater conservation districts are political subdivisions of the state and, therefore, do not normally follow aquifer boundaries, so management plans adopted by districts bordering unregulated areas can be severely undermined by this lack of regulation.¹¹⁹ Without consistent aquifer-wide management prac-

113. See *id.* at 109-10 (recognizing that while Senate Bill 1 vastly improved the state of groundwater regulation in 1997, “several issues remained unresolved”).

114. *Id.*

115. *Id.*

116. *Id.*

117. Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 110 (2004).

118. See Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 252-53 (2001) (noting the need for additional groundwater conservation districts); see also Rachel Proctor May, *Are We Sucking the Trinity Dry?*, THE AUSTIN CHRON., Oct. 14, 2005, at 22 (describing how groundwater management plans can easily be undermined when wells located within a priority groundwater management area (PGMA) do not lie within the boundaries of any GCD). For example, the Golf Club at Circle C in southwest Travis County operated two water wells situated within the Hill Country PGMA for the last sixteen years, but the wells lie outside of any existing GCD. *Id.* Therefore, the Golf Club's water usage is governed only by the rule of capture. *Id.* Chapter 35 of the Texas Water Code requires that all land within a PGMA be regulated by GCDs no later than two years subsequent to creation of the PGMA. TEX. WATER CODE ANN. § 35.012 (Vernon Supp. 2006). Nevertheless, the southwest corner of Travis County is not yet within a GCD, and the Golf Club at Circle C is free to draw unlimited amounts of groundwater from the Trinity Aquifer, despite any detrimental effects upon other users located within either the Barton Springs/Edwards Aquifer GCD or the Hays Trinity GCD. Rachel Proctor May, *Are We Sucking the Trinity Dry?*, THE AUSTIN CHRON., Oct. 14, 2005, at 22.

119. Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 252-53 (2001); see also *Williamson v. Guadalupe County Groundwater Conservation Dist.*, 343 F. Supp. 2d 580, 587 (W.D. Tex. 2004) (implying, inter alia, that a majority of the plaintiffs' property was not within the Guadalupe County Groundwater Conservation District, and therefore was not subject to the district's management plan).

tices, groundwater supplies can be irreparably depleted with relative impunity.¹²⁰

Yet, the most glaring flaw in Senate Bill 1 was its failure to address the incoherent regulation strategies among the districts.¹²¹ The state water plan envisions unified groundwater management and conservation efforts throughout the entire state.¹²² However, Senate Bill 1 empowered groundwater conservation districts to, for the most part, enact their own regulatory practices and follow their own management agendas.¹²³ This conservation strategy invariably led to problems with districts serving their own self-interest and neglecting the concerns of outside users needing to tap the state's available water supplies.¹²⁴

120. See Rachel Proctor May, *Are We Sucking the Trinity Dry?*, THE AUSTIN CHRON., Oct. 14, 2005, at 22 (reporting that there are portions of the Hill Country priority groundwater management area that are not regulated by any groundwater conservation districts; consequently, landowners within these unregulated areas are able to draw as much water from the Trinity Aquifer as they desire).

121. See Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 108 (2004) (describing Senate Bill 1's effect as empowering local regulatory authorities, rather than firmly establishing a comprehensive state-wide management plan); see also Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 252 (2001) (identifying localized problems, such as inadequate resources and political tensions that prevent local groundwater regulatory authorities from operating as a cohesive unit).

122. TEXAS WATER DEVELOPMENT BOARD, WATER FOR TEXAS 5 (2002), available at http://www.twdb.state.tx.us/publications/reports/State_Water_Plan/2002/FinalWaterPlan2002.asp#2002SWP (follow "Table of Contents and Chapter 1" hyperlink; proceed to page 5) (on file with the *St. Mary's Law Journal*). The prologue to the state water plan succinctly declares that "[t]he State Water Plan shall provide for the orderly development, management, and conservation of water resources . . . in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the entire [s]tate." *Id.* (emphasis added).

123. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 4.28, sec. 36.1071, 1997 Tex. Gen. Laws 3610, 3644 (current version at TEX. WATER CODE ANN. § 36.1071) (Vernon 2000 & Supp. 2006); see also Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 252-53 (2001) (conveying that one criticism of decentralized regulation is that "problems of self interest, limited funding, local politics, and the self-limiting nature of these districts prevent meaningful management and protection of groundwater resources").

124. See *Williamson v. Guadalupe County Groundwater Conservation Dist.*, 343 F. Supp. 2d 580, 594 (W.D. Tex. 2004) (recognizing that, despite denying plaintiffs' permit applications, the Guadalupe County Groundwater Conservation District (GCGCD) approved pumping permits for Springs Hill Water Supply Corp. to produce "more groundwater per surface acre of land than is authorized by GCGCD rule 5.4(a)"). The district, however, classified Williamson's permit applications "into an identifiable group of out of district permit applications in contravention to Texas Water Code § 36.122(c)" because the plaintiffs intended to lease their groundwater rights to a retail water utility in Bexar

For instance, section 4.31 of Senate Bill 1, which ultimately came to be housed in section 36.1131 of the Water Code,¹²⁵ defines the permissible regulatory elements of districts' production permit requirements.¹²⁶ One particularly alarming clause allows districts to set a timeframe during which actual production must occur in order for a permit to remain valid.¹²⁷ In other words, if a well is not drilled during the stipulated timeframe, the permittee loses the right to draw the approved amount of groundwater and must reapply for another production permit.¹²⁸ At the time Senate Bill 1 was passed, this modification amounted to little more than an added procedural hurdle that permit applicants were forced to overcome. However, as will be discussed in subsection B, when combined with the additional permitting authority granted to GCDs by Senate Bill 2, these permit restrictions effectually armed districts with the ammunition necessary to impede exportation of local groundwater by high-capacity wells.¹²⁹ This significant oversight promptly sent lawmakers back to the drawing board to amend the Water Code in order to remedy the shortcomings of Senate Bill 1.

B. *Senate Bill 2: A Second Crack at the Nut*

Senate Bill 2 was the 77th Legislature's attempt to correct the remaining unresolved issues facing localized groundwater regulation lingering in the post-Senate Bill 1 era.¹³⁰ One of the highlights of the bill was that it

County. *Id.*; see TEX. WATER CODE ANN. § 36.122 (Vernon Supp. 2006) (outlining the extent to which a district may enact rules to grant or deny a permit to outside users wishing to tap into a district's available water supply).

125. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 4.31, sec. 36.1131, 1997 Tex. Gen. Laws 3610, 3647 (current version at TEX. WATER CODE ANN. § 36.1131 (Vernon 2000 & Supp. 2006)). Section 4.31 of Senate Bill 1 lists the elements that a district may require in order to obtain a permit. *Id.*

126. TEX. WATER CODE ANN. § 36.1131 (Vernon 2000 & Supp. 2006). Section 36.1131 states, in part: "(a) A permit issued by the district to the applicant under [s]ection 36.113 shall state the terms and provisions prescribed by the district. (b) The permit may include: . . . (3) the date the permit is to expire if no well is drilled." *Id.*

127. *Id.* § 36.1131(b)(3).

128. See *id.* (implying that the failure to draw groundwater from a well within the specified time period of a permit results in the permittee reapplying for another production permit).

129. See Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.44, sec. 36.101, 2001 Tex. Gen. Laws 1991, 2012 (current version at TEX. WATER CODE ANN. § 36.101 (Vernon Supp. 2006) (granting groundwater conservation districts the power to regulate production based on tract size and well spacing). The problems inherent in granting this additional regulatory authority will be discussed in greater detail in subsection B of this Comment.

130. Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991.

purported to ease the burden of financing localized regulation.¹³¹ Ironically, Senate Bill 2 implicitly enhanced groundwater conservation districts' ability to inject the regulation process with local bias and prejudice.¹³² Senate Bill 2 adopted three major changes in how GCDs are able to restrict groundwater production.¹³³ The first two changes allow districts to regulate well spacing and grant permits based on tract size.¹³⁴ These revisions alone do not appear to pose any serious threat of local bias; in fact, they seem to represent sound conservation strategies, which could potentially spread the economic benefits of groundwater exportation among many landowners. However, when combined with the provisions in Senate Bill 1 that grant districts the power to revoke permits for failure to obtain production within specified timeframes, GCDs are now able to effectively dissuade potential exporters from tapping into local groundwater supplies.¹³⁵

By granting local groundwater conservation districts the power to regulate groundwater production based on well spacing and tract size functions, the legislature provided conservation districts with the tools necessary to inhibit regions suffering from water shortages from procuring large quantities of supplemental water resources from areas of the

131. See Act of May 27, 2001, 77th Leg., R.S., ch. 966, §§ 4.01-4.02, secs. 15.903-955, 2001 Tex. Gen. Laws 1991, 2063-67 (current version at TEX. WATER CODE ANN. §§ 15.903-.955 (Vernon Supp. 2006)) (establishing the Water Infrastructure Fund and the Rural Water Assistance Fund to ease the financial burden of local groundwater management initiatives); see also Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 112 (2004) (detailing how "[t]he Water Infrastructure Fund supports loans and grants to political subdivisions . . . for various water conservation and development projects," and "[t]he Rural Water Assistance fund is intended to aid similar water initiatives, but it is primarily aimed at assisting rural areas that have distinctive water needs and limited financial capabilities").

132. See Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 117 (2004) (commenting how detractors of localized regulation frequently cite bias as one of the major obstacles facing localized groundwater regulation).

133. See Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 92 (2004) (indicating that Senate Bill 2 allowed districts to further regulate groundwater production by regulating well spacing, basing permits on tract size, and allowing for consideration of historic use of groundwater).

134. Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.44, sec. 36.101, 2001 Tex. Gen. Laws 1991, 2012 (current version at TEX. WATER CODE ANN. § 36.101 (Vernon Supp. 2006)).

135. See, e.g., *Williamson v. Guadalupe County Groundwater Conservation Dist.*, 343 F. Supp. 2d 580, 586-87 (W.D. Tex. 2004) (describing a case where the GCD denied a retail water utility its production permit, likely because the water was to be exported to Bexar county).

state with surplus reserves.¹³⁶ Municipalities and retail water utilities alike must commit significant capital resources to projects that require transportation of groundwater from areas not within the immediate vicinity of their service range.¹³⁷ The cost of drilling and pumping alone is often considerable; but once the costs of laying transportation pipelines and acquiring easements are factored in, capital expenditures increase exponentially.¹³⁸ Allowing districts to regulate well spacing and base permits on tract size effectually forces these producers intending to drill high-capacity wells to obtain a greater amount of land and drill a larger number of wells. Again, taken alone, this statutory restriction facially encourages sound conservation practices. However, because Senate Bill 1 empowered districts with the authority to revoke permits if wells were not producing within a certain amount of time,¹³⁹ these “large-volume”

136. See *S. Plains Lamesa R.R., Ltd. v. High Plains Underground Water Conservation Dist. No. 1*, 52 S.W.3d 770, 779-80 (Tex. App.—Amarillo 2001, no pet.) (agreeing that the Water Code does not specifically authorize the High Plains Underground Water Conservation District to regulate disproportionate groundwater pumping by basing production permits on tract size). Justice Quinn suggests that by denying production permits because the permittee did not possess a minimum number of acres, the district’s actions “contravene[d] fundamental fairness and render[ed] the agency decision arbitrary and unreasonable.” *Id.* at 782 (Quinn, J., concurring). By denying plaintiffs’ permits because they failed to meet minimum tract size requirements, the district recognized a method of preventing production under the guise of resource management. *Id.* at 780-81.

137. Stephen Scheibal, *Water Deal Could Fuel Growth Along Texas 130*, AUSTIN AM.-STATESMAN, Nov. 16, 2005, at B1, available at <http://www.sustainablewaterresources.com/news.html> (indicating that the cost of a water exportation project that would provide northern Bexar County with water supplies could cost an estimated \$200 million to \$250 million) (on file with the *St. Mary’s Law Journal*).

138. See TEXAS WATER DEVELOPMENT BOARD, WATER FOR TEXAS 79-80 (2002), available at http://www.twdb.state.tx.us/publications/reports/State_Water_Plan/2002/FinalWaterPlan2002.asp#2002SWP (follow “Chapter 9-10” hyperlink; proceed to page 79) (suggesting that the “[t]otal capital costs of implementing all of the water management strategies included in the 16 regional water plans are approximately \$17.9 billion”) (on file with the *St. Mary’s Law Journal*); see also Stephen Scheibal, *Water Deal Could Fuel Growth Along Texas 130*, AUSTIN AM.-STATESMAN, Nov. 16, 2005, at B1, available at <http://www.sustainablewaterresources.com/news.html> (estimating the cost of providing an infrastructure for the proposed water project at \$200 million to \$250 million) (on file with the *St. Mary’s Law Journal*); Michael L. Williams, *Can Oil and Water Mix? The Impact of Water Law on Oil, Gas, and Mineral Production*, 68 TEX. B.J. 816, 820 (2005) (revealing the magnitude of capital costs involved in providing adequate water supplies to all areas of the state).

139. See, e.g., Hill Country Underground Water Conservation District, District Rules, rule 5.4 (e), (g), 2004, http://www.hcuwcd.org/RulesOctober052004.htm#_RULE_5_WELL (last visited Nov. 3, 2006) (mandating that once a permit is approved, the permittee has six months within which to commence drilling, otherwise the permit will be revoked) (on file with the *St. Mary’s Law Journal*); Rules of the Gonzales County Underground Water Conservation District, rule 7, 2003, <http://www.geocities.com/gcuwcd/s.txt> (last vis-

producers, such as municipalities and retail water utilities, are now forced to rethink whether they want to infuse the necessary capital into projects that could very likely be terminated before they ever begin.¹⁴⁰

To further illustrate this scenario, consider a retail water utility wishing to obtain production rights to 20,000 acre-feet of groundwater within the Gonzales County Underground Water Conservation District (the GCUWCD). This district requires that, once a production permit has been obtained, “[a]ny permit granted hereunder shall remain valid if the work permitted shall have been completed within one hundred twenty (120) days from the granting of the permit.”¹⁴¹ If production is not commenced within this timeframe, the permit will become void, unless the board of directors agrees to extend the permit.¹⁴² Further, if the water is to be transported outside of the district, the applicant must obtain a transportation permit and pay the corresponding fees in addition to acquiring a production permit.¹⁴³ Suppose that this retail water utility can produce at a rate of 1,400 gallons per minute (GPM), therefore falling into class E, which is the largest category of wells in the GCUWCD.¹⁴⁴ The GCUWCD also allows a maximum production of two acre-feet per year, or one square acre of water, one foot deep, for each acre of surface land owned.¹⁴⁵ Therefore, the retail water utility, to meet the acreage requirements, would have to purchase 10,000 acres of groundwater production rights. Due to the increasing demand for water, these rights are becoming more and more costly. In this example, the wells produce water at a rate of 1,400 GPM, so in order to produce the desired 20,000 acre-feet, the utility must drill nine wells that are capable of running nonstop year round. These nine wells must be up and running within 120 days of time the permit is granted, or the permit could be revoked and all capital in-

ited Nov. 3, 2006) (requiring permittees to commence drilling on permitted wells within 120 days from the date on which the permit is originally granted) (on file with the *St. Mary's Law Journal*); Springhills Water Management District Rules, rule 5.1.10, 2002, <http://www.springhillswmd.org/Rules.htm> (last visited Nov. 3, 2006) (stipulating that an “Application of Intent to Drill or Alter a Well” is valid for 120 days, the expiration of which, if drilling has not commenced, will cause the permit to expire) (on file with the *St. Mary's Law Journal*).

140. See, e.g., *Williamson*, 343 F. Supp. 2d at 586-87 (illustrating how companies who contract to purchase groundwater production rights are forced to take substantial risks by building an entire infrastructure to transport the water, and then running the risk of not obtaining a production permit).

141. Rules of the Gonzales County Underground Water Conservation District, rule 7, 2003, <http://www.geocities.com/gcuwcd/s.txt> (last visited Nov. 3, 2006) (on file with the *St. Mary's Law Journal*).

142. *Id.*

143. *Id.* rule 11(A).

144. *Id.* rule 13(B).

145. *Id.* rule 13(E).

vestment would be lost. Completing such a large project in just four months would, to say the least, be a somewhat daunting task. This typical scenario exemplifies how conservation districts are able to prevent large-volume water exporters from penetrating their groundwater resources.

Lastly, the third major revision adopted by Senate Bill 2 allows conservation districts to base production permits on historic use periods.¹⁴⁶ Historic use is defined in section 36.001(29) of the Water Code as “evidence that is material and relevant to a determination of the amount of groundwater beneficially used without waste by a permit applicant during the relevant time period set by district rule that regulates groundwater based on historic use.”¹⁴⁷ The most striking language in this section is the clause that confers authority on the individual districts to determine their own periods on which to base historic use.¹⁴⁸ This legislation gives groundwater conservation districts the rule-making authority to arbitrarily assign historic use periods based on whatever factors *the districts* feel might be pertinent.¹⁴⁹

The 77th Legislature apparently recognized that Senate Bill 1 failed to address the issue of financing for groundwater conservation districts and squarely confronted these challenges in Senate Bill 2.¹⁵⁰ Unfortunately, Texas lawmakers deftly sidestepped the most critical issue: inconsistent and discriminatory management practices among districts.¹⁵¹ Legislators

146. Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.49, sec. 36.113, 2001 Tex. Gen. Laws 1991, 2015 (current version at TEX. WATER CODE ANN. § 36.113 (Vernon Supp. 2006)).

147. TEX. WATER CODE ANN. § 36.001(29) (Vernon Supp. 2006). The definition of historic use was actually supplied by House Bill 1763 in 2005, but Senate Bill 2 was the mechanism that allowed districts to consider historic use. Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.49, sec. 36.113, 2001 Tex. Gen. Laws 1991, 2015 (current version at TEX. WATER CODE ANN. § 36.113 (Vernon Supp. 2006)).

148. *Id.*

149. See Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17 (illuminating the problem surrounding groundwater conservation districts' authority to determine their own historic use periods). Senate Bill 3, the brainchild of the 79th Legislature, was supposed to rectify this issue. *Id.* at 18. Although the Senate Bill 3 was never signed into law, House Bill 1763 included some of Senate Bill 3's proposed amendments. Act of May 30, 2005, 79th Leg., R.S., ch. 970, 2005 Tex. Gen. Laws 3247.

150. See Act of May 27, 2001, 77th Leg., R.S., ch. 966, §§ 4.01-.02, secs. 15.903-.955, 2001 Tex. Gen. Laws 1991, 2063-67 (establishing the Water Infrastructure Fund and the Rural Water Assistance Fund).

151. See generally Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991 (failing to address consistency among water districts).

did manage to create both the Texas Water Advisory Council¹⁵² and the Joint Committee on Water Resources¹⁵³ to facilitate unity among districts, but neither of these bodies was given any regulatory authority.¹⁵⁴ Furthermore, rather than focusing on centralizing groundwater conservation authority, Senate Bill 2 attempted to circumvent this issue by placing hollow limitations on districts' abilities to impose restrictions upon groundwater exporters.¹⁵⁵ The bill forbade districts from discriminating against groundwater exporters when issuing permits, but failed to put in place any controls or punitive measures which would ensure districts' compliance with these requirements.¹⁵⁶ Most importantly, while the bill might serve to deter self-interest, these remedial modifications cannot completely realign groundwater management strategies with the goals of the state water plan—unified statewide regulation.

C. *Strike Three: Another Missed Opportunity to Remedy Groundwater Regulation Issues*

The 79th Legislative Session was expected to produce major changes in the Water Code with respect to groundwater regulation. Senate Bill 3, proposed by Senator Kenneth Armbrister, was created in part to address remaining concerns over “the development and management of the water resources of the state.”¹⁵⁷ However, the bill died while under review by

152. See Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 1.01, secs. 9.001-.017, 2001 Tex. Gen. Laws 1991, 1991-95 (current version at TEX. WATER CODE ANN. §§ 9.001-.017 (Vernon Supp. 2006)) (establishing the Texas Water Advisory Council).

153. See Act of May 27, 2001, 77th Leg., R.S., ch. 966, §§ 5.01-.11, 2001 Tex. Gen. Laws 1991, 2074-75 (outlining the purpose, membership, and rules of the Joint Committee on Water Resources).

154. See Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 111 (2004) (explaining that the Texas Water Policy Council serves merely as a “policy liaison” intended to provide “a unified state voice on significant water policy issues”). The author further explains that the responsibility of the Joint Committee on Water Resources is “to conduct interim studies and issue recommendations regarding long-term water conservation strategies and the efficient use of existing water supplies.” *Id.*

155. See Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.52, sec. 36.122(c), 2001 Tex. Gen. Laws 1991, 2018 (current version at TEX. WATER CODE ANN. § 36.122(c) (Vernon Supp. 2006)) (forbidding groundwater conservation districts from “impos[ing] more restrictive permit conditions on transporters than the district imposes on existing in-district users” or “deny[ing] a permit based on the fact that the applicant seeks to transfer groundwater outside of the district”).

156. See *id.* (limiting a district from discriminating against exporters of groundwater).

157. Tex. S.B. 3, 79th Leg., R.S. (2005), available at <http://www.capitol.state.tx.us/tlodocs/79R/billtext/html/SB00003E.htm> (on file with the *St. Mary's Law Journal*).

the House Natural Resources Committee.¹⁵⁸ One issue the bill addressed was the matter of historic usage for districts when considering production permit requests.¹⁵⁹ As noted above, groundwater conservation districts already possess statutory authority to base permits on historic usage,¹⁶⁰ and each district also enjoys free reign to determine what period of time constitutes historic use.¹⁶¹ Consequently, districts frequently define historic use in very different terms, often times assigning the periods to coincide with a period of heavy use by an influential landowner wishing to market his groundwater rights.¹⁶² Senate Bill 3 essentially would have structured historic use to include *all* previous historic use, rather than a limited window of time.¹⁶³ This simple adjustment would have abolished districts' abilities to arbitrarily assign historic use periods. Yet, because the bill never made it to the governor's desk, groundwater conservation districts remain free to set historic use ranges however they see fit. With no regulations in place to standardize historic use, the potential exists for great discrepancies among production permits for similarly sized acreages.¹⁶⁴ Furthermore, districts remain free to structure their permitting

158. Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17.

159. Tex. S.B. 3, 79th Leg., R.S. (2005), available at <http://www.capitol.state.tx.us/tlodocs/79R/billtext/html/SB00003E.htm> (on file with the *St. Mary's Law Journal*).

160. TEX. WATER CODE ANN. § 36.113(g) (Vernon Supp. 2006).

161. See Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17 (illustrating how the Hudspeth Underground Water Conservation District bases historic use on the amount of groundwater production from the years 1992 to 2002).

162. See, e.g., *id.* (reporting on how the Hudspeth County Underground Water Conservation District has assigned a historic use period of ten years that effectually granted "seven percent of the landowners in Hudspeth County . . . 100 percent of the right to permanently and indefinitely produce all the groundwater within the entirety of the district").

163. *Id.*

164. To further illustrate this scenario, suppose two neighboring landowners, Landowner *A* and Landowner *B*, both with equally sized lands, apply for pumping permits. Landowner *A* has a historic use of 5,000 acre-feet per year that is used solely for agricultural purposes. Landowner *B*, for no other reason except that he voluntarily chose to limit his groundwater use in the interest of conservation, sold his rights to only 1,000 acre-feet per year during the historic use period. Now, however, because of the increasing marketability of groundwater, both landowners wish to sell their water rights on the open market. Landowner *A* is allocated a greater quantity of water than Landowner *B*, simply because he pumped more groundwater during the period of time the district assigned as the historic use period. The fact that Landowner *B* voluntarily chose to limit his water consumption is of no relevance. The most glaring flaw is that this permit allocation method fails to recognize that Landowner *A*'s historic use was for agricultural purposes only; none of the water was sold commercially. Therefore, Landowner *A*'s intent to market his water is, in all actuality, a *new use*, and his permit should be apportioned accordingly.

process to grant larger permits to the more influential landowners, often at the expense of those landowners with less political clout.¹⁶⁵

Another provision in Senate Bill 3 that was never enacted was the section that dealt with high-capacity wells located outside the political boundaries of groundwater conservation districts.¹⁶⁶ Section 2.09 of the filed version of Senate Bill 3 would have allowed domestic or livestock groundwater producers to complain to local groundwater management area councils about water table drawdown caused by nearby high-capacity wells not located within the groundwater district.¹⁶⁷ Essentially, this amendment would have further centralized groundwater management initiatives in order to fairly allocate resources to all interested parties.

As mentioned above, Senate Bill 3 was not enacted in its entirety; however, portions of the bill were actually passed as riders to other bills.¹⁶⁸ The most important of these amendments was article 2 of the original bill,

165. Tex. S.B. 3, 79th Leg., R.S. (2005), available at <http://www.capitol.state.tx.us/tlodocs/79R/billtext/pdf/SB00003E.pdf> (on file with the *St. Mary's Law Journal*); see, e.g., Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17 (describing how some landowners within the Hudspeth County groundwater district allege that the district based its historic use period on a time when the more influential landowners within the county had higher groundwater production levels). When the 79th Legislature granted groundwater conservation districts the authority to assign permits based on historic use, it furnished the districts with a method of granting larger permits to the more influential landowners. See, e.g., *id.* (exploring the effects of the authority granted to the groundwater conservation districts). Because districts can determine their own historic use periods, they can assign a period that corresponds with a higher use period for certain influential landowners. See, e.g., *id.* (examining the Hudspeth County groundwater district, where a very small number of landowners own all of the rights to produce groundwater for export to the city of El Paso).

166. Tex. S.B. 3, 79th Leg., R.S. (2005), available at <http://www.capitol.state.tx.us/tlodocs/79R/billtext/pdf/SB00003E.pdf> (on file with the *St. Mary's Law Journal*). Specifically, section 2.09 provided that “[a]n owner of a domestic or agricultural well may petition the applicable groundwater management area council . . . to review the operation of a high-capacity well . . . that may be interfering with the petitioner’s well.” *Id.* § 2.09. According to the Texas Railroad Commissioner, Michael Williams, the “provision would have prohibited high-capacity wells outside of a groundwater conservation district from interfering with another person’s use of a water well for domestic or livestock purposes.” Michael L. Williams, *Can Oil and Water Mix? The Impact of Water Law on Oil, Gas, and Mineral Production*, 68 TEX. B.J. 816, 820 (2005).

167. Tex. S.B. 3, 79th Leg., R.S. (2005), available at <http://www.capitol.state.tx.us/tlodocs/79R/billtext/pdf/SB00003E.pdf> (on file with the *St. Mary's Law Journal*). High-capacity wells owned by municipalities would have been exempted from these provisions in Senate Bill 3. *Id.* § 2.09.

168. See Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17 (recounting that the legislature did not pass Senate Bill 3, and that some legislators said that the bill was introduced too late in the session for appropriate consideration).

which ultimately found its way into the Water Code via House Bill 1763.¹⁶⁹ Section 8 of the bill amended “oversight control of local groundwater districts through the establishment of regional boards called ‘Groundwater Management Area Councils’ or GMACs.”¹⁷⁰ Creation of these GMACs provides the Texas Water Development Board with additional supervisory authority over the management and conservation practices of local groundwater conservation districts.¹⁷¹ However, according to Russ Johnson of Bracewell & Giuliani, “it does very little to eliminate local bias and prejudice in connection with decisions on permitting.”¹⁷²

169. Act of May 30, 2005, 79th Leg., R.S., ch. 970, § 8, sec. 36.108, 2005 Tex. Gen. Laws 3247, 3254 (current version at TEX. WATER CODE ANN. § 36.108 (Vernon Supp. 2006)).

170. Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17. Section 8 of House Bill 1763 amended section 36.108 of the Water Code and dictates that districts residing within the same management area “shall consider the plans individually and shall compare them to other management plans then in force in the management area.” Act of May 30, 2005, 79th Leg., R.S., ch. 970, § 8, sec. 36.108, 2005 Tex. Gen. Laws 3247, 3254 (current version at TEX. WATER CODE ANN. § 36.108 (Vernon Supp. 2006)). Upon review of all of the management plans within the GMAC, a board composed of members of each district is required to “establish desired future conditions for the relevant aquifers within the management area.” *Id.*

171. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 970, § 8, sec. 36.108(m), 2005 Tex. Gen. Laws 3247, 3256 (current version at TEX. WATER CODE ANN. § 36.108(m) (Vernon Supp. 2006)) (granting the Texas Water Development Board adjudicatory authority to hear disputes over the proposed report on the desired future conditions of the groundwater resources, and if the TWDB finds that any of the conditions need revisions, it may submit “a list of findings and recommended revisions to the desired future conditions of the groundwater resources”); *cf.* Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17 (relaying the impression of Russ Johnson of Bracewell & Giuliani, who regards the section of House Bill 1763 that relates to GMACs as “essentially a watered-down version, attempting to normalize the management plans of the various groundwater districts over a particular aquifer”).

172. Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17 (quoting Russ Johnson of Bracewell & Giuliani, who serves as lead counsel for the Guitar Family Partnership). The Guitar Family Partnership owns nearly 40,000 acres of land in Hudspeth County and is challenging the historic use rules adopted by the Hudspeth County groundwater district. *Id.* The historic use period for the Hudspeth County district is determined by the amount of groundwater used between the years of 1992 and 2002. *Id.* The Guitar Family, however, has virtually no historic use according to the district rules, because during the period from 1992 to 2002 they were pumping groundwater for livestock only and were hardly using their fifteen irrigation wells. *Id.* Consequently, the district granted them a permit only for livestock and domestic use. *Id.* The Guitars, like many other landowners in far West Texas, realize the value of the water beneath their land and are intent on capitalizing on the growing water market. *See* Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17.

Until the legislature recognizes the need for a central governing body, localized groundwater regulation will continue to stumble clumsily into a future mired by local bias and inconsistent management practices.

Ironically, the problem does not lie in the legislature's failure to recognize these challenges facing effective groundwater regulation. To the contrary, significant modifications have been made to the Water Code in an attempt to rectify problems as they arise,¹⁷³ and the current strategy of localized management has taken significant strides since its inception in 1949.¹⁷⁴ Groundwater conservation districts are, and always will be, in the best position to recognize threats to local groundwater resources because they are able to adopt management plans to directly address local concerns.¹⁷⁵ However, by adopting a decentralized regulatory model, Texas lawmakers have opened a Pandora's box that cannot be closed merely by patchwork amendments to the Water Code. To truly resolve the issue of discordant regulation, Texas lawmakers need to appoint one

See generally Stephen Scheibal, *Water Deal Could Fuel Growth Along Texas 130*, AUSTIN AM.-STATESMAN, Nov. 16, 2005, at B1, available at <http://www.sustainablewaterresources.com/news.html> (reporting on how Sustainable Water Resources, a "high-powered" water marketing partnership, is structuring a deal to draw nearly 10 billion gallons of water per year from the Carrizo-Wilcox Aquifer in order to supply San Antonio's exploding suburban populations, in addition to supplying water for new developments along Texas Interstate 30 between Austin and San Antonio, east of Interstate 35) (on file with the *St. Mary's Law Journal*); Rick Storm, *Pickens Ready to Deliver Water: All Mesa Water Needs Is a Buyer*, AMARILLO GLOBE NEWS, Aug. 23, 2002, available at http://amarillo.com/stories/082302/tex_pickensready.shtml (user registration required) (describing how Mesa Water, Inc. has acquired the rights to 150,000 acre-feet of water per year with the intention of marketing it to municipalities in need of supplemental water supplies) (on file with the *St. Mary's Law Journal*).

173. Act of May 30, 2005, 79th Leg., R.S., ch. 970, 2005 Tex. Gen. Laws 3247; Act of May 28, 2003, 78th Leg., R.S., ch. 1032, 2003 Tex. Gen. Laws 2979; Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991; Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610. Additionally, in 2003, Lieutenant Governor David Dewhurst created the Senate Committee on Water Policy to "[s]tudy all issues related to ground and surface water law, policy and management." Senate Committee on Water Policy, <http://www.senate.state.tx.us/75r/senate/commit/c750/c750.htm> (last visited Nov. 3, 2006) (on file with the *St. Mary's Law Journal*); see also Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 95 (2004) (describing the measures that the Lieutenant Governor has taken to gather the necessary information in order to improve upon the existing Water Code).

174. Act of May 19, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559, *repealed* by Act of May 29, 1995, 74th Leg., R.S., ch. 933, § 6, 1995 Tex. Gen. Laws 4673, 4701.

175. See Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 133 (2004) (explaining the benefits and dilemmas presented by the local control of groundwater conservation districts).

central governing body to regulate the water needs of the state as a whole.

IV. REMAINING CONCERNS FACING GROUNDWATER REGULATION

Despite lawmakers' numerous attempts to resolve groundwater management issues, many serious questions remain unanswered. As indicated above, current statutory regulations governing groundwater conservation districts essentially allow each district to grant historic use permits based on arbitrary historic use periods.¹⁷⁶ These inconsistent management practices can lead to preferential treatment for certain landowners within each district.¹⁷⁷ Furthermore, regions with water shortages are often limited in their ability to acquire supplemental groundwater resources from regions with groundwater surpluses, because many districts require drilling to commence within unreasonably short periods of time.¹⁷⁸ Also, GCDs are free to require additional permits for users wishing to transport groundwater to locations outside of district boundaries.¹⁷⁹ Consequently, landowners within districts that do not require

176. See TEX. WATER CODE ANN. § 36.113(g) (Vernon Supp. 2006) (stating that “[i]n issuing a permit for an existing or historic use, a district may not discriminate between land that is irrigated for production and land or wells on land that was irrigated for production”); Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17 (suggesting that historic use periods for the Hudspeth County groundwater district were assigned to correspond with high levels of groundwater production for the county's more influential landowners).

177. See Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17 (suggesting that some conservation districts in West Texas adopted historic use periods that directly correspond with periods of high groundwater production by the more influential landowners within the district).

178. See Panhandle Groundwater Conservation District, District Rules, rule 4.5 (b), 2004, <http://www.panhandlegroundwater.org> (follow “Rules & Management Plans” hyperlink; then follow “District Rules Adopted 12/15/2004” hyperlink) (last visited Nov. 3, 2006) (requiring permittees to begin production “within 120 days of the issuance of the permit,” or the permit will expire and the permittee will be forced to reapply for a permit) (on file with the *St. Mary's Law Journal*); see also Colleen Schreiber, *TCEQ Commissioner Outlines Thoughts on Water Policies*, LIVESTOCK WKLY. (San Angelo, Tex.), Sept. 29, 2005, at 14 (describing the direction Texas Commission on Environmental Quality Commissioner Larry Soward sees groundwater management heading in the future). Commissioner Soward explained at a recent CLE International Water Law conference that:

Instead of letting government tell us what we can do with water, when, and how, the price of water in the marketplace should be set at a level that reflects its true value We should treat water like every other scarce and vital commodity by placing an appropriate economic value on it. We do that now with oil and gas. Why not water?

Id.

179. See Blanco-Pedernales Groundwater Conservation District Rules, rule 3.4, 2004, <http://www.blancocountygroundwater.org/rules/index.htm> (last visited Nov. 3, 2006) (man-

these additional permits can more readily capitalize on their groundwater resources than can landowners who reside within districts that require such transport permits.

Groundwater marketing is rapidly becoming a preferable method of allocating water to regions of the state suffering from depleted water supplies.¹⁸⁰ Water marketing, in general, consists of “[t]ransferring water from agricultural to municipal uses [and] is seen as a way to provide cities with a low-cost, dependable water supply.”¹⁸¹ Yet, the legislature’s failure to adopt a cohesive statewide regulatory strategy has substantially hampered the development of this attractive market.¹⁸² Furthermore, many districts impose export regulations upon landowners planning to lease production rights to users outside of district boundaries, and until

dating that “[a]n owner of a well producing groundwater that is transported outside of Blanco County shall obtain a transport permit from the [d]istrict”) (on file with the *St. Mary's Law Journal*); Bluebonnet Groundwater Conservation District, District Rules, rule 8.4, 2005, http://www.bluebonnetgroundwater.org/rules/rules_amended_09-01-05.doc (last visited Nov. 3, 2006) (requiring groundwater exporters to obtain a transport permit from the district prior to transporting groundwater to locations outside of the district) (on file with the *St. Mary's Law Journal*); cf. Hemphill County Underground Water Conservation District Rules, rule 4.011(a), 2004, <http://www.hemphillwcd.com/RulesMain.htm> (last visited Nov. 3, 2006) (declaring that “all persons exporting groundwater produced from the aquifer from a well within the [d]istrict’s boundaries to a place of use outside of the [d]istrict’s boundaries shall pay, an export fee based on per thousand gallon units of the metered volume of groundwater produced for export”) (on file with the *St. Mary's Law Journal*).

180. See Ronald Kaiser, *A Problem in Search of a Solution*, 67 TEX. B.J. 188, 188-90 (2004) (recognizing that groundwater marketing is quickly becoming a preferred method for cities to augment the current water supplies). This shift in groundwater use is best illustrated by the author’s suggestion that “[m]ore than 30 groundwater transfer proposals are pending and the trend will continue.” *Id.* at 190. “Many proposals involve direct negotiations between public water supply agencies and rural landowners; however, an increasing number involve private intermediaries who are negotiating with rural landowners to then sell the water to cities.” *Id.*

181. Ronald A. Kaiser, *Texas Water Marketing in the Next Millennium: A Conceptual and Legal Analysis*, 27 TEX. TECH L. REV. 181, 186 (1996).

182. See 45 DOUGLAS G. CAROOM ET AL., TEXAS PRACTICE SERIES: ENVIRONMENTAL LAW § 14.19 (2d ed. 2005) (addressing the “[s]ignificant obstacles]” in water marketing). Groundwater marketing has its own obstacles, for example:

Within groundwater conservation districts, district regulations may limit production to less than the amount anticipated, may impose additional fees for exporting water out of the district, and may impose additional permitting requirements. Moreover, such requirements may vary from district to district or within a single district, as the composition and interests of the district’s board of directors changes. Some uniformity and predictability in the manner in which groundwater conservation districts exercise their regulatory authority would significantly facilitate development of groundwater markets.

Id.

the legislature adopts a cohesive statewide regulatory strategy, the market will not attain its potential level of efficiency.¹⁸³ These additional permit requirements essentially discourage water marketers from applying for production permits because of the significant red tape and increased costs.¹⁸⁴ From a statewide perspective, regions with water shortages will likely be forced to either pay higher prices to import groundwater—these costs then being transferred to the end users—or further restrict the rights of local users in an attempt to conserve resources.

Recently, in *Williamson v. Guadalupe County Groundwater Conservation District*,¹⁸⁵ the Federal District Court for the Western District of Texas affirmed a groundwater conservation district's denial of plaintiffs' requests for production permits on the grounds that the Texas Legislature specifically granted GCDs the authority to approve or deny such permit requests.¹⁸⁶ According to the current provisions of the Water Code, the court made the proper ruling.¹⁸⁷ However, the district court further recognized that the groundwater conservation district previously approved a

183. See Bluebonnet Groundwater Conservation District, District Rules, rule 8.4, 2005, http://www.bluebonnetgroundwater.org/rules/rules_amended_09-01-05.doc (last visited Nov. 8, 2006) (mandating that persons wishing to transport water produced within the district to areas outside the district obtain not only a production permit, but also a transport permit) (on file with the *St. Mary's Law Journal*); Hemphill County Underground Water Conservation District Rules, rule 5.117(10), 2004, <http://www.hemphilluwc.com/Rules.htm> (last visited Nov. 8, 2006) (delineating permitting regulations for the Hemphill County Underground Water Conservation District, which require landowners wishing to export their water outside the district to obtain not only a production permit, which is required of all groundwater users, but also a groundwater exportation permit, which is required only of water exporters) (on file with the *St. Mary's Law Journal*); Panhandle Groundwater Conservation District, District Rules, rule 14, 2004, <http://www.panhandlegroundwater.org/> (follow "Rules & Management Plans" hyperlink; then follow "District Rules Adopted 12/15/2004" hyperlink) (last visited Nov. 8, 2006) (requiring water exporters to pay a water transport fee, in addition to acquiring an initial production permit required of all permittees, for transporting water outside of district boundaries) (on file with the *St. Mary's Law Journal*).

184. See, e.g., David Bowser, *Hemphill County a Late-Comer to Panhandle Water Conflicts*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 14 (explaining the process for attaining a water exportation permit in Hemphill County).

185. 343 F. Supp. 2d 580 (W.D. Tex. 2004).

186. See *Williamson v. Guadalupe County Groundwater Conservation Dist.*, 343 F. Supp. 2d 580, 595 (W.D. Tex. 2004) (refusing to overrule defendant groundwater district's decision to deny plaintiffs' several permits to draw certain quantities of groundwater from the Carrizo and Wilcox Aquifers).

187. See TEX. WATER CODE ANN. § 36.101 (Vernon Supp. 2006) (granting groundwater conservation districts the rule-making authority to limit groundwater production based on factors such as tract size or well spacing, in order 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

similar permit to Springs Hill Water Supply Corporation, whose use was within the political subdivision of the district, to “produce for municipal use more groundwater per surface acre of land than is authorized by [Guadalupe County Groundwater Conservation District] rule 5.4(a) and indicated an intent to exempt Springs Hill from any production limitation from the Carrizo Aquifer.”¹⁸⁸ The plaintiffs’ production permits were for an almost identical use, and were *within* district guidelines, but would have resulted in the exportation of groundwater outside of the district’s political boundaries.¹⁸⁹ It therefore seems abundantly clear that the GCGCD denied plaintiffs’ permits solely on the grounds that the water was to be put to use in Bexar County, rather than within the district.

Williamson is an excellent example of the type of restrictions that GCDs are allowed to place on landowners who attempt to capitalize on the groundwater resources beneath their lands.¹⁹⁰ The administrative agencies charged with monitoring groundwater regulation, and Texas lawmakers alike, recognize water marketing as the direction in which groundwater production is heading.¹⁹¹ A free market in which ground-

prevent waste of groundwater”); *see also id.* § 16.054 (designating groundwater conservation districts as “the state’s preferred method of managing groundwater”).

188. *Williamson*, 343 F. Supp. 2d at 594. Rule 5.4(d) of the Rules of the Guadalupe County Groundwater Conservation District states that:

An application shall be approved unless the Board of Directors finds and determines that the proposed use will either constitute waste or that such use will not constitute a “use for a beneficial purpose” as those terms are defined under Chapter 36 of the Texas Water Code, as amended, or is otherwise inconsistent with the statutory purposes of the [d]istrict.

Guadalupe County Groundwater Conservation District Rules, rule 5.4(d), 2001, http://www.seguin.net/org/groundwater/GCGCD_rules.doc (last visited Nov. 3, 2006) (on file with the *St. Mary's Law Journal*). The wording suggests that a production permit will be granted, so long as the water will be used for legitimate purposes. *Id.* In *Williamson*, plaintiffs filed a set of nine permit applications to withdraw a total of 6,000 acre-feet of water from their ranch. *Williamson*, 343 F. Supp. 2d at 587. The drilling rights were then to be sold to Bexar Metropolitan Water District to provide additional water supplies to Bexar County. *Id.* The amount requested in the permit was well within the district guidelines of two acre-feet of water per surface acre of land (plaintiffs collectively owned 4,511.24 acres of land, thus allotting them 9,022.48 acre-feet of groundwater production), and the water was to be used for municipal purposes. *Id.* at 585-87.

189. *See Williamson*, 343 F. Supp. 2d at 587 (presenting that plaintiffs had specifically contracted with Bexar Metropolitan Water District, and the district obtained the production and drilling rights to plaintiffs’ land for the purpose of drilling and pumping groundwater).

190. *Id.* (explaining the GCGCD has rules limiting annual groundwater production).

191. *See* Martin Hubert, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs*, 30 TEX. TECH L. REV. 53, 68 (1999) (illustrating that “[w]ater marketing, between a willing buyer and willing seller is a mechanism that may encourage water efficiency and decrease waste”). Former Lieutenant Governor of Texas, Bob Bul-

water could be bought and sold would have a threefold effect. First, both landowners and “water ranchers”¹⁹² will have the opportunity to capitalize on this available resource.¹⁹³ Second, areas of the state that rely heavily on groundwater for residential and commercial uses, mainly municipalities such as Amarillo, Bryan-College Station, El Paso, Houston, Lubbock and San Antonio,¹⁹⁴ would now be able to acquire water resources over and above those which they are currently able to produce locally.¹⁹⁵ Finally, and quite possibly the most critical result from groundwater marketing, the market itself would ultimately determine the true economic value of the resource.¹⁹⁶ A market-driven groundwater economy would force users to self-regulate consumption based on their desire

lock, and his general counsel, Martin Hubert, both staunch supporters of Senate Bill 1, recognize that water marketing is a way to alleviate some unnecessary waste of the resource. *Id.* at 53, 68; *see also* Colleen Schreiber, *TCEQ Commissioner Outlines Thoughts on Water Policies*, LIVESTOCK WKLY. (San Angelo, Tex.), Sept. 29, 2005, at 14 (reporting Commissioner Soward’s opinion that the legislature should recognize the economic value of groundwater and place “an appropriate economic value on it”). Larry Soward, commissioner of the Texas Commission on Environmental Quality, supports allowing the market to determine the economic value of groundwater resources. *Id.*

192. *See* BRUCE J. LESIKAR ET AL., TEX. COOP. EXTENSION, QUESTIONS ABOUT GROUNDWATER CONSERVATION DISTRICTS IN TEXAS 11 (2002) (defining “water ranching” as the purchase of groundwater from rural areas for the purpose of transporting it to other areas of the state).

193. *Cf. Williamson*, 343 F. Supp. 2d at 587 (recounting that plaintiffs alleged they contracted with Bexar Metropolitan Water District to sell groundwater to the City of San Antonio but were arbitrarily refused permits by the local groundwater district); Stephen Scheibal, *Water Deal Could Fuel Growth Along Texas 130*, AUSTIN AM.-STATESMAN, Nov. 16, 2005, at B1, *available at* <http://www.sustainablewaterresources.com/news.html> (describing a deal in which the Sustainable Water Resources partnership would pump up to 10 billion gallons of water per year from the Carrizo-Wilcox Aquifer to provide additional water supplies to the San Antonio area) (on file with the *St. Mary's Law Journal*); Rick Storm, *Pickens Ready to Deliver Water: All Mesa Water Needs Is a Buyer*, AMARILLO GLOBE NEWS, Aug. 23, 2002, *available at* http://amarillo.com/stories/082302/tex_pickens_ready.shtml (user registration required) (reporting that Mesa Water has taken the necessary steps to market groundwater to municipalities in need of supplemental water supplies) (on file with the *St. Mary's Law Journal*).

194. *See* BRUCE J. LESIKAR ET AL., TEX. COOP. EXTENSION, QUESTIONS ABOUT GROUNDWATER CONSERVATION DISTRICTS IN TEXAS 2 (2002) (discussing the groundwater market and use patterns in Texas).

195. *See generally* Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 259 (2001) (indicating that municipal and industrial uses for water will likely increase dramatically over the next twenty-five years).

196. *See* Colleen Schreiber, *TCEQ Commissioner Outlines Thoughts on Water Policies*, LIVESTOCK WKLY. (San Angelo, Tex.), Sept. 29, 2005, at 14 (describing the mechanics of water pricing in Texas).

to pay the corresponding market price.¹⁹⁷ However, the legislature's chosen regulatory strategy has thwarted any opportunity to maximize both the economic and societal utility of this valuable resource.

Conversely, oil and gas, with which groundwater shares many characteristics, is specifically regulated to maximize the conservation of the resource.¹⁹⁸ Because oil and gas is treated as a commodity with a corresponding market value, its limited availability is commonly recognized; groundwater is not, and never has been, viewed in the same light.¹⁹⁹ At a 2005 CLE International Water Law conference, Larry Soward, the Texas Commission on Environmental Quality (the TCEQ) commissioner, suggested that groundwater marketing can easily be likened to oil and gas: "We should treat water like every other scarce and vital commodity by placing an appropriate economic value on it. We do that now with oil and gas. Why not water?"²⁰⁰ Water is currently valued by the state at roughly 22 cents per acre-foot, or "22 cents for 325,851 gallons of water."²⁰¹ When compared to the price of gasoline, approximately \$3 per gallon, one-acre foot of gas would cost approximately \$977,553.²⁰² Clearly this vast price discrepancy suggests that end-users will consume oil and gas products much more sparingly than groundwater resources. By allowing the market to have more influence over the price of groundwater, consumers will adjust their consumption levels accordingly.

V. GROUNDWATER VERSUS OIL AND GAS: SO SIMILAR, YET REGULATED SO DIFFERENTLY

This Comment advocates a method of groundwater regulation that closely resembles oil and gas regulation. To substantiate this proposition, it must first be established that groundwater shares enough common qualities and characteristics with oil and gas to warrant similar govern-

197. *Id.* (suggesting that water is currently bought and sold by the state on a routine basis, but because the cost is so miniscule, no one appreciates the limited nature of the resource).

198. *See* TEX. NAT. RES. CODE ANN. § 85.201 (Vernon 2001) (declaring that "[t]he commission shall make and enforce rules and orders for the conservation of oil and gas and prevention of waste of oil and gas").

199. *See* Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 55 (2004) (contrasting that while oil and gas have always been referred to as minerals, groundwater "has never been considered a mineral since the time of Justinian").

200. Colleen Schreiber, *TCEQ Commissioner Outlines Thoughts on Water Policies*, LIVESTOCK WKLY. (San Angelo, Tex.), Sept. 29, 2005, at 14.

201. *Id.*

202. *Id.*

ance. Groundwater is succinctly defined by the Texas legislature as “water percolating below the surface of the earth.”²⁰³ Similarly, crude oil is statutorily defined as “any naturally occurring liquid hydrocarbon at atmospheric temperature and pressure coming from the earth.”²⁰⁴ In Texas, the rule of capture was first applied to groundwater ownership rights in *Houston & Texas Central Railroad Co. v. East*.²⁰⁵ As discussed above, according to *East*, the owner of land has the absolute right to draw as much groundwater from beneath his property as he so desires.²⁰⁶ At common law, oil and gas production was first governed by the rule of capture as well.²⁰⁷ In fact, the doctrines of both groundwater law and oil and gas law derive their roots from *East*.²⁰⁸ To date, this rule is still applied to both groundwater law and oil and gas law.²⁰⁹ However, oil and gas ownership has since evolved to include the doctrine of “ownership in place”²¹⁰ and the doctrine of “correlative rights.”²¹¹ While groundwater

203. TEX. WATER CODE ANN. § 36.001(5) (Vernon Supp. 2006).

204. TEX. NAT. RES. CODE ANN. § 40.003(6) (Vernon Supp. 2006).

205. See *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 281 (1904) (applying the rule of capture to groundwater rights for the first time).

206. *Id.* at 280.

207. See *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 83 S.W.2d 935, 940 (1935) (recognizing that at common law a landowner could produce an unlimited amount of oil and gas from beneath his property and the only recourse that adjoining landowners had was to drill offset wells). Specifically, the rule of capture “gives the right to produce all of the oil and gas that will flow out of the well on one’s land; and this is a property right.” *Id.*

208. *East*, 81 S.W. at 281; see Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 59 (2004) (suggesting that the roots of oil and gas law are grounded in the Texas Supreme Court’s decision in *East*); see also *Prairie Oil & Gas Co. v. State*, 231 S.W. 1088, 1091 (Tex. Comm’n App. 1921, judgment adopted) (relating the absolute ownership doctrine adopted in *East* to an oil and gas case involving permits to drill on state owned lands).

209. See *SWEPI, L.P. v. Camden Res., Inc.*, 139 S.W.3d 332, 341 (Tex. App.—San Antonio 2004, pet. denied) (reiterating that “[t]he ‘rule of capture’ is a well established doctrine in Texas which holds that a landowner is entitled to produce the oil and gas in place beneath his land”); *City of San Marcos v. Tex. Comm’n on Env’tl. Quality*, 128 S.W.3d 264, 271 (Tex. App.—Austin 2004, pet. denied) (recognizing that “the rule of capture has been reaffirmed by this state’s supreme court as recently as 1999 . . . [i]n *Sipriano v. Great Spring Waters of America*,” and applying it accordingly).

210. See *Tex. Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717, 719-20 (1915) (describing the conveyance of oil and gas and that “title to the surface may rest in one person and title to the strata beneath the surface containing such minerals in another”). In *Daugherty*, Justice Phillips poignantly articulated how oil and gas, despite possessing fluent qualities, could be rationalized as an exclusive right in real property:

Because of the fugitive nature of oil and gas, some courts, emphasizing the doctrine that they are incapable of absolute ownership until captured and reduced to possession and analogizing their ownership to that of things *ferae naturae*, have made a distinction between their conveyance while in place and that of other minerals, hold-

law has not officially adopted the doctrine of correlative rights per se, the legislature has encouraged conservation districts to impose production limits in order to allow all landowners in a common pool to capitalize on their groundwater resources.²¹²

Traditionally, the rule of capture bestowed an unsevered surface owner with the right to produce as much of these liquids, whether groundwater

ing that it created no interest in the realty. But it is difficult to perceive a substantial ground for the distinction. A purchaser of them within the ground assumes the hazard of their absence through the possibility of their escape from beneath the particular tract of land, and, of course, if they are not discovered, the conveyance is of no effect, just as the purchaser of solid mineral within the ground incurs the risk of its absence, and therefore a futile venture. But let it be supposed that they have not escaped, and are in repose within the strata beneath the particular tract and capable of possession by appropriation from it. There they clearly constitute a part of the realty. Is the possibility of their escape to render them while in place incapable of conveyance, or is their ownership while in that condition, with the exclusive right to take them from the land, anything less than ownership of an interest in the land? Conceding that they are fluent in their nature and may depart from the land before brought into absolute possession, will it be denied that, so long as they have not departed, they are a part of the land? Or when conveyed in their natural state, and they are in fact beneath the particular tract, that their grant amounts to an interest in the land? The opposing argument is founded entirely upon their peculiar property, and therefore the risk of their escape. But how does that possibility alter the character of the property interest which they constitute while in place beneath the land? The argument ignores the equal possibility of their presence, and that the parties have contracted upon the latter assumption; that, if they are in place beneath the tract, they are essentially a part of the realty, and their grant, therefore, while in that condition, if effectual at all, is a grant of an interest in the realty.

Id.; accord Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 58-59 (2004) (heralding *Daugherty* as the first Texas case to recognize the doctrine of ownership in place and apply it to oil and gas law).

211. TEX. NAT. RES. CODE ANN. § 85.053(a)(2) (Vernon Supp. 2006); TEX. NAT. RES. CODE ANN. § 86.083 (Vernon 2001); see *Corzelius v. Harrell*, 143 Tex. 509, 186 S.W.2d 961, 964 (1945) (declaring that the Railroad Commission is authorized, under article XVI, section 59(a) of the Texas Constitution, to adjust correlative rights of owners in a common pool to preserve the state's natural resources).

212. See Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.50, sec. 36.116, 2001 Tex. Gen. Laws 1991, 2015-16 (current version at TEX. WATER CODE ANN. § 36.116 (Vernon Supp. 2006)) (regulating well spacing, in addition to limiting groundwater production quantities, also serves to distribute revenue from marketing of groundwater rights to a greater number of landowners with groundwater production capabilities); see also Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 92 (2004) (suggesting that the 77th Legislature's amendment to the Water Code allowing conservation districts to regulate groundwater production according "to acreage and tract size is a hallmark of correlative rights").

or oil and gas, as he chose.²¹³ This right of absolute ownership is regarded by courts as a vested property right.²¹⁴ However, some commentators suggest that these liquids are not truly “owned” until reduced to actual possession.²¹⁵ John M. Gould, in his 1891 work, *A Treatise on the Law of Waters, Including Riparian Rights and Public and Private Rights in Waters Tidal and Inland*,²¹⁶ proposed that “[p]etroleum oil[,] . . . [l]ike water[,] . . . is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie.”²¹⁷ Regardless of when ownership of oil and gas or groundwater is actually vested, production of both substances is limited by the police powers of the state.²¹⁸

The state, acting under the authority of article XVI, section 59(a), of the Texas Constitution,²¹⁹ chose to regulate groundwater and oil and gas in two very different manners. As stated above, groundwater is regulated on a local level by groundwater conservation districts, which take general guidance from various administrative agencies²²⁰ but are essentially free to regulate in the manner that best suits their local agendas.²²¹ Oil and gas regulation, however, is centrally and singularly governed by the Texas Railroad Commission.²²²

213. See, e.g., *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 83 S.W.2d 935, 940 (1935) (detailing that the property owner’s right “is limited only by the physical possibility of the adjoining landowner diminishing the oil and gas under one’s land by the exercise of the same right of capture”).

214. See, e.g., *id.* (affirming that the right to produce all of the minerals that flow from beneath a landowner’s property is a vested property right).

215. See Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 56-57 (2004) (relaying that commentators have proposed that water is not truly owned until reduced to actual possession).

216. JOHN M. GOULD, *A TREATISE ON THE LAW OF WATERS, INCLUDING RIPARIAN RIGHTS AND PUBLIC AND PRIVATE RIGHTS IN WATERS TIDAL AND INLAND* § 291, at 567-68 (Chicago, Callaghan & Co. 1891) (1883).

217. *Id.*

218. TEX. CONST. art. XVI, § 59(a); see also *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996) (stating that “the Conservation Amendment to the Texas Constitution . . . provides that the conservation, preservation, and development of the state’s natural resources are public rights and duties”); *Brown*, 83 S.W.2d at 941 (indicating that article XVI, section 59(a) of the Texas Constitution empowers the Texas Railroad Commission to regulate oil and gas production for the conservation of natural resources).

219. TEX. CONST. art. XVI, § 59(a).

220. TEX. WATER CODE ANN. § 6.012 (Vernon 2000).

221. *Id.* § 16.054 (Vernon Supp. 2006).

222. TEX. NAT. RES. CODE ANN. § 85.041-.042 (Vernon 2001); *id.* § 85.201-.202; *id.* § 86.001; *id.* § 86.011; *id.* § 86.041-.042; *id.* § 86.082-.083.

Despite these polarized methods of regulation, both the Texas Railroad Commission and the web of groundwater conservation districts structure their respective management strategies around the same goal: “the preservation and conservation of all such natural resources of the State.”²²³ The Supreme Court of Texas recognized the parallels between groundwater and oil and gas regulation as recently as 2002, in *Bragg v. Edwards Aquifer Authority*.²²⁴ In *Bragg*, Justice Hankinson declared that the Edwards Aquifer Authority possessed the statutory authority to “prevent[] waste by conserving, protecting, and preserving the aquifer through the [l]egislature’s designated permit system[,] . . . similar to the concept of governmental action taken to prevent waste of oil and gas and to protect the correlative rights of owners of interests in oil and gas.”²²⁵ This case exemplifies the comparable goals of these two regulatory systems. Despite the differing resource management techniques, both groundwater and oil and gas law employ many similar conservation strategies.

The Conservation Amendment bestows the duty of preserving all natural resources of the state upon the Texas Legislature.²²⁶ Accordingly, lawmakers delegated oil and gas management authority to the Railroad Commission²²⁷ and groundwater management authority to local groundwater conservation districts.²²⁸ Both of these very different resource management formulas utilize almost identical techniques for conserving resources within individual reservoirs. For instance, section 3.37 (termed Rule 37) of the Texas Administrative Code conveys authority upon the Railroad Commission to regulate well spacing to “prevent waste or to prevent the confiscation of property.”²²⁹ Section 3.38 (know as Rule 38) of the Texas Administrative Code grants the Railroad Commission addi-

223. TEX. CONST. art. XVI, § 59(a); *see also* 45 DOUGLAS G. CAROOM ET AL., TEXAS PRACTICE SERIES: ENVIRONMENTAL LAW § 14.2 (2d ed. 2005) (postulating that groundwater, like oil and gas, is subject to regulation under the police powers of the state under the mandate of article XVI, section 59(a) of the Texas Constitution).

224. 71 S.W.3d 729, 735-36 (Tex. 2002).

225. *Bragg v. Edwards Aquifer Auth.*, 71 S.W.3d 729, 736 (Tex. 2002) (announcing that the Edwards Aquifer Authority is authorized by statute to ensure that groundwater resources are not subjected to unnecessary waste).

226. TEX. CONST. art. XVI, § 59(a).

227. TEX. NAT. RES. CODE ANN. § 85.041-.042 (Vernon 2001); *id.* § 85.201-.202; *id.* § 86.001; *id.* § 86.011; *id.* § 86.041-.042 (Vernon 2001); *id.* § 86.082-.083.

228. TEX. WATER CODE ANN. § 36.0015 (Vernon Supp. 2006).

229. 16 TEX. ADMIN. CODE § 3.37 (2006). Section 3.37 of volume 16 of the Texas Administrative Code is commonly referred to as “Rule 37.” *Id.*; *see also* 56 TEX. JUR. 3D *Oil and Gas* § 598 (2004) (reiterating that Rule 37 grants the Railroad Commission the authority to restrict production based on well spacing as “one expression of the state’s interest in conserving its natural resources”).

tional power to limit production by assigning acreage to a well²³⁰ “for the purpose of . . . allocating allowable production to the well.”²³¹ Section 36.116 of the Water Code is tantamount in effect to Rules 37 and 38. It authorizes groundwater conservation districts to limit groundwater production by prescribing well spacing requirements and “limiting the amount of water produced based on acreage or tract size.”²³² In sum, both well spacing and acreage requirements attempt to preserve and maximize utility of natural resources, apropos to both groundwater and oil and gas. It is, therefore, difficult to understand why two very similar substances, regulated with analogous conservation objectives in mind, are governed by such diametrically opposed regulatory bodies.²³³

VI. OIL AND GAS REGULATION: ONE CENTRAL AUTHORITY

The discovery of massive quantities of oil at Spindletop in 1901 sparked the Texas oil boom.²³⁴ As more and more people flocked to Texas to strike it rich, lawmakers recognized the need to place regulations on the proliferating oil and gas industry. Accordingly, the legislature passed the Conservation Act of 1919,²³⁵ tapping the Texas Railroad Commission as the administrative agency charged with governing this burgeoning trade.²³⁶ The Railroad Commission was originally selected because it was

230. 16 TEX. ADMIN. CODE § 3.38(a)(3) (2006). A well’s assigned acreage is known as a proration unit, which determines how many barrels of oil that specific well may produce per day. *Id.*

231. *Id.* Section 3.38 of volume 16 of the Texas Administrative Code is commonly referred to as “Rule 38.” *Id.*; see also R.R. Comm’n v. Shell Oil Co., 139 Tex. 66, 161 S.W.2d 1022, 1027 (1942) (affirming that the Railroad Commission possesses the rule-making authority to limit well production by regulating well spacing); 56 TEX. JUR. 3D *Oil and Gas* § 600 (2004) (restating that the purpose of Rule 38 “is to establish the acreage that wells in a specific field can drain efficiently,” and apportion production allowables based on tract size within the proration unit).

232. TEX. WATER CODE ANN. § 36.116 (Vernon Supp. 2006).

233. See Eric Opiela, *The Rule of Capture in Texas: An Outdated Principle Beyond its Time*, 6 U. DENV. WATER L. REV. 87, 114 (2002) (suggesting that a method of centralized regulation, similar to what the Texas Railroad Commission provides for the oil and gas industry, would be “easily transferable” to groundwater law).

234. Cullen M. “Mike” Godfrey, *A Brief History of the Oil and Gas Practice in Texas*, 68 TEX. B.J. 812, 813 (2005).

235. Act of March 31, 1919, 36th Leg., R.S., ch. 155, 1919 Tex. Gen. Laws 285, repealed by Act of May 24, 1977, 65th Leg., R.S., ch. 871, art. I, § 2(a)(2), 1977 Tex. Gen. Laws 2349, 2689, amended by Act of May 24, 1977, 65th Leg., R.S., ch. 871, art. II, § 5, 1977 Tex. Gen. Laws 2349, 2694.

236. See *Shell Oil Co.*, 206 S.W.2d at 241 (1947) (recognizing that Article 6023 appointed the Texas Railroad Commission as the administrative agency charged with regulating the oil and gas industry).

“the best-organized regulatory agency in the state at the time.”²³⁷ Today, oil and gas regulation is the primary function of the Railroad Commission.²³⁸ Specifically, “[t]he Railroad Commission is vested with the power to make rules and regulations to carry out the [l]egislature’s purpose of preventing the wasting of the state’s oil and gas resources.”²³⁹ The Commission is comprised of “five operating divisions, including the Oil and Gas Division, the Rail Division, the Gas Services Division, the Surface Mining and Reclamation Division, and the Alternative Fuels Research and Education Division.”²⁴⁰ The Oil and Gas Division, not surprisingly, is the primary department that oversees the oil and gas industry.²⁴¹

The Conservation Act of 1919 originally conferred regulatory authority of the oil and gas industry upon the Railroad Commission,²⁴² but this legislation has since been amended and can now be found in various sections of the Texas Natural Resources Code (the Natural Resources Code).²⁴³ The Natural Resources Code vests the Railroad Commission with the authority to both draft laws pertaining to oil and gas regulation²⁴⁴ and to resolve disputes arising under these laws.²⁴⁵

237. Cullen M. “Mike” Godfrey, *A Brief History of the Oil and Gas Practice in Texas*, 68 TEX. B.J. 812, 813 (2005).

238. 45 MARTIN ROCHELLE & MICHELLE MADDOX SMITH, TEXAS PRACTICE SERIES: ENVIRONMENTAL LAW § 2.10 (2d ed. 2005).

239. Nathan Block & Robin Smith Houston, *All Powers Necessary and Convenient: The Scope of Implied Powers for Texas’s Administrative Agencies*, 1 TEX. TECH J. TEX. ADMIN. LAW 1, 10 (2000).

240. 45 MARTIN ROCHELLE & MICHELLE MADDOX SMITH, TEXAS PRACTICE SERIES: ENVIRONMENTAL LAW § 2.10(a)(2) (2d ed. 2005).

241. *Id.*

242. R.R. Comm’n v. Shell Oil Co., 146 Tex. 286, 206 S.W.2d 235, 241 (1947). “Power and authority are hereby conferred upon the Railroad Commission of Texas . . . over all persons, associations and corporations owning or engaged in drilling or operating oil and gas wells in Texas.” *Id.*

243. TEX. NAT. RES. CODE ANN. § 85.041-.042 (Vernon 2001); *id.* § 85.201-.202; *id.* § 86.001; *id.* § 86.011; *id.* § 86.041-.042; *id.* § 86.082-.083; *see also* Act of May 24, 1977, 65th Leg., R.S., ch. 871, art. I § 2(a)(2), 1977 Tex. Gen. Laws 2349, 2689 (instituting the Natural Resources Code as a replacement for the General and Special laws of Texas).

244. TEX. NAT. RES. CODE ANN. § 85.041-.042 (Vernon 2001); *id.* § 85.201-.202; *id.* § 86.001; *id.* § 86.011; *id.* § 86.041-.042.

245. TEX. NAT. RES. CODE ANN. § 86.082-.083 (Vernon 2001); *see, e.g.*, R.R. Comm’n of Tex. v. Lone Star Gas Co., 844 S.W.2d 679, 688 (Tex. 1992) (declaring that “the legislature created a ‘dual’ system of oil and natural gas regulation in which the Commission possesses both rulemaking and adjudicatory powers”).

The ability of legislators to designate rulemaking authority in general to administrative agencies is firmly established.²⁴⁶ On occasion, the Railroad Commission's authority in general has been directly attacked and certain regulatory initiatives have been questioned.²⁴⁷ For instance, in 1942, in *Railroad Commission v. Shell Oil Co.*,²⁴⁸ Shell Oil disputed the Commission's authority to regulate the spacing between wells in a particular field.²⁴⁹ The Supreme Court of Texas declared that "the Commission undoubtedly has authority to make some reasonable rule for the spacing of wells. . . . It can lawfully change that rule if the facts warrant it, or it may allow the rule to stand as a general rule and make exceptions where the facts require it."²⁵⁰

Three years later, the Commission again found its regulatory authority under attack.²⁵¹ In *Corzelius v. Harrell*,²⁵² the plaintiff, Harrell, filed suit against the Railroad Commission, questioning its power to limit the production of natural gas within the Bammel Field in Harris County.²⁵³ The high court emphatically upheld the Railroad Commission's regulatory dominion over gas production:

It is utterly impossible for the [l]egislature to meet the demands of every detail in the enactment of laws relating to the production of oil and gas. The duty to carry out the just and reasonable public policy as is provided for under [a]rticle XVI, [s]ection 59a, of the [c]onstitution, has been placed with the Railroad Commission. . . . [The legislature] has authorized the Railroad Commission to handle

246. See *State ex rel. Grimes County Taxpayers Ass'n v. Tex. Mun. Power Agency*, 565 S.W.2d 258, 273 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ dismissed). The court held that:

Where the legislature delegates its authority . . . it may leave to selected municipalities the making of rules and the determination of facts to establish the basis for the application of the legislative policy. Such standards may be broad where conditions must be considered which cannot be conveniently investigated by the legislature.

Id.

247. See *R.R. Comm'n v. Shell Oil Co.*, 139 Tex. 66, 161 S.W.2d 1022, 1027 (1942) (proclaiming that regulation of well spacing is unquestionably within the powers delegated to the Railroad Commission by the legislature).

248. 139 Tex. 66, 161 S.W.2d 1022 (1942).

249. *Shell Oil Co.*, 161 S.W.2d at 1023-24, 1027 (declaring that the Texas Railroad Commission has complete authority to enact any rules necessary to effectively regulate and preserve oil and gas resources).

250. *Id.* at 1027.

251. *Corzelius v. Harrell*, 143 Tex. 509, 186 S.W.2d 961, 962 (1945).

252. 143 Tex. 509, 186 S.W.2d 961 (1945).

253. *Id.* at 962-64 (recognizing that the legislature is ill-equipped to competently regulate the ever-evolving oil and gas industry, and thus properly delegated such authority to the Texas Railroad Commission).

the details relating to the preservation and conservation of the natural resources of the [s]tate. It has been repeatedly held that the Railroad Commission is authorized to act under the many articles of the statutes enacted for the purpose of conserving and preventing waste of oil and gas.²⁵⁴

Several cases since *Corzelius* disputed some aspect of the Railroad Commission's authority, but courts continue to support the legislature's decision to allow this administrative agency to adopt those laws it deems necessary to properly regulate the oil and gas trade.²⁵⁵ No one would suggest that the Railroad Commission has been a panacea for the oil and gas industry; but as one commentator suggests, "Texas has the largest and best-developed body of oil and gas law of any jurisdiction in the world."²⁵⁶ When determining a groundwater regulation strategy, it would appear senseless for legislators to disregard such an effective regulatory model created within the state, considering Texas's oil and gas law is emulated by countries all over the world.²⁵⁷

VII. CONCLUSION: GROUNDWATER REGULATION SHOULD MIRROR OIL AND GAS REGULATION

Groundwater regulation has only recently become a major issue for Texans. This new focus is likely because, historically, the abundance of water supplies minimized any real concerns over the resource's scarcity.

254. *Id.* at 964.

255. See *R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 688 (Tex. 1992) (noting that the Railroad Commission possesses the authority not only to create the rules governing the oil and gas industry, but also to adjudicate disputes that arise under these rules); *Texaco, Inc. v. R.R. Comm'n*, 583 S.W.2d 307, 309 (Tex. 1979) (acknowledging that the Railroad Commission is charged with regulating the oil and gas industry and the decisions of the Commission are presumed valid, and thus are not reviewable *de novo*); *Stewart v. Humble Oil & Ref. Co.*, 377 S.W.2d 830, 834 (Tex. 1964) (articulating that the Railroad Commission is in the best position to regulate the oil and gas trade, and thus, decisions made by the Commission are only reviewable to the extent that they may be considered arbitrary and capricious); *R.R. Comm'n v. Shell Oil Co.*, 146 Tex. 286, 206 S.W.2d 235, 242 (1947) (announcing that the Railroad Commission is vested with the "authority to make fair and reasonable rules" in the discharge of its duty to prevent waste, and that an order preventing flaring of casinghead gas is well within that authority); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 382 S.W.2d 343, 346 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.) (declaring that the Railroad Commission "is an administrative body having broad powers and discretion in connection with the subjects of conservation and production of crude petroleum oil and natural gas").

256. Cullen M. "Mike" Godfrey, *A Brief History of the Oil and Gas Practice in Texas*, 68 TEX. B.J. 812, 815 (2005).

257. See *id.* (explaining that Texas's law regarding oil and gas is "the largest and best-developed . . . in the world").

Even more likely, because of its relative plentitude, there was little money to be made marketing groundwater rights. However, as the resource becomes less readily available, people have begun tapping this rapidly expanding market.²⁵⁸ Recent legislation indicates that Texas lawmakers recognize the ever-growing thirst for water supplies and have responded with several amendments to the Water Code directed at preserving resources.²⁵⁹ These revisions, however, have met with only limited success, because the legislature remains fervently committed to a system of decentralized regulation.²⁶⁰ One commentator suggested that “despite the proliferation of local districts, no state agency has been given any enforceable oversight authority to ensure that the interest of the [s]tate as a whole is considered, or that the multitude of local management schemes are cohesive and can work together.”²⁶¹

In recent years, the legislature recognized that many of the problems surrounding groundwater regulation directly result from local management policies.²⁶² Accordingly, Texas lawmakers have taken steps to cen-

258. See Stephen Scheibal, *Water Deal Could Fuel Growth Along Texas 130*, AUSTIN AM.-STATESMAN, Nov. 16, 2005, at B1, available at <http://sustainablewaterresources.com/news.html> (illustrating how water marketers found a ready and willing market in the Texas Hill Country and are acquiring groundwater production rights in order to satisfy this growing thirst) (on file with the *St. Mary's Law Journal*); Rick Storm, *Pickens Ready to Deliver Water: All Mesa Water Needs Is a Buyer*, AMARILLO GLOBE NEWS, Aug. 23, 2002, available at http://amarillo.com/stories/082302/tex_pickensready.shtml (user registration required) (illustrating how companies have purchased groundwater rights in anticipation of increasing needs from major cities) (on file with the *St. Mary's Law Journal*).

259. Act of May 30, 2005, 79th Leg., R.S., ch. 970, 2005 Tex. Gen. Laws 3247; Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991; Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610.

260. See Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 110-13 (2004) (proposing that despite the legislature's attempts to amend the Water Code once and for all, each legislative session is presented with new challenges that arise out of the previous session's changes).

261. Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 94 (2004).

262. See Colleen Schreiber, *TCEQ Commissioner Outlines Thoughts on Water Policies*, LIVESTOCK WKLY. (San Angelo, Tex.), Sept. 29, 2005, at 14 (relaying the statements of the Texas Commission on Environmental Quality commissioner, Larry Soward). When asked about the fragmented authorities charged with managing water resources, Commissioner Soward responded:

We have river authorities and aquifer authorities, underground water districts, municipal utility districts, irrigation districts, subsidence districts, cities, counties and state agencies. All of these entities bring a necessary, valuable and unique perspective to water resource management. The local and regional authorities have just as much at stake as the state, but there remain at times significant confusion as to who's doing what, when or how.

tralize some aspects of statewide groundwater regulation in order to more closely align local management agendas with those of the state water plan. Senate Bill 1 authorized the Texas Water Development Board to certify GCD management plans in the event that disputes arise.²⁶³ The bill fell short of granting the board authority to resolve such conflicts,²⁶⁴ but lawmakers soon recognized that the TWDB was in a perfect position to hear such disputes. Accordingly, Senate Bill 2 vested the TWDB with the necessary authority to resolve conflicts between groundwater management plans and the state water plan.²⁶⁵ The TWDB is also authorized to deny districts' funding requests for proposed development projects if they do not conform to current state water plan initiatives.²⁶⁶ Finally, the TWDB possesses supervisory authority over groundwater conservation districts within groundwater management areas.²⁶⁷ If conflicts arise over whether a district's management plan conforms to the desired future conditions report, the board hears relevant testimony and issues suggested revisions to the desired future conditions report.²⁶⁸ By empowering the TWDB with these greater supervisory controls, legislators appear to be taking steps towards centralization of groundwater resource management.

With the emergence of water marketing as a conduit for transporting groundwater to all areas of the state, Texas lawmakers will be forced to continuously refine the Water Code unless the legislature reverses course and focuses on a centralized regulatory model. TCEQ Commissioner Soward suggests that:

[T]he state with full input and participation from every stakeholder should have an overarching and comprehensive policy that addresses current and future needs. . . .

. . . We cannot afford to have policies that put economics and growth at odds with protection of our environment and our natural

Id. at 15.

263. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 4.28, sec. 36.1072(d), 1997 Tex. Gen. Laws 3610, 3646 (current version TEX. WATER CODE ANN. § 36.1072(d) (Vernon 2000 & Supp. 2006)).

264. See Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 4.28, sec. 36.1072(f), 1997 Tex. Gen. Laws 3610, 3646 (current version TEX. WATER CODE ANN. § 36.1072(f) (Vernon 2000 & Supp. 2006)) (stating the Texas Water Development Board has authority to grant or deny certification).

265. Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.47, sec. 36.1072(g), 2001 Tex. Gen. Laws 1991, 2013 (current version TEX. WATER CODE ANN. § 36.1072(g) (Vernon Supp. 2006)).

266. 31 TEX. ADMIN. CODE § 357.13(c) (Vernon 2006).

267. See TEX. WATER CODE ANN. § 36.108(m) (Vernon Supp. 2006) (granting the TWDB authority to review petitions).

268. TEX. WATER CODE ANN. § 36.108(m)-(n) (Vernon Supp. 2006).

resources, or where one region of Texas is placed in an adversarial position to another region in Texas.²⁶⁹

Groundwater marketing continues to emerge as a lucrative business opportunity for multitudes of Texans.²⁷⁰ Large municipalities, such as El Paso and San Antonio, are becoming more and more active in pursuing additional water resources to quench the thirst of their escalating populations.²⁷¹ Also, farmers are beginning to realize that, in many instances, they are able to realize greater profits from selling their groundwater rights than from traditional agricultural practices.²⁷²

The rapid growth in the groundwater industry parallels early twentieth century oil and gas exploration when Texas's potential in that market was

269. Colleen Schreiber, *TCEQ Commissioner Outlines Thoughts on Water Policies*, LIVESTOCK WKLY. (San Angelo, Tex.), Sept. 29, 2005, at 15.

270. See Ronald A. Kaiser, *Texas Water Marketing in the Next Millennium: A Conceptual and Legal Analysis*, 27 TEX. TECH L. REV. 181, 185-86 (1996) (suggesting that in the near future, cities and environmental interests will begin purchasing water from agricultural users with more frequency rather than relying on traditional water development methods, such as building new reservoirs); see also Stephen Scheibal, *Water Deal Could Fuel Growth Along Texas 130*, AUSTIN AM.-STATESMAN, Nov. 16, 2005, at B1, available at <http://www.sustainablewaterresources.com/news.html> (portraying the growing market for water resources in the Texas Hill Country, due primarily to the burgeoning suburbs in the San Antonio area and the anticipated commercial development that will result from the construction of Texas Interstate 30) (on file with the *St. Mary's Law Journal*); Rick Storm, *Pickens Ready to Deliver Water: All Mesa Water Needs Is a Buyer*, AMARILLO GLOBE NEWS, Aug. 23, 2002, available at http://amarillo.com/stories/082302/tex_pickensready.shtml (user registration required) (describing how corporations such as Pickens' Mesa Water, Inc. are purchasing the rights to groundwater production in West Texas in anticipation of selling this water to municipalities in need of supplemental water resources) (on file with the *St. Mary's Law Journal*).

271. E.g., Michael L. Williams, *Can Oil and Water Mix? The Impact of Water Law on Oil, Gas, and Mineral Production*, 68 TEX. B.J. 816, 819 (2005) (denoting that these cities are forced, because of limited water resources, to "acquire groundwater rights from remote locations that previously would have been economically unfeasible"); cf. Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 259 (2001) (speculating that "by the 2040s, municipal and industrial uses of water are expected to exceed agricultural use of water"); TEXAS WATER DEVELOPMENT BOARD, *WATER FOR TEXAS* 3-4 (2002), available at http://www.twdb.state.tx.us/publications/reports/State_Water_Plan/1997/Ch_3.1_Intro.pdf (recognizing that groundwater use for agricultural purposes declined by almost 20% from the early 1980s to 1990; conversely, groundwater use for municipal and manufacturing increased by more than 60% during that period) (on file with the *St. Mary's Law Journal*).

272. See Colleen Schreiber, *Texas Lawmakers Complete Minor Changes in State's Water Laws*, LIVESTOCK WKLY. (San Angelo, Tex.), June 16, 2005, at 17 (illustrating how, before water marketing became so popular, families similar to the Guitar family in West Texas merely leased or sold their land for agricultural purposes).

first discovered.²⁷³ Texas lawmakers then recognized the need to regulate the proliferating oil and gas trade²⁷⁴ and accordingly, appointed the Texas Railroad Commission to regulate all aspects of the industry.²⁷⁵ It stands to reason that legislators should look to this administrative agency for guidance as it has nearly one hundred years of experience regulating an industry that is, on many levels, indistinguishable from groundwater production and conservation.

Serendipitously, at common law, oil and gas governance found its roots in *Houston & Texas Central Railroad, Co. v. East*, a groundwater case.²⁷⁶ One commentator submits that, “oil and gas law is an *offshoot of groundwater law*, but oil and gas law developed more quickly because of the rapidity with which an oil and gas market emerged. Such a market is only now emerging with respect to the development of groundwater law.”²⁷⁷ To successfully diffuse the remaining and future problems surrounding groundwater regulation, legislators need to realize that the most effective approach would be to appoint an administrative agency with regulatory authority analogous to that of the Railroad Commission.

Opponents of a central governing body for groundwater regulation claim that because Texas has such diverse groundwater needs, localized management is the most practical method of regulation.²⁷⁸ The diverse needs of the state’s contrasting regions are unquestionably a legitimate

273. See generally Cullen M. “Mike” Godfrey, *A Brief History of the Oil and Gas Practice in Texas*, 68 TEX. B.J. 812, 813 (2005) (describing the oil boom of the early 1900s and the need for governmental regulation to address “the problems associated with unbridled drilling and production”).

274. See *id.* (indicating that the Texas oil boom of the early twentieth century necessitated state regulation in order to set a price on crude oil).

275. R.R. Comm’n v. Shell Oil Co., 146 Tex. 286, 206 S.W.2d 235, 241 (1947).

276. See *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 280 (1904) (indicating that a surface owner “may dig therein and apply all that is there found to his own purposes, at his free will and pleasure”).

277. Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 59 (2004) (emphasis added).

278. See *Williamson v. Guadalupe County Groundwater Conservation Dist.*, 343 F. Supp. 2d 580, 597 (W.D. Tex. 2004) (recognizing that “the Texas Legislature chose to allow county-based conservation districts to make the decisions on permits . . . [which] appear[s] to underline the strong [s]tate preference for local decisionmaking”); see also Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas’s Most Precious Resource*, 35 TEX. TECH L. REV. 101, 106 (2004) (suggesting that localized groundwater management provides “valuable security for local water interests”).

concern, but one that the Railroad Commission has also confronted.²⁷⁹ In the case of *Railroad Commission v. Shell Oil Co.*,²⁸⁰ the Railroad Commission passed an order prohibiting the plaintiff, Shell Oil, from producing oil or gas until measures could be taken to prevent the waste of casinghead gas during the production process.²⁸¹ The Supreme Court of Texas, in upholding the Railroad Commission's authority, declared that:

The duty of waste prevention which is delegated to the Commission and its authority to make fair and reasonable rules in the discharge of that duty was fully considered in *Railroad Commission v. Shell Oil Co.*, [citation omitted] where the Commission's spacing rule for oil and gas wells was upheld. . . . Nor does the fact that this kind of rule has not been adopted for any other oil field nor for oil fields generally invalidate it.²⁸²

This case indicates that a centralized regulatory agency is perfectly capable of recognizing and effectively regulating the differing needs of various regions of the state. Another common argument against a centralized groundwater management system is that while oil and gas resources are finite, they can be easily imported from other states, or even countries, to satisfy demand.²⁸³ These opponents suggest that groundwater cannot be imported from other areas in the same manner.²⁸⁴ To the extent that it is as economically sensible to import groundwater, such an argument has merit. However, unlike oil and gas reserves, groundwater resources can be replenished through recharge.²⁸⁵ These supplies, if properly managed on a statewide level, should adequately support the state's water needs for years to come.

In sum, the only effective strategy for contemporaneously utilizing, yet preserving, groundwater resources is to appoint one central administra-

279. See *Shell Oil Co.*, 206 S.W.2d at 242 (holding that the Railroad Commission did have authority to place restrictions on gas production from one field that were not placed on other fields throughout the state).

280. 146 Tex. 286, 206 S.W.2d 235 (1947).

281. See *R.R. Comm'n v. Shell Oil Co.*, 146 Tex. 286, 206 S.W.2d 235, 237, 242 (1947) (exploring that since being charged with prevention of waste is one of the primary goals of oil and gas regulation, the Railroad Commission properly imposed certain field-wide regulations upon gas wells that were unique to that specific gas field).

282. *Id.* at 242.

283. Robert Elder, Jr., *With Water, Oil Lessons Don't Apply*, AUSTIN AM.-STATESMAN, Dec. 21, 2003, available at <http://www.sustainablewaterresources.com/news.html> (on file with the *St. Mary's Law Journal*).

284. *Id.*

285. See BRUCE J. LESIKAR ET AL., TEX. COOP. EXTENSION, QUESTIONS ABOUT GROUNDWATER CONSERVATION DISTRICTS IN TEXAS 6 (2002) (indicating an aquifer is recharged by rain and other precipitation).

tive agency to regulate all aspects of groundwater production, use, and conservation. A proven model for statewide regulation all but beckons to lead the way. Eventually, lawmakers must recognize that to continue reforming a regulatory model that can never fully succeed poses a greater risk of harm than does a drastic shift in direction. In order to properly conserve this precious resource, all regions of the state must march in unison to the beat of a single drum; otherwise, future generations of Texans may never experience the physical and spiritual powers of water that flows from beneath the ground.²⁸⁶

286. See 1 PAUL HORGAN, *GREAT RIVER: THE RIO GRANDE IN NORTH AMERICAN HISTORY* 35 (Tex. Monthly Press, Inc. 1984) (1954) (portraying that Indians believed “[l]akes and springs were sacred too, and natural pools. They were doorways to the world below”).