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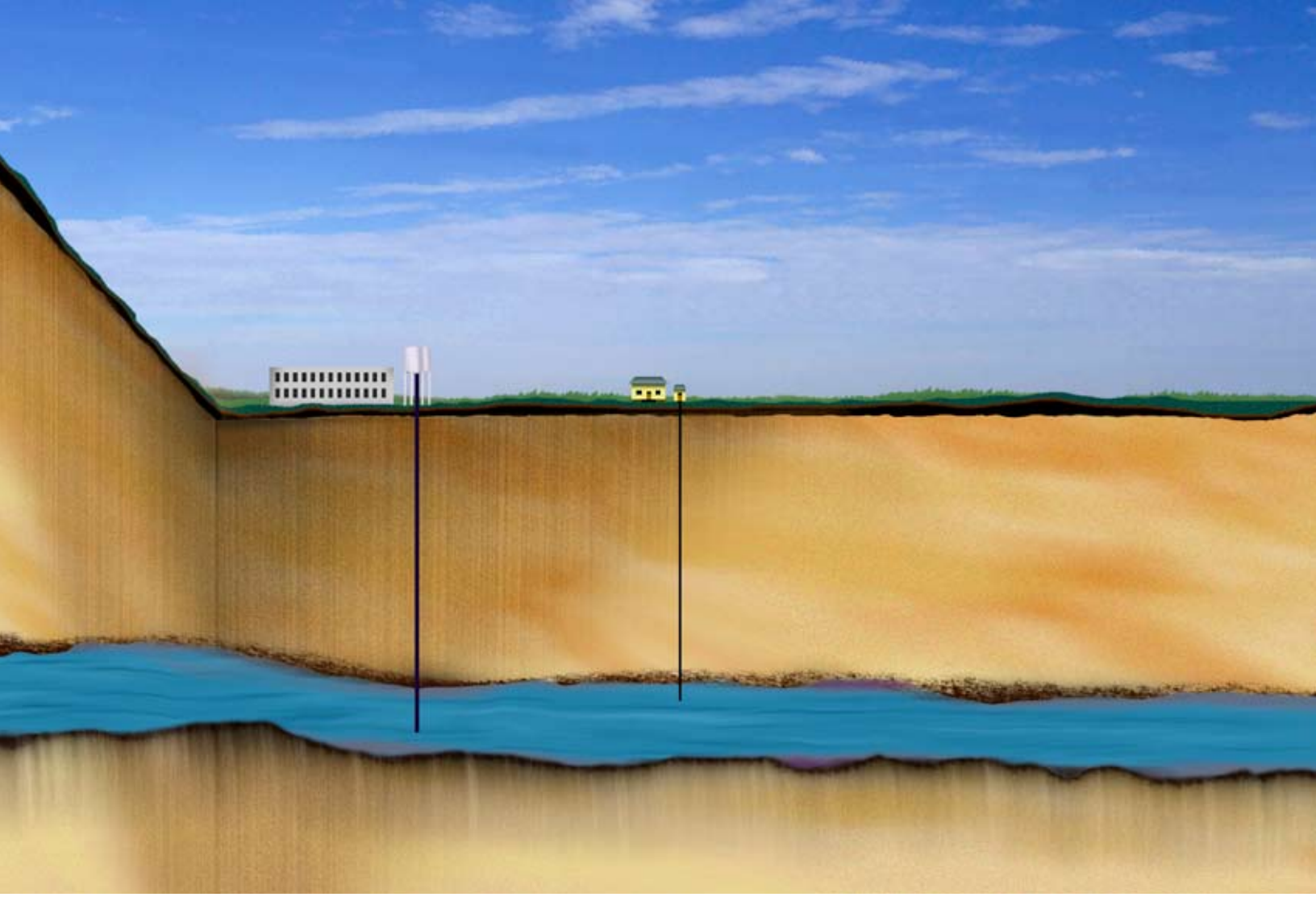
Water Pressure

Below the Surface of GCDs

by Charles E. Gilliland

Texas landowners have historically enjoyed a virtually unlimited right to pump underground water from their property and convert it to a beneficial use. That tradition, defended by the legal doctrine known as "rule of capture," is the root of a fundamental disagreement about water rights in Texas.

Many landowners believe they own the water beneath their acreage. Others insist that landowners own the water only after they pump it to the surface from a legal well.



The Texas Supreme Court repeatedly has avoided clarifying the essential nature of the rule of capture as it applies to Texas groundwater. In fact, the legislature and the courts have imposed few restrictions on landowners' rights to groundwater — until now.

To promote management of aquifers in Texas, the legislature significantly strengthened the powers of groundwater conservation districts (GCDs) in Senate Bill 2, passed in 2001. Those expanded powers gave GCDs the authority to regulate groundwater transfers outside their districts for the first time.

As landowners attempt to market their water to thirsty municipalities, they undoubtedly will encounter an increasingly complex web of regulations. Without question, the new powers granted to GCDs have changed the nature of groundwater rights in Texas. They may ultimately have a profound effect on land use and value.

GCD Creation

Groundwater conservation districts are political subdivisions of the State of Texas, as are independent school districts. Each district presides over a territory described at its creation, striving to protect property owners' rights while at the same time preserving groundwater resources.

An elected board of directors governs the GCD as it develops rules to accomplish a ten-year management plan that must be filed with the Texas Water Development Board (TWDB).

GCDs are created by legislation or through a petition signed by registered voters in the area. In priority groundwater management areas, districts can be created by order of the Texas Commission on Environmental Quality. Owners can petition an existing groundwater conservation district to annex their land.

By far, the majority of existing districts were created by legislation. That legislation establishes district boundaries, names temporary directors and mandates an election to ratify the district. The election also serves to choose permanent directors and establish a funding regimen involving fees, taxes or a combination of the two. Districts established through a petition also are described by documents that specify boundaries, name temporary directors and require a confirming election.

Authorized in the late 1940s, the first GCD was created in 1951. That district continues to operate as the High Plains Underground Water Conservation District No. 1, headquartered in Lubbock. Ten more districts were created by 1979, 20 more in the 1980s and ten between 1990 and 1997. Passage of Senate Bill 1 in 1997 spawned 46 additional districts by 2005. All but five of the GCDs have been confirmed by voters.

The map indicates where all GCDs are located. Many are delineated by county lines rather than geographic boundaries of the aquifer they were created to manage. The recently created groundwater conservation districts are in various stages of operation — developing management plans, adopting rules, imposing fees and taxes and establishing staffed offices.

District Management Plans

Most landowners want to know what measures groundwater conservation districts can include in their rules and what actions remain off limits. However, because the geological

formations of managed aquifers vary widely, the measures that effectively manage them often vary as well. Consequently, it is difficult to specify the exact array of regulations landowners can anticipate as groundwater conservation districts begin operations.

The Texas Water Code creates the legal framework for groundwater conservation district organization. The code instructs groundwater conservation districts to formulate management plans that:

- provide for the most efficient use of groundwater,
- control and prevent waste of groundwater,
- control and prevent subsidence,
- address conjunctive surface water issues,
- address natural resource issues,
- address drought conditions and
- address conservation.

To achieve these goals, districts must adopt rules ensuring that water usage conforms to regional water plans. GCD plans must be based on estimates of available groundwater that are acceptable to the TWDB, must establish the amount of water being used and must forecast future supplies and demands.

Plans estimate the amount of expected aquifer recharge and specify performance standards as well as actions needed to achieve those standards. Plan development culminates in adoption of a set of rules to put the plan into effect. All of this should happen within two years of district formation.

TWDB has identified a set of groundwater management areas throughout Texas that roughly follow the boundaries of the major aquifers in the state. Because GCDs conform to political boundaries like county lines, multiple districts frequently lie over one managed aquifer. When this occurs, district plans must not conflict with each other. This requirement may prompt districts to cooperate as they develop their plans.

The new powers granted to groundwater conservation districts have changed the nature of groundwater rights in Texas.

Effects on Landowners

Language in the water code specifies that, "nothing in this Code shall be construed as depriving or divesting the owners . . . of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a district." However, subjecting ownership to the rules of the district clearly signals the intent to allow restrictions on an owner's use of groundwater that were not imposed by the rule of capture.

The rules typically of most interest to landowners deal with registration and permitting of wells. In general, all wells must be registered with the district, even those exempted by the water code. Domestic wells on tracts larger than ten acres that produce 25,000 gallons or less per day are exempt from the permitting process, as are wells permitted by the Texas Railroad Commission. A district may also exempt other wells as the board of directors sees fit. However, exempt wells must conform to GCD specifications for casing, pipe and fittings.

Most wells producing more than 25,000 gallons per day will require a permit stating the terms specified by the district. The permit may include the location and purpose of the well, a requirement for beneficial use of the water and conditions and limitations on withdrawals. Permits may further specify where the water produced from the well must be used. Permit requirements normally apply to drilling and completing new wells or altering the size of existing wells.

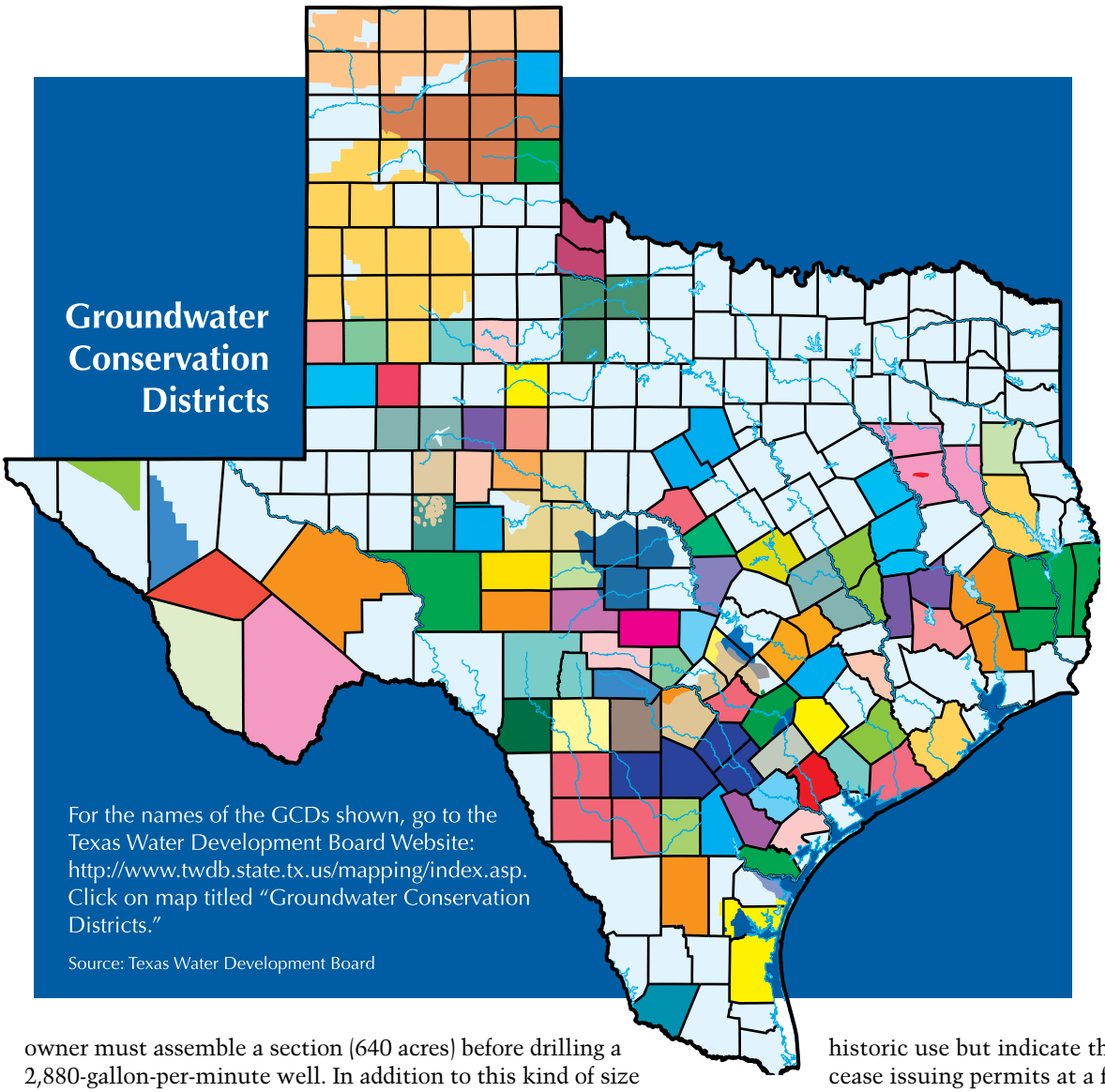
The water code allows the groundwater conservation district to consider how granting a new permit will affect existing permit holders and surface water resources. This provision allows the possibility of rules that protect historical users to the detriment of new applicants. While the code requires "fair and impartial" district rules, it specifies that districts may "preserve historic use before the effective date of the rules to the maximum extent practicable. . . ." Thus, more stringent rules may be adopted for new permit applications than those applied to existing permit holders.

Any new restrictions must apply to all new users and those increasing output of existing wells. The code does not identify the extent of protection historic users may receive, but clearly, historic users and new users may face vastly different requirements to obtain a permit. Not only can rules vary among landowners, but districts can adopt different rules for different aquifers, subdivisions of aquifers or geologic strata.

Rule differences should not be arbitrary and must bear some reasonable relationship to the GCD's management plan. Although district boards cannot prohibit water exports, they may regulate them and charge export fees.

By far the most intrusive rules faced by landowners involve restrictions on withdrawals from the aquifers. Historically, districts have sought to protect groundwater by regulating the spacing of wells, limiting the rate of pumping, limiting the amount of pumping each year or a combination of these measures. Spacing rules typically identify a minimum distance allowed from property lines to wells and between wells. The distance generally varies with the size of pump and casing pipe for the proposed well. These rules are designed to prevent one well from interfering with another.

Some GCDs specify the number of acres an owner must have for each size of pump. For example, a rule may specify that an



owner must assemble a section (640 acres) before drilling a 2,880-gallon-per-minute well. In addition to this kind of size requirement, some districts place limits on the total amount of water an owner may pump for each owned acre.

For example, the district might specify that each permitted well can pump only one acre-foot of water each year. These volume restrictions aim to protect the long-term viability of the groundwater resource. The rules addressing flows and quantities may require metering of water at the landowner's expense.

The code allows a GCD to impose a fine ranging up to $10,000 per day for violations of district rules. Each day the condition persists constitutes a separate violation. The district may seek a court injunction to enforce its rules and can recover court costs and attorney fees when it prevails.

Drilling without a required permit or pumping at a higher rate than specified in a permit renders a well illegal. The code specifies that an illegal well is legally classified as a nuisance, and any water produced is considered to have been wasted. In addition to district enforcement remedies, any person owning land adjacent to an illegal well may independently sue to enjoin the illegal activity and recover damages.

Future of GCDs

As the map shows, many districts are already operating; others are beginning to adopt rules. Some of these rules protect historic use but indicate that districts intend to cease issuing permits at a future date. Such an action would bar all landowners who do not possess permits from drilling wells that require permits. Those owners would no longer have access to water under their land unless they have exempt wells. Other districts have assigned pumping limits after a study of historic use patterns. Currently, water code does not specify limits to actions designed to protect historic users.

No one knows how much credible scientific information is required for a valid management plan. Are permits for historic uses permanent or might they expire as location or use of the water changes? Can a groundwater conservation district prohibit landowners from drilling to access water under their own land? Clearly, the owner has a right to an exempt well, but can district rules override the rule of capture?

Language in the code suggests a positive answer, but no court has ruled on this and other matters. Can two districts lying over the same aquifer with only a county line delineating their boundaries set vastly different limits on withdrawal? These and many other potential road blocks will likely emerge as this patchwork of districts struggles to effectively manage groundwater while preserving landowners' rights.

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