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A STREETCAR NAMED DISASTER:

A Train Wreck By Any Other Name…

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I. INTRODUCTION

With the passage of House Bill 1763 in 2005, the Legislature kicked off what promised to be a new era in groundwater planning. Changes to Chapter 36 of the Texas Water Code were designed to usher in "joint planning" between the many groundwater districts regulating the same aquifers around the state. In theory, joint planning would enhance the viability of the State Water Plan by producing accurate estimates of groundwater availability in the various regions of Texas. But after just one "round" of joint planning, the Legislature found it necessary to make major revisions to the process. Now, the question becomes whether the second round of joint planning is going to prove any more successful than the first. Because the Legislature failed to address the root problems of joint planning, the sad reality is that the desired future conditions process is still being derailed.

II. WHAT WAS DONE RIGHT

The Legislature got some things right in its design of the joint planning process. Two things, to be precise.

Designation of Groundwater Management Areas. Under Texas Water Code Sec. 35.004, the Legislature tasked the Texas Water Development Board with designating "groundwater management areas," with the directive that the GMAs should "to the extent feasible" coincide with the boundaries of a groundwater reservoir or a subdivision of a groundwater reservoir. To its credit, TWDB did an excellent job of defining sixteen discreet GMA's, largely along the lines of the major aquifers of the State. As noted below, this delineation of groundwater management areas is important in the context of joint planning, and adheres to the original legislation regarding the establishment of groundwater conservation districts. That legislation, passed in 1949, required the boundaries of an embryonic GCD to be "coterminous" with an underground water reservoir or subdivision of a reservoir. By definition, "reservoir" referred to "a specific subsurface water bearing reservoir having ascertainable

[1] With apologies to Dr. Robert E. Mace and William Shakespeare. Dr. Mace did not create the desired future conditions system, nor did Shakespeare.

[2] Acts 1949, 51 st Leg., ch. 306, s 1.

boundaries," and "subdivision" was defined as "a definable part of an underground reservoir from which withdrawal of waters cannot measurably affect the underground water of any other part of such reservoir..."[3] Later, the Legislature relaxed this standard, allowing GCDs to be created along political boundaries.[4] Still later, the Legislature restricted the creation of GCDs to single counties, unless the adjoining counties voted to join in.[5] Not surprisingly, all the later GCDs have been single county districts.

But to its credit, TWDB got the GMA boundaries right. Score one for the legislature for specifying hydrogeological considerations for this task.

Due Process in the DFC Appeals Scheme. The original legislation creating the DFC scheme provided a process for aggrieved persons to appeal the DFCs established and adopted by GCDs.[6] Specifically, a person with a legally defined interest in groundwater, or a regional planning group, or a district in a GMA, or a district adjacent to a GMA, could file a petition with TWDB appealing the approval of a DFC. Under this process, if TWDB found a DFC to be unreasonable, it was required to submit a report to the districts of the GMA that included a list of findings and recommendations.[7] Upon receipt of the report, the Water Code stated that the districts "shall revise the conditions and submit the conditions to the [TWDB] for review."[8]

Contrary to the normal definition of the words "shall"[9] and "revise,"[10] the districts and TWDB took the position that the districts were not required to actually change a DFC found by TWDB to be unreasonable. Instead, TWDB characterized itself as a mere "advisor," while the districts were the "deciders."[11] In other words, you could appeal a DFC to TWDB, but TWDB claimed it was powerless to actually require a district to change the DFC even if it found the DFC to be unreasonable. This construction of the Water Code violates the rules of statutory construction. *See City of La Porte* v. *Barfield* [12] ("we will not read statutory language to be

[3] Acts 1949, 51st Leg., ch. 306, s I.
[4] Texas Water Code Sec. 52.024.
[5] Texas Water Code Sec. 36.012.
[6] Texas Water Code Sec. 36.108(0(2005).
[7] Texas Water Code Sec. 36.108(m) (2005).
[8] Texas Water Code Sec. 36.108(o) (2005) (emphasis added).
[9] "Shall" is generally recognized as mandatory—creating a duty or obligation—unless legislative intent suggests otherwise. *See, e.g., Helena Chemical Co.* v. *Wilkins,* 47 S.W.3d 486, 493 (Tex. 2001); *Albertson's Inc.* v. *Sinclair,* 984 S.W.2d 958 (Tex. 1999); *Wright* v. *Ector Cty. I.S.D.,* 867 S.W.2d 863, 868 (Tex. App.—El Paso 1993, no writ).
[10] "Revise" means to modify or change, to rewrite. AMERICAN HERITAGE DICTIONARY 1058 (2d college ed. 1985).
[11] TWDB's First Amended Plea to the Jurisdiction filed in *Mesa Water LP et al* v. *Texas Water Development Board,* Cause No. D-l-GN-10-000819, Travis County District Court, 201[s1] Judicial District.
[12] 898 S.W.2d 288, 291-92 (Tex. 1995)

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