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## **Groundwater districts' local control challenged in courts**

By Curtis Chubb, Special to The Herald

A principal feature of groundwater conservation districts (GCDs) is the concept of 'local control.' The districts, however, are not free from state control.

For example, the only powers that groundwater conservation districts, such as the Post Oak Savannah Groundwater Conservation District (Post Oak), have are those authorized by the State of Texas and recorded in Chapter 36 of the Texas Water Code.

The rules governing GCDs, as well as their responsibilities, have been refined and expanded by the state legislature since their initial authorization by the 1949 Texas Groundwater Districts Act.

The number of GCDs began a rapid increase when two major water bills were passed in 1997 Senate Bill 1 - the first comprehensive legislative effort to reform water policy in Texas in several decades - and in 2001 (SB 2).

SB 1 was of particular importance because it stated, for the first time, that GCDs are the preferred method of managing groundwater in Texas.

One reason for the increased legislation governing GCDs was the realization that some districts had been formed only to protect the groundwater from the state and users outside the district. One of the GCDs that did nothing for years was the Hudspeth County Underground Water Conservation District No. 1 (Hudspeth District) which is located in the northeast corner of Hudspeth County in far west Texas. Fewer than 1,000 people live within the 200,000-acre encompassed by the district's boundary.

The Hudspeth District, formed in 1955, was forced into activity by the requirements included in SB 1.

The Hudspeth District was also one of the GCDs that attempted to prevent the export of groundwater by incorporating strict export limitations in their regulations. This practice was specifically addressed by SB 2 in 2001. SB 2 amended Chapter 36 of the Texas Water Code to prohibit GCDs from enacting regulations that were more restrictive on groundwater exporters than those using groundwater within the district.

The Hudspeth District is in the spotlight now because of a case before the Texas Supreme Court that is challenging specific rules of the district. The case was filed by Guitar Holding Company LP. The high profile of the case is evidenced by Guitar's counsel including an attorney from the Bracewell and Guiliani law firm and Russell Johnson of McGinnis, Lochridge, & Kilgore LLP.

Post Oak's Board of Directors voted to contribute \$500 to assist the Texas Alliance of Groundwater Districts in their preparation of a legal brief to support the Hudspeth District.

The rules being challenged by Guitar were adopted in 2002. In essence, Guitar is challenging the legality of the Hudspeth District's rules which allow historic use permit holders to base the amount of water that they can export on the historic production.

Guitar owns 38,000 acres in the district but did not use the groundwater for irrigation during the designated historic period. So, when they filed for export permits, the district allowed Guitar only 162 acre-feet for export per year.

Although the Hudspeth District and other supporters, including the Texas Alliance of Groundwater Districts, appear to focus on the right of GCDs to recognize and grant historic use permits, the Guitar attorneys are arguing that their client is being discriminated against because they did not use large amounts of groundwater in the historic period. One of their supporting arguments is that no one uses more groundwater than the farmers using irrigation - so anyone who is not a farmer will be discriminated against if they plan to export groundwater.

Also, the Guitar counsel is arguing that Chapter 36 focuses on "historic use," not "historic production." Subsequently, the farmers who used the groundwater for irrigation should only be able to use their historic use permit allocation for irrigation, not export.

In rebuttal, the Hudspeth District attorneys maintain that Chapter 36 does not "force the un-coupling of historic use rules for production permits from export of water produced under those permits."

A more recent legislative effort by the State of Texas (HB 1763 approved in 2005) allows the Texas Water Development Board to exert more control over the GCDs.

HB 1763 addresses one of the original concerns of GCDs being developed along political boundaries, instead of aquifer boundaries. The bill requires GCDs over the same aquifer to coordinate their efforts by organizing "Groundwater Management Areas (GMAs)." Post Oak is a member of two GMAs: GMA 8 and GMA 12.

An important role of the GMAs is to develop 'desired future conditions' of the aquifer which will be used by the Texas Water Development Board to calculate the total amount of groundwater within specific aquifers which is available for beneficial use.

Water marketers have expressed their concern of the "desired future conditions" process. Also, the process has caught the attention of Texas House Speaker Tom Craddick. Craddick has charged the House Natural Resources Committee to perform the following task before the next legislative session: "Monitor ongoing efforts related to joint planning in groundwater management areas, including progress toward setting desired future

conditions for aquifers. Examine and evaluate the process relating to an appeal challenging the approval of desired future conditions.”

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