

**DON'T HAND ME NO LINES,
AND KEEP YOUR GCD HANDS TO YOURSELF**
**Exemptions from GCD Regulation
and Their Exceptions and Limitations**

MARK MCPHERSON
MCPHERSON LAW FIRM, PC
WWW.MCTEXLAW.COM
17400 DALLAS PARKWAY, SUITE 112
DALLAS, TEXAS 75287

(972) 381-9800 [OFFICE]
(972) 381-9802 [FACSIMILE]

MARK@MCTEXLAW.COM



State Bar of Texas
**10th ANNUAL CHANGING FACE OF
WATER RIGHTS ADVANCED COURSE**
April 2-3, 2009
Austin

CHAPTER 4.1



MARK MCPHERSON

MCTEXLAW
.COM

MCPHERSON & ASSOCIATES, PC

17400 DALLAS PARKWAY, SUITE 112

DALLAS, TEXAS 75287

972-381-9800

972-381-9802 [FACSIMILE]

MARK@MCTEXLAW.COM



Mr. McPherson has over 19 years of experience in commercial real estate, water and environmental law. He has represented national and local companies, entrepreneurs, and landowners in a wide variety of matters, including:

- Water Purchase and Sales Transactions
- Environmental and Water Supply Due Diligence in Transactions
- Contested Case Hearings over Water Rights and Environmental Issues
- Defense of TCEQ Enforcement Actions
- Comments to Proposed Agency Rules
- Air Quality, Solid Waste and Water Supply (CCN) Issues and Compliance
- Real Estate Zoning, Development and Construction

Mr. McPherson is an active lecturer and Course Director at CLE programs in Texas. He has served in numerous leadership positions with the State Bar of Texas' Real Estate, Probate and Trust Law (REPTL) Section, including as a member of the REPTL Council, and Chair of its Real Estate Legislative Affairs Committee (RELACs) for the 79th and 80th Legislatures. He is currently Vice Chair of its Water Rights Committee and Editor of **THE REPORTER**.

Mr. McPherson is Author of the MCTEXLAW E-MAIL ALERT, a periodic newsletter circulated to clients and colleagues, and posted on www.mctexlaw.com, concerning recent Texas legal developments affecting business owners and commercial real estate, with circulation of approximately 4,084 as of March, 2008. Free subscriptions are available at www.mctexlaw.com/emailalerts.com

He is also the Administrator and Host of the MCTEXLAW REAL ESTATE E-MAIL DISCUSSION GROUP, an E-mail based discussion group for professionals in the Texas real estate industry, with approximately 110 members as of March, 2008. Free subscriptions are available to qualified individuals upon request to mark@mctexlaw.com

Mr. McPherson received his J.D. from Washington & Lee University School of Law (1990) and his B.S., *cum laude*, in Political Science from Belmont University (1987).

TABLE OF CONTENTS

I.	OVERVIEW OF THE SCOPE OF THIS PAPER	1
A.	The Relationship of “Exemption”, “Exception” and “Limitation”	1
B.	The Challenges of Construing § 36.117	1
II.	HOW DID THE GCD GET HERE, AND WHY DOES IT MATTER?	2
III.	EXEMPT WATER WELLS	3
A.	Specifically Exempt by GCD Rule	3
B.	Domestic and Livestock Use	4
C.	Drilling or Exploring Operations for an Oil or Gas Well	5
D.	Surface Mining Activities	6
E.	Certain Production or Injection Wells	8
F.	Other Exemptions	9
1.	Uranium Mining	9
2.	Cathodic Protection Wells	10
G.	Other Restrictions on GCDs	10
IV.	WATER VS. MINERALS: WILL THIS BECOME A PERFECT STORM?	11
A.	The Mineral Estate’s Historical Common Law Rights	11
B.	Managed Groundwater Comes to the Barnett Shale: Two New PGMAs	12
C.	The Use of Water in Shale Plays	14
D.	Reconciling Chapter 36 and Common Law Rights	15
E.	The Big Four Questions about Water Used to Produce Oil and Gas	16
1.	Can a GCD Limit Production of Water Used to Produce Oil and Gas?	16
2.	Can a GCD Assess Fees on the Production of Water Used to Produce Oil and Gas?	17
3.	Can a GCD Restrict or Charge a Fee on the Transportation of Water Outside the District to Develop a Mineral Estate?	18
4.	Can an Existing Water Well Attain and Lose Exemption Temporarily?	18
V.	CONCLUSION	19
VI.	CREDITS AND DISCLAIMERS	19
	EXHIBIT A	
	The Enacted History of Section 36.117	21
	EXHIBIT B	
	Order of Priority for Resolving Conflicts Between GCD Rules and Chapter 36	30
	EXHIBIT C	
	Estimated Total Water Declines, Major Aquifers of Texas	31
	EXHIBIT D	
	The Perfect Storm	32

DON'T HAND ME NO LINES, AND KEEP YOUR GCD HANDS TO YOURSELF

I. OVERVIEW OF THE SCOPE OF THIS PAPER

Texas Water Code § 36.114 (Vernon 2008) (Water Code) provides that a groundwater conservation district (GCD) must determine each activity regulated by the GCD for which a permit or permit amendment is required. Water Code Section 36.113(a) provides that a GCD must require a permit for the drilling, equipping, operating or completing of groundwater wells, or for substantially altering the size of groundwater wells or well pumps, except as provided by Water Code § 36.117.

This paper analyzes the limitations imposed by Texas Water Code § 36.117 on a GCD's ability to regulate groundwater resources. This Section is a notoriously difficult, if not impossible, statute to construe in its current form. It is internally inconsistent and seems to raise as many questions as it answers. The author could not find any reported cases addressing Water Code § 36.117, as of March 1, 2009. As such, it appears we are left with little further obvious guidance. Attached as Exhibit A is Water Code § 36.117 in its entirety, as it was originally enacted in 1995, followed by each amendment to the statute through the date of this paper's publication.

This paper will not address the constitutional limits on a GCD's power to regulate groundwater (such as alleged equal protection or due process violations, or takings or inverse condemnation claims) other than to mention the issues in the overall context of this topic. It will also not address potential limitations on GCDs based on the powers of cities or counties, for example their land use planning or zoning powers, nor will it address any conflicts or restrictions on GCDs arising from water quality control regulation.

A. The Relationship of "Exemption", "Exception" and "Limitation"

At the outset it is helpful to consider the structure of Water Code § 36.117. The title to this Section simply lists three terms: Exemption, Exception, Limitation. Water law practitioners are familiar with the vocabulary of "exempt wells" and "non-exempt" wells. Section 36.117 defines five categories of activities that are "exempt" from arguably either complete or varying degrees of GCD regulation. The other provisions of this section are exceptions to, or limitations on, those exemptions and some are limitations on the exceptions to

the exemption.¹ In this paper, the various exceptions and limitations will be applied within the discussion of each exemption.

B. The Challenges of Construing § 36.117

Water Code § 36.117 is one of the most challenging statutes to construe (this may very well be the poster child of inartful draftsmanship). Before one can apply this section, one must resolve some or all of these challenges:

1. Three of the exemptions clearly exempt "wells" while two do not. One of those other exemptions only expressly exempts the need to obtain a permit to drill a well, while the other expressly exempts the need to obtain a permit to drill the well and also includes an express limitation on the GCD's ability to regulate production from the well.
2. Notwithstanding the fact that one of the class of exemptions exempts "wells," in another subsection the statute prohibits a GCD from limiting production from this class of exempt wells, even though there is already an express limitation on production in the statement of the exemption. This second express limitation appears completely redundant but, more importantly, raises questions as to why the statute does not expressly limit GCD regulation of production for the other classes of exemptions.
3. Notwithstanding the differences in what may or may not be exempt from GCD regulation as expressly stated in each of the exemptions, when a well, or part of the volume of water produced from the well, loses its exemption, the statute says "a district may require a well to be permitted by the district and to comply with all district rules..." Why would it say that if the exemption was not from "all district rules" in the first place? Do all five exempt classes of wells (and not just 3 out of 5) really exempt the entire well and not just the need to obtain a drilling permit, or just the need to obtain a drilling permit and a production permit?
4. Subsection "b" begins with "A district may not require any permit issued by the district..." and then defines three different classes of wells. However, in two of those classes, the subpart of subsection b seems to only exempt the need to obtain one or two specific permits, which is much narrower and completely inconsistent with "any permit issued by the district."

¹The basic logic of this section uses the double negative: "A GCD cannot do 'x' but it cannot not do 'x' if 'y'." Use of double-negative logic is, in and of itself, a significant source of the confusion surrounding this statute.

5. Subsection (b)(3) exempts partial production from a well defined in this class of exempt wells, but the limitation on this exemption, in (d)(3), if read expressly, would cause the entire well to lose its exemption based on the same set of facts that were used to obtain the partial exemption in the first place. In other words, the limitation on the exemption eliminates the entire exemption.
6. Is it possible for a well to be exempt, lose the exemption due to changed factual circumstances, then obtain the exemption again if the facts change yet again? For example, one of the exemptions is for wells used solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil and gas well. What if the water well is originally used exclusively for this purpose, then is used for D&L use, and then is used exclusively for another drilling or exploration operation? Can a non-exempt use forever disqualify a water well from an exemption?

And these are just the highlights! There may be more. Some sympathy for the various drafters through the years may be needed. Perhaps this statute is a challenge, in part, because each GCD can adopt different rules that regulate different acts and require different permits—different in name, different in scope of activity affected. It is challenging to draft a purpose-based statute that can apply consistently to every different set of GCD rules, allowing each GCD the needed flexibility to develop its regulations specific to a particular groundwater resource.

This paper will not attempt to identify and address every conceivable conflict in this statute, but in Section III this paper will attempt to resolve some of the various interpretation challenges presented by this statute for each class of exemption. That section looks at the proverbial “trees” of this statute, tree by tree by tree, and in some instances leaf by leaf.

However, if one looks at the “forest” that is this entire statute, in order to try to make some overall, global sense out of it, without having a client paying for it to mean something particular for the benefit of that client, then it appears most likely and reasonable to this author that this statute (particularly when read with consideration of the common law) was intended by the Legislature to generally exempt 5 classes of wells from GCD regulation (4 of which are based on purpose of water use, the 5th being whatever wells the GCD chooses to exempt), while specifically preserving GCD power to require that all wells be registered, that they comply with GCD well construction quality standards and well operating quality standards, and that the owner or operator report volumes of water produced (in one exempt class reporting the volume used in each of two different uses) to enable effective planning. Now setting

aside this momentary lapse of statesmanship, we can turn to the maddening trees of this statute.

II. HOW DID THE GCD GET HERE, AND WHY DOES IT MATTER?

The first issue to consider when evaluating the limitations on a GCD’s powers is how it was formed. The method of formation matters because it may affect the powers of that GCD. GCDs are authorized by the Texas Constitution² and created either by statute or through an administrative process within the TCEQ.³ Water Code Chapter 36 (Chapter 36) contains default provisions applicable to all GCDs, regardless of how a GCD is created. As discussed in more detail below, enabling acts are special laws, and as such take precedence over conflicting provisions in Chapter 36, which are general laws. In practice, this means that a GCD created by an enabling statute may have more or different powers than those otherwise in Chapter 36, whereas those created pursuant to the TCEQ’s process cannot override the provisions of Chapter 36. The order of priority for resolving conflicting provisions, as developed below in this Section, is set out in Exhibit B.

Water Code § 36.052(a) provides that Chapter 36 governs the administration and operations of GCDs, and that other laws governing the administration of districts created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, do not apply to GCDs. It then specifies that Chapter 36 prevails over any other law in conflict or inconsistent with Chapter 36, except that any special law governing a specific GCD prevails over Chapter 36. However, the following provisions prevail over a conflicting or inconsistent provision of a special law that governs a specific district:

- §§ 36.107-36.108 [part of the Powers and Duties of a GCD];
- §§ 36.159-36.161 [part of GCD Finances]; and
- Subchapter I [Performance Review and Dissolution of GCDs].⁴

No enabling act can change these referenced sections. Notably absent from this list is Water Code Section 36.117. However, equal protection concerns may practically require that result. An exempt well should be an exempt well no matter where it is drilled.

²Tex. Const. § 59, Art. XVI

³Water Code §§ 36.011, 36.013. The TCEQ has more than one regulatory procedure it may use to move an area into a GCD. The differences in those regulatory processes are irrelevant for purposes of this paper.

⁴Water Code § 36.052(b)

Water Code § 1.002 provides that the Texas Code Construction Act⁵ applies to the construction of each provision in the Water Code, except as otherwise expressly provided by the Water Code.⁶ The Water Code then specifies the following specific rules of statutory construction applicable to the Water Code:

- a reference to a title, chapter, or section without further identification is a reference to a title, chapter, or section of the Water Code;⁷
- a reference to a subtitle, subchapter, subsection, subdivision, paragraph, or other numbered or lettered unit without further identification is a reference to a unit of the next larger unit of the Water Code in which the reference appears;⁸ and
- a reference in a law to a statute or part of a statute revised by the Water Code is considered to be a reference to the part of the Water Code that revises that statute or part of the statute.⁹

Other than those specific provisions, the Code Construction Act applies to the Water Code, and it provides, in relevant part:

- (a) If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both; and
- (b) If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.¹⁰

In practice, Water Code § 36.052(a), mentioned above, effectively changes these sections of the Code Construction Act because Water Code § 36.052(a) does not allow for an exception to the rule that special laws prevail over the general provisions of Chapter 36. Otherwise, the underlined phrase would have interesting application to GCDs given that GCDs are created each

legislative session, while the Legislature also continues to make changes to Chapter 36.¹¹

III. EXEMPT WATER WELLS

Buried in Water Code § 36.117(l) one finds Chapter 36's general scope of application:

This chapter applies to water wells, including water wells used to supply water for activities related to the exploration or production of hydrocarbons or minerals.

The other provisions in Water Code § 36.117 then list the various exemptions to this general rule, and the exceptions and limitations to those exemptions. More particularly, Water Code § 36.117(a) and (b) lists four activities that are exempt from the permitting requirements of a GCD. Section 36.117(l) also exempts certain water wells from the entirety of Chapter 36, for a total of 5 exemptions in this section.

A. Specifically Exempt by GCD Rule

Water Code § 36.117(a) provides a GCD with the discretionary power to exempt wells from the obligation to obtain a drilling permit, an operating permit, or any other permit required by Chapter 36 or the GCD's own rules. The subsection provides "A district may exempt wells..." The word "may" "creates discretionary authority or grants permission or power."¹²

However, these exempt wells must still be registered in accordance with GCD rules¹³ and be equipped and maintained to conform to the GCD's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.¹⁴ The driller of a water well exempt under this section must file the drilling

⁵Texas Govt. Code, Subtitle B, Chapter 311 (Vernon Ann. 2008) (Govt. Code)

⁶Water Code § 1.002(a)

⁷Water Code § 1.002(b)(1)

⁸Water Code § 1.002(b)(2)

⁹Water Code § 1.002(c)

¹⁰Code Construction Act § 311.026

¹¹The issue would become whether, in cases where a change to Chapter 36 postdated an enabling act, a revision to Chapter 36 changed an enabling act adopted prior to that change. The focus of that inquiry would be whether it was the "manifest intent" of the Legislature that a later adopted general provision prevail, not whether the Legislature's manifest intent was that the enabling act prevail. Consider how tough the challenge would be to determine the chronology of GCD creation within the context of the dates of changes to Chapter 36.

¹²Code Construction Act § 311.016(1)

¹³Water Code § 36.117(h)(1)

¹⁴Water Code § 36.117(h)(2)

log with the GCD.¹⁵ Any water withdrawn from a well exempt under this section and subsequently transported outside the GCD's boundaries is subject to any applicable production and export fees of a GCD under Water Code §§ 36.122 and 36.205.¹⁶ A GCD may require that records be kept and reports be made of the drilling, equipping, and completing of these water wells, and of their production and use of groundwater, and in order to accomplish this, a GCD's rules may require an owner or operator of a water well that is required to be registered or permitted with the GCD to report groundwater withdrawals using reasonable and appropriate reporting methods and frequency.¹⁷

The Constitutional doctrines of denial of due process and denial of equal protection act as practical restrictions on the use of this power by GCDs to exempt wells. As such, it is uncommon for GCDs to use this provision to exempt specific wells. It is more likely for GCDs to use this power in order to grant broad, class-based exemptions, such as:

1. a "grandfather" clause for existing wells (e.g., "all wells in existence as of [a specific date]");
2. all domestic and livestock uses (regardless of lot size or well size);
3. those wells with *de minimis* non-exempt uses (e.g., so that a D&L well also used for a small office does not lose its exemption); or
4. those wells with *de minimis* exports (so that, for example, a municipal system that straddles the GCD's boundaries may continue to supply the portion outside the GCD without a transportation permit or paying export fees).

To determine whether a well is exempt under this subsection of the Water Code (including the limitations and exceptions to any such exemption), consult the specific rules adopted by the applicable GCD.¹⁸

B. Domestic and Livestock Use

Water Code § 36.117(b)(1) defines the second category of activities exempt from certain GCD permitting requirements:

A GCD may not¹⁹ require any permit issued by the GCD for a well used solely for domestic use or for providing water for livestock or poultry on a tract of land larger than 10 acres that is either drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day. [emphasis added]

These are often referred to as "D&L" wells.²⁰ A GCD cannot restrict the production of a D&L well.²¹ The production limitation of 25,000 gallons per day is in the statute. D&L wells located in the Hill County PGMA lose their exemption when the well is no longer used solely for domestic use or to provide water for livestock or poultry.²² A D&L well must still be registered in accordance with GCD rules²³ and be equipped and maintained to conform to the GCD's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.²⁴ The driller of a D&L well must file the drilling log with the GCD.²⁵ A D&L well expressly loses its exemption if it is used to supply water for a subdivision of land for which a plat approval is required by Texas Local Govt. Code Chapter 232.²⁶

There is an exception to the limitation of the exemption for D&L wells in another section of the Water Code. The limitation of the exemption is that a GCD may require that records be kept and reports be made of the drilling, equipping, and completing of D&L water wells, and of the production and use of groundwater.²⁷

¹⁹"May not" imposes a prohibition and is synonymous with "shall not." Code Construction Act § 311.016(5)

²⁰For a detailed history of the D&L use exemption, see Dean, *Domestic and Livestock Use—What Rights Does the Landowner Have?*, The Changing Face of Water Rights in Texas, TexasBarCLE (2004)

²¹Water Code § 36.117(c)

²²Water Code § 36.117(d)(1)

²³Water Code § 36.117(h)(1)

²⁴Water Code § 36.117(h)(2)

²⁵Water Code § 36.117(i)

²⁶Water Code § 36.117(j)

²⁷Water Code § 36.111(a)

¹⁵Water Code § 36.117(i)

¹⁶Water Code § 36.117(k)

¹⁷Water Code § 36.111(a) and (b)

¹⁸Readers interested in comparing the different approaches adopted by different GCDs on this issue may consult Burkhalter and Arnold, *Survey of Regulatory Approaches Used by Groundwater Conservation Districts (Round II)*, Water Law Institute, University of Texas CLE (2008)

The awkwardly worded exception to that limitation appears to mean that a GCD may not adopt rules that impose reasonable or appropriate reporting methods or frequency for reporting the production and use of groundwater from a D&L well.²⁸ Taken literally, a GCD can require that owners or operators of D&L wells keep records and make reports about the drilling, equipping and completing of D&L wells, and about the production and use of groundwater from those wells, but in implementing that power, for D&L wells a GCD cannot use reasonable and appropriate reporting methods and frequency (leading one to question whether it is acceptable for a GCD to use unreasonable and inappropriate reporting methods and frequency).

The placement of the “except for” clause in Water Code § 36.111(b) is confusing. Both subsection (a) and (b) use the permissive term “may” which, pursuant to Code Construction Act § 311.116(1) “creates discretionary authority or grants permission or a power.” Granting discretion “except for...” removes the discretion in dealing with the exception. It logically makes “may” mean “may not” for the exception.

Prohibiting the reporting of water produced from D&L wells may be acceptable under the current water planning and management scheme where Desired Future Conditions (DFCs) set Managed Available Groundwater (MAG) but MAGs do not take exempt uses into account (see footnote 96 of this paper for further explanation of this issue), but if the Legislature changes the definition of MAG to include exempt uses, this section of the Water Code must also be changed so GCDs can know how much water D&L wells are producing. GCDs can’t manage what they don’t know.

The D&L well exemption seems to be understood consistently by the interested parties, and this part of the statute is fairly clear and straightforward. The key is that the well must be incapable of producing more than 25,000 gallons of water per day (approximately 17.36 gallons per minute), and not be a well that can produce more than that volume, with the owner or operator merely agreeing not to produce more than 25,000 gallons of water per day.

²⁸Water Code § 36.111(b). This statute provides as follows: “(a) The district may require that records be kept and reports be made of the drilling, equipping, and completing of water wells and of the production and use of groundwater.

“(b) In implementing Subsection (a), a district may adopt rules that require an owner or operator of a water well that is required to be registered with or permitted by the district, except for the owner or operator of a well that is exempt from permit requirements under Section 36.117(b)(1), to report groundwater withdrawals using reasonable and appropriate reporting methods and frequency.” [emphasis added]

C. Drilling or Exploring Operations for an Oil or Gas Well

Water Code § 36.117(b)(2) defines the following activities exempt from certain GCD permitting requirements:

A GCD may not²⁹ require any permit issued by the GCD for the drilling of a water well used solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas provided that the person holding the permit is responsible for drilling and operating the water well and the well is located on the same lease or field associated with the drilling rig. [emphasis added]

The statute is expressly silent as to whether a GCD can restrict the volume of groundwater produced from this class of exempt well. However, there is a production limit in this subsection. A rig actively engaged in the drilling or exploration operations for an oil and gas well permitted by the RRC can only use a certain amount of water. This subsection further limits water production from this class of exempt well to *active* oil rigs operating *on the same lease or field* associated with the drilling rig. This means that a GCD can regulate the production of groundwater from a well situated on one tract of land when the water produced from that tract (or pooled tracts) is used to produce oil and gas from a different tract, pool or field. As explained below in Section IV, this interpretation of the statute is consistent with Texas’ oil and gas statutory and common law. The converse is also accurate and consistent with common law: a production limitation on this class of exempt well, where the water from the well is used to develop minerals from the same tract of land or a tract in the same pool or field is inconsistent with historical Texas oil and gas statutory and common law. The basis for these conclusions is further explained below in Section IV of this paper.

A GCD may require a well in this exempt class to be permitted and to comply with all GCD rules if the purpose of the well is no longer solely to supply water for a rig that is actively engaged in drilling or exploration operations for the oil and gas well.³⁰ A well in this exempt class must still be registered in accordance with GCD rules³¹ and be equipped and maintained to conform to the GCD’s rules requiring installation of casing, pipe,

²⁹“May not” imposes a prohibition and is synonymous with “shall not.” Code Construction Act § 311.016(5)

³⁰Water Code § 36.117(d)(2)

³¹Water Code § 36.117(h)(1)

and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.³² The driller of a water well exempt under this subsection must file the drilling log with the GCD.³³ This subsection does not exempt a well to supply water for a subdivision of land for which a plat approval is required by Texas Local Govt. Code Chapter 232.³⁴ A GCD may require that records be kept and reports be made of the drilling, equipping, and completing of these exempt water wells, and of the production and use of groundwater, and in order to accomplish this, a GCD may require an owner or operator of the water well to report groundwater withdrawals by adopting rules that impose reasonable and appropriate reporting methods and frequency.³⁵

Generally, for this class of exempt well, a GCD cannot require a drilling permit, but it can require registration of the well and regulate and verify the construction standards of the well. But this section does not directly answer the three biggest questions: (1) Can a GCD regulate production of water from such a well (i.e. with operation permits)? (2) Can a GCD tax production from such a well? and (3) Can a GCD restrict transportation of water from such a well to an area outside the GCD's boundaries (i.e. with transportation permits)? These three questions are discussed in Section IV below.

D. Surface Mining Activities

Water Code § 36.117(b)(3) defines the following well permitting exemption:

A GCD may not³⁶ require any permit issued by the GCD for the drilling of a water well authorized under a permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code, or for production from such a well to the extent the withdrawals are required for mining activities regardless of any subsequent use of the water. [emphasis added]

³²Water Code § 36.117(h)(2)

³³Water Code § 36.117(i)

³⁴Water Code § 36.117(j)

³⁵Water Code § 36.111(a) and (b)

³⁶“May not” imposes a prohibition and is synonymous with “shall not.” Code Construction Act § 311.016(5)

Texas Natural Resources Code Chapter 134³⁷ is the Texas Surface Coal Mining and Reclamation Act. Among other things, it defines the circumstances in which a person must first obtain a permit from the RRC in order to conduct surface mining operations.³⁸

This subsection of the Water Code specifically includes the production of groundwater from this class of exempt well in the exemption (helping only to raise the question for other exempt classes). An entity holding the permit issued by the RRC must report monthly to the GCD:

1. The total amount of water withdrawn during the month;
2. The quantity of water necessary for mining activities; and
3. The quantity of water withdrawn for other purposes.³⁹

This requirement is consistent with the exemption. A GCD cannot require a well described in this section to comply with any spacing requirements of the GCD.⁴⁰

An exempt well in this category must still be registered in accordance with GCD rules⁴¹ and be equipped and maintained to conform to the GCD's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.⁴² The driller of a water well exempt under this subsection must file the drilling log with the GCD.⁴³ This subsection does not exempt a well to supply water for a subdivision of land for which a plat approval is required by Texas Local Govt. Code Chapter 232.⁴⁴ A GCD may require that records be kept and reports be made of the drilling, equipping, and completing of these exempt water wells, and of the production and use of groundwater, and in order to accomplish this, a GCD

³⁷(Vernon Ann. 2008) (Natural Resources Code)

³⁸Natural Resources Code § 134.014

³⁹Water Code § 36.117(e)

⁴⁰Water Code § 36.117(f)

⁴¹Water Code § 36.117(h)(1)

⁴²Water Code § 36.117(h)(2)

⁴³Water Code § 36.117(i)

⁴⁴Water Code § 36.117(j)

may require an owner or operator of the water well to report groundwater withdrawals by adopting rules that impose reasonable and appropriate reporting methods and frequency.⁴⁵

Subsection (d)(3) of the statute imposes the following limitation on the (b)(3) exemption: a GCD may require a well described in (b)(3) to be permitted by the GCD and comply with all GCD rules if the withdrawals from this type of well are no longer necessary for mining activities or are greater than the amount reasonably necessary for mining activities specified in the permit issued by the RRC.⁴⁶ The author is of the opinion that this limitation contains irreconcilable conflicts with the exemption if read and applied literally.

Ignoring the conflict momentarily (we have to stop meeting like this), it appears the intent of this exemption was to contemplate the possible scenario where one well produces water used in two different ways: (1) the amount necessary for mining activities specified in the permit issued by the RRC; and (2) any additional amount. It then seemingly intends to regulate each of these uses differently, exempting the first use from drilling permits and production regulation, while subjecting the second to all GCD permits and rules (among other things, why else include § 36.117(e)'s separate mandatory reporting requirement for these two uses?). This possible interpretation will be referred to as the Blinding Flash of the Obvious.

But this is not what the statute expressly states. The limitation on the exemption applies to the entire well, so that the entire well's production loses its exemption if the well produces an amount of water greater than the amount necessary for mining activities specified in the permit issued by the RRC. Obviously, to construe the limitation of (d)(3) so broadly would completely eliminate the exemption in (b)(3), producing an absurd result. And so one must turn to the Code Construction Act and case law to identify and apply rules of statutory construction, to bring order to this chaos.

The Code Construction Act provides that if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails. This does not help resolve the conflicts between (b)(3) and (d)(3) because they were both amended to their current form at the same time, by SB 2 (77th Leg., R.S., 2001).

Case law consistently holds that a court's primary objective when construing a statute is to determine and

give effect to the legislature's intent.⁴⁷ Courts should not interpret statutory language so rigidly that the almost certain intent of the legislature is disregarded; instead, the court should consider the consequences that would follow from its construction of a statute and avoid absurd results.⁴⁸ Allowing a limitation on an exemption to completely eliminate the exemption would be an absurd result. Should there occur any repugnance between statutory provisions, the courts should adjust the matter so that each provision has a meaning that will permit both to stand in harmony.⁴⁹ Note that the goal is not just to construe the conflicting provisions so that both continue to have meaning, but to do so in such a way that their meanings are compatible. Finally, construction of a statute that would make a provision useless or superfluous is also not favored by law.⁵⁰

The Texas Supreme Court has addressed at least one situation where a court of appeals construed one statute in a way that effectively eviscerated another statute.⁵¹ Interestingly, it involves the Texas Water Commission, a wastewater permit, a restroom, and a court opinion that uses a synonym for "disembowels." The Water Commission's three commissioners were holding a public hearing on a requested permit for a wastewater treatment plant. During a recess of the public hearing, two of the three commissioners (a quorum of the Commission) purportedly discussed some concerns about the application while in the restroom. When two of the three commissioners voted against the permit, the applicant alleged a violation of the Open Meetings Act.

The Court of Appeals decided against the applicant on the basis that a section of the Texas Administrative Procedure and Texas Register Act (APTRA) allows private communications between agency members even

⁴⁷*City of Marshall v. City of Uncertain*, 206 S.W.3d 97 (Tex. 2006), *rehearing den'd*.

⁴⁸*Finley v. Steenkamp*, 19 S.W.3d 533 (Tex. App.—Fort Worth, 2000, no pet); see also *Univ. of Texas Southwestern Med. Center at Dallas v. Loutzenhiger*, 140 S.W.3d 351 (Tex. 2004)

⁴⁹*Valero Transmission Co. v. Hays Consol. Indep. School District*, 704 S.W.2d 857 (Tex. App.—Austin 1985, *writ ref'd n.r.e.*); *Texas Prop. & Cas. Ins. Guar. Ass'n v. Johnson*, 4 S.W.3d 328 (Tex. App.—Austin 1999, *pet. den'd*)

⁵⁰*Carson v. Hudson*, 398 S.W.2d 321, 323 (Tex. Civ. App.—Austin 1966, no writ), cited favorably as dicta in *Conseco Finance Servicing Corp. v. J&J Mobile Homes, Inc.*, 120 S.W.3d 878, 884 (Tex. App.—Fort Worth 2003, *pet. denied*); *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003)

⁵¹*Acker v. Texas Water Commission*, 790 S.W.2d 299 (Tex. 1990)

⁴⁵Water Code § 36.111(a) and (b)

⁴⁶Water Code § 36.117(d)(3)

though the purpose of the Open Meetings Act was to promote transparency in government. The Texas Supreme Court affirmed the decision, but not the reasoning, of the court of appeals, stating that the court of appeal's holding:

effectively eviscerates the Open Meetings Act..section 17 of APTRA can be harmonized with the Open Meetings Act by allowing a state commission's members to confer ex parte, but only when less than a quorum is present. Such coordinating preserves both APTRA and the objective of the Open Meetings Act to forbid ex parte deliberations between a majority of governmental decisionmakers.⁵²

Applying these rules and this example of statutory construction allows one to construe the limitation on this exemption to mean the Blinding Flash of the Obvious, and it is the author's opinion that this is the appropriate construction necessary and most appropriate to harmonize Water Code § 36.117(b)(3) with (d)(3) in a way that gives effect to both subsections.

Therefore, generally, for wells in this class of exemption a GCD cannot require permits for drilling or production up to the amount necessary for mining activities specified in the permit issued by the RRC, nor do these wells have to comply with any spacing rules of a GCD. But a GCD can require registration of the well and regulate and verify the construction standards of the well, and it can require the owner or operator to obtain all applicable GCD permits, and comply with all non-well spacing rules, for the amount of water produced in excess of the amount necessary for mining activities specified in the permit issued by the RRC.

E. Certain Production or Injection Wells

Water Code § 36.117(l) sets out a broad exemption. It provides in relevant part:

This chapter [the entirety of Chapter 36] does not apply to production or injection wells drilled for oil, gas, sulphur, uranium, or brine, or for core tests, or for injection of gas, saltwater, or other fluids, under permits issued by the Railroad Commission of Texas.

A GCD cannot require any drilling permit, operating permit, transportation permit, or any other type of permit, for these wells, so the key to this section is determining whether any water wells are included in the scope of this exemption. Breaking this sentence down, the following

wells are exempt from Chapter 36 (this is a list of availability based on the statute without deleting descriptions of wells that would never practically be drilled):

- A. production wells:
 1. drilled for oil, gas, sulphur, uranium, brine, or core tests; and
 2. under permits issued by the RRC; or
- B. injection wells:
 1. drilled for either:
 - a. oil, gas, sulphur, uranium, brine, or core tests; or
 - b. injection of gas, saltwater, or other fluids; and
 2. under permits issued by the RRC.

Defining the complete scope of what the permits the RRC can and cannot issue, or will or will not issue, or has discretion to issue, is well beyond the scope of this paper. Parts of this area are briefly discussed in Section III(F) below. Readers interested in this exemption should begin with the particular permit issued by the RRC and test the particulars of that permit with this subsection of the Water Code.

If the issue is "can my client obtain a permit from the RRC in order to exempt a well from a GCD?", the answer may be found in Water Code § 26.131 which provides:

- (a) The Railroad Commission of Texas is solely responsible for the control and disposition of waste and the abatement and prevention of pollution of surface and subsurface water resulting from:
 - (1) activities associated with the exploration, development, and production of oil or gas or geothermal resources, including:
 - (A) activities associated with the drilling of injection water source wells which penetrate the base of useable quality water;
 - (B) activities associated with the drilling of cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of the Railroad Commission of Texas;
 - (C) activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants;
 - (D) activities associated with any underground natural gas storage facility, provided the terms "natural gas" and "storage facility" shall have the meanings

⁵²Acker, 790 S.W.2d at 301

set out in Section 91.173, Natural Resources Code;

- (E) activities associated with any underground hydrocarbon storage facility, provided the terms “hydrocarbons” and “underground hydrocarbon storage facility” shall have the meanings set out in Section 91.201, Natural Resources Code; and
 - (F) activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel;
- (2) except to the extent the activities are regulated by the Texas Department of Health under Chapter 401, Health and Safety Code, activities associated with uranium exploration consisting of the disturbance of the surface or subsurface for the purpose of or related to determining the location, quantity, or quality of uranium ore; and
 - (3) any other activities regulated by the Railroad Commission of Texas pursuant to Section 91.101, Natural Resources Code.
- (b) The Railroad Commission of Texas may issue permits for the discharge of waste resulting from these activities, and the discharge of waste into water in this state resulting from these activities shall meet the water quality standards established by the commission.
 - (c) The term “waste” as used in this section does not include any waste that results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants if that waste is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq., as amended.

All of the items in Section (a)(1) include “activities associated with...”, which clearly gives the RRC discretion in the identified matters. In fact, based in part on the potentially overlapping jurisdiction of the RRC with the TCEQ created by this discretion and other ambiguities in the Water Code, those parties have developed and agreed to a Memorandum of

Understanding (the MOU)⁵³ clarifying certain jurisdictions of those agencies.

However, there may also be specific facts in which the RRC would require the applicant to follow GCD regulation for the associated water well. The point of Water Code § 36.117(l) is that, if the RRC permit includes a water well in the permit due to it being “associated with” the activity, that well is within this exemption from GCD regulation.

Injection wells drilled for the injection of produced water, salt water, or drilling fluids, are a very hot and controversial subject as of the date of this paper, particularly in the Barnett Shale area. These wells are specifically exempt from GCD regulation; however, some GCDs attempt to avoid this delegation of jurisdiction to the RRC and involve themselves in the issue by appearing in the regulatory proceedings applying for or amending injection well permits.⁵⁴

F. Other Exemptions

1. Uranium Mining

There are specific delegations of regulatory powers between the RRC and GCDs in the Uranium Surface Mining and Reclamation Act. Natural Resources Code § 131.354(a) grants to the RRC jurisdiction over operational uranium exploration holes completed under an exploration permit issued under Natural Resources Code Subchapter I (Permits for Exploration Activities). A cased exploration well subject to an exploration permit issued under Subchapter I is exempt from regulation by GCDs if the well is: (1) used for exploration; or (2) used for rig supply purposes,⁵⁵ except as follows:

- 1. The well is subject to a GCD’s rules for registration if:
 - a. the well is located in the groundwater conservation district and the well is used for monitoring purposes; and

⁵³The MOU is set out in 16 Texas Admin. Code § 3.30

⁵⁴Query whether it is a waste (to use a concept from this area of law) of GCD revenues for a GCD to pay to involve itself in processes, the subject of which has been specifically and clearly removed from GCD jurisdiction by the Legislature. The RRC wonders, informally and anecdotally, whether it will be able to ever again administratively approve an injection well permit due to persistent GCD involvement in injection well permit applications. There may be an issue of whether this Water Code exemption could and should be construed to prevent a GCD from being designated as a “party” in an injection well permitting application case.

⁵⁵Natural Resources Code § 131.353(c)

- b. the cumulative amount of water produced from the wells located inside the area subject to the exploration permit and completed under the exploration permit issued under this subchapter exceeds 40 acre feet in one year.⁵⁶
2. The well is subject to a GCD's rules for registration, production, and reporting if:
 - a. the well is located in the groundwater conservation district and the well is used for rig supply purposes; and
 - b. the cumulative amount of water produced from the wells located inside the area subject to the exploration permit and completed under the exploration permit issued under this subchapter exceeds 40 acre feet in one year.⁵⁷

If one of these wells is located in both a GCD and inside the area subject to the exploration permit, then each month the holder of the exploration permit must report to the GCD the total amount of water produced from the well.⁵⁸ GCDs must use the number of acres described in the exploration permit in determining any GCD production requirements.⁵⁹

2. Cathodic Protection Wells

GCDs do not have regulatory power over “activities associated with the drilling of cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of the [RRC].”⁶⁰ The RRC defines a cathodic protection well as “[a]ny well drilled for the purpose of installing one or more anodes to prevent corrosion of a facility associated with the production of oil, gas, or geothermal resources, such as a well casing, storage and separation facility, or pipeline.”⁶¹

Generally, cathodic protection devices redirect electrical current to flow from a “sacrificial” anode to the soil-water electrolyte, instead of from an anode area on a pipeline or whichever metallic structure is to be protected. The protective anode corrodes in place of the metallic object it is designed to protect.

Texas statutes do not directly eliminate potential GCD regulation of other cathodic protection holes or

cathodic protection wells. The author is not aware of any GCD that has adopted rules to regulate cathodic protection wells where the structure to be protected is the water well or an associated water pipeline. However, cathodic protection wells address water quality issues, and water quality issues are generally understood to be within the jurisdiction of the TCEQ and not GCDs.⁶²

Furthermore, it makes the most common sense to deal with these types of wells at the state level, and not the local level, because serious electrical interference problems may occur where cathodic protection electrical networks criss-cross over one another or are too close to each other.⁶³ Stray currents from electrical transmission lines and other equipment may also interfere with cathodic protection systems. Interference problems are most pronounced in urban areas. Local GCD regulation would not solve these potential problems without meaningful coordinated regulation for areas in close proximity to each other. Finally, regulating cathodic wells protective of water well infrastructure at the state (TCEQ) level would be consistent with the state-wide treatment of cathodic protection wells for oil and gas infrastructure, provided by RRC regulation.

G. Other Restrictions on GCDs

The Water Code specifies two other instances in which a GCD cannot require a permit:

1. A GCD cannot require a permit or permit amendment for maintenance or repair of a well if the maintenance or repair does not increase the production capabilities of the well to more than its authorized or permitted production rate⁶⁴ (however, a GCD may require that a change in the withdrawal or use of groundwater during the term of a permit issued by a GCD may not be made unless the GCD has first approved a permit amendment authorizing the change);⁶⁵ and
2. Except as provided by Section 36.117 [the marvel of clarity that it is], a GCD created on or after September 1, 1991, must exempt from regulation under Chapter 36 a well and any water produced or to be produced by a well that is located in a county that has a population of 14,000 or less if the water is to be used solely to supply a municipality that has a population of 121,000 or less and the rights to the

⁵⁶Natural Resources Code § 131.354(b)

⁵⁷Natural Resources Code § 131.354(c)

⁵⁸Natural Resources Code § 131.354(d)

⁵⁹Natural Resources Code § 131.354(e)

⁶⁰Water Code § 26.131(a)(1)(B)

⁶¹16 Tex. Admin. Code § 3.99(a)(1)

⁶²Water Code § 5.013

⁶³Source: California Department of Water Resources, Southern District

⁶⁴Water Code § 36.113(a-1)

⁶⁵Water Code § 36.113(a)

water produced from the well are owned by a political subdivision that is not a municipality, or by a municipality that has a population of 100,000 or less, and that purchased, owned, or held rights to the water before the date on which the GCD was created, regardless of the date the well is drilled or the water is produced. The GCD may not prohibit the political subdivision or municipality from transporting produced water inside or outside the GCD's boundaries.⁶⁶

IV. WATER VS. MINERALS: WILL THIS BECOME A PERFECT STORM?

If a "perfect storm" requires the convergence of three different disturbances, as dramatized in the popular movie of the same name, then Texas may be facing its own perfect storm in the battle between water and energy. This perfect storm may require the professional community to directly confront the ambiguities, conflicts, inconsistencies and other challenges of construing Water Code § 36.117, because there are three separate things heading for a collision like never before in State history.

First, Texas law is clear that the mineral estate is the dominant estate. This means, generally, that the owner of the mineral estate has the right to the free use of the premises as is reasonably necessary to produce oil and gas. The Natural Resources Code clearly states that it is the policy of the State to maximize the total ultimate recovery of oil or gas.⁶⁷ And we need domestically produced oil and gas.

Second, the State of Texas' policy regarding groundwater is that groundwater must be managed, conserved, and protected,⁶⁸ which is the opposite goal of maximizing its production. This task is carried out in practice by GCDs, and to that end, GCDs generally have the discretionary power to restrict groundwater

production. More recent changes to the Water Code to protect environmental flows will further restrict the amount of groundwater that can (or should) be produced.

Third, based in part on projected declines in the Trinity aquifer, the TCEQ recently designated 5 counties over the Trinity aquifer as the Central Texas (Trinity Aquifer) Priority Groundwater Management Area (PGMA), and an additional 13 counties over the Trinity and Woodbine aquifers as the Northern Trinity and Woodbine Aquifers PGMA. Exhibit C shows the estimated total water declines in the major aquifers of Texas, with the Trinity aquifer projected to suffer the most severe decline in feet. These two PGMAs also lie directly over the Barnett Shale, currently the largest natural gas play in the continental United States. Attached as Exhibit D is a map of the Barnett Shale laid over the Trinity and Woodbine aquifers, to which I have manually added the boundaries of these 2 new PGMAs.

The current technology used to maximize mineral recovery from the Barnett Shale is commonly known as "fracing" the gas well, or more technically, hydraulic fracture stimulation or hydrofracturing the gas well. If the GCDs formed in these PGMAs attempt to restrict the amount of water reasonably needed to maximize the recovery of oil and gas from the Barnett Shale, whether by necessity or desire, they may set off the perfect storm. Our state policies of maximizing mineral development and conserving water may come into direct and perhaps irreconcilable conflict through GCD regulation.

A. The Mineral Estate's Historical Common Law Rights

Among the bundle of sticks that can be owned in connection with real property, the mineral estate is the dominant estate.⁶⁹ The seminal case addressing the rights of a mineral estate owner in groundwater is *Stradley v. Magnolia Petroleum Co.*⁷⁰ In *Stradley*, Magnolia Petroleum owned the mineral estate to a tract of land in Hutchinson County, and Alice Stradley owned the surface estate. In December of 1937, Magnolia Petroleum began operations on this land for the development of oil and gas, by first drilling a water well to supply water necessary for drilling the oil wells. By October of 1940 it had ten producing oil wells on this land. The Stradleys sued to, among other things, recover monetary damages for the alleged conversion of their groundwater, and obtain an injunction preventing further appropriation of water by Magnolia.

The court identified the controlling rule that the conveyance of property implies a grant of all the

⁶⁶Water Code § 36.121

⁶⁷See, e.g., Natural Resources Code § 85.046(a)(6) and Natural Resources Code § 86.012(a)(5), both of which define "waste" (which is prohibited by §§ 85.045 and 86.011) as including "physical waste or loss incident to or resulting from so drilling, equipping, or operating a well or wells as to reduce or tend to reduce the ultimate recovery of gas from any pool". While production methods are to recover as much of the minerals as possible, the Legislature also directed the RRC to limit the volume produced from any well or pool to market demand. See, e.g., Natural Resources Code §§ 85.055 and 86.085. Based on current market demand, the RRC has set the limit at "absolute open flow."

⁶⁸See, e.g., Water Code § 36.0015, which provides that the Legislature has created GCDs to "provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater."

⁶⁹*Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967)

⁷⁰155 S.W.2d 649 (Tex. Civ. App.—Amarillo, 1941, writ ref'd)

incidents which are essential to the full enjoyment of the property. In the specific context of a mineral estate owner's right to use water, the court applied the rule as follows:

Prospecting for oil requires the drilling of a well and if oil is discovered the development of the land requires drilling more wells. The drilling of wells necessitates the use of water. Producing oil from a well that does not flow necessitates pumping. Pumping requires adequate machinery for raising the oil to the surface. Transporting requires pipe lines and storing requires tanks in which to place the oil.⁷¹

Another court noted that the *Stradley* case simply followed a "long line of decisions adopting the rule first announced by the Supreme Court of Texas in the year 1916, in the case of *Texas Company v. Daugherty*..."⁷² In dicta this court quoted from *Guffey et al. v. Stroud*⁷³ holding that the right to take oil carries with it by implication "a grant of the way, surface, soil, water, gas and the like essential to the enjoyment of the actual grant of the oil."⁷⁴

Subsequent opinions elaborate on the mineral estate owner's rights regarding groundwater from the same tract. The right to use so much of the premises as is reasonably necessary to effectuate the purposes of the mineral lease is implied by law in all conveyances of the mineral estate absent express limitation in the mineral lease.⁷⁵ A party cannot use parol evidence to prove that "a particular instrument of conveyance did not intend the legal consequences of the grant."⁷⁶

Specifically in regard to a mineral estate owner's right to use groundwater from the premises to develop the mineral estate, the Texas Supreme Court has held that: "[t]he implied grant of reasonable use extends to and includes the right to use water from the leased premises in such amount as may be reasonably necessary

to carry out the lessee's operations under the lease."⁷⁷ This opinion also confirmed that oil and gas lessees have the right to drill water wells on the land and to use the water from those wells to the extent reasonably necessary for the development and production of the minerals.⁷⁸

There are limitations on the mineral owner's rights. A mineral owner cannot negligently or unnecessarily damage the surface subsurface of the tract.⁷⁹ The opinion does not state explicitly whether this limitation also applies to the tract's groundwater. The implied rights can only be used for the development of minerals from the same tract, not for other tracts.⁸⁰ At least one Texas Supreme Court opinion holds that water from one tract may be used to develop minerals from other tracts pooled with that Lease.⁸¹

B. Managed Groundwater Comes to the Barnett Shale: Two New PGMA's

In 2007 the TCEQ completed two different studies, each of which determined that a number of counties over the Barnett Shale should be designated as PGMA's. On June 26, 2007, TCEQ staff recommended that Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant and Wise counties should be designated as the North Central Texas (Trinity and Woodbine Aquifers) PGMA.⁸² The TCEQ filed the Mills Study with the Office of the Chief Clerk of the TCEQ on June 26, 2007. The Mills Study detailed how some (but not all) counties in the North Central Texas study area met the statutory PGMA definition, namely that they were expected to experience, within the next 25 years, critical groundwater problems, including shortages of surface water or groundwater, land subsidence resulting from groundwater withdrawal, and contamination of groundwater supplies.

The question of whether to designate this area a PGMA, and if so how to design GCDs, was referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing, and the administrative law

⁷¹*Id.* at 651

⁷²*McFarland Drilling Contractor v. Connell*, 344 S.W.2d 493, 496 (Tex. Civ. App.—El Paso 1961), *rev'd on other grounds*, 347 S.W.2d 565 (Tex. 1961)

⁷³16 S.W.2d 527, 528, 64 A.L.R. 730 (opinion adopted by Supreme Court)

⁷⁴*Daugherty*, 344 S.W.2d at 495

⁷⁵*Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972)

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971)

⁸⁰*McFarland Drilling Contractor*, 344 S.W.2d at 497; *Robinson v. Robbins Petroleum Corp., Inc.*, 501 S.W.2d 865 (Tex. 1973)

⁸¹*Robbins*, 501 S.W.2d at 867

⁸²*Mills*, *Updated Evaluation for the North-Central Texas - Trinity and Woodbine Aquifers - Priority Groundwater Management Study Area* (TCEQ Water Supply Division, June, 2007) (the Mills Study)

judge (ALJ) held a public hearing on May 13, 2008, at which she considered two issues: (A) whether some or all of the area should be designated a PGMA; and (B) how the area should be covered by one or more GCDs, namely: (i) whether one or more GCDs should be created within the proposed PGMA; or (ii) whether all or part of the land in the proposed PGMA should be added to an existing GCD; or (iii) whether a combination of those actions should be taken.

The ALJ issued her proposal for decision (PFD) on September 2, 2008. The PFD concluded that a PGMA should be designated, and remarked that there was no controversy over that issue. The PFD recommended that the TCEQ form one GCD consisting of all counties in the proposed PGMA not already in a GCD, namely: Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson counties. On February 18, 2009, the TCEQ designated Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant, and Wise counties as the Northern Trinity and Woodbine Aquifers PGMA. The TCEQ Order adopted the PFD which recommended a single, multi-county GCD for the included counties.

Similar to the North Central Texas study and process of designating that PGMA, on January 9, 2008, TCEQ staff recommended that 5 counties should be designated as the Central Texas (Trinity Aquifer) PGMA.⁸³ The Byrd Study explained how some (but not all) counties in this study area met the statutory test for a PGMA. This matter was also referred for a contested case hearing, and the ALJ held the public hearing on May 1, 2008. The ALJ issued his PFD on July 28, 2008. On October 31, 2008, the TCEQ accepted this PFD and designated Bosque, Coryell, Eastland, Hill, McClennan and Somervell counties as the Central Texas (Trinity Aquifer) PGMA.

The purpose of designating an area as a PGMA is to cause the quick formation of one or more districts with the power to regulate groundwater use for the entire area. The designation of a PGMA by the TCEQ cannot be appealed nor may it be challenged under Water Code § 5.351 or Govt. Code § 2001.038. Within 2 years after the TCEQ issues its order designating a PGMA, the landowners in the PGMA must create one or more GCDs to cover the entire PGMA. For land in the PGMA not in a GCD by the end of this two year period, the TCEQ must either create a GCD for some or all of those areas, or recommend to an existing GCD that some or all of the

land be added to that GCD.⁸⁴ An existing GCD must follow certain procedures to consider and act on the TCEQ's recommendation to add land to the existing GCD.⁸⁵ If the GCD does not approve adding new area to the GCD, then within one year after that vote the TCEQ must form a new GCD for that area or advise the Legislature whether it should take legislative action to address the need for groundwater management in the PGMA.⁸⁶

As noted above, GCDs are created either by the Legislature or the TCEQ. All of Bosque, Coryell, Hill, McLennan and Somervell counties must be in a GCD by October 31, 2010. On November 1, 2010, the formation of GCDs for these counties will be delegated to the TCEQ and the TCEQ will proceed to form GCDs over all areas in this PGMA not already in a GCD, in accordance with the applicable PFD. Similarly, Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant, and Wise counties must be in a GCD by February 12, 2011, to avoid the delegation of this power to the TCEQ for it to proceed in accordance with its applicable PFD.

Since the legislature only meets every two years, there will only be one legislative session held before the end of these two year PGMA periods, namely, the 81st Legislature's regular session in 2009 underway as of the presentation of this paper.⁸⁷ As a result, it seems highly probable that one or more GCDs will be formed for this PGMA in the 81st Legislature's regular session, as local interested parties may be motivated to preempt formation of GCDs as proposed by the PFDs adopted by the TCEQ.

⁸⁴30 Tex. Admin. Code § 294.43(e)

⁸⁵30 Tex. Admin. Code § 294.44(a)-(c)

⁸⁶30 Tex. Admin. Code § 294.44(d)

⁸⁷The 82nd Legislature's regular session will begin in January, 2011. Bills passed in that session generally take effect in June of 2011 or the first week of September, 2011. Theoretically, the Governor could declare the formation of GCDs in the Northern Trinity and Woodbine Aquifers PGMA to be an emergency item, thereby allowing the 82nd Legislature to consider GCD formation bills within the first 30 days of the session. The Legislature could pass a bill very early in the session and (assuming the necessary votes) provide that it became effective immediately upon passage and signature by the Governor, but the probability that such a bill could be passed by February 12, 2011, is very small.

⁸³Byrd, *Updated Evaluation for the Central Texas–Trinity Aquifer–Priority Groundwater Management Study Area* (TCEQ Water Supply Division, December, 2007) (the Byrd Study)

C. The Use of Water in Shale Plays

Stimulating production of gas from shale by fracing the shale was first used commercially in 1949.⁸⁸ However, in the mid-1990s refinements to this process made it simpler and cheaper, which led to a rapid expansion of its use in shale plays.⁸⁹ In a 2008 opinion, the Texas Supreme Court described the fracing process as follows:

[Fracing] is done by pumping fluid down a well at high pressure so that it is forced out into the [sandstone or shale] formation. The pressure creates cracks in the rock that propagate along the azimuth of natural fault lines in an elongated elliptical pattern in opposite directions from the well. Behind the fluid comes a slurry containing small granules called proppants-sand, ceramic beads, or bauxite are used-that lodge themselves in the cracks, propping them open against the enormous subsurface pressure that would force them shut as soon as the fluid was gone. The fluid is then drained, leaving the cracks open for gas or oil to flow to the wellbore. Fracing in effect increases the well’s exposure to the formation, allowing greater production....

Engineers design a fracing operation for a particular well, selecting the injection pressure, volumes of material injected, and type of proppant to achieve a desired result based on data regarding the porosity, permeability, and modulus (elasticity) of the rock, and the pressure and other aspects of the reservoir. The design projects the length of the fractures from the well measured three ways: the hydraulic length, which is the distance the fracing fluid will travel, sometimes as far as 3,000 feet from the well; the propped length, which is the slightly shorter distance the proppant will reach; and the effective length, the still shorter distance within which the fracing operations will actually improve

production. Estimates of these distances are dependent on available data and are at best imprecise. Clues about the direction in which fractures are likely to run horizontally from the well may be derived from seismic and other data, but virtually nothing can be done to control that direction; the fractures will follow Mother Nature’s fault lines in the formation. The vertical dimension of the fracing pattern is confined by barriers-in this case, shale-or other lithological changes above and below the reservoir.⁹⁰

The amount of water required for any given oil or gas well can vary substantially, depending on the depth of the well, the type of well, and any problems incurred while drilling the well. Some industry sources report the typical use of 420,000 gallons during drilling and another 4 million gallons to drill and hydraulically fracture a well.⁹¹ Other reported statistics show that when well fracture technology is used, a typical Barnett Shale vertical completion requires approximately 1.2 million gallons (3.68 acre-feet) of water, and a typical horizontal Barnett Shale completion requires around 3.5 million gallons (10.74 acre-feet) of water.⁹²

From December, 2004, through November of 2005, crude oil production in the Dallas-Fort Worth Metroplex area was almost 5.4 million barrels, and gas well gas production exceeded 486 trillion cubic feet.⁹³ As of September of 2005, the following numbers of oil and gas wells were located in the indicated counties:⁹⁴

<u>Oil:</u>		<u>Gas:</u>	
Cook	3,054	Wise	3,797
Montague	2,874	Denton	1,833
Navarro	2,096	Parker	1,367
Grayson	999	Tarrant	624
Wise	951	Hood	336
TOTAL:	9,974		7,957

RRC staff is of the opinion that it may take over 50,000 wells to fully develop the Barnett Shale.⁹⁵ If the above use estimates are accurate, the Dallas-Fort Worth

⁸⁸*Coastal Oil & Gas Corp. v. Garza Energy Trust*, __ S.W.3d __ (Tex. 2008), Slip Opin., No. 05-0466 (Tex. Aug. 29, 2008). Copies of the Court’s opinion, as well as an opinion dissenting in part and concurring in part and a concurring opinion are a c c e s s i b l e a t <http://www.supreme.courts.state.tx.us/historical/082908.asp>.

⁸⁹Harden, *Northern Trinity-Woodbine GAM Assessment of Groundwater Use in the Northern Trinity Aquifer Due to Urban Growth and Barnett Shale Development*, December, 2006, p. 6 (the Harden Study)

⁹⁰*Coastal*, __ S.W.3d at __.

⁹¹Mills Study at p. 44

⁹²Harden Study at p. 6

⁹³Mills Study at p. 18

⁹⁴*Id.*

⁹⁵*Id.* at p. 49

Metroplex area could see as many as 42,000 additional gas wells over the next 15-20 years, using between 3.68 and 10.74 acre-feet of water each, which translates to somewhere between 154,560 and 451,080 acre-feet of water necessary to fully develop the Barnett Shale over time.⁹⁶ In Denton, Hood, Johnson, Parker, Tarrant and Wise counties, 4,834 new water wells were drilled over a 44 month period ending in August of 2006.⁹⁷ Approximately 5% (241 wells) were used in the drilling and fracturing of Barnett Shale gas wells.⁹⁸

In modern times, practitioners confronting the issues surrounding the use of large quantities of water to produce minerals may tend to think that there has been no historical conflict between mineral development and associated groundwater use. Granted, more recently, with the refinement of hydraulic fracturing as described below, significantly larger volumes of water are being used to produce energy. However, waterflood projects are also commonly used to develop minerals and they also use quite a large volume of water, so a review of those cases may be helpful, to see if the volume of water used created any concerns for our courts.

In a waterflood project, the operator injects water into wells on one side of the field in an effort to force the oil toward wells on the other side of the field. More specifically, the operator deliberately injects a controlled amount of water or gas into an oil-producing stratum for the purpose of increasing the percentage and rate of recovery of oil from the stratum; it is known as a secondary recovery method because its function is to recover oil which would not be otherwise recoverable by primary production methods; and this process was comparatively new to Texas in 1946.⁹⁹ By the 1970s Texas courts consistently found that waterflood projects

were reasonably necessary operations under oil and gas leases.¹⁰⁰ In the *Whitaker* case, the surface owner (Whitaker) tried to prohibit the mineral estate owner (Sun Oil Co.) from using groundwater from the Ogallala aquifer in a waterflood project for the 267 acre tract in question. The surface owner wanted to force Sun to purchase surface water for the project or obtain groundwater elsewhere. Obviously, Sun objected and relied on its common law rights to use groundwater from the tract to develop the tract's mineral estate.

At trial Whitaker obtained jury findings that: (1) it was not reasonably necessary for Sun to use Ogallala water; and (2) the proposed use of fresh water for this waterflood project would substantially devalue the surface owner's farm. The Supreme Court found no evidence to support the first of these jury findings and also concluded that "To hold that Sun can be required to purchase water from other sources or owners of other tracts in the area, would be in derogation of the dominant estate."¹⁰¹ The Court went on not just to reverse the court of appeals but to render judgment granting Sun's application for a permanent injunction enjoining Whitaker from interfering with its production of not more than 100,000 gallons of fresh water per day, from the Ogallala formation.

Generally, the RRC has broad, exclusive regulatory power over the production of minerals. Justice Willett, while sitting on the Texas Supreme Court, has stated that the RRC has open-ended authority from the Legislature to adopt rules to govern and regulating persons and their operations in the use of techniques to enhance production of oil and gas, and to protect correlative rights.¹⁰² However, he also notes that the RRC has not promulgated any regulations that single out fracturing specifically.¹⁰³ Notwithstanding such silence, clearly in these times hydrofracturing is the normal and ordinary way to produce minerals from shales such as the Barnett Shale, and it has been accepted as such by our courts and the RRC, just as water flood projects have been accepted historically.

D. Reconciling Chapter 36 and Common Law Rights

Water Code § 36.002 provides in relevant part that:

[t]he ownership and rights of the owners of the land and their lessees and assigns in

⁹⁶Currently, the definition of Managed Available Groundwater (MAG) does not include the quantity of water produced from an exempt well (because, for example, it is used in the production of oil and gas). Some professionals in this area advocate including all exempt uses in MAG, or deducting the water volume used for exempt purposes from the MAG figure. In effect, if water used for oil and gas production, exempt from GCD regulation, equaled or exceeded the MAG production limitations based on Desired Future Conditions (DFCs), this would at least in theory mean there may be no water in the Trinity aquifer for any use other than for the production of oil and gas. This theory also assumes that the MAG derived from an aquifer's DFC(s) is a limitation on production. If MAG is a floor, this concern goes away. This issue (DFC as floor vs. ceiling) seems to currently be in flux.

⁹⁷Mills Study at p. 46

⁹⁸*Id.*

⁹⁹*Whitaker*, 483 S.W.2d at fn 1

¹⁰⁰*See, e.g., Id.* at 811, and the list of cases cited therein

¹⁰¹*Id.* at 812

¹⁰²*Coastal*, ___ S.W.3d at ___ (concurring opinion)

¹⁰³*Id.*

groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a district.

Note that it does not say that Chapter 36 limits or alters ownership or rights, but only that GCD rules may limit or alter ownership or rights. One of the widely accepted rules of statutory construction in Texas is that the expression of one thing is the exclusion of another (otherwise known to you Latin experts as *expressio unius*).¹⁰⁴ Therefore, Chapter 36 must first be interpreted and applied consistently with ownership and rights as they exist. This is a limitation on the meaning of Chapter 36. Chapter 36 cannot be interpreted to limit or alter common law ownership of or rights in water. Once Chapter 36 has been interpreted and applied consistently with this limitation, GCDs may then adopt rules as authorized by that construction of Chapter 36, and they are prohibited from adopting rules not authorized by (i.e. within the exemptions of) Chapter 36.¹⁰⁵

Given the limitation on Chapter 36 discussed in the immediately preceding paragraph, the challenge is to

¹⁰⁴See, e.g., *Johnson v. Second Injury Fund*, 688 S.W.2d 107, 108 (Tex. 1985)

¹⁰⁵If Water Code § 36.002 did not exist, construction of Chapter 36 would default to the Code Construction Act and common law rules of statutory construction. While the common law rule requires strict construction of statutes in derogation of the common law, Texas follows the rule that statutes in derogation of the common law are not to be strictly construed. Code Construction Act § 312.006(b); *Smith v. Sewell*, 858 S.W.2d 350 (Tex. 1993) Nevertheless, even a statute that deprives a person of a common-law right will not be extended beyond its plain meaning, nor applied to cases not clearly within its purview. See, e.g., *Cash America International, Inc., v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000), citing *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969); *Sewell*, 858 S.W.2d at 354 Abrogating common law claims is disfavored; to do so requires a clear repugnance between the common law and statute at issue. *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 192 (Tex. App.–Fort Worth 1995, writ denied), cited with approval by the Texas Supreme Court in *Bennett*, 448 S.W.2d at 16. A more currently common synonym for “abrogates” is “revokes”, which both denotes and connotes an affirmative act or provision. So, if Water Code § 36.002 did not exist, a court would have to find that Water Code § 36.117 or some other section of the Water Code was clear enough to affirmatively revoke common law rights in water, an analysis that most likely would lead to the same conclusion as applying Water Code § 36.002.

harmonize Chapter 36 with a person’s common law rights. In a “give and take” world, Chapter 36 must give or submit to the common law. The *Akers* case discussed in Section III(D) above is one example of a court harmonizing two statutes. In similarly harmonizing Chapter 36 with the common law, we can better answer the four biggest questions posed by the inartful drafting of § 36.117.

E. The Big Four Questions about Water Used to Produce Oil and Gas

There are at least four significant questions left unanswered, at least directly, by Chapter 36. This paper will attempt to address each of them. The first three questions share this: a “yes” answer changes the common law.

1. Can a GCD Limit Production of Water Used to Produce Oil and Gas?

The primary looming question from Water Code § 36.117 is whether a GCD can limit the volume of water produced from groundwater wells used to develop the applicable mineral estate, including water used to frac a well. This is not an issue for a D&L well because that exemption applies to the entire well, thereby expressly including an exemption from production permits and fees. The statute raises this issue because § 36.117(b)(2) and (3) exempt the need to permit the drilling of a well for the listed purposes, but they do not address the issue of exempting those wells from other permits, such as operating permits. What is the meaning of such silence?

Under the common law, as discussed in detail above, the mineral estate owner has the free right to use as much water from the servient tract as reasonably necessary to develop the mineral estate. Therefore, if a statute arguably limits the volume of production from groundwater wells used to develop a mineral estate, that statute would be eliminating the well-settled common law right of a lessee to that water. This interpretation of § 36.117(b)(2) is prohibited by § 13.002, but even in the absence of that section, courts do not find a legislative intent to supplant existing common law in areas where a statute is silent.¹⁰⁶

Nothing in Chapter 36 specifically denies or revokes a mineral lessee’s right to use as much groundwater as reasonably necessary to produce minerals from the tract (or pool). In fact, as discussed above, Water Code § 36.117(b)(2) contains a practical limitation on water production for this class of exempt wells (water production in these circumstances is limited to the amount used for active oil rigs operating on the same

¹⁰⁶See, e.g., *U. S. v. Texas*, 507 U.S. 529, 113 S. Ct. 1631 (1993), on remand *State of Texas v. U.S.*, 993 F.2d 51

lease or field associated with the drilling rig). Inactive oil rigs do not need water (to use water that way would probably be “waste”), and in these modern times the production of minerals is accomplished via a “rig.” The limitation in this subsection must be construed consistently with the common law principle that the dominant mineral estate has the free use of the volume of water from the same tract (or pool) reasonably necessary to develop and produce the minerals from that tract (or pool). Furthermore, it is consistent with common law rights to test the intention of the mineral estate owner on the date a water well is drilled and to restrict the exemption to only persons who both hold the RRC permit for the oil and gas well, because it is wasteful for the mineral lessee to use water from the premises in any other way. This just limits the exemption to the legitimate purposes of the mineral lessee.

To interpret this subsection of Chapter 36 as allowing a GCD to reduce water production any further below the limitation in the statute would clearly abrogate the mineral estate owner’s common law rights, a result prohibited by § 36.002. As noted by the Supreme Court, if the Legislature intended such a drastic change, it could have easily provided that specific power to a GCD.¹⁰⁷ Even considering Water Code § 36.117(1)’s broad prescription that Chapter 36 “applies to water wells used to supply water for activities related to the exploration or production of hydrocarbons or minerals,” that only leads back to § 36.002’s directive that Chapter 36 does not change common law ownership of or rights in water.

For any specific GCD, practitioners should review the GCD’s enabling act to see if the enabling act directly and clearly revokes these common law rights. GCDs created by the TCEQ do not have enabling acts, and so until Chapter 36 alters its default rules on this subject, GCDs created pursuant to the TCEQ’s regulatory process do not have the legal power to limit the volume of production from groundwater from servient estates to benefit the dominant mineral estate.

2. Can a GCD Assess Fees on the Production of Water Used to Produce Oil and Gas?

The next big question is whether a GCD can assess fees on the production of water used to develop minerals. This is a much more difficult question. First, consider the two general methods by which a GCD raises revenues for its operations. The GCD either assesses a fee based on the market value of the property in the district, or it assesses a fee upon the production of water, based on the volume of water produced, or it does some of both. The particular method used by a specific GCD may affect the answer to this question.

If a GCD assesses fees based on property value, which is paid by the surface estate owner, the common law does not pass that fee along to the mineral estate owner nor can the surface estate owner pass it to the mineral estate owner absent a contract. If, however, a GCD assesses water production, there is an “assessable event” such that, regardless of whether the surface estate owner or mineral estate owner produces the water, a fee is levied on the produced water. The mineral owner cannot produce the water and require the surface owner to pay the GCD assessment; in such an instance the mineral owner must pay the assessment.¹⁰⁸

Construing § 36.117 as not including an exemption from production fees within its exemptions would cause at least two negative things: (1) it would negatively change a mineral owner’s common law rights, but only for mineral owners producing water in GCDs that assess fees on production and not property value; (2) which may open up this entire area for a challenge for denial of equal protection. As stated above, courts are to construe statutes with a view toward their consequences given different interpretations, which clearly argues against construing § 36.117’s exemptions as not including payment of production fees.

Otherwise, this analysis is very similar to the issue of limiting water production. Under the common law, as discussed in detail above, the mineral estate owner has the free right to use as much water from the servient tract as reasonably necessary to develop that tract’s mineral

¹⁰⁷*City of Marshall*, 206 S.W.3d at 107. In *City of Marshall*, the Supreme Court had to construe Water Code Section 11.122(b) in the context of the TCEQ’s denying notice and hearing on Marshall’s water rights permit amendment application, and in defining the criteria that the TCEQ must consider in the process of approving or denying an amendment to a permitted water right. When considering the statute, the Court refused to rewrite the statute which would have been necessary to adopt Marshall’s argument, on the basis that had the Legislature intended that construction, it could have easily so stated. Similarly, if the Legislature had intended to give GCDs the right to restrict production of water used to produce minerals, it could have.

¹⁰⁸Although a mineral estate owner can drill its own water wells and use the produced water to develop the mineral estate associated with that surface estate, a mineral estate owner cannot force a surface estate owner to allow it to use the surface owner’s water well to produce water to develop the mineral estate. When a surface owner already has water wells on the tract, the parties often agree to allow the mineral estate to produce and use water from the surface owner’s water wells, with the mineral estate owner paying the surface estate owner for the water. The surface estate owner has the opportunity to pass along to the mineral estate owner, in the agreement, liability for the payment of any GCD fees assessed on the produced water.

estate. The mineral estate owner does not pay anyone any amount of money for that right. Allowing a GCD to assess a fee on the production of water used to develop and produce minerals would cause the mineral estate owner to have to pay something for the water. This interpretation would change common law rights, an interpretation of Chapter 36 prohibited by § 36.002. Therefore, § 36.117(b)(2) and (3) must be interpreted as including within their exemptions an exemption from the payment of any production fees assessed on groundwater produced within these exemptions.

3. Can a GCD Restrict or Charge a Fee on the Transportation of Water Outside the District to Develop a Mineral Estate?

Water Code § 36.122 addresses a GCD's power to regulate water produced in the district and transported outside the district. Subsection (b) provides that a GCD may promulgate rules requiring a person to obtain a permit or an amendment to a permit under § 36.113 from the GCD for the transfer of groundwater out of the district. Section 36.113 is specifically restricted by § 36.117, meaning § 36.122 is subject to § 36.117, and so we are yet again confronted with this most enjoyable section.

Under the common law, a mineral estate owner has the right to produce water from any part of the servient estate to produce minerals anywhere else on that tract, including other tracts pooled with the water-producing tract. However, a mineral estate owner cannot produce water from a servient tract and use it for any other purpose. Applied to § 36.117, and thus to § 36.122 and any permit for the transfer of water outside a district, if the servient tract or any pool it is in lies partially within and without a GCD's boundaries, then the GCD cannot restrict the use of water produced from the servient tract to develop the dominant mineral estate, nor can it assess it an increased fee if it is transported across the GCD's boundary, but the GCD can otherwise regulate the transportation of water, i.e. producing water from a servient tract inside the GCD to produce minerals on a tract outside the GCD that is not related to the servient tract.

4. Can an Existing Water Well Attain and Lose Exemption Temporarily?

This is admittedly not the most obvious question that comes to mind when reading § 36.117. This issue appeared based on the author's experience drafting contracts for the sale of water to oil and gas companies for minerals development in the Barnett Shale. The short answer to this question is "no" and this section is not intended to argue otherwise as a matter of law. It is intended to point out that, as a matter of policy, changing the answer to this question may be an improvement over

the current law. Readers not interested in policy discussions can skip to the next Section of this paper.

When a mineral estate owner drills a water well and allows some of that water to be used by the surface owner (or anyone else for that matter), the mineral estate owner has gone beyond his common law rights in the water produced from the servient tract. Once even partially removed from the protections of those common law rights, § 36.117 takes away all exemption for this water use. It takes an agreement between the mineral estate owner and the surface estate owner to share a water well or its production, and the case law developed under the common law did not address this issue.

But consider the practical results of such a policy, given the Barnett Shale play, which is occurring in developed areas, and more importantly for this discussion, in *developing* areas. Developing areas need water wells for non-mineral production use, while at the same time mineral lessees need water to produce gas from the shale. To maintain the exemption of § 36.117(b)(2), all water produced from a water well must be used to produce minerals. If other development also needs a water well, another well must be drilled. If, on the other hand, the "all or nothing" exemption of § 36.117(b)(2) was modified to the "some and some" exemption concept in § 36.117(b)(3) [exemption for amounts necessary for surface mining permits issued by the RRC, with GCD regulation of excess amounts], the following efficiencies could be achieved:

1. There would be fewer wells drilled into the aquifers, which would better protect the aquifer and reduce the risk of harming the aquifer;
2. There would be fewer wells for a GCD to monitor, reducing GCD overhead expense (and thus hopefully the GCD's revenues and the burden on its residents);
3. There would be fewer wells to manage in conformity with MAG based on DFCs, which should ease the GCD's burden and increase chances of successful management;
4. Landowners would have the opportunity to negotiate with oil and gas companies to improve their land by having the oil and gas companies pay for the water wells (instead of burdening the landowner with having to pay for a separate water well for its uses), to include simultaneous uses beneficial to the landowner, which could include development on the land, helping grow the area's overall economy (to the extent the readers sees economic development as a good thing).

If this concept was good enough for § 36.117(b)(3) in relation to water used for certain RRC mining permits, it

seems good enough to use in relation to water used for RRC oil and gas production permits.

V. CONCLUSION

By now many readers may view § 36.117 as the author did upon completing this paper, not as a forest, tree or leaf, but as an onion, with an almost infinite number of layers to be peeled away. Because the more layers you peel, the more it just makes you want to cry. Perhaps the more observant readers can sense the author's fully formed frustration(s) with § 36.117. Unfortunately, this section and the plethora of emotions it may bring cannot be avoided because much is riding on the interpretation and construction of this section. Money. Power. Legal fees. The Georgia Satellites. Bathroom breaks during public hearings.

In pursuit of a more perfect world, perhaps landowners and mineral lessees can use this information to make sure a GCD's existing rules conform to the exemptions of § 36.117 and challenge any that are inconsistent. GCDs can draft rules consistent with § 36.117. Legislators can draft and enact an amendment to § 36.117 thereby legislating this paper and our collective tears into irrelevance.

Notwithstanding the involuntary emotions, competing interests or money, water and energy are the cornerstones of our civilization because the sustainment of our civilization requires both. We even use water to produce energy, and energy to produce water. Our state's policy to maximize energy production may not continue to be entirely compatible with our state's policy to conserve and manage our groundwater, especially given the projected population growth and the demands that may place on our water supplies. Until the Legislature changes the law to clarify these relative priorities differently than they exist today, GCDs may find themselves at the epicenter of a storm if they attempt to impose regulations beyond their legal powers and in derogation of long-standing common law rights of mineral estate owners.

But the temptation is there, and so it is foreseeable that the day may come when someone must stand up and rousingly sing: "*Don't hand me no lines, and keep your GCD hands to yourself.*"

VI. CREDITS AND DISCLAIMERS

This was a very challenging topic, and this paper could not have turned out as it did without the help of several key individuals, to whom I am deeply indebted. Their help was provided notwithstanding the potentially polarizing nature of the subject matter.

None of the people listed in this section controlled or monitored, or were even aware of, the final content of this paper until it was finished and sent for publication. Nothing about the mere fact that they provided assistance

to the author is intended to be construed or implied that they may or may not agree with the content of this paper, in whole or in part. But we were all able to agree that this section of the Water Code is one of the best examples of poor draftsmanship we have seen. And it does help to fully understand the problem before you try to fix the problem.

Robin Melvin with Graves, Dougherty, Hearon & Moody, sat on this course's planning committee with me and helped identify problems with Section 36.117, then provided information to help solve those and other issues. For example, she raised the issue of cathodic protection wells, and Greg Ellis and Robin Smith helped answer that question.

Chad Baruch, The Law Office of Chad Baruch, is the master drafter, the guru of construing poorly worded statutes, and so you can imagine the many communications we had about this paper.

Greg Ellis, Law Offices of Greg Ellis and Executive Director of the Texas Alliance of Groundwater Districts, provided his insights into and frustrations with Section 36.117 and answered every question I asked of him.

Grady Jolley, with Nunley Jolley Cluck Aelvoet, LLP, also provided his insight and experience with this subject matter, and actually might have seen some of this paper in its nearly final form before publication.

Anytime a paper has to deal with a subject matter that is regulated by state agencies, inside connections are invaluable. Robin Smith, with the TCEQ, saved me all sorts of time with quick answers to a smattering of questions. And Philip "Flip" Whitworth, Jr., with Scott, Douglass & McConnico, LLP, introduced me to some very helpful people with the Railroad Commission, proving yet again the old adage "it's not what you know, it's who you know." The names of these people will, however, remain nameless to protect the innocent.

For more information about this topic please visit one of my three websites.

For environmental:



For water:



And the mother ship:



EXHIBIT A**THE ENACTED HISTORY OF SECTION 36.117**

From House Bill 2294 (74th Leg. R. S. 1995), the original adoption of Water Code Section 36.117:

Sec. 36.117. EXCEPTIONS; LIMITATIONS.

- (a) A district may not require a permit for:
- (1) drilling or producing from a well either drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day;
 - (2) the drilling or alteration of the size of a well or to restrict the production of a well if the water produced or to be produced from the well is used or to be used to supply the domestic needs of 10 or fewer households and a person who is a member of each household is either the owner of the well, a person related to the owner or a member of the owner's household within the second degree by consanguinity, or an employee of the owner;
 - (3) the drilling or alteration of the size of a well or to restrict the production from the well if the water produced or to be produced from the well is used or to be used to provide water for feeding livestock and poultry connected with farming, ranching, or dairy enterprises;
 - (4) water wells to supply water for hydrocarbon production activities, regardless of whether those wells are producing, that are associated with any well permitted by the Railroad Commission of Texas drilled before September 1, 1985; or
 - (5) jet wells used for domestic needs.
- (b) The board shall adopt rules determining the applicability of Subsection (a)(3) to facilities used primarily for feeding livestock.
- (c) The district shall not deny the owner of a tract of land, or his lessee, who has no well equipped to produce more than 25,000 gallons a day on the tract, either a permit to drill a well on his land or the privilege to produce groundwater from his land, subject to the rules of the district.
- (d) A district may not restrict the production of any well equipped to produce 25,000 gallons or less a day.
- (e) Nothing in this chapter applies to wells drilled for oil, gas, sulphur, uranium, or brine, or for core tests, or for injection of gas, saltwater, or other fluid, or for any other purpose, under permits issued by the Railroad Commission of Texas. A district may not require a permit to drill a well to supply water for drilling any of these wells permitted by the Railroad Commission of Texas. Any well that ceases to be used for these purposes and is then used as an ordinary water well is subject to the rules of the district.
- (f) Water wells exempted under this section shall be equipped and maintained so as to conform to the district's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.
- (g) A district shall require water wells exempted under this section to be registered with the district. All exempt water wells shall be equipped and maintained so as to conform to the district's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.

Acts 1995, 74th Leg., ch. 933, Sec. 2, eff. Sept. 1, 1995

From Senate Bill 1 (R.S. 75th Leg. 1997):

Sec. 36.117. EXEMPTIONS; Exception; Limitations.

- (a) A district may exempt wells from the requirements to obtain a drilling permit, an operating permit, or any other permit required by this chapter or the district's rules. A district may not require a permit for:
- (1) drilling or producing from a well either drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day;
 - (2) the drilling or alteration of the size of a well or to restrict the production of a well if the water produced or to be produced from the well is used or to be used to supply the domestic needs of 10 or fewer households and a person who is a member of each household is either the owner of the well, a person related to the owner or a member of the owner's household within the second degree by consanguinity, or an employee of the owner;
 - (3) the drilling or alteration of the size of a well or to restrict the production from the well if the water produced or to be produced from the well is used or to be used to provide water for feeding livestock and poultry connected with farming, ranching, or dairy enterprises;
 - (4) water wells to supply water for hydrocarbon production activities, regardless of whether those wells are producing, that are associated with any well permitted by the Railroad Commission of Texas drilled before September 1, 1985; or
 - (5) jet wells used for domestic needs.
- (b) The board shall adopt rules determining the applicability of Subsection (a)(3) to facilities used primarily for feeding livestock.
- (c) The district shall not deny the owner of a tract of land, or his lessee, who has no well equipped to produce more than 25,000 gallons a day on the tract, either a permit to drill a well on his land or the privilege to produce groundwater from his land, subject to the rules of the district.
- (d) A district may not restrict the production of any well equipped to produce 25,000 gallons or less a day.
- (e) Nothing in this chapter applies to wells drilled for oil, gas, sulphur, uranium, or brine, or for core tests, or for injection of gas, saltwater, or other fluid, or for any other purpose, under permits issued by the Railroad Commission of Texas. A district may not require a drilling permit for [to drill] a well to supply water for drilling any [of these] wells permitted by the Railroad Commission of Texas. Any well that ceases to be used for these purposes and is then used as an ordinary water well is subject to the rules of the district. Water wells drilled after September 1, 1997, to supply water for hydrocarbon production activities must meet the spacing requirements of the district unless no space is available within 300 feet of the production well or the central injection station.
- (f) Water wells exempted under this section shall be equipped and maintained so as to conform to the district's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.
- (g) A district shall require water wells exempted under this section to be registered with the district before drilling. All exempt water wells shall be equipped and maintained so as to conform to the district's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.

(h) A well to supply water for a subdivision of land for which a plat approval is required by law is not exempted under this section.

Acts 1997, 75th Leg., ch. 1010, Sec. 4.32, eff. Sept. 1, 1997

HB 340 (R.S. 76th Leg. 1999):

(a) A district may exempt wells from the requirements to obtain a drilling permit, an operating permit, or any other permit required by this chapter or the district's rules. A district may not require a permit for:

- (1) drilling or producing from a well either drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day;
- (2) the drilling or alteration of the size of a well or to restrict the production of a well if the water produced or to be produced from the well is used or to be used to supply the domestic needs of 10 or fewer households and a person who is a member of each household is either the owner of the well, a person related to the owner or a member of the owner's household within the second degree by consanguinity, or an employee of the owner;
- (3) the drilling or alteration of the size of a well or to restrict the production from the well if the water produced or to be produced from the well is used or to be used to provide water for feeding livestock and poultry connected with farming, ranching, or dairy enterprises; or
- (4) water wells to supply water for hydrocarbon production activities, regardless of whether those wells are producing, that are associated with any well permitted by the Railroad Commission of Texas drilled before September 1, 1985~~[-or]~~

~~[(5) jet wells used for domestic needs].~~

Acts 1999, 76th Leg., ch. 239, Sec. 1, eff. Sept. 1, 1999

From HB 3587 (77th Leg., R.S., 2001):¹⁰⁹

Sec. 36.117. EXEMPTIONS; EXCEPTION; LIMITATIONS.

- (a) A district may exempt wells from the requirements to obtain a drilling permit, an operating permit, or any other permit required by this chapter or the district's rules.
- (b) A district may not require a permit for:
- (1) ~~[drilling or producing from]~~ a well on a tract of land larger than 10 acres if the well is [either] drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day and if the water produced or to be produced from the well is used or to be used for domestic purposes or to provide water for livestock or poultry;
 - (2) the drilling of a well to supply water solely for a drilling rig that is actively engaged in drilling or exploration operations permitted by the Railroad Commission of Texas if:
 - (A) the person holding the permit is responsible for the water well; and
 - (B) the water well is located:
 - (i) on the lease on which the drilling rig is located;
 - (ii) within the boundaries of the field in which the drilling rig is located; or
 - (iii) in close proximity to the drilling rig [or alteration of the size of a well or to restrict the production of a well if the water produced or to be produced from the well is used or to be used to supply the domestic needs of 10 or fewer households and a person who is a member of each household is either the owner of the well, a person related to the owner or a member of the owner's household within the second degree by consanguinity, or an employee of the owner]; or
 - (3) the drilling of a well or to restrict the production of a well if the water produced or to be produced is necessary or will be necessary for mining purposes permitted by the Railroad Commission of Texas under Chapter 134, Natural Resources Code [or alteration of the size of a well or to restrict the production from the well if the water produced or to be produced from the well is used or to be used to provide water for feeding livestock and poultry connected with farming, ranching, or dairy enterprises; or]
 - ~~[(4) water wells to supply water for hydrocarbon production activities, regardless of whether those wells are producing, that are associated with any well permitted by the Railroad Commission of Texas drilled before September 1, 1985].~~
- ~~[(b) The board shall adopt rules determining the applicability of Subsection (a)(3) to facilities used primarily for feeding livestock.]~~

¹⁰⁹SECTION 1 of this bill details the changes to this section. Sections 2 and 3 of this bill provide the effectiveness of the changes made by this bill, as follows in their entirety:

“SECTION 2. The changes in law made by this Act to Section 36.117, Water Code, apply only to an application for the drilling, equipping, completion, or alteration of a well or pump filed on or after the effective date of this Act. An application for the drilling, equipping, completion, or alteration of a well or pump filed before the effective date of this Act is governed by the law in effect on the date on which the application was filed, and the former law is continued in effect for that purpose.”

“SECTION 3. This Act takes effect September 1, 2001.”

- (c) ~~[The district shall not deny the owner of a tract of land, or his lessee, who has no well equipped to produce more than 25,000 gallons a day on the tract, either a permit to drill a well on his land or the privilege to produce groundwater from his land, subject to the rules of the district.]~~
- ~~[(d)]~~ A district may not restrict the production of any well exempted under Subsection (b)(1) ~~[equipped to produce 25,000 gallons or less a day].~~
- (d) A district may require a well exempted under Subsection (b)(2) or (b)(3) to obtain a permit and comply with district rules if:
- (1) a well exempted under Subsection (b)(2) is no longer used to supply water for a drilling rig that is actively engaged in drilling or exploration operations permitted by the Railroad Commission of Texas; or
- (2) withdrawals from a well exempted under Subsection (b)(3) are:
- (A) no longer necessary for mining purposes permitted by the Railroad Commission of Texas under Chapter 134, Natural Resources Code; or
- (B) greater than the amount necessary for mining purposes permitted by the Railroad Commission of Texas under Chapter 134, Natural Resources Code.
- (e) A person required to obtain a permit for a well under Subsection (d)(2) shall report monthly to the district the total amount of water withdrawn from the well, the quantity of water necessary for mining purposes, and the quantity of water withdrawn for other purposes [Nothing in this chapter applies to wells drilled for oil, gas, sulphur, uranium, or brine, or for core tests, or for injection of gas, saltwater, or other fluid, or for any other purpose, under permits issued by the Railroad Commission of Texas. A district may not require a drilling permit for a well to supply water for drilling any wells permitted by the Railroad Commission of Texas. Any well that ceases to be used for these purposes and is then used as an ordinary water well is subject to the rules of the district. Water wells drilled after September 1, 1997, to supply water for hydrocarbon production activities must meet the spacing requirements of the district unless no space is available within 300 feet of the production well or the central injection station].
- (f) Notwithstanding Subsection (d), a district may not require a well exempted under Subsection (b)(3) to meet the spacing requirements of the district [Water wells exempted under this section shall be equipped and maintained so as to conform to the district's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir].
- (g) A district may not deny an application for a permit to drill a water well to supply water for hydrocarbon production activities if the application is in compliance with the spacing, density, and production rules applicable to all permitted water wells of the district.
- (h) A district shall require water wells exempted under this section to be registered in accordance with rules adopted by the district [before drilling]. All exempt water wells shall be equipped and maintained so as to conform to the district's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir. A driller of an exempt well shall file the well's drilling log with the district.
- (i) ~~(h)~~ A well to supply water for a subdivision of land for which a plat approval is required under Chapter 232, Local Government Code, [by law] is not exempted under Subsection (b) [this section].
- (j) An exemption under this section does not affect a district's authority to impose fees under Section 36.122 or Subchapter G.

- (k) Groundwater withdrawn from a well exempt from permitting or regulation under this section and subsequently transported outside the boundaries of the district shall be subject to any applicable production and export fees under Sections 36.122 and 36.205.
- (l) This chapter applies to water wells, including water wells used to supply water for activities related to the exploration or production of hydrocarbons or minerals. This chapter does not apply to production or injection wells drilled for oil, gas, sulphur, uranium, or brine, or for core tests, or for injection of gas, saltwater, or other fluids, under permits issued by the Railroad Commission of Texas.

Acts 2001, 77th Leg., ch. 966, Sec. 2.51, eff. Sept. 1, 2001

Also From SB 2 (77th Leg., R.S., 2001) (Section 2.51):

Sec. 36.117. EXEMPTIONS; EXCEPTION; LIMITATIONS.

- (a) A district may exempt wells from the requirement of obtaining [~~requirements to obtain~~] a drilling permit, an operating permit, or any other permit required by this chapter or the district's rules.
- (b) A district may not require any [a] permit issued by the district for:
- (1) [~~drilling or producing from~~] a well used solely for domestic use or for providing water for livestock or poultry on a tract of land larger than 10 acres that is either drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day;
 - (2) the drilling of a water well used solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas provided that the person holding the permit is responsible for drilling and operating the water well and the well is located on the same lease or field associated with the drilling rig; or [~~alteration of the size of a well or to restrict the production of a well if the water produced or to be produced from the well is used or to be used to supply the domestic needs of 10 or fewer households and a person who is a member of each household is either the owner of the well, a person related to the owner or a member of the owner's household within the second degree by consanguinity, or an employee of the owner;~~]
 - (3) the drilling of a water well authorized under a permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code, or for production from such a well to the extent the withdrawals are required for mining activities regardless of any subsequent use of the water. [~~or alteration of the size of a well or to restrict the production from the well if the water produced or to be produced from the well is used or to be used to provide water for feeding livestock and poultry connected with farming, ranching, or dairy enterprises; or~~]
- [~~(4) water wells to supply water for hydrocarbon production activities, regardless of whether those wells are producing, that are associated with any well permitted by the Railroad Commission of Texas drilled before September 1, 1985;~~]
- [~~(b) The board shall adopt rules determining the applicability of Subsection (a)(3) to facilities used primarily for feeding livestock;~~]
- (c) [~~The district shall not deny the owner of a tract of land, or his lessee, who has no well equipped to produce more than 25,000 gallons a day on the tract, either a permit to drill a well on his land or the privilege to produce groundwater from his land, subject to the rules of the district.~~]
- [~~(d)~~] A district may not restrict the production of any well that is exempt from permitting under Subsection (b)(1) [~~equipped to produce 25,000 gallons or less a day~~].

- (d) Notwithstanding Subsection (b), a district may require a well to be permitted by the district and to comply with all district rules if:
- (1) the purpose of a well exempted under Subsection (b)(2) is no longer solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas; or
 - (2) the withdrawals from a well exempted under Subsection (b)(3) are no longer necessary for mining activities or are greater than the amount necessary for mining activities specified in the permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code.
- (e) An entity holding a permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code, that authorizes the drilling of a water well shall report monthly to the district:
- (1) the total amount of water withdrawn during the month;
 - (2) the quantity of water necessary for mining activities; and
 - (3) the quantity of water withdrawn for other purposes. [Nothing in this chapter applies to wells drilled for oil, gas, sulphur, uranium, or brine, or for core tests, or for injection of gas, saltwater, or other fluid, or for any other purpose, under permits issued by the Railroad Commission of Texas. A district may not require a drilling permit for a well to supply water for drilling any wells permitted by the Railroad Commission of Texas. Any well that ceases to be used for these purposes and is then used as an ordinary water well is subject to the rules of the district. Water wells drilled after September 1, 1997, to supply water for hydrocarbon production activities must meet the spacing requirements of the district unless no space is available within 300 feet of the production well or the central injection station.]
- (f) Notwithstanding Subsection (d), a district may not require a well exempted under Subsection (b)(3) to comply with the spacing requirements of the district. [Water wells exempted under this section shall be equipped and maintained so as to conform to the district's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.]
- (g) A district may not deny an application for a permit to drill and produce water for hydrocarbon production activities if the application meets all applicable rules as promulgated by the district.
- (h) A ~~shall require~~ water well ~~[wells]~~ exempted under Subsection (a) or (b) shall:
- (1) ~~[this section to]~~ be registered in accordance with rules promulgated by the district; and
 - (2) ~~[before drilling. All exempt water wells shall]~~ be equipped and maintained so as to conform to the district's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.
- (i) The driller of a well exempted under Subsection (a) or (b) shall file the drilling log with the district.
- (j~~(h)~~) A well to supply water for a subdivision of land for which a plat approval is required by Chapter 232, Local Government Code, ~~[law]~~ is not exempted under Subsection (b) ~~[this section]~~.
- (k) Groundwater withdrawn from a well exempt from permitting or regulation under this section and subsequently transported outside the boundaries of the district is subject to any applicable production and export fees under Sections 36.122 and 36.205.

- (l) This chapter applies to water wells, including water wells used to supply water for activities related to the exploration or production of hydrocarbons or minerals. This chapter does not apply to production or injection wells drilled for oil, gas, sulphur, uranium, or brine, or for core tests, or for injection of gas, saltwater, or other fluids, under permits issued by the Railroad Commission of Texas.

Acts 2001, 77th Leg., ch. 966, Sec. 2.51, eff. Sept. 1, 2001

From SB 3 (80th Leg. R.S. 2007), Section 2.22:¹¹⁰

- (d) Notwithstanding Subsection (b), a district may require a well to be permitted by the district and to comply with all district rules if:
- (1) the withdrawals from a well in the Hill Country Priority Groundwater Management Area and exempted under Subsection (b)(1) are no longer used solely for domestic use or to provide water for livestock or poultry;
 - (2) the purpose of a well exempted under Subsection (b)(2) is no longer solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas; or
 - (3) ~~(2)~~ the withdrawals from a well exempted under Subsection (b)(3) are no longer necessary for mining activities or are greater than the amount necessary for mining activities specified in the permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code.

Acts 2007, 80th Leg., R.S., Ch. 1430, Sec. 2.22, eff. September 1, 2007

The current form of Texas Water Code Section 36.117 (2008):

§ 36.117. EXEMPTIONS; EXCEPTION; LIMITATIONS. (a) A district may exempt wells from the requirement of obtaining a drilling permit, an operating permit, or any other permit required by this chapter or the district's rules.

(b) A district may not require any permit issued by the district for:

- (1) a well used solely for domestic use or for providing water for livestock or poultry on a tract of land larger than 10 acres that is either drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day;
- (2) the drilling of a water well used solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas provided that the person holding the permit is responsible for drilling and operating the water well and the well is located on the same lease or field associated with the drilling rig; or
- (3) the drilling of a water well authorized under a permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code, or for production from such a well to the extent the withdrawals are required for mining activities regardless of any subsequent use of the water.

(c) A district may not restrict the production of any well that is exempt from permitting under Subsection (b)(1).

¹¹⁰SB 714 (80th Leg. R.S. 2007) made changes to Water Code Section 36.111(b) which references 36.117. They do not seem to have any effect on the meaning of 36.117.

- (d) Notwithstanding Subsection (b), a district may require a well to be permitted by the district and to comply with all district rules if:
- (1) the withdrawals from a well in the Hill Country Priority Groundwater Management Area and exempted under Subsection (b)(1) are no longer used solely for domestic use or to provide water for livestock or poultry;
 - (2) the purpose of a well exempted under Subsection (b)(2) is no longer solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas; or
 - (3) the withdrawals from a well exempted under Subsection (b)(3) are no longer necessary for mining activities or are greater than the amount necessary for mining activities specified in the permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code.
- (e) An entity holding a permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code, that authorizes the drilling of a water well shall report monthly to the district:
- (1) the total amount of water withdrawn during the month;
 - (2) the quantity of water necessary for mining activities; and
 - (3) the quantity of water withdrawn for other purposes.
- (f) Notwithstanding Subsection (d), a district may not require a well exempted under Subsection (b)(3) to comply with the spacing requirements of the district.
- (g) A district may not deny an application for a permit to drill and produce water for hydrocarbon production activities if the application meets all applicable rules as promulgated by the district.
- (h) A water well exempted under Subsection (a) or (b) shall:
- (1) be registered in accordance with rules promulgated by the district; and
 - (2) be equipped and maintained so as to conform to the district's rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.
- (i) The driller of a well exempted under Subsection (a) or (b) shall file the drilling log with the district.
- (j) A well to supply water for a subdivision of land for which a plat approval is required by Chapter 232, Local Government Code, is not exempted under Subsection (b).
- (k) Groundwater withdrawn from a well exempt from permitting or regulation under this section and subsequently transported outside the boundaries of the district is subject to any applicable production and export fees under Sections 36.122 and 36.205.
- (l) This chapter applies to water wells, including water wells used to supply water for activities related to the exploration or production of hydrocarbons or minerals. This chapter does not apply to production or injection wells drilled for oil, gas, sulphur, uranium, or brine, or for core tests, or for injection of gas, saltwater, or other fluids, under permits issued by the Railroad Commission of Texas.

EXHIBIT B

ORDER OF PRIORITY FOR RESOLVING CONFLICTS BETWEEN GCD RULES AND CHAPTER 36 (from the lowest priority at the bottom to the highest priority at the top)	
1	Sections 36.107-36.108 [part of the Powers and Duties of a GCD] Sections 36.159-36.161 [part of GCD Finances] Subchapter I [Performance Review and Dissolution of GCDs]
2	GCD Enabling Act Provisions
3	Water Code Chapter 36
4	TCEQ Order Forming GCD
5	GCD Rules

EXHIBIT C

**ESTIMATED TOTAL WATER DECLINES
MAJOR AQUIFERS OF TEXAS**

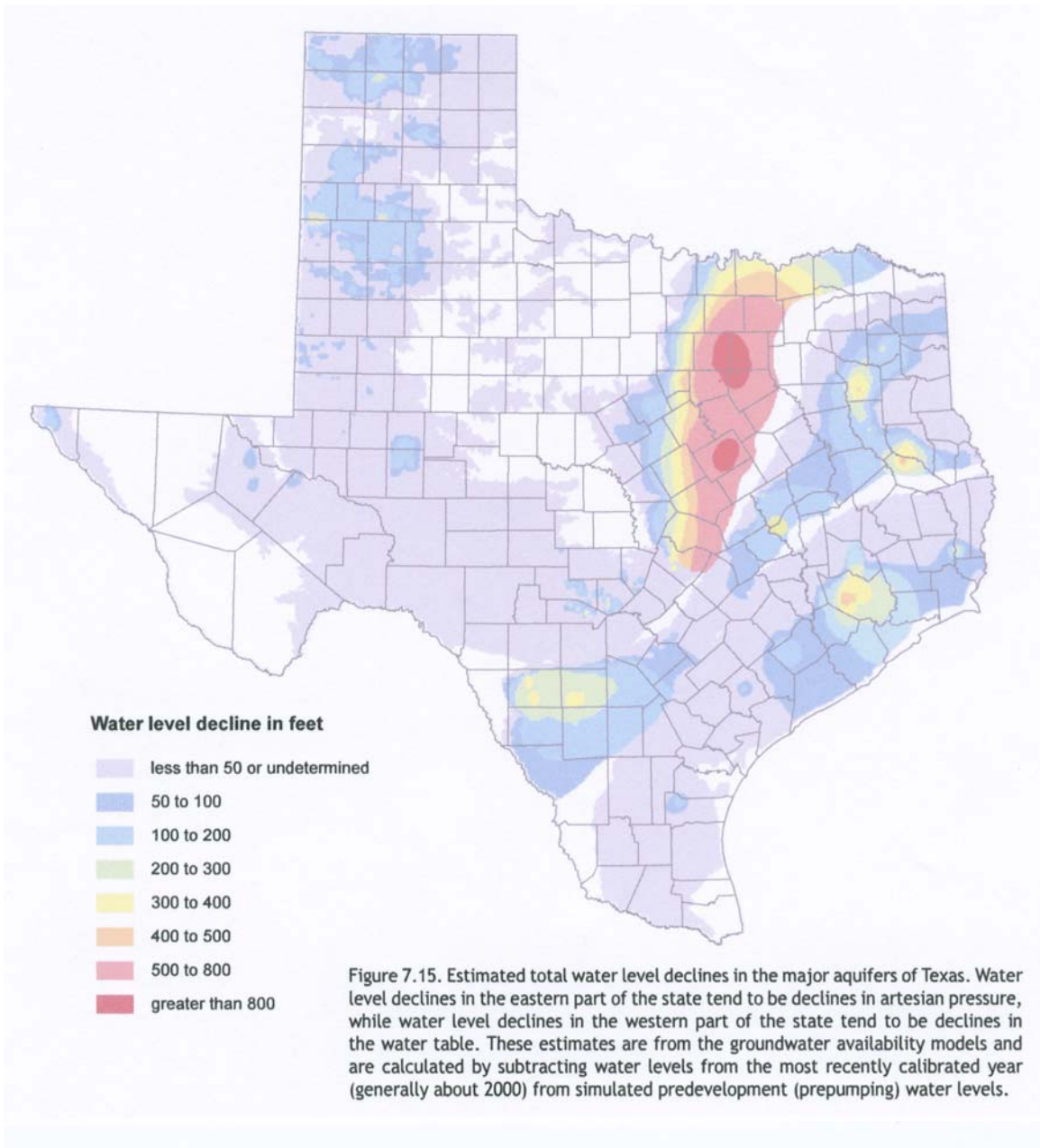


EXHIBIT D

THE PERFECT STORM

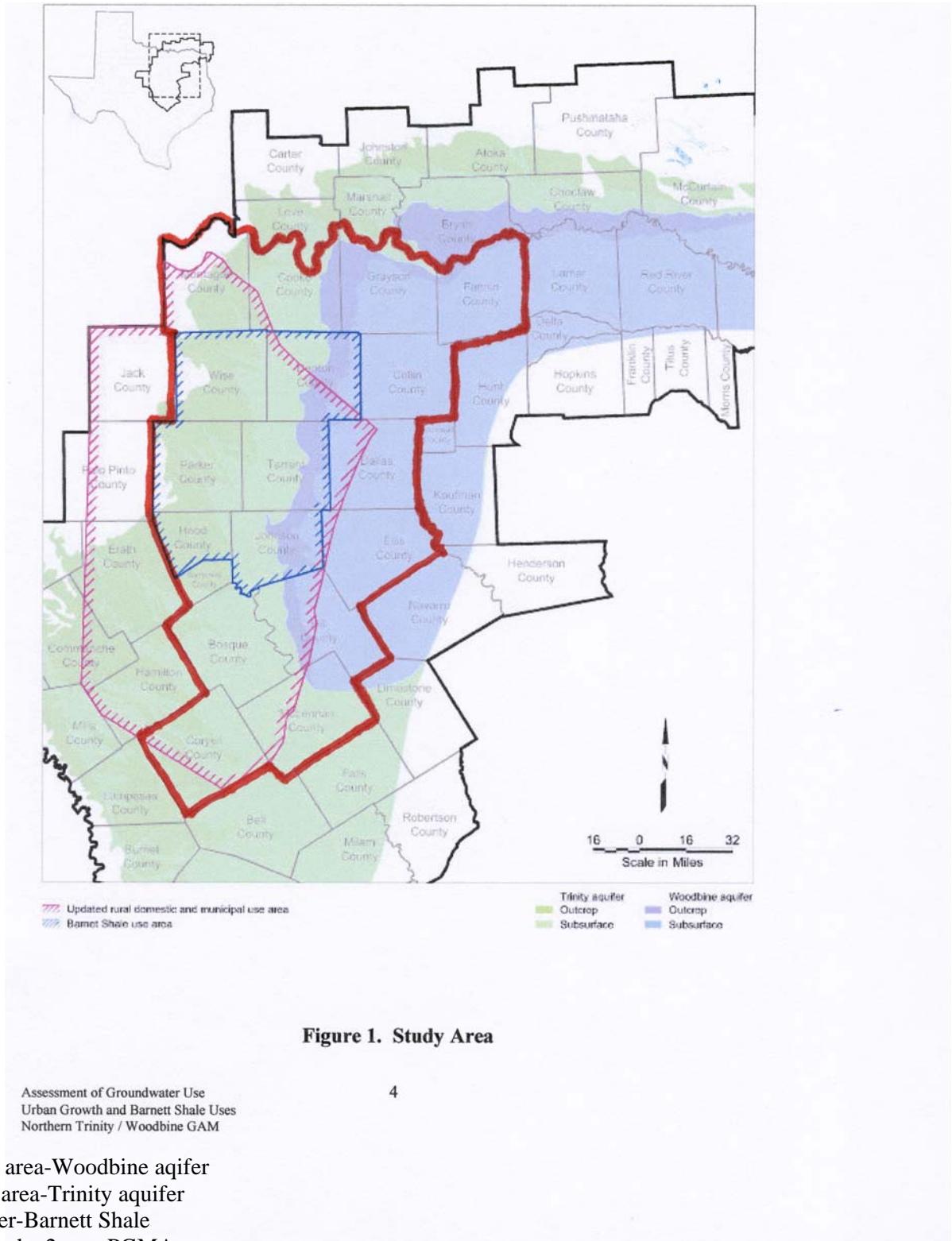


Figure 1. Study Area

Assessment of Groundwater Use
Urban Growth and Barnett Shale Uses
Northern Trinity / Woodbine GAM

Purple shaded area-Woodbine aquifer
Green shaded area-Trinity aquifer
Magenta border-Barnett Shale
Orange border-the 2 new PGMA

Harden Study, p. 4