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OPEN RECORDS DIVISION

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July 14, 2011

VIA CERTIFIED MAIL/
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FILE # ML-46787-11
I.D. # 46787

The Honorable Greg Abbot
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0985-GA

Re: Changes to § 36.121, Water Code, made by HB 2702 and HB 3109

Dear Attorney General Abbot:

Chapter 36, Water Code, is Texas' general law governing the powers and duties of groundwater conservation districts. Chapter 36 includes § 36.121 ("Limitation on Rulemaking Power of Districts Over Wells in Certain Counties"), which provides a limitation on the rulemaking power of certain groundwater conservation districts over wells and water produced by such wells that meet certain specified criteria.

The 82nd Texas Legislature enacted two laws – HB 2702 and HB 3109 – each of which purport to amend § 36.121 with respect to criteria for whether a well is covered by the exemption from regulation set forth in § 36.121.

Pursuant to § 402.043 Government Code, I respectfully ask that you provide a formal written opinion regarding the following question:

Are the amendments to § 36.121 set forth in HB 2702 that add new floors to the criteria that govern whether a well is covered by § 36.121's exemption from regulation by certain groundwater conservation districts legally effective, or are they of no effect on the grounds that they conflict with the amendment to § 36.121 set forth in HB 3109?

The answer to this question potentially affects whether the Brewster County Groundwater Conservation District (BCGCD) may regulate certain wells within Brewster County.

Background/Facts

1. **Section 36.121 – As it Existed Prior to the 2011 Legislative Session**

Prior to the 2011 legislative session, § 36.121 stated as follows:

Except as provided by Section 36.117, a district that is created under this chapter on or after September 1, 1991, shall exempt from regulation under this chapter 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 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 district was created, regardless of the date the well is drilled or the water is produced. The district may not prohibit the political subdivision or municipality from transporting produced water inside or outside the district's boundaries.

Thus, under § 36.121, as it existed prior to the 2011 legislative session, certain groundwater conservation districts (those created on or after September 1, 1991), may not regulate a well located in a county with a population of 14,000 or less if: (a) the water from that well is used solely to supply a municipality that has a population of 121,000 or less; (b) the rights to the water from that well are owned by a municipality that has a population of 100,000 or less; and (c) a political subdivision or a municipality that has a population of 100,00 or less, purchased, owned or held rights to the water before the date on which the district was created.

2. **Amendments to § 36.121 by the 82nd Texas Legislature**

During the 82nd regular session, the Texas Legislature passed two separate laws amending § 36.121. These laws are:

- HB 3109 (Act of May 29, 2011, 82nd Leg., R.S., Ch. 1042, § 1); and
- HB 2702 (Act of May 27, 2011, 82nd Leg., R.S., Ch. 1163, § 181).¹

A. **HB 3109**

HB 3109 amends § 36.121 as follows:

Except as provided by Section 36.117, a district that is created under this chapter on or after September 1, 1991, shall exempt from regulation under this chapter 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

¹ A copy of HB 2702 and HB 3109 is enclosed.

municipality that has a population of 121,000 or less and the rights to the 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 115,000 [~~100,000~~] or less, and that purchased, owned, or held rights to the water before the date on which the district was created, regardless of the date the well is drilled or the water is produced. The district may not prohibit the political subdivision or municipality from transporting produced water inside or outside the district's boundaries.

B. HB 2702

HB 2702 amends § 36.121 as follows:

Except as provided by Section 36.117, a district that is created under this chapter on or after September 1, 1991, shall exempt from regulation under this chapter 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 but greater than 100,000 and the rights to the 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 115,000 [~~100,000~~] or less but greater than 100,000, and that purchased, owned, or held rights to the water before the date on which the district was created, regardless of the date the well is drilled or the water is produced. The district may not prohibit the political subdivision or municipality from transporting produced water inside or outside the district's boundaries.

In addition, HB 2702, Section 201(b) states as follows

To the extent that a law enacted by the 82nd Legislature, Regular Session, 2011 conflicts with this Act, the other law prevails, regardless of the relative dates or enactment or the relative effective dates.²

Position of Requestor

It is the position of the requestor that the amendments to § 36.121 set forth in HB 2702 that add new minimum population levels to the criteria that govern whether a well is covered by § 36.121's exemption from regulation by certain groundwater conservation districts are legally effective.

Argument and Authorities

- HB 2702 and HB 3109 are to be read together such that the minimum population criteria of HB 2702 supplement the maximum population criteria.

² Act of May 27, 2011, 82nd Leg., R.S., Ch. 1163, § 201.

Texas Water Code Section 36.121 provides for exemption of certain wells under two different scenarios, with each scenario requiring four criteria to be met. The first criteria is that groundwater conservation district in which the well is located must have been created on or after September 1, 1991. The second criteria is that the well must be located in a county with a population of 14, 000 or less. The third criteria is that the water from the well is to be used solely by a municipality with a population of 121,000 or less, and under HB 2702, not greater than 100,000. The fourth criteria may be met under one of two options, the first being that the rights to the water produced from the well are owned by a political subdivision that is not a municipality. The second option under the fourth criteria is that the rights to water produced from the well are owned by a municipality that has a population of, according to both HB 3109 and HB 2702, 115,000 or less, (both bills raised this criteria from 100,00 to 115,000) and under HB 2702, a population greater than 100,000.

The rule of statutory construction that seems most applicable to this situation is that of *in pari materia*, which governs situations where two statutes are of the same subject. The rule of *in pari materia* is that two statutes of the same subject are to be taken together and construed in reference to each other, such that, if practicable, the effect of legislative intent is given to both.³ The rule applies with particular force to acts passed in the same legislative session. *See id.* "It is presumed that contemporaneous statutes are actuated by the same policy and imbued by the same spirit. Accordingly, they will be read together, each in the light of the other, as though they were embraced in one act or were supplementary to each other. The several acts will be harmonized, and each will be upheld and given effect unless their provisions are absolutely repugnant."⁴

Applying the *in pari materia* doctrine, with the acts being read together and giving full effect to legislative intent of each, the additional minimum population criteria for municipalities in HB 2702 supplements the maximum population criteria. This supplementation creates a bracket encompassing, as to municipalities using water from the potentially exempt well, those with a population of 121, 000 or less but greater than 100,000, and as to municipalities that own rights to produce water from the potentially exempt well, those with a population of 115,000 or less but greater than 100,000.

Municipalities of population less than 100,000, seeking to be exempt from regulation of groundwater conservation districts, may argue that there is a conflict in these statutes, in that if only HB 3109 was given effect those municipalities would meet the requirements of criteria three and four. In the event of a conflict, the duly passed legislative amendments to Section 36.121 contained in HB 2702⁵ would be given no effect and impliedly repealed. In this instance, to not

³ *See State v. Dyer*, 200 S.W.2d 813, 817 (Tex. 1947).

⁴ *See Cheney v. State*, 487 S.W.2d 750, 751 (Tex. Crim. App. 1972).

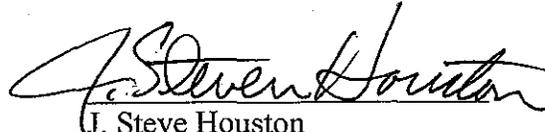
⁵ We will provide further briefing on the distinction between the two amendments to 36.121 made by HB 2702 and the effect of each on the potential conflict, specifically in that HB 3109 only raises the ceiling with respect to the criterion regarding the population of the municipality owning the rights to the water from the well in question. It does not similarly raise the ceiling with respect to the criterion regarding the size of municipality being supplied by the well. Therefore, even if there is a conflict between HB 3109 and HB 2702 with respect the criteria regarding the population of the municipality owning the water rights, there is no conflict between HB 3109 and HB 2702 with respect to the

give effect to HB 2702 would violate standard principles of statutory construction.⁶

Conclusion

It appears that proper statutory construction gives effect to the amendments to Section 36.121 made by both HB 3109 and HB 2702. I do not believe these two acts to be in conflict and respectfully request your opinion regarding this issue. Please note that I will provide further briefing and argument for your consideration of this issue, yet this question is of such critical importance to groundwater regulation in our county I felt it imperative that this request for opinion be submitted as soon as possible.

Respectfully submitted,



J. Steve Houston
Brewster County Attorney

criteria regarding the population of the municipality being supplied by the well.

⁶ See Tex. Govt. Code. Ann. § 311.025(b) (“amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each.”).