

GROUNDWATER MANAGEMENT AREA 12:  
CONSIDERATION OF THE IMPACT ON  
THE INTERESTS AND RIGHTS  
IN PRIVATE PROPERTY  
IN THE ADOPTION OF  
DESIRED FUTURE CONDITIONS OF AQUIFERS

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## Required DFC considerations in Section 36.108(c):

- (d) ...the districts shall consider groundwater availability models and other data or information for the management area and shall propose for adoption desired future conditions for the relevant aquifers within the management area. Before voting on the proposed desired future conditions of the aquifers under Subsection (d-2), **the districts shall consider:**
- (1) aquifer uses or conditions within the management area, including conditions that differ substantially from one geographic area to another;
  - (2) the water supply needs and water management strategies included in the state water plan;
  - (3) hydrological conditions, including for each aquifer in the management area the total estimated recoverable storage as provided by the executive administrator, and the average annual recharge, inflows, and discharge;
  - (4) other environmental impacts, including impacts on spring flow and other interactions between groundwater and surface water;
  - (5) the impact on subsidence;
  - (6) socioeconomic impacts reasonably expected to occur;
  - (7) **the impact on the interests and rights in private property, including ownership and the rights of management area landowners and their lessees and assigns in groundwater as recognized under Section 36.002;**
  - (8) the feasibility of achieving the desired future condition; and
  - (9) any other information relevant to the specific desired future conditions.

(d-2) The desired future conditions proposed under Subsection (d) must provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater and control of subsidence in the management area. This subsection does not prohibit the establishment of desired future conditions that provide for the reasonable long-term management of groundwater resources consistent with the management goals under Section 36.1071(a).

GMA 12's consideration of the impact of proposed DFCs on the interests and rights in private property, is one of many considerations that the GMA must make in developing a DFC that **provides a balance between the highest practicable level of groundwater production and the conservation.**



In the first round of DFCs, the impact of the DFC on private property was one of TWDB's considerations to determine if the DFC was reasonable.



Since then, Texas has further defined groundwater property rights—in both statute and case law.



And amended §36.108 to require an Explanatory Report that documents the nine considerations, including the “impact on the interests and rights in private property.”

# Explanatory Report Required

GMAAs are required to document their consideration of the §36.108(d) factors (including impacts on private property) in an explanatory report that will be given to the TWDB with the proposed DFCs submittal package.

Under 36.109(d-3) the explanatory report shall:

- (1) identify each desired future condition;
- (2) provide the policy and technical justifications for each desired future condition;
- (3) **include documentation that the factors under Subsection (d) were considered by the districts and a discussion of how the adopted desired future conditions impact each factor;**
- (4) list other desired future condition options considered, if any, and the reasons why those options were not adopted; and
- (5) discuss reasons why recommendations made by advisory committees and relevant public comments received by the districts were or were not incorporated into the desired future conditions.

# In 2011, the 82<sup>nd</sup> Texas Legislature modified groundwater law by redefining the ownership of groundwater:

**Sec. 36.002. OWNERSHIP OF GROUNDWATER.** (a) The legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property.

(b) The groundwater ownership and rights described by this section [~~:(+)~~] entitle the landowner, including a landowner's lessees, heirs, or assigns, to:

(1) drill for and produce the groundwater below the surface of real property, subject to Subsection (d), without causing waste or malicious drainage of other property or negligently causing subsidence; and

(2) have any other right recognized under common law.

(b-1) The groundwater ownership and rights described by this section do [~~, but does~~]  
not:

(1) entitle a landowner, including a landowner's lessees, heirs, or assigns, to the right to capture a specific amount of groundwater below the surface of that landowner's land; or [~~and~~]

(2) [~~do not~~] affect the existence of common law defenses or other defenses to liability under the rule of capture.

(c) Nothing in this code shall be construed as granting the authority to deprive or divest a landowner, including a landowner's lessees, heirs, or assigns, of the groundwater ownership and rights described by this section.

## **Sec. 36.002. OWNERSHIP OF GROUNDWATER.**

(d) This section does not:

- (1) prohibit a district from limiting or prohibiting the drilling of a well by a landowner for failure or inability to comply with minimum well spacing or tract size requirements adopted by the district;
- (2) affect the ability of a district to manage groundwater production as authorized under Section 36.113, 36.116, or 36.122 or otherwise under this chapter or a special law governing a district; or
- (3) require that a rule adopted by a district allocate to each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres owned by the landowner.



**In 2012, the Texas Supreme Court affirmed the Texas Legislature's recognition of groundwater as a real property right in the case of The Edwards Aquifer Authority v. Burrell Day and Joel McDaniel.**



The Texas Supreme Court ruled that, under both the common law and the Section 36.002 of the Texas Water Code, a landowner owns the groundwater under his land "in place" as a property right that cannot be taken for public use without adequate compensation guaranteed by the Takings Clause of the Texas Constitution.



The State is empowered to regulate groundwater production.



Regulation is essential to groundwater conservation and use.

# What does this change in groundwater ownership law mean?

- Texas now recognizes both Rule of Capture and groundwater ownership as a real property right.
- Therefore, landowners have a statutory right to pump groundwater; although not a correlative right to pump a specific amount of groundwater.
- The tort preclusion aspects of Rule of Capture remain as they do in common law. Therefore, you cannot sue your neighbor for pumping your well dry in most circumstances.
- Recognizes that owners of groundwater rights must comply with groundwater district management if they are within the boundaries of a groundwater conservation district.
- Opens the door for a groundwater rights owner to challenge a groundwater district's rules and/or permits based on constitutional regulatory takings grounds.
- Lawyers can stop fighting over if groundwater is a property right and start fight over how much regulation constitutes a takings.

# Consideration of Potential DFC Impacts

- “Considerations” analyze how property rights could be impacted.
- Impacts  $\neq$  takings in this process
  - *this is NOT a takings impact analysis*
- A GMA must consider the rights of all owners of private property, including all owners of groundwater within the GMA. All interests, whether they favor highest practicable use or conservation, have property rights under the law.
- Impacts may be viewed as both restricting and enhancing property rights.
- Rules adopted by a District to achieve a DFC may have a potential impact on property rights

# Major GMA 12 Interests in Groundwater Rights

**Highest  
Practicable  
Use**

- Interests and rights that are benefitted or enhanced by the present use of groundwater.

- Interests and rights that are benefitted or enhanced by the use of groundwater in the near future.

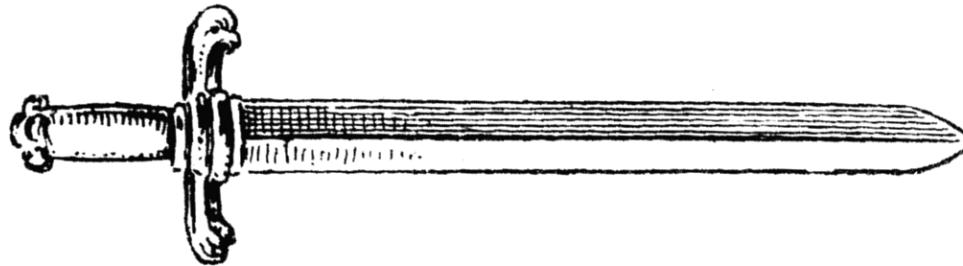
- Interests and rights that are benefitted or enhanced by the ability to use groundwater over the long-term.

- Interests and rights that are benefitted or enhanced by leaving a significant amount of groundwater in place.

**Conservation**

# How DFCs May Impact Interests in Real Property Including Groundwater

- A DFC that allows for lower aquifer levels could favorably impact property interests identified on the “highest practicable use” in the balance; while negatively impacting interests identified as “conservation”



- A DFC that aims for a higher aquifer levels could favorably impact property interests identified as “conservation” in the balance; while negatively impacting interests identified as “highest practicable use”

## Potential Impacts by District Rules to Achieve DFCs

Existing Rules that implement DFCs adopted by GMA 12 impact or affect private property rights by setting well spacing requirements and production limits.

Spacing Requirements impact where well owners can drill wells. Spacing requirements also impact neighboring property right holders by reducing interference between wells.

Production limitations currently exist in GMA 12 districts. These Rules are designed to prolong the groundwater supply and reduce impact on surrounding groundwater rights.

## Potential impacts on property rights of DFCs favoring “highest practicable production”:

- lenient production restrictions that allow existing users to produce more groundwater with less acreage.
- may allow groundwater supply and levels to meet needs.
- may endanger water supply and needs of future users.
- may increase interference between groundwater right owners.

## Potential impacts on property rights of DFCs favoring conservation, preservation, protection and recharging:

- increased production limits may require existing users to reduce groundwater production or acquire additional groundwater rights.
- may extend groundwater supply and levels to meet future needs.
- may extend the productive life of the aquifer.
- may minimize interference between groundwater right owners.



# Takeaway?

- Consideration of impact on Private Property Rights is one of many factors that have to be weighed to provide a balance between the highest practicable level of groundwater production and the conservation to provide for the reasonable long-term management of groundwater resources
- An impact does not mean a taking
- Impacts are a double-edged sword: a DFC that may benefit one property right owner may restrict another...hence the balancing act.

