

# LEMON, SHEARER, PHILLIPS & GOOD, P.C.



## DFC IMPACT ON PRIVATE PROPERTY

# DFC Impact on Private Property in GMA-1





# The Legislative Mandate



## Excerpts from TWC Section 36.108:



Section 36.108(d), Joint Planning in the Management Area, provides in pertinent part:



"Before voting on the proposed desired future conditions of the aquifers under Subsection (d-2), the districts shall consider:



(1) aquifer uses and conditions;



(2) water supply needs;



(3) hydrological conditions . . . annual recharge, inflows, and discharge;



(4) other environmental impacts . . . including impacts on spring flow;



(5) impact on subsidence;



(6) socio-economics reasonably expected to occur;



**(7) the impact on the interests and rights in private property, including ownership and the rights of management area landowners...in the groundwater as recognized under Section 36.002;"**



(8) the feasibility of achieving the DFC; and,



(9) any other relevant information to a specific DFC.

# Explanatory Report Required



Requirement to document – in the *DFC Explanatory Report* – that the Section 36.108(d) factors (including impacts on private property) were considered and how the adopted DFCs impact each factor.



The consideration of impacts on private property rights is a new concept for the GMAs.



However in 2010, if a petition was filed, the TWDB under its Rules, considered the impact on private property rights as one of the factors to determine if the adopted DFC was reasonable.

## Excerpts from TWC Section 36.002:



Section 36.002 Ownership of Groundwater, provides in pertinent part:



"(a) The legislature recognizes that a landowner owns the groundwater beneath the surface of the landowner's land as real property."

## Excerpts from TWC Section 36.002:



Section 36.002 Ownership of Groundwater, provides in pertinent part:



"(b) The groundwater ownership and rights described by this Section:



(1) entitle the landowner...to drill for and produce the groundwater subject to Subsection (d) but does not entitle the landowner the right to capture a specific amount of groundwater..."

## Excerpts from TWC Section 36.002 (cont.)



"(c) Nothing in this Code shall be construed as granting the authority to deprive or divest a landowner of the groundwater..."



## Excerpts from TWC Section 36.002: (contd.)



"(d) This Section does not:



(1) prohibit a district from limiting or prohibiting the drilling of a well...for failure or inability to comply with minimum spacing or tract size requirements..."



(2) affect the ability of a district to regulate groundwater production under Section 36.113 (Permitting), 36.116 (Spacing and Production Limits), or 36.122 (Export) or



(3) require that a rule adopted by a district allocate to each landowner a proportionate share of available groundwater based on the number of acres owned by the landowner."

# In *EAA vs. Day*, The Texas Supreme Court Sends a Variety of Signals Regarding Regulation by Groundwater Conservation Districts:



"Unquestionably, the State is empowered to regulate groundwater production."



"Regulation is essential to groundwater conservation and use."







The rule of ownership must be considered in connection with the law of capture and is subject to police regulation.

## *EAA vs. Day (contd.)*

- 🚰 Each landowner "owns separately, distinctly, and exclusively all the water under his land."
- 🚰 "Landowners do have a constitutionally compensable interest in groundwater."
- 🚰 "Groundwater rights are property rights subject to constitutional protection, whatever difficulties may lie in determining adequate compensation for a taking."

## Potential DFC Impacts

-  Any meaningful Rules adopted by a District to achieve a DFC may have a potential impact on property rights.
-  “Considerations” analyze how property rights could be impacted.
-  Impacts are not equated as “takings” in this process.
-  Impacts may be viewed as both restricting and benefitting property rights.

## Major GMA-1 Interest Groups who own Groundwater Rights



Property Interests and Rights Related to the Production and Conservation of Groundwater in GMA 1 include:



Interest 1: Interests and rights that are benefitted or enhanced by the present use of groundwater.



Interest 2: Interests and rights that are benefitted or enhanced by the use of groundwater in the near future.



## Major GMA-1 Interest Groups who own Groundwater Rights (contd.)






**Group 3:** Interests and rights that are benefitted or enhanced by the ability to use groundwater over the long-term.




**Group 4:** Interests and rights that are benefitted or enhanced by leaving a significant amount of groundwater in place.


# How DFCs May Impact Interests in Private Real Property Including Groundwater

-  DFCs have been set for the Ogallala Aquifer by GMA-1 as a percentage of volume remaining in storage in 50 years.
-  A DFC that aims for a lower percentage of the current groundwater remaining in storage after 50 years could favorably impact Interests 1 and 2.
-  A DFC that aims for a higher percentage of the current volume of groundwater remaining in storage after 50 years could favorably impact Interests 3 and 4.

## DFCs – Rules – Impact on Private Property Rights

 DFCs are goals the GMA proposes to achieve for the relevant aquifers within the GMA in 50 years.

 The Rules adopted by each District to achieve the DFCs set by the GMA, and the Districts' permitting and other decisions made under those Rules, appear to be the potential "impacting" forces on private property rights in groundwater.

 Current district Rules do impact groundwater rights in various ways, including well spacing and production limits.

# Balancing of Private Property Interests





By statute and under *EAA vs. Day*, all landowners have constitutionally protected property rights in groundwater beneath their property.



A GMA must consider the rights of all owners of private property including all owners of groundwater within the GMA. All four identified Interests have the potential to be “impacted” by groundwater regulation (or the absence of regulation).

## Potential Impacts by Rules to Achieve DFCs

-  Existing Rules that implement DFCs adopted by GMA-1 in 2010 impact or affect private property rights by setting well spacing requirements and production limits.
-  Spacing Requirements impact where landowners may drill wells. Spacing requirements may also positively impact the property interests of neighboring landowners by reducing the potential for interference between wells.



# Potential Impacts by Rules to Achieve DFCs



Production limitations currently exist in most GMA-1 districts. Such Rules are designed to prolong the groundwater supply and reduce the drainage of groundwater owned by neighboring landowners.

## Potential Impacts by Rules to Achieve DFCs (cont.)



GMA-1's DFCs “must provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater . . . .”

## Potential Impacts by Rules to Achieve DFCs (cont.)

- 🚰 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.
  - 🚰 endangers water supply and needs of future users.
  - 🚰 escalated production will increase drainage of groundwater from neighboring landowners.

## Potential Impacts by Rules to Achieve DFCs (cont.)

- 🚰 Potential impacts on property rights of DFCs favoring conservation, preservation, protection and recharging:
  - 🚰 increased production limits may force 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.

## Potential Impacts by Rules to Achieve DFCs (cont.)



The GMA is expressly allowed to adopt DFCs for the “establishment of desired future conditions that provide for the reasonable long-term management of groundwater resources . . . .”



## RECAP



The GMA must consider the impact of GMA-1 DFCs on private property rights in groundwater as recognized under Texas Water Code Section 36.002:



Owners are entitled to drill for and produce groundwater (subject to regulation by groundwater conservation districts);



Owners are not entitled to capture a specific amount of groundwater; and,

## RECAP (cont.)



Section 36.002 does not grant a groundwater conservation district the authority to deprive or divest an Owner of the rights described by Section 36.002;



It is unlikely that GMA-1 DFCs will result in an Owner being prohibited from drilling for and producing groundwater; and,



It is unlikely that GMA-1 DFCs will result in an Owner being deprived or divested of groundwater rights described in Section 36.002.

## Conclusion



Different DFCs, Rules, and policy decisions by the Districts within the GMA may impact private property rights differently.



Each District's Rules and the implementation thereof, may have more potential to "impact" property rights in groundwater than DFCs.

# Questions

