

## **Agenda Item #10**

*Discussion and consideration of 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 Texas Water Code Section 36.002, as required by Texas Water Code Section 36.108(d)(7).*

For your reference, Texas Water Code Section 36.002 states:

*(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:*

*(1) entitle the landowner, including a landowner's lessees, heirs, or assigns, to 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, but does not 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; 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.*

*(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 regulate 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.*

*(e) This section does not affect the ability to regulate groundwater in any manner authorized under:*

*(1) Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, for the Edwards Aquifer Authority;*

*(2) Chapter 8801, Special District Local Laws Code, for the Harris-Galveston Subsidence District; and*

*(3) Chapter 8834, Special District Local Laws Code, for the Fort Bend Subsidence District.*

As with the other required factors included in Texas Water Code Section (TWC) 36.108(d)(1 -9), the procedural requirements during the joint-planning process of TWC 36.108 (d)(7) are not prescribed in statute nor do TWDB rules provide and additional guidance.

A suggested list of topics for each district to consider as we begin to develop DFCs, in light of the private property rights factor, includes:

- Existing uses within the GCD
- Projected future uses within the GCD
- Investment-backed expectations of existing users and property owners within the GCD
- Long-term viability of groundwater resources in area
- Availability of water to all properties and ability to allocate MAG through rules after DFC adoption
- Whether immediate cutbacks would be required in setting a particular DFC or whether cutbacks, if any, would need to occur over a certain timeframe
- For outcrop areas, how the outcrop depletes rapidly in dry times, and whether drought rules or triggers based on the DFC/MAG for the outcrop could be beneficial to ensure viability of the resource during dry times
- Economic consequences to existing users (i.e., cost to drop pumps, reconfigure or drill new wells upon water table dropping, etc...). Also consider the reverse—economic consequences of less water available to protect the existing users from the economic consequences relevant to existing users—reaching a balance between these two dynamics
- Reviewing the sustainability run versus additional runs that provide for more pumping from aquifer, and how those two differ with respect to private property rights
- Those GCDs with existing rules developed based on the current DFC might find it helpful to review the rules that the GCD considers relevant as we work to adopt DFCs over the next 2 years. For example, the rules and Management Plan in place based on the current DFCs can help determine how a GCD currently impacts

private property rights and whether those same interests are important as we work to adopt DFCs over the next 2 years

- Focusing on finding a balance, as that balance is defined by each GCD, between all of these considerations

This is intended to be a list for discussion as we begin the process, so each GCD should feel free to consider other items within the private property rights discussion that might be important to a particular GCD that go beyond this list. This list and other items considered relevant by a GCD are points that each GCD should keep in mind as we develop the DFCs during this round of joint planning.

I will be asking each GCD to develop a written summary of how the proposed DFCs that we will be developing over the next several months impact private property rights within the GCD. I intend to incorporate some or all of the text from these summaries into the explanatory report. Of course these summaries will not be completed until we have actual DFCs that are being considered and reviewed under the 9 factors, but I wanted to frame up this discussion since I have received several questions on it already. Again, this discussion today is an initial review for purposes of framing up how we will work on this private property rights factor going forward.