

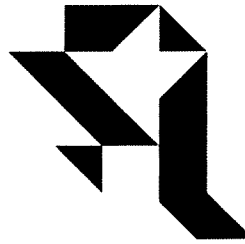
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**S A N D O W
L A K E S**

December 12, 2024

Gary Westbrook
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**Re: Comments on GMA 12's Desired Future Conditions for December 13, 2024
Joint Planning Meeting**

Dear Groundwater Management Area 12 Members:

SLR Property I, LP ("SLR") appreciates this opportunity to provide the members of Groundwater Management Area 12 ("GMA 12") with comments on the joint planning process for adopting desired future conditions ("DFCs"). SLR supports GMA 12's efforts to carefully consider each of the nine required statutory elements before proposing a DFC. DFCs are policy decisions. But the statutory framework requires that they be formed—and informed—by application of scientific fact, reason, and law.

To aid GMA 12 in its considerations, SLR offers the following comments on two of the statutory elements: Element 7 (interests and rights in private property) and Element 6 (socioeconomic impacts). SLR welcomes the chance to engage with GMA 12 on these important topics.

A. Element 7: Impact on the Interests and Rights in Private Property

Texas law recognizes that private property rights in groundwater include both a landowner's ownership of groundwater in place, Tex. Water Code § 36.002(a), *and* the landowner's ability to "produce th[at] groundwater." Tex. Water Code § 36.002(b)(1). Proper evaluation of the seventh DFC-setting consideration—"the impact on the interests and rights in private property"—must therefore encompass both of these facets. Tex. Water Code § 36.108(d)(7).

In discussing Element 7, we first lay out Texas's legal framework of groundwater ownership. Then, we offer a simple, but important, change that GMA 12 can make in setting the DFCs that will respect private property rights in groundwater.

i. *A DFC must respect the private ownership of water in aquifers.*

Unlike surface water and the beds and banks of state watercourses, groundwater is private property. Neither GMA 12 nor the five groundwater conservation districts (“GCDs”) that comprise it hold title to the groundwater within the GMA boundaries. Individual landowners do. And these individual landowners have different ideas for how to exercise their groundwater rights. Some landowners may want to produce this water to support their house and ranch; others, like SLR, may want to produce it to support the economic development of their property and the vitality of their community. In accordance with the law, any DFCs selected by GMA 12 should encourage the exercise of these private property rights. To do that, GMA 12 must strike a balance that accords with the law, as set by the Texas Legislature and interpreted by the Texas courts.

The Texas Legislature directs GMAs to select DFCs that 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.” Tex. Water Code § 36.108(d-2) (emphasis added). On the face of the statute, the Legislature indicated a hierarchy of interests: it decided that “groundwater production” should receive the “highest” practicable weight, balanced against other considerations that have no similar emphasis. While the highest practicable level of groundwater production must be considered in the context of other enumerated interests—such as prevention of waste and conservation—the law favors production.

Regarding prevention of waste, the Legislature mandates that groundwater be “put to beneficial [i.e., non-wasteful] use at all times,” and only water so used may be pumped from the ground. Tex. Water Code § 36.1131(b)(5). By authorizing the production of groundwater only when it can be beneficially used—not wasted—the Legislature provides a backstop. This backstop allows GMAs (and GCDs) to encourage production of privately owned groundwater to the “highest practicable level,” secure in the knowledge that such production will not result in waste.

Regarding conservation, GMAs must examine the unique characteristics of the aquifers within their boundaries before defaulting to non-production (or lower production) in the name of conservation. Some aquifers readily recharge; others do not. Guarding production from the Ogallala Aquifer, with its nearly nonexistent recharge, may be reasonable; but applying a similarly protectionist approach to the Carrizo-Wilcox Aquifer, which recharges at a more substantial rate, is not. Moreover, individuals pumping the Carrizo-Wilcox utilize only a small fraction of the entire storage of the aquifer. Therefore, a DFC for the Carrizo-Wilcox Aquifer that accommodates significant groundwater production would still harmonize with the GMA’s “conservation” obligations.

Like the Legislature, Texas state courts have repeatedly emphasized Texas’s respect for private property rights in groundwater. We know from case law that groundwater in Texas is the “exclusive property” of the overlying landowner,¹ who owns this property in place (i.e., before capture).² The Legislature struck a balance between groundwater production and conservation—

¹ *Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927).

² *Edwards Aquifer Auth. v. Day*, 369 S.W. 814, 832 (Tex. 2012).

just as GMAs are directed to do via DFCs—by tempering the rule of capture with a prohibition on waste.³ But, fundamentally, landowners who wish to produce their groundwater for a (beneficial) purpose may do so, so long as they conserve the resource by not wasting it. Like the Texas Legislature, Texas courts have repeatedly confirmed that the groundwater property right most protected by law is the right to *produce* one’s groundwater.

Texas law sets forth, for each GMA, how to consider “impact on the interests and rights in private property,” when setting DFCs. Whatever the numerical value of a DFC—and how that value changes over time—the GMA must adhere to Texas’s statutory and common law in choosing the DFC, and in doing so protect the highest practicable level of groundwater production, along with landowners’ attendant rights to produce their groundwater.

ii. *DFCs should not assume non-production of groundwater.*

When setting DFCs based on modeled groundwater production, a GMA should be careful not to assume that permitted groundwater will not be produced to its full authorized amount. Assuming non-production of permitted groundwater artificially depresses the baseline of groundwater production and creates a false presumption: the *non-exercise* of private property rights. Absent curtailments, GMAs and GCDs do not get to decide if, when, or how an individual groundwater owner will exercise its permitted production rights for its privately owned groundwater.

SLR’s situation provides a clear example. SLR currently holds production permits within GMA 12 that authorize the production of 40,000 af/yr. The current GMA 12 DFCs were based, in part, on the 2017 assumption that Alcoa, the prior owner of SLR’s property, would not produce all the groundwater for which it was permitted. While SLR, who purchased the property in 2021, intends to make full use of its permitted production, the GMA’s modeling assumptions have never changed. The failure to right-size the modeling used to set the DFC (incorrectly) allows a GMA to set—or perpetuate—DFCs that will not be satisfied if landowners fully utilize their existing permitted production. There is no factual or hydrological problem with this. But, unless a DFC is changed to address this disconnect, a DFC risks impinging upon a landowner’s exercise of a fully-permitted, existing private property right.

Fortunately, DFCs are adaptable. GMA 12 can, and should, set its DFCs based on assumptions that consider total *permitted* production. Modeling and setting DFCs based on permitted, rather than actual, production better aligns with Chapter 36’s charge to GCDs, to issue permits “up to the point that the total volume of exempt *and permitted* groundwater production will achieve an applicable [DFC].” Tex. Water Code § 36.1132(a) (emphasis added). Because GCDs must consider *permitted* production in relation to the DFCs when issuing new permits, GMAs should also look at permitted production when *setting* the DFCs. Under such an approach, the GMA could (appropriately) achieve its DFC while supporting landowners’ exercise of both their permitted production authorizations and their underlying private property rights.

³ Tex. Water Code § 36.002(b)(1); see *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 801-02 (Tex. 1955); *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999); *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 832 (Tex. 2012).

B. Element 6: Socioeconomic Impacts Reasonably Expected to Occur

A GMA must also consider the “socioeconomic impacts reasonably expected to occur” when setting its DFCs. Tex. Water Code § 36.108(d)(6). A DFC should reflect what the Legislature repeatedly emphasizes—the positive socioeconomic impacts associated with groundwater production—embodied, for instance, by the directive that GCDs “shall issue [production] permits up to the point that the total volume of exempt and permitted groundwater production will achieve an applicable [DFC].” Tex. Water Code § 36.1132(a). Put another way, GCDs must authorize the maximum amount of production possible while achieving a DFC that is, itself, set to allow “the highest practicable level of groundwater production.” Tex. Water Code § 36.108(d-2).

Setting DFCs that accommodate, and even encourage, groundwater production, invites investment in development and the accompanying, positive, socioeconomic impacts. Attracting new development—whether that be residential housing, commercial, industrial, or otherwise—requires a secure water supply. In groundwater, like in surface water, a water supply must exist before development can follow. Water is a limiting resource for development in Texas. When individuals are looking to relocate to an area, they look for things that provide quality of life—such as schools, secure housing, transportation, reliable power, and available amenities—each of which requires a water supply. More specifically, whether it is chip manufacturing in Taylor or new subdivisions in Milam County, all require water before companies will make the serious commitment to invest, or people will make the thoughtful decision to move. With an established water supply, companies invest and people move, creating an economic engine.

The Texas Legislature understood that water supply precedes development: water supply planning in this state operates on a 50-year planning horizon. And GMA 12 has, historically, recognized the valuable, positive, indirect socioeconomic impacts of a DFC that accommodates groundwater production during this 50-year window. However, the positive impacts are also direct and immediate: a DFC that allows landowners to produce their privately-owned groundwater provides such individuals access to a tangible resource, bolstering their own socioeconomic position,⁴ independent of, and in addition to, the broader, indirect, positive impacts of groundwater production for the area and community.

Of course, the DFC-enabled socioeconomic impacts are not all positive. Large-volume production to support new development may draw down water levels in nearby smaller wells, with attendant impacts on that smaller well’s productivity. While this negative impact cannot be overlooked, it must be contextualized. Even with production permits in hand, Texas law simply does not allow groundwater production without a beneficial use for that water. Tex. Water Code § 36.1131(b)(5). The ramping up of production over time, and in stages, allows landowners, GCDs, and the GMA to plan for and respond to the negative socioeconomic impacts, such as on individuals’ wells, as a consequence of the production that drives new investment, new development, and the associated positive socioeconomic impacts.

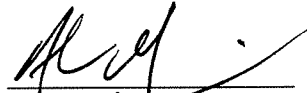
⁴ See, e.g., *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 152-53 (Tex. App.—San Antonio, 2013) (discussing the difference in value of two orchards with and without access to groundwater).

When considering socioeconomic impacts, GMA 12 should acknowledge that a DFC that accommodates new production will spur more positive than negative socioeconomic impacts. On the other hand, DFCs that are too restrictive risk deterring investment and funneling economic growth elsewhere.

* * *

SLR appreciates the opportunity to provide these comments and looks forward to continuing to work with GMA 12 in its DFC-setting process.

Respectfully,

A handwritten signature in black ink, appearing to read 'Alan Gardenhire', written over a horizontal line.

Alan Gardenhire
Vice President of
Operations
SLR Property I, LP