

SUBJECT: Management of groundwater and the ownership and right to produce it

COMMITTEE: Natural Resources — committee substitute recommended

VOTE: 9 ayes — Ritter, T. King, Beck, Creighton, Hopson, Larson, Lucio, D. Miller, Price

0 nays

2 absent — Keffer, Martinez Fischer

SENATE VOTE: On final passage, March 30 — 28-3 (Rodriguez, Watson, Zaffirini)

WITNESSES: For — Russell Boening, Texas Farm Bureau; Jim Conkwright, High Plains Water Conservation District; Herff Cornelius; Joseph Fitzsimons, Texas Wildlife Association; Justin Hodge, Chris Johns, Dawson, Sodd, Ellis, Hodge, LLP; Paul Hofer, Guitar Ranches; Russell Johnson, Landowner Coalition of Texas; Marvin Jones, Mesa Water; Joe Leathers, 6666 Ranch; James Lynch, CL Ranch; Laura Lynch, CL Ranch, Lynch Family Ranch Hudspeth County, TX; Ed McCarthy, Fort Stockton Holdings LP; John Melvin, Brazos Valley Groundwater Rights Association; Joe Parker, Jr., Texas and Southwestern Cattle Raisers Association; David Stratta; Roy Thomas, Texas Pacific Land Trust; C.E. Williams, Panhandle Groundwater Conservation District; (*Registered, but did not testify*: Mike Barnett, Texas Association of Realtors; Pete Bonds; Austin Brown; Wayne Brown; Curtis Chubb; Wayne Cleveland, Texas Grain Sorghum Producers Association; Jay Evans; Todd Fox; James Hayne; Robert Howard, South Texans' Property Rights Association; Ron Hufford, Texas Forestry Association; William Knolle; Steve Kosub, San Antonio Water System; Darron L. Kinkel; J. Pete Laney, Texas Association of Dairymen; Coleman Locke; Ben Love; Bonnie Lynch, CL Ranch; Mike McGuire, Rolling Plains Groundwater Conservation District; Morgan O'Connor, Texas Land and Mineral Owners Association; Stephen Salmon, Riverside and Landowners Protection Coalition; Dave Scott; Charles Sherron; Bill White; Josh Winegarner, Texas Cattle Feeders Association)

Against — Jim Allison, Refugio Groundwater Conservation District; Al Blair, Rio Grande Project Allocation Committee and El Paso County Water Improvement District #1; James Brasher, Colorado County Groundwater Conservation District; Gregory Ellis, Harris-Galveston Subsidence District and Texas Rice Producers Legislative Group; Jimmy Gaines, Texas Landowners Council; Ronald Gertson, Texas Rice Producers Legislative Group; Janet Guthrie, Hemphill County Underground Water Conservation District; Myron Hess, National Wildlife Federation; Ken Kramer, Lone Star Chapter, Sierra Club; Ronald Neighbors, Harris Galveston Subsidence District; Laura Raun, LR Farms; Charles Rhodes; Joe David Ross; Caroline Runge, Menard County Underground Water District and Hickory Underground Water Conservation District #1; Deborah Trejo; (*Registered, but did not testify*: Timothy Andruss, Victoria County Groundwater Conservation District; Clarence Clark; Cheryl Gilpin; Bill Graham; Karen Hadden, Sustainable Energy and Economic Development (SEED) Coalition; Neil Hudgins, Coastal Bend Groundwater Conservation District; Cathie McCown; Mike McGuire, Rolling Plains Groundwater Conservation District; Bob Meharg; Our Land Our Lives; Thomas Michel, Fort Bend Subsidence District; Jim Short, Harris County and Fort Bend County; Terry Simpson, San Patricio County and County Judge and Community Association; Beth Sturgeon, Board Member, Hemphill County Underground Water Conservation District)

On — Joe B. Allen, North Fort Bend Water Authority and West Harris County Regional Water Authority; Steve Bresnen, North Harris County Regional Water Authority; Joe Cooper, Lost Pines Groundwater Conservation District; Daniel Hodge, Attorney General's Office; Drew Miller; (*Registered, but did not testify*: Kirk Holland, Barton Springs/Edwards Aquifer Conservation District; Kathleen White, Texas Public Policy Foundation)

BACKGROUND: Groundwater, unlike surface water in lakes or streams, is privately owned and subject to the “rule of capture.” This rule, adopted by the Texas Supreme Court in 1904, vests landowners with an “absolute” right to withdraw water from beneath their land, without liability for injury to another landowner caused by excessive or harmful drainage.

Like other property, a landowner’s ownership interest in the groundwater below the land can be regulated and managed. Groundwater conservation

districts are granted the authority by the Legislature to modify how groundwater is captured to protect and conserve groundwater resources.

DIGEST:

Groundwater owned as real property. CSSB 332 would amend the Water Code by stating that the Legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property.

The groundwater ownership and rights would entitle the landowner, including lessees, heirs, or assigns, to drill for and produce the groundwater below the surface of real property without causing waste or malicious drainage of other property or negligently causing subsidence, but would not entitle a landowner to the right to capture a specific amount of groundwater below the surface of the land, and would not affect the existence of common law defenses or other defenses to liability under the rule of capture. The bill would delete the phrase "except as those rights may be limited or altered by rules promulgated by a district" in relation to the landowner's rights.

The bill would state that nothing in the law could be construed as granting the authority to deprive or divest a landowner of the groundwater ownership and rights.

CSSB 332 would not:

- 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 a groundwater conservation district;
- affect the ability of a groundwater conservation district to regulate groundwater production; or
- 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.

Exemptions. CSSB 332 would not affect the ability of the Edward Aquifer Authority, Harris-Galveston Coastal Subsidence District, or the Fort Bend Subsidence District to regulate groundwater.

Groundwater conservation district rules. CSSB 332 would add factors that a district would have to consider in adopting rules, including:

- groundwater ownership and rights;
- the public interest in conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and in controlling subsidence caused by withdrawal of water from those groundwater reservoirs or their subdivisions, consistent with the objectives of the Conservation Amendment (Art. 16, sec. 59) in the Texas Constitution; and
- the goals developed as part of the district's comprehensive management plan.

Effective date. The bill would take effect September 1, 2011.

**SUPPORTERS
SAY:**

The Texas Water Code, sec. 36.002 does not clearly define the ownership rights of landowners to groundwater. Therefore, CSSB 332 is necessary to reaffirm that landowners have an ownership interest in groundwater and a right to capture groundwater. This legislation would provide consistency in regulating this private property right.

CSSB 332 would address many of the concerns of the Senate-passed version of the bill by removing language regarding a landowner's "vested" ownership interest in groundwater. CSSB 332 would simply restate current case law regarding the property rights of land owners and the duties of groundwater conservation districts. The bill would provide guidance to the courts by declaring groundwater a real property interest. The bill also would clarify that groundwater is a manageable resource of the state, as declared by the Texas Constitution in the early 1900s. Management of this resource should be through local control, which the Legislature believes is vitally important to the interests of landowners. The bill also would clarify to what extent local groundwater conservation districts could manage the resource.

Despite concerns that the lack of clear meaning of the term "real property" in relation to groundwater would lead to additional court cases and additional takings claims, the Supreme Court has clearly stated that groundwater is part of the owner's land, so it is real property.

CSSB 332 would not lead to a flood of regulatory takings lawsuits from landowners and bankrupt groundwater conservation districts, as some have claimed. Such law in Texas is well settled, and the standards and procedures for determining a taking are well developed to protect the

interests of groundwater conservation districts and landowners. Regulation of and limitations on property rights do not automatically give rise to a valid takings claim. While landowners have a right to take legal action if they believe their rights have been unfairly restricted or taken, the burden of proof is on them, not the district. Landowners must meet a difficult legal standard in order to prove that their property has been taken. Most landowners are not able to meet these difficult standards and rarely win these takings suits. In addition, if a landowner sues a district and loses, the landowner must pay the attorney and expert witness fees of the district. This is not required of the district if the landowner wins. Therefore, a landowner would need to ensure that he or she had a good case to avoid losing money. All of these factors serve as deterrents to landowners to sue a district. CSSB 332 would not change that.

OPPONENTS
SAY:

CSSB 332 is much improved by the removal of language in the Senate-passed version regarding a landowner's "vested" ownership interest in groundwater. However, CSSB 332 still would provide that groundwater is a real property interest. There has never been a clear understanding of what the term real property, as it relates to groundwater, means in practice. This could lead to additional court cases to determine what real property really means as well as to additional takings claims.

Establishing something so definitive as real property could increase the number of cases brought by landowners in takings claims. Even if guidelines for groundwater districts were established, by stating a real property right the landowner would have a stronger argument that a groundwater district action was a taking and that the landowner needed to be compensated for loss of value. Takings claims could bankrupt a district and make it difficult for it to operate.

The language of the bill states that a district would not be prohibited from limiting the drilling of a well by a landowner for failure or inability to comply with well spacing. The use of the word "prohibit" is limiting and should say "affect" instead. This would give greater authority to the district.

OTHER
OPPONENTS
SAY:

CSSB 332 is unnecessary because it would simply restate current case law regarding the property rights of land owners and the duties of groundwater conservation districts.

NOTES:

The House committee substitute made numerous changes to the Senate-passed version of the bill, including:

- stating that the Legislature recognized that a landowner owned the groundwater as real property, instead of that the Legislature recognized that a landowner had a vested ownership interest in the groundwater;
- specifying the rights of the landowner's lessees, heirs, or assigns, not just the landowner, in relation to the groundwater;
- stating that the rights entitled the landowner to drill for the groundwater, while the Senate-passed version would have stated that the vested ownership interest entitled the landowner to a fair chance to produce the groundwater;
- stating that nothing in the law could be construed as granting the authority to deprive or divest a landowner of the groundwater ownership and rights, while the Senate-passed version would have stated that nothing could be construed as granting the authority to deprive or divest a landowner of the ownership interest;
- adding language exempting certain subsidence districts and the Edwards Aquifer Authority.

According to the fiscal note, CSSB 332 would not have a significant fiscal impact on the state. There could be a fiscal impact on groundwater conservation districts, but it would vary depending on the number of lawsuits filed as a result of the provisions of this bill.