

## **SB 332: Relating to the vested ownership interest in groundwater beneath the surface and the right to produce that groundwater.**

In the first few days of the 2011 Texas legislative session, a bill was filed by Senator Troy Fraser that could affect groundwater availability and the flow of springs and streams throughout the Hill Country.

Senate Bill (SB) 332 addresses the significant issue of groundwater rights and groundwater regulation. This is not a simple issue; we all need to look carefully and consider what's best for rural landowners who become vulnerable when significant water resources are sold and shipped elsewhere. We need to consider what's best for our region, a unique place blessed with flowing springs and creeks that are often dependent on aquifers and a region experiencing a very high rate of growth in a fragile rural landscape.

The property right individual landowners have to groundwater has a long legal history in Texas and is intimately tied to our state water planning processes and regulatory structure. Because these issues are complicated and nuanced, any change in statutory language could have significant effects on groundwater use, regulation and planning throughout the Hill Country and the rest of Texas. These issues can also be very controversial, especially in a region that relies so heavily on groundwater. Because of the uncertain legal consequences of this proposed legislation, we urge our leadership to be very cautious.

HCA will gather ideas and resources to help Hill Country citizens understand groundwater rights and SB 332. Below is a brief explanation of the current regulatory environment and the changes SB 332, as introduced, would make. For more information about groundwater resources in the Hill Country, see [://www.hillcountryalliance.org/HCA/Groundwater](http://www.hillcountryalliance.org/HCA/Groundwater)

### *The Rule of Capture and Current Regulation*

Historically in Texas, landowners have the right to capture and use water beneath their land under a judicially created doctrine called the Rule of Capture, which dates back to 1904. Under the Rule of Capture, this right is realized when the water is actually captured (pumped) and put to a beneficial use. In exercising the Rule of Capture, the landowner using the water is generally not liable for harming anyone else – including any neighbor whose well runs dry because too much water has been pumped next door. (Today the Texas Supreme Court is considering further clarification of the Rule of Capture in the high profile *Edwards Aquifer Authority v. Day and McDaniel* case.)

The Texas Legislature in 1949 allowed for the creation of local Groundwater Conservation Districts (GCDs) to impose a regulatory structure on groundwater withdrawals. Under this structure, Texas aims to balance landowners' rights to use groundwater with an acknowledgment that adequate water is critical to our state's economy and quality of life. As the Legislature's preferred method of groundwater management, GCDs have the power to regulate groundwater pumping in different ways, responsive to

local aquifer characteristics and use patterns. Some GCDs require well spacing, in an attempt to prevent drawdown in one particular spot from negatively affecting other wells. In areas with heavy demand, some GCDs set pumping caps, limiting the amount of water that large users can draw. GCDs also work to determine the amount of water available in their area, in an attempt to ensure that we can correctly account for future water needs in water planning. In short, GCDs attempt to balance the many competing uses of groundwater on a locally governed basis and to manage, conserve and protect groundwater resources for the long term. Notably, wells that are capable of producing no more than 25,000 gallons per day and are for domestic and livestock use only are generally exempt from permitting.

### *What Does SB 332 Change?*

SB 332's most significant aspect can be summed up in three words: "vested ownership interest," which the bill uses to define the nature of the interest that a landowner has in groundwater. Current law already recognizes a landowner's property interest in groundwater beneath the owner's land, and GCDs consider this interest in managing the resource. SB 332 could be interpreted to go beyond the Rule of Capture — even to change it in a fundamental way — by setting up a system where a landowner's groundwater right would "vest" while the water is still underground, or "in place." This has the potential to dramatically alter not only the Rule of Capture, but also the role of GCDs in regulating water use and preserving future supplies.

In order to fulfill the role of truly protecting water supply for the long term, GCDs sometimes limit groundwater pumping. Many GCDs, particularly those in high demand areas, are struggling to prevent water from being withdrawn faster than it is restored ("aquifer mining"). Aquifer mining can result in a steep drawdown of the water table over time, adversely affecting existing well users and even reducing the flow of aquifer-fed springs. Reasonable pumping restrictions are vital to protecting overall supplies for the long term and preventing existing wells from going dry. These pumping limitations also have other important benefits, including maintaining flows for the many springs and creeks that characterize the Hill Country, contributing to our quality of life and strong property values.

### *How Does This Affect Water Use, Management, and Planning?*

If the groundwater right is "vested," the ability of GCDs to limit groundwater pumping and protect the long-term sustainability of aquifers may be significantly affected, depending on how the language is interpreted by GCDs and the courts. A vesting rule carries with it the possibility of making regulation financially prohibitive for the local GCDs. Addition of this new language to the Water Code could result in uncertainty and litigation, particularly from well-financed water marketers who are attempting to consolidate large amounts of groundwater rights for export to cities. Most GCDs already go to great lengths to balance the rights of local farmers, ranchers and other groundwater users with the need to reasonably protect aquifers. Passage of SB 332 could make regulation financially prohibitive for GCDs and undermine investments already made by existing well users who have been operating under the current system of GCD regulation.

Some GCDs are concerned that they would be open to unlimited protests from individuals, including water speculators, seeking to be compensated for "unreasonable" pumping restrictions, since a restriction could then be viewed as limiting their property right to water that remains unused underground.

If GCDs lose their ability to regulate groundwater pumping or the financial wherewithal to operate effectively, our entire regulatory process may be in jeopardy.

Water planning could also be significantly affected by the proposed legislation. Texas performs water supply planning at the regional level. These regional planning groups project future needs, evaluate available supplies and recommend water supply strategies in areas with identified shortages. Regional water planning is intimately connected to another on-going process designed to establish future water availability conditions in the state's aquifers (desired future conditions or DFCs). In order to accurately plan for the future, we need to know how much water we will use, how much is reliably available, where it will come from, and what impacts are involved.

A critical element of water planning is establishing a predictable trajectory of groundwater use. Addressing water shortages through regulatory tools like reasonable pumping limits is a mechanism that provides options for regions like ours that have rapidly growing populations and limited water supplies. The statutory changes outlined in SB 332 would introduce significant uncertainty into the regional water planning process, which could also have trickle-down effects on surface water rights, land values of ranches that contain streams (and general land values too), and maintenance of environmental flows required to protect wildlife, especially those that live in spring-fed habitats. The Hill Country is irreplaceable. Let's stop, think and act responsibly.

We encourage you to read our [Principles](#).