TEXAS PUBLIC POLICY FOUNDATION
Testimony

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Center for Energy & the Environment

House Bill 1730 and Senate Bill 332: Relating to the Ownership of Groundwater

Before the House Natural Resources Committee

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The Texas Public Policy Foundation (TPPF) strongly supports Chairman Ritter's House Bill 1730 as filed, to reaffirm and clarify a landowner's vested private property right in the water below his land.

SB 332 and HB 1730 present a historical question to the Texas Legislature. The historical question concerns the scope of the landowner's ownership of groundwater—a private property right relied upon by landowners, cities and businesses and upheld in Texas courts for over one hundred years. Questions about groundwater rights only now arise because of the rapid expansion of local groundwater district regulatory authority in the last ten years, initial implementation of HB 1763 regarding "desired future conditions" of aquifers and a few districts' contention that under Texas law, landowner's never had a vested ownership interest in the water below their land.

SB 332, as filed, mirrored HB 1732's simple re-affirmation that the landowner has a vested ownership interest in groundwater. CSSB 332, when considered in its entirety, however, regrettably muddles the legal status of a landowner's vested property interest in groundwater under Texas law. The Senate bill's assertion of a vital public interest in groundwater and in "long-term aquifer management" creates what some lawyers might characterize as a superior interest to the landowner's real property right.

Passage of HB 1730 is a key priority in TPPF's Agenda for Keeping Texas Competitive. This state's protection of clear ownership interests—private property rights—is essential to preserving the successful free enterprise system and adequate water supply that historically distinguish Texas. The outstanding economic and environmental performance of Texas over the last 10 years would be impossible without this state's historically strong respect for private property rights. State policies preserving the private ownership, conservation and exchange of natural resources—including water—are paramount to the future of Texas.

A landowner's vested real property right in the groundwater below his land—"in place" as is the legal terminology—is a long relied upon, consistently upheld private property right in Texas.

Since the 1904 Texas Supreme Court ruling in *Houston & Central Texas Central Railway Co. v. East,*[1] Texas courts have upheld the landowner's vested right in the water below his land. As the East court reasoned, the groundwater "is a part of and not different than the soil, and that groundwater is the same as the land in law and cannot be distinguished in law from the soil." An article in the Winter 2004 edition of the Texas Tech Law Review offers a thorough and persuasive history of Texas groundwater law still consistent with the *East* decision in 1904.[2]

HB 1730 more clearly answers a relatively simple question. Who owns the groundwater under the land? By asserting that the landowner has a vested ownership interest in and right to produce that groundwater, HB 1730's reply to the question is that the landowner owns that water. The bill in no way creates a right, but rather re-affirms that the landowner's right extends to the water in place. Similarly with oil, gas, sand, gravel and stone, Texas law has long recognized that ownership of the surface includes what is in and below the land unless those rights are otherwise severed from the surface. A simple but critical clarification, HB 1730 reaffirms that the ownership interest is a vested right, apart from capture or possession.

Opponents of HB 1730 often confuse or conflate the rule of capture with the vested right in groundwater. The rule of capture does not confer a right but is a corollary of the landowner's vested right to the water in place. The rule of capture describes the method by which the landowner exercises this vested right and delimits the landowners' tort liability. Upon capture, the water becomes the personal property of the landowner or his assigns. Confining the landowner's groundwater right to the rule of capture confuses settled groundwater law with the highly distinct Texas legal system for allocation of private rights to use surface water.

[1] 98 Tex. 146.

[2] Dylan Drumond, Lynn Ray Sherman, and Edmond McCarthy, The Rule of Capture in Texas—Still So Misunderstood after All These Years, 37 Texas Tech L. Rev. 1 (2004).

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In Texas, two wholly different legal systems operate over surface water and groundwater. Texas law stipulates that the state owns the corpus of the surface water and issues private usufructory rights to certain volumes of water for specific beneficial uses listed in law. None of this system has ever been applied to groundwater in Texas. Those who resist a landowner's private control of groundwater or who fear liability, however, have muddled and gradually eroded what is otherwise settled law. The legislature's clarification of these two cornerstones of Texas water—a landowner's ownership of groundwater and the prior appropriation system to use surface water—is needed to preserve the functional integrity of the Texas Water Code.

Opponents of HB 1730 exaggerate the consequences of clarifying a landowner's vested ownership in groundwater. Provisions of SB 332 as passed reflect this concern with takings claims. The House bill would not spawn a flood of litigation with claims that local district rules amount to a "taking" of a constitutionally protected property interest. Since passage of the Edwards Aquifer Act, which authorizes far more limitation of groundwater rights in the Edwards Aquifer than the rest of the state, only three "takings" claims have occurred. Takings claims are highly fact-specific individual cases. A court might find that an individual district rule might or might not amount to a taking based on its application to a specific set of facts.

Recall that the burden of proof in such a claim is on the landowner. And the legal the bar in Texas for proving such a claim is higher than elsewhere. If a Texas landowner fails to prove that the governmental entity "took" his groundwater, the landowner pays the defendant's legal costs. Pressing a takings claim in Texas is therefore financially too risky for all but a tiny minority of landowners. The state's or local district's liability for a constitutional taking of private property, however, should not be a reason to deny a private property right that has been constitutionally protected for a century. Constitutional protection of a vested real property right is the foundation of our system of government.

Reaffirming the vested status of a landowner's groundwater rights is wholly compatible with existing, broad authority to regulate groundwater. HB 1730 does not create any new limitation on, or cause of action against, the State's or local district's authority. The seminal Texas Supreme Court ruling in 1904 that first articulated the landowner's ownership of groundwater, acknowledged that the landowner's right could be limited by "positive legislation," regulation asserting the basic police power of the state to protect public welfare. In 1917, Article 16 was added to the Texas Constitution to provide state authority to regulate natural resource including groundwater.

In 1949, legislation created authority for local groundwater conservation districts (LGCDs) of which the state now has almost 100, covering most of the groundwater resources in Texas. Senate Bill's 1 and 2 significantly enlarged a local district's authority to limit a landowner's right to groundwater. While sometimes creating conflict and always a balancing act, regulation and vested real private property rights coexist throughout natural resource law. Law and rule governing private ownership of oil and gas offer the best analogies for groundwater.

This legislation reaffirming the ownership interest in groundwater may, indeed, limit or decrease takings claims by providing a backstop to regulation. HB 1730 provides this legal backstop for regulators to avoid promulgating rules that go too far. This statutory clarification could also make water marketing more difficult, not less, because a marketer would need to address the vested rights of all landowners impacted by withdrawals from the marketer's wells.

Texas landowners, cities and businesses have long relied on the landowner's vested ownership right in groundwater. Cities such as Lubbock, Amarillo, and San Antonio have invested millions in the purchase of landowners' groundwater interests. After steady expansion of regulatory authority over groundwater, HB 1730 provides a crucial balancing mechanism. Without this clear reaffirmation of groundwater rights as vested private property rights, the existing regulatory authority over groundwater is in principle unlimited, and could continue to erode this private property right until it is private in name only.

On groundwater, Texas faces a choice between two fundamental policies. Texas can join the statist current, typical of the federal government and states like California, in asserting unlimited government control over private resources for allegedly public purposes. Or Texas can reaffirm the landowner's vested private property right in groundwater with confidence that it is only secure private rights that can maximize stewardship, conservation, sustainability and efficient development of needed water. History has shown us that the path of private property rights—and not government control—is a far more effective path to achieve the same public good. ☆

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