



Groundwater Ownership

What is current law?

In 1904, the Texas Supreme Court established that landowners have an ownership interest in the groundwater below their land, providing that they have a right to capture it (drill a well and produce groundwater for a beneficial use) and can do so without being held liable for damage to others (Rule of Capture).

The Court said:

“An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.” *Houston & TC Railway Company v. East (1904)*

However, like other property, landowners’ ownership interest in the groundwater below the land can be regulated and managed. Groundwater conservation districts (GCDs) are granted the authority by the legislature to modify how groundwater is captured to protect and conserve groundwater resources.

What do we support?

We support landowners’ ownership interest in the groundwater below their land, their right to capture it (drill a well and produce groundwater for a beneficial use) and their ability to do so without being held liable for damage to others (Rule of Capture). We support this ownership interest so that the property rights of landowners are protected under the takings clauses of both the Texas and U.S. Constitutions from unreasonable regulation by GCDs.

We also support GCDs’ ability to reasonably regulate and manage groundwater to protect groundwater resources for the future. Ownership interest in groundwater below the land can co-exist with GCDs’ responsibility to regulate, protect and conserve groundwater resources. Ownership with local control equitably balances conservation and use.

What is the problem/issue?

Landowners’ ownership interest in groundwater below the surface has been recently challenged in the courts. The argument is being made by some GCDs that landowners do not have any right to the groundwater below their land – they only own it when they capture it. Interpretation of the current law is resulting in inconsistent treatment of landowners’ private property rights in groundwater by GCDs. This is troubling to most landowners because they voted to create their local GCD to help protect their rights to groundwater, not take them away.

Why is legislation necessary?

Section 36.002 Texas Water Code does not clearly define the ownership and rights of the landowner in groundwater. Therefore, legislation is necessary to reaffirm that landowners have an ownership interest in groundwater below the land and a right to capture groundwater. This legislation will provide consistency in regulating this private property right.

Please support

**Senate Bill 332 by Senator Troy Fraser
House Bill 1730 by Representative Allan Ritter**

www.groundwaterownership.com

Frequently Asked Questions

1. Is an ownership interest in groundwater below the surface a “vested” right?

Yes. Groundwater is a vested property right because the landowner owns it as part of the land, like soil, oil and gas, sand, gravel, and stone. Everything a landowner owns as part of their land is constitutionally protected from unreasonable regulation under the takings clauses of the Texas and U.S Constitutions and cannot be taken without compensation.

A landowner’s rights to property are vested (constitutionally protected). Either people believe that landowners have an ownership interest in groundwater below the surface, and that right is vested, or they don’t. Legally, there is no in-between. You can’t have an ownership interest in the groundwater below the surface and it not be vested. Legally, there is no such thing.

Secure protectable property rights best assure conservation and stewardship of all resources, including groundwater. The way private landowners, acting as land stewards, manage their property directly influences quantity and quality of groundwater available to all Texans.

2. Will GCDs be able to continue to regulate and manage groundwater under this legislation?

Yes. The legislature through the Conservation Amendment of the Texas Constitution has given GCDs statutory authority to conserve and protect groundwater resources. It would be impossible for GCDs to limit landowners’ ownership interest in groundwater below the land if they did not have the authority to do so.

The Texas Constitution requires that adequate compensation be paid when private property is taken for public use. However, all property is held subject to the valid exercise of the police power of government. A government is not required to make compensation for losses occasioned by the proper and reasonable exercise of its police power. *Chicago, B. & Q. Ry. Co. v. Drainage Commissioners, 200 U.S. 561, 594 (1906)*

GCDs have a lot of leeway in which to regulate groundwater and there are no provisions in this legislation that will result in a loss of their authority to continue to do so, including the ability to discriminate between landowners. But, if they discriminate, the private property right in groundwater will require them to provide a “reasonable basis in fact” for the rule or decision, like a geographic area of severe depletion or subsidence. *Railroad Commission v. Shell Oil Co., 161 S.W. 2d 1002, 1026 (Tex. 1942)*

An ownership interest in groundwater below the land is not a ‘super’ property right that, if restricted in any way, requires compensation to the landowner. Why would an ownership interest in groundwater be superior to all the other vested property rights of a landowner? All other property can be reasonably regulated, and groundwater is no different.

Cities, counties, and state and federal governments have the authority to regulate and restrict the use of landowners’ property. Cities and counties can enforce zoning ordinances, building codes, etc. In addition, the Railroad Commission of Texas regulates vested property rights in oil and gas, including the amount of oil and gas that can be captured.

3. Will this legislation lead to more lawsuits from landowners and bankrupt GCDs?

No. Takings law in Texas is well settled and the standards and procedures for determining a taking are well developed to protect the interests of GCDs and landowners. Regulation and limitations on the exercise of 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 GCD.

Landowners must meet a difficult legal standard established by the U.S. Supreme Court in the *Penn Central Case (1978)* in order to prove their property has been taken. They must prove one of the following:

- 1) The regulation is not in the public's interest. *(The Texas Constitution clearly states that conservation of the state's natural resources is in the public's interest.)*
- 2) The regulation significantly devalues the property. *(In most cases the courts require the regulation to leave the property without any economic viability before it is a taking.)*
- 3) The regulation interferes with a reasonable investment-backed expectation. *(The landowner must prove to the court that investments were made that cannot be recouped under the regulation. And, that these investments were made because they had a legitimate reason to believe they could engage in the activity the regulation now prohibits. Of course, pleading ignorance of a law is not a good reason.)*

Most landowners are not able to meet these difficult standards, and rarely win these takings suits.

In addition, if a landowner sues a GCD and loses, he can be required to pay the attorney and expert witness fees of the GCD under Section 36.066(g) Texas Water Code. This is not required of the GCD if the landowner wins. Therefore, before a landowner sues he should make sure he has a good case; otherwise he stands to lose a lot.

All of these factors serve as deterrents to landowners to sue a GCD and this legislation does not change that. Furthermore, this legislation could actually reduce the number of lawsuits by settling the ownership interest issue and avoid decades of lawsuits like those that occurred in the oil and gas industry on this same ownership issue.

4. Will this legislation hurt historic users?

It depends on the circumstances in each GCD. GCDs currently have the authority to regulate the permits of historic users, which means GCDs can cut back and/or cut off permits under current law. If a historic user does not have a constitutionally protected ownership interest in the groundwater below the surface, then he has no legal rights to prevent that groundwater from being taken from him without justification. This legislation actually ensures that historic users and all landowners are constitutionally protected from unreasonable regulation.

The only way a historic user can truly protect the investment in his farm, business, etc., is to have a constitutionally-protected ownership interest in the groundwater below the surface.

Some historic users claim that this legislation will cause them to be cut back or cut off because GCDs will be mandated to give permits to new users. This legislation does not mandate that a GCD grant a permit to anyone that requests one. It is up to each GCD to make that determination, just as they do today.

5. Will this legislation benefit those wanting to market groundwater?

No. Some claim that this legislation will only benefit those wanting to market groundwater to cities. However, if all landowners have an ownership interest in groundwater below the surface, then it actually makes water marketing projects more challenging.

Without an ownership interest in groundwater below the surface, a water marketer only has to buy or lease enough land to drill his wells because neighboring landowners do not have a right to the groundwater below the surface and therefore cannot affect him.

However, if all landowners have an ownership interest in groundwater below the surface, a water marketer must ensure that neighboring landowners will not drill wells or lease their rights to someone else because such an action could impact their project.

The only way to protect their investment and ensure that others don't exercise their groundwater rights is for the water marketer to buy or lease the groundwater rights of others. This respects all landowners' ownership interest in groundwater below the surface and ensures that the value of available groundwater resources is shared by all property owners, not just a select few.

Many landowners want to conserve their groundwater, but if water marketers come, this legislation will make sure they are mindful of all landowners' groundwater rights, and don't just purchase a few acres and drill a well.

6. Will this legislation require a GCD to give all landowners an equal share of groundwater?

No. Landowners have an ownership interest in the groundwater below their land at any given time, but each landowner does not own a specific amount of groundwater. Like oil and gas, landowners' ownership interest in groundwater below the surface gives them a vested property right to drill and produce whatever groundwater is under their land at the moment they capture it. How much they can produce is subject to the amount of groundwater that can be used without waste, aquifer and geological formations, and the other regulations necessary to protect the aquifer. *Brown v. Humble Oil (1935)*

This legislation does not change the way GCDs currently operate and does not require GCDs to adopt any new or specific permitting system mandating an acre feet per surface acre allocation. GCDs can continue to operate as usual while respecting the property rights of landowners. It is the decision of each GCD to determine what management and regulatory practices best suit their local situation.

7. Will this legislation change the Rule of Capture?

No. *East* identified that landowners have an ownership interest in the groundwater below their land, providing that they have a right to capture it (drill a well and produce groundwater without waste) and can do so without being held liable for damage to others (Rule of Capture).

The Rule of Capture explains the manner in which a landowner may exercise their ownership interest in groundwater without liability, not whether the ownership interest exists.

The Texas and U.S. Supreme Courts have ruled that the ownership of fugitive substances like oil and gas or groundwater does not remove the liability protection for landowners under the Rule of Capture. *Brown v. Humble Oil (1935)*; *Thompson v. Consolidated Gas Utility Corp (1937)*

In areas where a GCD exists, the right to capture (drill a well and produce groundwater for a beneficial use) has been modified, but the liability protection under the Rule of Capture remains in place. This legislation does not change that.

8. Groundwater moves, so how can landowners claim ownership to it?

Some people claim that since groundwater moves under different tracts of land, no particular person can own it.

Landowners have a *real property right* in the groundwater below their land, but they do not own a particular amount of groundwater when it is below their land. The Texas Supreme Court ruled that ownership of fugitive substances, like groundwater, gives them a vested property right to produce groundwater from their land, subject to regulation by a GCD, not ownership of a specific quantity of the substance. *Stephens County v. Mid-Kansas Oil and Gas Company (1923)*

Once groundwater is produced and reduced to possession by the landowner, the groundwater becomes *personal property*, subject to sale and commerce.

The courts have ruled that the property owner has ownership of the oil and gas below the surface. The courts have also ruled that just because oil and gas moves, doesn't mean that the landowner doesn't own it at the time it is part of their land. Groundwater is no different in that way.

The difference is in how groundwater is managed. Landowners have a property right to produce oil and gas or groundwater without waste. The key to management is that what constitutes waste for oil and gas is different than what constitutes waste for groundwater. State law recognizes this and gives GCDs the authority to regulate based on this difference; however, the basic property right still applies.

9. How can you own groundwater if you can't protect it from your neighbor or others?

Property rights opponents argue that an essential element of ownership is the right to exclude others and that groundwater cannot be owned below the surface because the Rule of Capture precludes the surface owner from preventing drainage of his property by others. This argument is contradictory to nearly 100 years of oil and gas law recognizing the concept of ownership in place alongside the Rule of Capture.

The Texas Supreme Court has consistently recognized both the Rule of Capture and ownership interest of groundwater below the surface. A landowner does have some protection from their neighbors under the Rule of Capture, such as for wasteful use and negligent subsidence, but the Rule of Capture is also subject to reasonable regulation by a GCD.

10. If a landowner has a vested ownership interest in groundwater below the surface, will property taxes go up?

No. Groundwater in place cannot be valued or taxed separately from the land under current law.

Groundwater is an integral part of the surface estate, just like soil, sand, gravel, and stone. They are all taxed "in place" as part of the market value of the land.

Groundwater cannot be taxed separately unless it is separated from the land by pumping it and selling it. This is how all the other substances of the surface estate (limestone, sand, and gravel quarries) are taxed.

11. With an important case pending before the Texas Supreme Court on groundwater ownership, why not wait for the Court to issue an opinion?

Pursuant to the Conservation Amendment to the Texas Constitution, the legislature is obligated to clarify this issue.

In addition, the Texas Supreme Court can use this clarification in their deliberations and help avoid future legal proceedings on the groundwater ownership issue, like similar lawsuits in the oil and gas industry over the past several decades.

Important groundwater decisions are being made by GCDs in Texas and landowners' property rights deserve recognition and protection at all levels. This legislation will clarify the nature of this property right for landowners, GCDs, courts, and others.

While the Texas Supreme Court may indeed rule on this issue one way or another, this legislation would add clarity and reaffirm the property right that landowners have had for over 100 years.

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