

## **BILL ANALYSIS**

C.S.S.B. 332  
By: Fraser  
Natural Resources  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

In 1904 the Texas Supreme Court in *Houston & TC Railway Company v. East* established the rule of capture in Texas. The supreme court ruled that a landowner has an ownership interest in the groundwater beneath their property. This ownership gives the landowner the right to capture the groundwater without being held liable for damage to others. Groundwater Conservation Districts (GCDs) were created by the Texas Legislature to be the preferred method of groundwater management. They are charged with the task of protecting and conserving groundwater resources. Recently, landowners' interest in groundwater below the surface has come into question in the courts. The argument being made by some GCDs is that the landowner does not have an interest in the water below the surface until they capture it.

C.S.S.B. 332 clearly defines that a landowner owns the groundwater below the surface of the landowner's land as real property.

C.S.S.B. 332 amends current law relating to vested ownership interest in groundwater beneath the surface of land, the right to produce that groundwater, and the management of groundwater in this state.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

SECTION 1. Amends Section 36.002, Water Code, as follows:

Sec. 36.002. OWNERSHIP OF GROUNDWATER. (a) Provides that the legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property.

(b) Provides that the groundwater ownership and rights described by this section:

(1) entitle the landowner, including a landowner's lessees, heirs, or assigns, to drill for and produce the groundwater below the surface of real property, subject to Subsection (d), without causing waste or malicious drainage of other property or negligently causing subsidence, but does not entitle a landowner, including a landowner's lessees, heirs, or assigns, to the right to capture a specific amount of groundwater below the surface of his land; and

(2) do not affect the existence of common law defenses or other defenses to liability under the rule of capture.

(c) Provides that nothing in this code must be construed as granting the authority to deprive or divest a landowner, including a landowner's lessees, heirs, or assigns, of the groundwater ownership and rights described by this section. Deletes existing text providing that the ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized, and nothing in this code is to be construed

as depriving or divesting the owners or their lessees and assigns of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a district.

(d) Provides that Section 36.002 does not:

(1) 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 the district;

(2) affect the ability of a district to regulate groundwater production as authorized under Section 36.113 (Permits for Wells; Permit Amendments), 36.116 (Regulation of Spacing and Production), or 36.122 (Transfer of Groundwater Out of District) or otherwise under this chapter or a special law governing a district; or

(3) 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.

Deletes existing text providing that a rule promulgated by a district may not discriminate between owners of land that is irrigated for production and owners of land or their lessees and assigns whose land that was irrigated for production is enrolled or participating in a federal conservation program.

(e) Provides that Section 32.002 does not affect the ability to regulate groundwater in any manner authorized under Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, for the Edwards Aquifer Authority; Chapter 8801, Special District Local Laws Code, for the Harris-Galveston Coastal Subsidence District; and Chapter 8834, Special District Local Laws Code, for the Fort Bend Subsidence District.

SECTION 2. Amends Section 36.101, Water Code, by amending Subsection (a) and adding Subsection (a-1), as follows:

(a) Creates this subsection from existing text, providing that a district to make and enforce rules, including rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater and to carry out the powers and duties provided by this chapter.

Adds additional requirements a district must meet in adopting a rule under this chapter. Provides that a district must:

(1) consider all groundwater uses and needs;

(2) develop rules that are fair and impartial;

(3) consider the groundwater ownership and rights described by Section 36.002;

(4) consider 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 Section 59, Article XVI, Texas Constitution;

(5) consider the goals developed as part of the district's comprehensive management plan under Section 36.1071 (Management Plan); and

(6) not discriminate between land that is irrigated for production and land that was irrigated for production and enrolled or participation in a federal conservation program.

Makes nonsubstantive changes.

(a-1) Creates this subsection from existing text.

SECTION 3. Provides for the effective date of this Act.

**EFFECTIVE DATE**

This Act takes effect September 1, 2011.

**COMPARISON OF ORIGINAL TO SUBSTITUTE**

C.S.S.B. 332 differs from the original by striking a provision that provided for the definition of “landowner” and stated legislative findings in the original.

C.S.S.B. 332 differs from the original by stating that the legislature recognizes that a landowner owns the groundwater below the surface of the landowner’s land as real property, whereas the original stated that the legislature recognizes that a landowner has a vested ownership interest in the groundwater below the surface as an interest in the landowner’s real property.

C.S.S.B. 332 differs from the original by stating that the groundwater ownership and rights described by Sec. 36.002 entitle the landowner, including a landowner’s lessees, heirs, or assigns, to drill for and produce the groundwater below the surface of real property, subject to Subsection (d), without causing waste or malicious drainage of other properties or negligently causing subsidence, but does not entitle a landowner, including a landowner’s lessees, heirs, or assigns, to the right to capture a specific amount of groundwater below the surface of his land, whereas the original stated that the vested ownership interest described by this section entitles the landowner to fair chance to produce the groundwater below the surface of real property, subject to Subsection (d), without causing waste or malicious drainage of other properties or negligently causing subsidence, but does not entitle a landowner to the right to capture a specific amount of groundwater below the surface.

C.S.S.B. 332 differs from the original by stating that nothing in this code shall be construed as granting the authority to deprive or divest a landowner, including a landowner’s lessees, heirs, or assigns, of the groundwater ownership and rights described by Section 36.002, whereas the original stated that nothing in this code shall be construed as depriving or divesting a landowner of the ownership interest.

C.S.S.B. 332 differs from the original by striking a provision that in current law provides that nothing in this section must be construed to prohibit a district from promulgating a rule to limit the exercise of the right of the landowner to produce groundwater.

C.S.S.B. 332 differs from the original by stating that this section does not require that a rule adopted by a district, whereas the original stated nothing in this section shall be construed to require that rules or regulations adopted by a district must, 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.

C.S.S.B. 332 differs from the original by striking a provision in current law that stated a rule promulgated by a district may not discriminate between owners of land that is irrigated for production and owners of land or their lessees and assigns whose land that was irrigated for production is enrolled or participating in a federal conservation program.

C.S.S.B. 332 differs from the original by stating that this section does not affect the ability to regulate groundwater in any manner authorized under Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, for the Edwards Aquifer Authority; Chapter 8801, Special District Local Laws Code, for the Harris-Galveston Coastal Subsidence District; and Chapter 8834, Special District Local Laws Code, for the Fort Bend Subsidence District, whereas the original did not contain this provision.

C.S.S.B. 332 differs from the original by stating that, as one of the listed criteria, in adopting a rule under this chapter, a district must consider the groundwater ownership and rights described

by Section 36.002., whereas the original stated that a district must consider the vested ownership interest described by Section 36.002.

C.S.S.B. 332 differs from the original by striking all amended provisions to Section 36.108, Water Code, whereas the original added a provision that stated in reviewing the management plans, the districts must consider the effectiveness of the measures established by each management plan for conserving and protecting groundwater, preventing waste, and considering the vested ownership interest described by Section 36.002, and the effectiveness of these measures in the management area.

C.S.S.B. 332 makes other conforming changes.