



March 1, 2011

# Texas Wildlife Association Testimony on SB 332 and SB 667

By JOSEPH FITZSIMONS,  
Chair, TWA Water Stewardship Committee  
Senate Committee on Natural Resources

## MR. CHAIRMAN, MEMBERS, MY NAME IS JOSEPH FITZSIMONS,

Chairman of Texas Wildlife Association's Water Stewardship Committee. I am a South Texas rancher, conservationist, practicing natural resources attorney, and former Chairman of TPWD.

I am here to testify on behalf of the TWA in support of SB 332. This bill reaffirms current law and current practice – much of it has been in place with Groundwater Conservation Districts (GCDs) since the 1950's – and has been the well settled law of Texas since we adopted the English common law in 1836 and has been affirmed by the courts consistently for over 100 years.

The TWA stands for conservation and stewardship through our private landowner members, who own almost 95% of Texas and our rural Texas habitats and open spaces. We stand for conservation by practicing it, where it counts, on the ground. We believe that secure property rights best protect and encourage conservation and stewardship of all resources, including groundwater.

Not only does this provide the landowner a right to produce, but ensures the ability to conserve groundwater.

Some suggest landowners do not own groundwater but instead have only the right to produce groundwater. If so, where is the right to conserve? A right to produce only encourages a "use it or lose it" scenario of groundwater use and leads not to conservation, but instead, to waste and exploitation.

Unfortunately, the concept of not recognizing this real property interest in groundwater is currently promoted by some GCDs and has already been adopted by some in their regulations. Landowners voted to create their local GCD to help protect their rights to groundwater – including their right to conserve it – not take those rights away.

As the demand for groundwater in Texas increases, it is important that current law is reaffirmed as provided in SB 332, and the landowner's ownership interest in groundwater continues to be recognized and reaffirmed as a vested, real property interest of private landowners. SB 667 does NOT, however, recognize the real property interest in groundwater below the surface, and thus, is a radical change to current law and policy.

Private landowners and their productive open land are keys to an effectively functioning water cycle. Their active and informed stewardship of land and water resources benefits all Texans. This vested ownership interest incentivizes property owners to maintain and manage critical open space lands that contribute to and form the geological sponges that are physically integral to the land and are a connected component of groundwater resources.

Like all other real private property in Texas, groundwater is subject to reasonable regulation. This ensures that private landowners are treated fairly (afforded due process), property rights are respected, and that all private landowners maintain the ability to use groundwater for any beneficial use.

Some oppose SB332 by arguing it will unleash a flood of takings claims. This claim is unfounded. Just as with real property and zoning, or oil and gas and the Texas Railroad Commission, we have a long history of balancing property rights with reasonable regulation.

And where are the cases when the Subsidence Districts were formed, regulating groundwater? Where are the cases from one of the most comprehensive acts on groundwater in this Legislature, creating the Edwards Aquifer Authority – a grand total of three cases over almost 20 years.

You will recall the Gragg Decision where the same objection was raised about takings, and almost 10 years later, where are the cases the River Authorities and the Tarrant Regional Water District claimed would occur, and that they would be in the courts after the decision on inverse condemnation around reservoirs. The flood of "taking claims" never happened.

And where are the cases after HB 809 by Rep. Geren and Sen. Duncan when they addressed the condemnation of groundwater? (The very legislation that increased the protection of landowners against condemnation had to first recognize the landowner's ownership in groundwater.)

The flood of takings cases was prevented by the recognition of vested property rights, not the absence of them. Secure property rights guide the GCD boards and regulatory authorities in making reasonable decisions. Those regulations have been by and large reasonable. Those who fear the flood of taking claims do not distinguish between reasonable and unreasonable regulation.

Real estate and zoning, oil and gas, and the RRC, all are regulated and all are vested property rights. Only where a future GCD is arbitrary, unreasonable or motivated by something other than reasonable science based regulation do they have anything to fear from takings claims.

SB 667 would alternatively not recognize the property interest in groundwater below the surface, and in these days of this legislature actively campaigning for "limited government", it would instead create a super regulatory authority in GCDs that could make rules that deny any standing for landowners, and without standing "the reasonable nature of the rules" cannot be challenged. This is taking power from citizens and giving to a politicized bureaucracy. That is bad public policy.

By reaffirming current law and recognizing the private landowners' ownership interest in groundwater as in SB 332 and assuring the right of the GCDs to manage and regulate in a reasonable way, more certainty and balance is provided in water planning and groundwater conservation. Water planners can concentrate on how to conserve and best use groundwater to meet the state's critical needs instead of arguing about who owns it. Reasonable regulation currently does and can continue to recognize ownership interests and existing uses in most GCDs, while allowing landowners and water planners to conserve and manage the resource for long-term sustainability and assure long-term public benefits. This type of balance is critical for economic development in the state, and ensures the balance between rural water-producing areas and urban water-consuming areas without jeopardizing potential growth in either area of the state. Recognition of all landowners' rights ensures that the value of available groundwater resources is shared by all property owners, not just a select few.

Protecting and reaffirming that private landowners have a vested, real property interest in groundwater is critical because ownership in groundwater encourages good stewardship and promotes accountability. The way private landowners, acting as land stewards, manage their property directly influences quantity and quality of groundwater available to all Texans. A vested property right is a right that can be conserved and stewarded for future generations. A "right to produce" alone discourages conservation. Only a vested property right recognizes the right to withhold water from current use, thereby conserving it for the future. It is the future we should be thinking about by encouraging conservation and efficiency through stewardship. When I was Chairman of the TPWD, I followed a simple conservation rule. Stewardship requires stewards, and there is no better steward than the owner of the land. 

