

Senate committee looks at rule of capture

Water can't be treated like oil, it has to be treated like blood, said to state Sen. Robert Duncan, R-Lubbock.

Duncan and other members of the Texas Senate Select Committee on Water Policy are looking at the rule of capture, the doctrine used by Texas to govern ground water.

The rule of capture is undergoing considerable scrutiny during its 100th anniversary this year. Texas is the only state west of the Mississippi to continue using this method of governing underground water.

Rule of capture means a landowner has the right to pump as much water as he wants from beneath his land and it is seen as a private property right.

Who Has Control?

Dr. Gabriel Eckstein, Texas Tech Law School professor, testified at a recent public hearing before the water policy committee that rule of capture has outlived its usefulness.

"I'm not necessarily saying we have to replace it or get rid of it," Eckstein said. "But with it's almost boundless opportunities, I think it does a disservice to the state as well as individual landowners."

Duncan said the outcome of the Ozarka court case, in which neighbors sued the company alleging its pumping drained their underground water, reaffirmed rule of capture and put any changes that are to come in the hands of the legislature.

"There is a lot of water marketing being proposed in the state and a lot of the entrepreneurs are seeking to put together water rights with the potential to sell to municipalities," he said.

The first thing that must be looked at with regard to water marketing is the rule of capture, Duncan said. There's concern about whether it is the appropriate doctrine to allow a fair appropriation of that resource.

"Some feel it is outdated with the growth of population and shortage of water supply," he said.

After hearing both sides, Duncan agrees academically the doctrine is strange.

"Who owns the water under the ground and is it good public policy to balance competing interests by who can get their pump in the ground the fastest and pump out the most?" he said. "Rule of capture is pretty good until Ozarka moves next door."

Duncan said ground water conservation districts, composed of regionally elected board members, must make decisions consistent with the regional water planning process and the state water plan, he said.

"I'm convinced local control is appropriate," Duncan said. "I think there needs to be some check and balance to that system and I'm not sure the process has developed enough to properly balance the competing interests consistent with all those goals."

The future must be taken into account, he said.

"Water is not like oil. We can live without oil, but we can't live without water. I've likened water to blood. Take it away and you die. Don't treat it like oil," Duncan said.

He said one possible change is the ground water districts need to be properly drawn so they reflect the hydrological boundaries of aquifers.

"If you don't have a boundary that is hydrologically consistent, then you can't manage the competing interests," he said.

Eckstein questioned whether, under the rule of capture, "do you really have local control when your neighbor can pump your water with no liability?"

He said there are 89 ground water conservation districts, the majority of which have been authorized in the past 10 years. And they don't cover the whole state or all 29 aquifers, nine major and 20 minor. Where there is no conservation district, rule of capture applies.

"You have multiple districts on the same aquifer. Each district is authorized by the legislature to enact its own regulations on ground water pumping within that district," Eckstein said. "The problem is two districts on the same aquifer have different rules."

"You can keep the rule or get rid of it, but you need some kind of consistency across the board across the state - something that rules even outside of water districts," he said.

"I agree that one size does not fit all. The suggestions I'm making are not absolute standards. What I'm suggesting are general standards," Eckstein said.

State Involvement

If the state suggests a rule of sustainability for recharging aquifers, all that means is those aquifers can only be pumped no more than the rate of recharge. The aquifer would be sustained for generations, he said.

In cases such as the Ogallala, a non-recharging aquifer, the state needs to establish life spans. All districts would come together and determine, based on population and needs, how long the aquifer can survive and the maximum level which can be pumped to meet that goal, Eckstein said.

He said in the long-term the rule will change, but the question is will it be before the crisis point is reached.

"There's not enough water. Populations are growing, aquifers are being over pumped, others are not growing. Where are we going to get all this water?" Eckstein said.

C.E. Williams, Panhandle Groundwater Conservation District manager, said rule of capture has already been modified through the rule-making process of ground water districts with well spacing requirements and production limits.

No one rule can be written to fit all districts or all aquifers, Williams said, because of the vast diversity of climate, aquifer conditions, rainfall patterns and geography.

Many districts are already using a combinations of water doctrines to compliment rule of capture and Williams said while there will be discussion, he expects little change.

"I think the system is in place. We've worked on it for 50 years," he said. "Where people have taken the time and effort to create a district, there's not a better system than what we have today, in my opinion."

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