

- SUBJECT:** Valuing groundwater separately from land in condemnation proceeding
- COMMITTEE:** Natural Resources — favorable, without amendment
- VOTE:** 7 ayes — Puente, Callegari, Hope, Campbell, R. Cook, Geren, Hamilton
0 nays
2 absent — Hardcastle, Wolens
- WITNESSES:** For — Nathan Ausley; Winfree L. Brown; Marcus Greaves; Billy Howe and Gary McGehee, Texas Farm Bureau; Ed Small, Texas and Southwestern Cattle Raisers Association; Bob Turner, Texas Sheep and Goat Raisers Association

Against — Chris Bowers, City of Dallas; David Maddox, City of Sweetwater

On — Susan Combs, Texas Department of Agriculture; Harvey Everheart, Mesa Underground Water Conservation District
- BACKGROUND:** Property Code, ch. 21 governs condemnation proceedings under the power of eminent domain. If a public entity, such as a municipality, seeks to acquire property for public use and cannot agree with the owner on the amount of damages, the city may begin condemnation proceedings by filing a petition in court. The judge must appoint three disinterested freeholders in the county as special commissioners to assess the amount owed to the property owner. The special commissioners must admit evidence on the value of the property, the injury to the property owner, the benefit to the owner's remaining property, and the use of the property for the purpose of the condemnation. The special commissioners must assess damages according to the evidence presented at the hearing.
- DIGEST:** HB 803 would require the special commissioners or court in a condemnation proceeding to admit evidence on the market value of groundwater rights as property separate from the land, in addition to the market value of the real property, if:

- a municipality proposed to condemn the fee title of real property, and
- the special commissioners or court found that the municipality could use the property to develop the groundwater for a public purpose.

The market value of the groundwater would have to be based on generally accepted appraisal methods and techniques.

If the special commissioners or court found that the groundwater could be used for public purposes, damages to the property owner could be assessed according to the local market value of the real property, excluding the value of the groundwater, and the market value of groundwater rights as property apart from the land.

The bill would not authorize groundwater rights to be appraised separately from the property for property-tax appraisal purposes. Property condemned for its groundwater resources would not be subject to additional taxes due to loss of agricultural productivity appraisal or change in use of the land.

The bill would take effect September 1, 2003. It would not affect any litigation pending on that date that involved assessing damages in a condemnation proceeding.

**SUPPORTERS
SAY:**

HB 803 would ensure that a property owner received fair compensation when a city condemned land for its groundwater resources. The current evidence requirements for a condemnation proceeding do not recognize the market value of groundwater rights separate from the property value of the land. Thus, in a case where a city is condemning land solely for its groundwater resources, a landowner may not be compensated according to the purpose for which the city plans to use the land. This bill would require that evidence in such a proceeding include the market value of groundwater rights separate from the land.

A recent case highlights the need for this legislation. After attempting to buy the land from which it had been buying groundwater, the City of Sweetwater began proceedings to condemn the land. The court awarded damages to the property owner of about \$300 per acre for 705 acres. However, the owner had requested about \$6,700 per acre based on the value of the water that had been sold to the city for decades. The city plans to pump nearly 1 million gallons

per day of groundwater from the property. Under current law, however, the city may be able to condemn the land without paying for the water it will produce. The case is under appeal.

When a city condemns land to pump groundwater for the city's water supply, it is condemning that land for the production of a commodity — water. In a condemnation proceeding, however, the city need only compensate the owner for the value of the property, not the value of the commodity it contains and for which it will be used. Compensation should mirror the property's value in a transaction between a willing buyer and seller. Such a transaction would include a discussion of the value of the groundwater under the property. However, current law does not recognize the distinction. HB 803 would remedy the disparity so that property owners could be compensated according to the purpose for which their property was being condemned.

The value of groundwater would be determined by expert witness testimony in a condemnation proceeding. Experts would give testimony regarding the nature, amount, and market value of the water. Such testimony has been a part of condemnation proceedings since at least the 1960s. Moreover, a floor amendment to the bill would establish specific criteria that would have to be considered in assessing the market value of groundwater.

**OPPONENTS
SAY:**

HB 803 could make acquiring property for its groundwater so expensive that it would be nearly impossible for some cities to acquire new water supplies. Cities out of the range of surface water, such as in West Texas, would be at the mercy of property owners. The owners would have no reason — to sell property to a city in a willing transaction, because forcing the city to use condemnation would result in a much higher price than they otherwise could receive for the land. For example, a property owner would know that land that he could sell to his neighbor for \$300 per acre might be valued at an additional \$5,000 per acre in a condemnation proceeding.

The bill could make it more difficult for cities to plan project costs. In many cases, estimating the value of groundwater separate from the land would rely entirely on speculation. Also, placing a value on the water separate from the land would raise a series of questions: Is only the water directly under the property being valued? Should the rainfall that will recharge the aquifer be included in the value? If so, over what time period — five years or 50 years?

Also, what value, if any, should be assigned to the groundwater under a neighbor's property that would be drawn out when pumping began? The complexity of such a valuation would make an appraiser's work very difficult and could subject a city to paying prices for land based on the speculated values of a nonexistent market.

NOTES:

A similar bill, HB 1532 by R. Cook, was reported favorably, without amendment, by the House Natural Resources Committee on March 26. HB 1532 would require a municipality to include in a petition to begin condemnation proceedings a statement that it already had taken certain measures, including preparing a drought contingency plan, implementing a water conservation plan, pursuing alternative water supplies, and making a good faith effort to acquire the property in a voluntary transaction.