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A CONTRIVED BATTLE FOR STATE
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THE OWNERSHIP OF GROUNDWATER IN TEXAS: A CONTRIVED BATTLE FOR STATE CONTROL OF GROUNDWATER

Marvin W. Jones and Andrew Little*

Water. Over 70% of the earth's surface is covered with it, yet only 2.5% of all that water is fresh water suitable for consumption.¹ Of that 2.5%, nearly 70% is locked up in glaciers, and about 30% is groundwater.² Small wonder, then, that range wars were fought over water in the early days of the West. Today, new battles over groundwater are breaking out across Texas. Regulation by groundwater conservation districts has led to a plethora of suits that are making their way through the court system. Advocates for groundwater conservation districts, newspaper commentators and even state legislators are beating the drum for a radical departure from centuries-old concepts of groundwater ownership. How? The purpose of this Article is to explore the statements that are being made, why they are being made now, and, most importantly, what the law is concerning this critical issue.

THE NEW CHORUS OF VOICES

On August 5, 2008, the Texas Senate Committee on Natural Resources held a hearing in Amarillo concerning, among other topics, the issue of regulation of groundwater. During the course of that hearing, Senator Robert Duncan of Lubbock made the following observations:

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¹NAT'L AERONAUTICS & SPACE ADMIN., SCIENCE SERVING SOCIETY: WATER MANAGEMENT, 2 (2006), http://cosps.nasa.gov/ftp_docs/water_litho.pdf.

²*Id.*

[N]obody owns the groundwater under—in place. You have the right to drill and you have the right to capture, but you have no right

And I might add to that—that the trend would seem to me to be—that property right is—to the ownership is pretty illusory Illusory—in other words, I don't think there is property right. I don't think you own the water in place.

The point I'm trying to make is—is that if—if—because ownership of the water in place is not clear, it would occur to me that in the future, there is a lot of opportunity for central control of that water.³

In a similar vein, Greg Ellis, Executive Director of the Texas Alliance of Groundwater Districts, is quoted as stating that:

[T]he biggest issue the [Texas] courts will have to decide is the question of who owns the groundwater. Though this issue has been discussed in legal circles for well over a decade, it's only in the last year, really, that cases addressing this 'vested rights' issue—whether or not landowners have a vested right in the ownership of groundwater—are making their way through to the higher courts.⁴

This very issue, who owns the groundwater, is currently on petition for review to the Texas Supreme Court after the San Antonio Court of Appeals recently recognized a landowner's interest in groundwater.⁵ There, the question was whether the Edwards Aquifer Authority's denial of an application to pump groundwater from a well constituted a taking entitled to constitutional protection.⁶ The San Antonio Court of Appeals held that a landowner did have a vested property right, and that property right was

³Hearing on Groundwater Regulation Before the S. Comm. on Natural Resources (Aug. 5, 2008) (statement of Sen. Robert Duncan), available at http://www.senate.state.tx.us/75r/senate/commit/c580/c580_80.htm#Real.

⁴Colleen Schreiber, *Attorneys Discuss Latest Twists As Groundwater Case Law Evolves*, LIVESTOCK WEEKLY, Oct. 16, 2008, <http://www.livestockweekly.com/papers/08/10/16/whl16watercaselaw.asp>

⁵*Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742, 756 (Tex. App.—San Antonio 2008, pet. filed).

⁶*See id.*

entitled to constitutional protection.⁷ Currently on petition for review to the Texas Supreme Court, both the Edwards Aquifer Authority and Attorney General Greg Abbott are taking the implicit position that the State owns the groundwater as is evidenced by their briefs supporting petition for review.⁸

In an op-ed piece in the San Antonio Express-News on October 30, 2008, Bruce Davidson expressed his dismay that "more than a decade of hard work by the Edwards Aquifer Authority could be washed down the drain by a recent 4th Court of Appeals opinion."⁹ Why? Because as mentioned above, the *Day* opinion recognized that landowners have some ownership rights in groundwater beneath their land and their "vested right in the groundwater beneath their property is entitled to constitutional protection."¹⁰ Davidson then expressed the view that this appellate decision sets up a battle over the rule of capture, opining that this rule is in conflict with "the direction [of] groundwater districts and the state's water management planning."¹¹ Davidson wrote: "And the stakes could not be higher. If the 'rule of capture' is applied to Texas groundwater, any landowner could claim rights to water beneath his or her property."¹²

As will be seen below, the rule of capture has been applied to groundwater in Texas for over a century, landowners do have rights in the water beneath their property, and constitutional protections do apply to those rights. The only surprise here is that anyone could, in this century at least, still seriously contest these truths.¹³ The question, of course, is why the issue has been resurrected now.

⁷ *Id.*; see also *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002) (holding that a vested property right is entitled to constitutional protection).

⁸ See Petition for Review at 14, *Edwards Aquifer Auth. v. Day*, No. 08-0964 (Tex. Feb. 2, 2009), 2009 WL 505725 (claiming that ownership of groundwater is not a vested property right, and that the legislature may "adjust the parameters of groundwater ownership"); Petition for Review of the Edwards Aquifer Authority at 13, *Edwards Aquifer Auth. v. Day*, No. 08-0964 (Tex. Feb. 2, 2009), 2009 WL 505724 (stating that "a landowner has no vested property interest in groundwater beneath her property").

⁹ Bruce Davidson, *Groundwater Free-For-All*, SAN ANTONIO EXPRESS-NEWS, Oct. 30, 2008, at 7B, available at http://www.mysanantonio.com/opinion/columnists/bruce_davidson/Groundwater_free-for-all.html.

¹⁰ *Edwards Aquifer Auth.*, 274 S.W.3d at 756.

¹¹ Davidson, *supra* note 9.

¹² *Id.*

¹³ The proponents of the view that groundwater is not owned by the landowner uniformly fail to then articulate their opinions on the next important question: if that's true, just who does own

THE REGULATORY STATUS QUO

An appreciation of the recent controversy concerning ownership of groundwater requires some understanding of the regulatory mechanism currently in place. All of the groundwater districts in the state, from the oldest to the most freshly minted, are under a September 1, 2010, deadline to determine the desired future condition for the aquifers under their regulatory control.¹⁴ Implementation of new rules will likely follow, with the expectation that districts will actually take steps to conserve water consistent with the desired future conditions they have designated. The obvious fly in the ointment is whether the districts can accomplish this task without infringing private property rights. This undertaking is simplified, at least somewhat, if groundwater is not in fact owned by the landowners. So the question becomes: who owns the groundwater in an aquifer underlying the surface?

A. The Ownership of Groundwater

In Texas, groundwater regulation is relegated to the individual groundwater districts under Chapter 36 of the Texas Water Code.¹⁵ To what extent are these districts, and the groundwater management areas (GMAs) to which they belong, constrained by legal considerations as they undertake the task of regulation? The answer to this question necessarily depends on the nature of the property rights affected by the district's regulation of groundwater. Are rights in and to groundwater vested property rights? If so, are those rights entitled to constitutional protection?

Water districts and their advocates deny that landowners have vested property rights in groundwater. They suggest that a private landowner has only a usufruct,¹⁶ which they describe as an exclusive right to capture the water under the property by producing it at the surface. Because ownership

it? The obvious answer is the State, but no one on that side of the issue has the temerity to say that.

¹⁴Tex. Water Code Ann. § 36.108(d) (Vernon 2008).

¹⁵*Id.* § 36.0015.

¹⁶A "usufruct" is defined as "the legal right of using and enjoying the fruits or profits of something belonging to another." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1379 (11th ed. 2003).

of property must vest somewhere at all times,¹⁷ the implication of this suggestion is that the State actually owns the groundwater until produced. Following this reasoning, they conclude that the State, acting through its agencies such as groundwater districts, has authority to regulate groundwater without concern for private property rights of the landowner, thereby exempting the State from liability in dealing with groundwater rights. This idea, however, finds absolutely no support under Texas case law or statutory enactments.

1. Texas Case Law

For at least a century, Texas cases have consistently recognized that the owner of the land owns the water underlying his property. A landowner's ownership of the groundwater has been recognized in Texas since at least 1904, when the Texas Supreme Court handed down its decision in *Houston & Texas Central Railway Co. v. East*.¹⁸ There, the Texas Supreme Court had before it a case in which East, a landowner, sued an adjoining landowner for drilling a well that dried up East's spring.¹⁹ East claimed damages to his property due to unavailability of water.²⁰ Rejecting East's claims, the trial court held for defendant.²¹ The court of appeals reversed, apparently on the premise that the use by the railroad company was an unreasonable use.²² In this posture, the Texas Supreme Court was clearly presented with the question of whether it should adopt the "reasonable use" doctrine for groundwater in this State, which would hold that the owner of the surface has only a right to use that amount of water that is reasonable. Or, alternatively, should it adopt an "absolute ownership" view that would give the landowner the right to produce all the water he could regardless of reasonableness of use? After analyzing holdings from around the country dealing with the right of a landowner to make use of water under his land, the court concluded:

¹⁷See, e.g., *Wolkewitz v. Wood*, 216 S.W.2d 611, 614 (Tex. Civ. App.—Texarkana 1948, writ ref'd n.r.e.); *Brooker v. Brooker*, 76 S.W.2d 180, 184 (Tex. Civ. App.—Fort Worth 1934), rev'd, 130 Tex. 27, 106 S.W.2d 247 (Tex. 1937).

¹⁸98 Tex. 146, 81 S.W. 279 (Tex. 1904).

¹⁹*Id.* at 147, 81 S.W. at 280.

²⁰*Id.* at 148, 81 S.W. at 280.

²¹*Id.*

²²*Id.*

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 the land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.²³

This rule of ownership comes from the English common law, specifically the doctrine of *ad coelum*,²⁴ which says that a property owner is vested with property rights in all of the sky above his property up to the heavens and everything beneath his property to the center of the earth.²⁵ Note that the *East* decision equates underground water with the land itself, indistinguishable from soil.²⁶ This characterization assumes significance when comparing rights in underground water with rights in flowing streams; the former is an absolute ownership right indistinguishable from the soil itself, while the latter is a right to reasonable use only. This distinction was fully recognized by the Texas Supreme Court in 1927 in *Texas Co. v. Burkett*, where the court was presented with a breach of contract action in which the plaintiff, Burkett, had contracted with the defendant, Texas Company, to provide water from his land for its operations.²⁷ Plaintiff's land had multiple water sources, including a stream that often but not always flowed, and a well.²⁸ After Texas Company failed to honor a verbal renewal of the contract, Burkett sued.²⁹ Defending, Texas Company claimed that the State, not Burkett, owned the water he had contracted to sell, and the contract was thus unlawful and contrary to public policy.³⁰ Thus, the ownership of riparian water and groundwater was at issue. With the ownership issue clearly joined, the supreme court first dealt with the water from the stream, holding:

²³ *Id.* at 150, 81 S.W. at 281 (citing *Pixley v. Clark*, 35 N.Y. 520 (1866)).

²⁴ The *ad coelum* doctrine is "the common-law rule that a landowner holds everything above and below the land, up to the sky and down to the earth's core, including all of the minerals." BLACK'S LAW DICTIONARY 40 (8th ed. 2004).

²⁵ *Cuius est solum, eius est usque ad caelum et ad inferos* ("for whoever owns the soil, it is theirs up to the sky and down to the depths") is a Roman legal principle of property law that was passed down to common law and civil law systems. HOWARD R. WILLIAMS & CHARLES J. MEYERS, MANUAL OF OIL AND GAS TERMS 19 (7th ed. 1987).

²⁶ *East*, 98 Tex. at 150-51, 81 S.W. at 281-82.

²⁷ 117 Tex. 16, 296 S.W. 273, 273-74 (1927).

²⁸ *Id.* at 275.

²⁹ *Id.* at 274.

³⁰ *Id.* at 274.

From the testimony shown in the record, we are of the opinion that Leon River is a stream to which riparian rights attach, and the flood waters of which are subject to the appropriation laws of this state.

The right of Burkett as a riparian owner was one of use only, since the riparian does not own the water which flows past his land.³¹

Turning to the issue of whether Burkett could therefore lawfully fulfill the contract from a well, the court noted the absence of evidence that the water from the well was in fact riparian water rather than percolating groundwater. Concluding the contract was not unlawful, the court stated:

We are unable to say, from the evidence, whether or not the spring, or springs, from these percolating waters, was, or were, of sufficient magnitude to be of any value to riparian proprietors, or added perceptibly to the general volume of water in the bed of the stream, and we therefore assume that they were springs of such character that Burkett plainly had the right to grant access to them and the use of their waters for any purpose, either on riparian or non-riparian land. In other words, in so far as this record discloses, they were neither surface water nor subsurface streams with defined channels, nor riparian water in any form, and therefore were the exclusive property of Burkett, who had all the rights incident to them one might have as to any other species of property.³²

Finally, the court noted that there was no evidence that the waters obtained from the excavated well were underground streams with defined channels and therefore subject to a rule of correlative rights.³³ Thus, the court concluded, "the presumption is that the sources of water supply obtained by such excavations are ordinary percolating waters, which are the exclusive property of the owner of the surface of the soil, and subject to barter and sale as any other species of property."³⁴

³¹ *Id.* at 276 (citations omitted).

³² *Id.* at 278.

³³ *Id.* at 278.

³⁴ *Id.*

The issue of ownership of groundwater surfaced again in 1955 in *City of Corpus Christi v. City of Pleasanton*.³⁵ There, the question was whether it was waste to transport water produced from artesian wells by flowing it down a natural stream bed and through lakes, with consequent loss by evaporation, transpiration and seepage.³⁶ In answering this issue, the court first noted that the right to use percolating waters off the premises of the owner did not originate in the statutes of this State—it existed at common law.³⁷ As did the court in *East*, the court turned to the English case of *Acton v. Blundell*, decided in 1843.³⁸ The court noted that the *East* court had both the common law rule of absolute ownership and the reasonable use rule squarely before it in 1904, and “adopted, unequivocally, the ‘English’ or ‘Common Law’ rule.”³⁹ As to the nature and extent of the rights of the landowner, the court held:

It thus appears that under the common-law rule adopted in this state an owner of land could use all of the percolating water he could capture from wells on his land for whatever beneficial purposes he needed it, on or off of the land, and could likewise sell it to others for use off of the land and outside of the basin where produced, just as he could sell any other species of property.⁴⁰

A couple of decades later, the Texas Supreme Court took the opportunity to revisit the issue of groundwater ownership yet again. In *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*,⁴¹ the supreme court had before it a case in which withdrawal of groundwater was causing subsidence in adjoining lands. The question became whether such withdrawals should be subject to the reasonable use restrictions applicable through nuisance and negligence theories. Rejecting a balancing test between users of property on legal or equitable grounds, the court stated, “This is a concept which was deliberately rejected with respect to

³⁵ 154 Tex. 289, 276 S.W.2d 798 (1955).

³⁶ *Id.* at 799.

³⁷ *Id.* at 800.

³⁸ 12 M & W 324, 152 Eng. Rep. 1223 (1843). Given that the State of Texas came into being as such in 1845, the *Acton v. Blundell* ruling was part of the common law of England adopted as the rule of decision for all issues not determined by the Constitution or by legislation.

³⁹ *City of Corpus Christi*, 154 Tex. at 293, 276 S.W.2d at 801.

⁴⁰ *Id.* at 802.

⁴¹ 576 S.W.2d 21 (Tex. 1978).

withdrawals of underground water when this Court adopted the common law rule that such rights are not correlative, but are absolute, and thus are not subject to the conflicting 'reasonable use' rule."⁴²

The court then noted that the *East* court made a deliberate choice between competing theories in 1904, considering the alternatives and adopting the common law rule as articulated in England.⁴³ Further, the court believed it of "some importance" that in the laws that created groundwater districts, the legislature "specifically confirmed private ownership of underground water."⁴⁴ The court concluded this discussion by stating "This ownership of underground water comes with ownership of the surface; it is part of the soil."⁴⁵ On an interesting note, the court pointed out:

In 1840, Texas adopted the common law of England, with exceptions not relevant here. Our present Article 1, Texas Revised Civil Statutes, reads:

The common law of England, so far as it is not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature.

We have found nothing in our Constitution, laws, or decisions inconsistent with the common law rule.⁴⁶

This holding is of particular importance to the issue of whether, as contended by some, the supreme court should change the law regarding ownership of groundwater in place.⁴⁷ Because the common law of England says that groundwater belongs to the surface owner indistinguishably from the soil itself, and given the adoption of the common law by statute in Texas, it is arguable that only the legislature, and not the Texas Supreme Court, can abrogate this now firmly established principle.

⁴² *Id.* at 24 (citing *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904)).

⁴³ *Id.* at 24.

⁴⁴ *Id.* at 27.

⁴⁵ *Id.* at 30.

⁴⁶ *Id.* at 27.

⁴⁷ See generally Susana Elena Canseco, *Landowners' Rights in Texas Groundwater: How and Why Texas Courts Should Determine Landowners Do Not Own Groundwater in Place*, 60 BAYLOR L. REV. 491 (2008).

Finally, the supreme court wisely noted in *Friendswood* that the property rights established by *East* have become “an established rule of property law in this State, under which many citizens own land and water rights. The rule has been relied upon by thousands of farmers, industries, and municipalities in purchasing and developing vast tracts of land overlying aquifers of underground water.”⁴⁸ This is, of course, equally true today—millions of dollars have been invested on the simple understanding that underground water belongs to the surface owner. To change the law now, after a century of development, would wreak havoc in all areas of the State and have a far-reaching impact upon the security of all property rights in the State.

In 1984, the supreme court once again confirmed the ownership of groundwater in *Moser v. United States Steel Corp.*, saying that groundwater “belong[s] to the surface estate as a matter of law.”⁴⁹

The San Antonio Court of Appeals neatly summarized the law regarding groundwater ownership in *Bartley v. Sone*, where the court said:

The owner of land “owns also all ordinary springs and waters arising thereon.” This rule relating to ownership of water flowing from springs stems from the rule that the owner of land owns the water under the surface, generally referred to by hydrologists as “ground water.” Our statutory law recognizes this principle, although the legislature uses the term ‘underground water,’ rather than “ground water.” Our statutes define “underground water” as “water percolating below the surface of the earth and that is suitable for agricultural gardening, domestic or stock raising purposes, but does not include defined subterranean streams or the underflow of rivers.” The Water Code expressly recognizes ‘the ownership and rights of the owner of the land . . . in underground water’ These statutory provisions are but the embodiment of well settled rules relating to the ownership of percolating waters.⁵⁰

⁴⁸ *Friendswood*, 576 S.W.2d at 29.

⁴⁹ 676 S.W.2d 99, 102 (Tex. 1984); see also, *Gifford-Hill & Co., Inc. v. Wise County Appraisal Dist.* 827 S.W.2d 811, 815 n.6 (Tex. 1992) (stating that groundwater belongs to the surface estate as a matter of law).

⁵⁰ 527 S.W.2d 754, 759–60 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.) (citations omitted). Sections 52.001–.004 of the Water Code have been repealed and replaced by section

2. The Oil and Gas Corollary

The application of this doctrine to aquifer water is not a unique theory of ownership—Texas law clearly recognizes that oil and gas belong to the landowner, and no one would question the right of a landowner to mine sand, gravel, coal, or other subsurface minerals from his land. In *Texas Co. v. Daugherty*,⁵¹ the Texas Supreme Court examined the question of whether the lessee under an oil and gas lease had the type of ownership interest in minerals in place that would properly subject that interest to property taxation. The lessee argued that the oil and gas lease gave it no more than a right to produce the minerals, in essence a usufructuary right not subject to taxation.⁵² The court summarized the lessee's contention thus:

[T]hese substances are incapable of ownership as property until severed or extracted from the ground, and that therefore these instruments conferred upon it no more than a mere use of the surface of the ground and the right to take them from it, amounting only to a privilege belonging to the land and taxable as a part of it against the owner of the fee⁵³

In other words, the lessee under this oil and gas lease made the precise arguments now fronted by those advocating that groundwater rights are illusory or a mere usufruct. Rejecting this position, the court reasoned:

Because of the fugitive nature of oil and gas, some courts, emphasizing the doctrine that they are incapable of absolute ownership until captured and reduced to possession and analogizing their ownership to that of things *ferae naturae*, have made a distinction between their conveyance while in place and that of other minerals, holding that it created no interest in the realty. But it is difficult to perceive a substantial ground for the distinction. A purchaser of them within the ground assumes the hazard of their absence through the possibility of their escape from beneath the

36.002, which states that “[t]he ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized” Tex. Water Code Ann. § 36.002 (Vernon 2008).

⁵¹ 107 Tex. 226, 176 S.W. 717 (1915).

⁵² *Id.* at 718.

⁵³ *Id.* at 719.

particular tract of land, and, of course, if they are not discovered, the conveyance is of no effect, just as the purchaser of solid mineral within the ground incurs the risk of its absence, and therefore a futile venture. But let it be supposed that they have not escaped, and are in repose within the strata beneath the particular tract and capable of possession by appropriation from it. There they clearly constitute a part of the realty. Is the possibility of their escape to render them while in place incapable of conveyance, or is their ownership while in that condition, with the exclusive right to take them from the land, anything less than ownership of an interest in the land? Conceding that they are fluent in their nature and may depart from the land before brought into absolute possession, will it be denied that, so long as they have not departed, they are a part of the land? Or when conveyed in their natural state, and they are in fact beneath the particular tract, that their grant amounts to an interest in the land? The opposing argument is founded entirely upon their peculiar property, and therefore the risk of their escape. But how does that possibility alter the character of the property interest which they constitute while in place beneath the land? The argument ignores the equal possibility of their presence, and that the parties have contracted upon the latter assumption; that, if they are in place beneath the tract, they are essentially a part of the realty, and their grant, therefore, while in that condition, if effectual at all, is a grant of an interest in the realty.⁵⁴

Significant to the discussion of groundwater, the court did not regard as dispositive the fact that oil and gas are fugitive and may flow from one parcel to the next while underground.⁵⁵ The fluidity of the substance, in other words, did not alter the absolute ownership in place.

Concluding, the court held that a Texas oil and gas lease conveyed a “vested interest in the minerals in the ground, forming in their natural state a part of the land, with absolute dominion over them while in that

⁵⁴ *Id.* at 719–20.

⁵⁵ *Id.* at 719.

state”⁵⁶ As described by the court, the landowner’s interest in the oil and gas “plainly constitute[d] property and all that is recognized in proprietorship, and equally amount[s] to an interest in the land itself.”⁵⁷ The court added that “the right to the oil and gas beneath his land is an exclusive and private property right in the landowner, inhering in virtue of his proprietorship of the land, and of which he may not be deprived without a taking of private property.”⁵⁸

The same usufruct argument was again presented to the Texas Supreme Court in *Ryan Consolidated Petroleum Corp. v. Pickens*,⁵⁹ and again dismissed. There, the court recognized that some states look to the fugacious nature of oil and gas in place and determine that they belong to no one until they are brought to the surface and reduced to possession.⁶⁰ In dismissing the usufruct argument, the court simply states that “this theory does not find approval in Texas.”⁶¹ Rather, oil and gas in place are, by established rules of property, subject to ownership, severance, conveyance, lease and taxation.⁶²

Texas oil and gas case law also addresses the relationship between the absolute ownership of oil and gas and the rule of capture.⁶³ The rule of capture, as is discussed in more depth below, provides that the “owner of a tract of land acquires title to the oil and gas produced from wells drilled thereon,” even though the “oil or gas may have migrated from adjoining land.”⁶⁴ The rule of capture says nothing about the ownership of gas that has remained in place,⁶⁵ nor does it affect the “fundamental rule of absolute ownership of the minerals in place.”⁶⁶ Rather, in harmonizing the two rules, oil and gas law indicates that the rule can mean little more than that due to their fugitive nature, fugitive substances belong to the owner of the well in

⁵⁶ *Id.* at 720.

⁵⁷ *Id.*

⁵⁸ *Id.* at 720.

⁵⁹ 155 Tex. 221, 285 S.W.2d 201 (1955).

⁶⁰ *Id.* at 208.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See generally *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008); *Halbouty v. R.R. Comm’n*, 163 Tex. 417, 357 S.W.2d 364 (1962); *Atl. Ref. Co. v. R.R. Comm’n*, 162 Tex. 274, 346 S.W.2d 801 (1961).

⁶⁴ *Ryan*, 155 Tex. at 230, 285 S.W.2d at 207.

⁶⁵ *Garza Energy*, 268 S.W.3d at 14.

⁶⁶ *Elliff v. Texon Drilling Co.*, 146 Tex. 575, 210 S.W.2d 558, 562 (1948).

which they flowed irrespective of where they were located originally without incurring liability for conversion.⁶⁷

No one would now seriously argue that oil and gas does not belong to the landowner by virtue of his ownership of the soil itself. Nor can anyone now seriously contend that groundwater should be treated any differently.⁶⁸

3. Texas Statutes

Because groundwater districts derive their authority from Chapter 36 of the Texas Water Code, it is fitting and appropriate that the legislature specifically provided for the following regarding ownership of groundwater:

OWNERSHIP OF GROUNDWATER. 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 shall 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. 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.⁶⁹

The Texas Supreme Court has stated at least twice that this statute "confirms private rights in underground water."⁷⁰ Given the long history of

⁶⁷ *Halbouty*, 163 Tex. at 433-34, 357 S.W.2d at 375.

⁶⁸ Senator Robert Duncan, however, has articulated the seeds of a different opinion: "Water is not like oil. It is like blood: life-sustaining." Robert Duncan & Kel Seliger, Op-Ed. *Water Pumping Plan Will Have Huge Impact on Property Rights*, AMARILLO GLOBE NEWS, June 29, 2008, available at http://www.amarillo.com/stories/062908/opi_10633387.shtml.

⁶⁹ Tex. Water Code Ann. § 36.002 (Vernon 2008 & Supp. 2008).

⁷⁰ *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 27 (Tex. 1978); *City of Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681, 686 (Tex. 1983). *But cf.* *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972) ("Water, unsevered expressly by conveyance or reservation, has been held to be a part of the surface estate. However, that decision expressly recognized the right of the oil and gas lessee to drill water wells on said land and to use water from such wells to the extent reasonably necessary for the development and production of minerals.").

Texas Supreme Court cases recognizing the absolute ownership of groundwater as being the same quality of ownership as the soil itself, it is evident that the legislature knew what it was saying when it used the term "ownership" in connection with groundwater.

Texas Water Code section 36.119 further recognizes the ownership of groundwater by specifically allowing a water rights owner to sue his neighbor for drainage if the neighbor is operating a well without a permit or otherwise in violation of district rules under section 36.116(a)(2). Obviously, any such drainage would take place under the surface, prior to production at the surface. If the landowner had a mere usufruct, with ownership attaching only at the surface, this legislative permission to sue would be superfluous. By promulgating Section 36.119, the legislature recognized that groundwater belongs to the owner of water rights even when it is in the aquifer, before it is produced at the surface.

In 2003, the legislature further recognized groundwater as a private property right when it amended the eminent domain statutes to require admission of "evidence related to the market value of groundwater rights as property apart from the land" when a political subdivision proposes to condemn the "fee title of real property," and there is evidence that the political subdivision plans to use the "rights to groundwater for a public purpose."⁷¹ This clearly demonstrates a legislative recognition of private property interests in groundwater that can be the subject of a "taking" in the constitutional sense.⁷²

Finally, the ownership rights in groundwater are recognized in the Private Real Property Rights Preservation Act, which defines the phrase "private real property" to mean "an interest in real property recognized by common law, including a groundwater or surface right of any kind, that is not owned by the federal government, this state, or a political subdivision of this state."⁷³

⁷¹Tex. Prop. Code Ann. § 21.0421(a) (Vernon Supp. 2008).

⁷²Ironically, the Senate Bill recognizing this vested property right in groundwater was co-sponsored by Senator Robert Duncan. See S. Comm. on Jurisprudence, Bill Analysis, Tex. H.B. 803, 78th Leg., R.S. (2003).

⁷³Tex. Gov't Code Ann. § 2007.002(4) (Vernon 2008).

B. The Rule of Capture: What Implications Does it Raise Concerning Ownership and Regulation?

Much is said about the rule of capture as it relates to groundwater regulation. An understanding of this rule is essential to a complete understanding of the abilities of a groundwater district to regulate groundwater. Unfortunately, there appears to be an incomplete understanding both of the nature of the rule of capture and of its implications in the groundwater regulation business. For example, an article in 2004 suggested that the 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.”⁷⁴ These two concepts are often confused, even by attorneys and legislators. One real estate attorney is quoted as saying that “Texas property owners do not actually own the water beneath their land, but they do own the right to search (drill) and pump (capture) it when it is found.”⁷⁵ Another commentator is quoted as saying that “[t]he right of capture doctrine states that a landowner does not own groundwater until it is ‘captured’ at the surface of the land.”⁷⁶ Fortunately, Texas case law on the subject, both with respect to water and with respect to oil and gas, adequately defines the concept.

There are two separate and distinct concepts surrounding water rights—the rule of capture and the absolute ownership theory. The Texas Supreme Court, since 1904, has held that percolating water is part of the soil and that the landowner is the absolute owner of the water.⁷⁷ Groundwater, as the property of the landowner, is subject to sale, just like any other type of property.⁷⁸ This “absolute ownership theory” permits a landowner to sever

⁷⁴Kay Ledbetter, *Senate Committee Looks at Rule of Capture*, AMARILLO GLOBE NEWS, Aug. 22, 2004, available at http://www.amarillo.com/stories/082204/new_senatelook.shtml; see also *Texas Groundwater Law in Flux; Primer is Constantly Changing*, LIVESTOCK WEEKLY, Oct. 12, 2006 (quoting Ronald Kaiser, a professor at Texas A&M University, that the rule of capture “applies where there are no groundwater districts”).

⁷⁵Lana Robinson, *Liquid Assets: A Hard Look at Texas Water*, TEX. AGRICULTURE, Apr. 4, 2003, <http://www.txfb.org/texasagriculture/2003/040403/040403waterissues.htm>.

⁷⁶*Id.*

⁷⁷See *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613, 617 (Tex. App.—San Antonio 2008, pet. filed) (citing *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904)); see also Schreiber, *supra* note 4.

⁷⁸*City of Del Rio*, 269 S.W.3d at 617.

groundwater from the surface by a reservation in a deed.⁷⁹ The rule of capture, on the other hand, is "a doctrine of nonliability for drainage, not a rule of property."⁸⁰ Thus, under the rule of capture, a landowner whose property is being drained of groundwater by his neighbor has no judicial remedy; rather, a landowner "owns all of the water produced by a well bottomed on his own land, even though the well may be draining substances from beneath other property."⁸¹

As noted above, the rule of capture was first articulated as to groundwater in the case of *Houston & Texas Central Railroad Co. v. East*,⁸² although the word capture is not to be found in the opinion. There, the railway company sank a well to provide water for its locomotives and other mechanical operations.⁸³ This well produced water in such quantities that it caused a neighbor's well to go completely dry.⁸⁴ The neighbor sued claiming to have sustained \$206.25 in damages to his land caused by the drying up of his well.⁸⁵ The Texas Supreme Court held that the neighbor was not entitled to recover damages as a result of his well going dry.⁸⁶ In making that holding, the court relied upon the decision from an English court entitled *Acton v. Blundell*, where the court stated:

That the person who owns the surface may dig therein and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the

⁷⁹ See *Fain v. Great Spring Waters of Am., Inc.*, 973 S.W.2d 327, 329-30 (Tex. App.—Tyler 1998), *aff'd sub nom.*, *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 82 (Tex. 1999). Landowners whose wells were drained by a water bottling company "argue[d] that the absolute ownership rule should be overruled as antiquated and violative of public policy." The court of appeals rejected this argument, stating that "[b]ut for so well-settled law as the absolute ownership rule, we conclude that it would be more appropriate for the legislature or the Supreme Court of Texas to fashion a new rule if it should be more attuned to the demands of modern society." *Id.*

⁸⁰ *City of Del Rio*, 269 S.W.3d at 618 (citing 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL & GAS § 1.1(A) (2d ed. 2007)). See also *Riley v. Riley*, 972 S.W.2d 149, 155 (Tex. App.—Texarkana 1998, no pet.)

⁸¹ *Id.* at 617-18, (citing 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL & GAS § 1.1(A) (2d ed. 2007)).

⁸² See generally 98 Tex. 146, 81 S.W. 279 (1904).

⁸³ *Id.* at 280.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 281-82.

underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*,⁸⁷ which cannot become the ground of an action.⁸⁸

The Texas Supreme Court then examined decisions from other jurisdictions in the United States, noting that the law does not recognize correlative rights with respect to underground waters for two reasons: (1) because the existence, origin, movement and course of such waters are so "secret, occult and concealed" that any attempt to administer a set of rules to regulate them would be involved in "hopeless uncertainty;" and (2) any recognition of such correlative rights would interfere with business and commerce to the detriment of the commonwealth.⁸⁹ Finally, the Texas Supreme Court noted that the viewpoint set forth in *Acton v. Blundell* is rooted in the philosophy that the owner of the land owns the water under it and is entitled to divert it, consume it or cut it off with impunity, so that "no action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface."⁹⁰

The rule of capture is sometimes equated with a rule of ownership and sometimes stated as a rule of non-liability for drainage. As articulated by the Texas Supreme Court in the opinion in *East*, however, the reality is that the rule of capture encompasses both ideas. Owner *A* owns the groundwater beneath his soil and has the right to produce it regardless of the quantity produced and notwithstanding the fact that he is likely draining water from his neighbor's (Owner *B*) property. While Owner *B* also has absolute ownership of his water, Owner *B* cannot sue Owner *A* for damages. Instead, the remedy for both Owner *A* and Owner *B* if drainage occurs is the right of offset—to protect their groundwater by having an equal right to produce it.

The corollary relationship between the rule of absolute ownership and the rule of capture was recently recognized by the San Antonio Court of Appeals in *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, where the court was confronted with a situation where a landowner had conveyed

⁸⁷ A *damnum absque injuria* is defined as "a loss without an injury." BLACK'S LAW DICTIONARY 420 (8th ed. 2004).

⁸⁸ *East*, 98 Tex. at 149, 81 S.W. at 280.

⁸⁹ *Id.* at 280–81.

⁹⁰ *Id.* at 281 (citing *Pixley v. Clark*, 35 N.Y. 520 (1866)); see also *City of San Marcos v. Tex. Comm'n on Env'tl. Quality*, 128 S.W.3d 264, 270 (Tex. App.—Austin 2004, pet. denied).

fifteen acres to a city, expressly reserving in the deed all rights to the groundwater.⁹¹ After the transaction closed, the city drilled a water well on the fifteen-acre tract and began producing groundwater from beneath it.⁹² In response to the landowner's suit, the city claimed that groundwater was not susceptible of ownership in place, but can only be owned when produced at the surface.⁹³ Rejecting this argument, the court first noted that "[a]ccording to the Trust, the City has confused the interplay between the separate and distinct concepts of the rule of capture and the absolute ownership theory. We agree."⁹⁴ The court then pointed to the long line of cases holding that the landowner has absolute ownership of groundwater beneath the land, and discussed the rule of capture in that context:

A corollary to this absolute ownership theory is the rule of capture. The rule of capture, a doctrine in both oil and gas law and water law in Texas, was first adopted by the supreme court in *Houston & T.C. Ry. Co. v. East*. "Under the rule of capture a person owns all of the [water or] oil and gas produced by a well bottomed on his own land, even though the well may be draining the substances from beneath other property." Further, the rule of capture denies the landowner whose property is being drained any judicial remedy; he can neither enjoin production from the draining well, nor obtain an accounting, nor obtain other equitable relief. This rule probably arose out of practical necessity—the inability of courts to determine the source of a well's production. Thus, the rule as developed was "a doctrine of nonliability for drainage, not a rule of property." "It did not give an operator the 'right' to drain his neighbor's tract but merely refused to impose liability for doing so."⁹⁵

Thus, the rule of capture merely prevents a landowner from bringing suit against his neighbor for drainage—it is literally a rule of non-liability. It does not mean that the landowner does not own groundwater until it is produced at the surface; it means that the one producing water at the surface

⁹¹ 269 S.W.3d 613, 614–15 (Tex. App.—San Antonio 2008, pet. filed).

⁹² *Id.* at 615.

⁹³ *Id.*

⁹⁴ *Id.* at 617.

⁹⁵ *Id.* at 617–18 (citations omitted).

cannot be sued for draining water from beneath the surface of his neighbor. Importantly, the result of the rule is that the only remedy a landowner has for drainage is an equal right to produce.

In *Sipriano v. Great Spring Waters of America*, Justice Hecht suggested in a concurring opinion that the underlying bases for the rule of capture were no longer viable in a technologically advanced world:

The extensive regulation of oil and gas production proves that effective regulation of migrant substances far below the surface is not only possible but necessary and effective. In the past several decades it has become clear, if it was not before, that it is not regulation that threatens progress, but the lack of it.⁹⁶

Yet, as recently as August 29, 2008, the Texas Supreme Court reaffirmed the necessity and viability of the rule of capture in oil and gas cases. In *Coastal Oil & Gas Corp. v. Garza Energy Trust*, the supreme court stated: "The rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation"⁹⁷ The court later noted that "[t]he rule of capture is justified because a landowner can protect himself from drainage by drilling his own well, thereby avoiding the uncertainties of determining how gas is migrating through a reservoir."⁹⁸ Then, recognizing the inherent relationship between ownership of oil and gas and the operation of the rule of capture, the court stated:

The rule of capture makes it possible for the Commission, through rules governing the spacing, density, and allowables of wells, to protect correlative rights of owners with interests in the same mineral deposits while securing "the state's goals of preventing waste and conserving natural resources." But such rules do not allow confiscation; on the contrary, they operate to prevent confiscation. Without the rule of capture, drainage would amount to a taking of a mineral owner's property—the oil

⁹⁶ 1 S.W.3d 75, 82 (Tex. 1999) (Hecht, J., concurring).

⁹⁷ 268 S.W.3d 1, 13 (Tex. 2008) (citing 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 1.1(A) (2d ed. 1998)).

⁹⁸ *Id.* at 14 (citing *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923)).

and gas below the surface of the property—thereby limiting the Commission's power to regulate production to assure a fair recovery by each owner.⁹⁹

If the land owner did not own the water (or oil and gas) beneath his property, there would be no need for the rule of capture. Drainage from beneath Owner *B*'s property would not affect Owner *B*'s ownership rights if Owner *B* only owned the groundwater after it is produced at the surface, or only owned a right to produce it at the surface.

To some extent, the rule of capture has been modified by chapter 36 of the Texas Water Code. Specifically, section 36.119 gives a landowner the right to sue an adjacent owner who may be producing water without a required permit or who is producing groundwater in violation of the district rules adopted under section 36.116(a)(2).¹⁰⁰ It is important to note that section 36.119 gives a landowner the right to sue to enjoin only illegal production, and the right to sue for money damages only for injuries suffered by reason of the illegal production.¹⁰¹ This provision of the Water Code does not give an owner the right to sue to enjoin or recover damages for production that is in compliance with a permit. Thus, if Owner *A* is producing legally, i.e., as required by his permit, Owner *B* has no legal remedy for the drainage that results from that production, and his only recourse is an equal right to produce. If the only remedy for drainage is to have a fair chance to likewise produce, then anything that diminishes that fair chance damages the property right itself. If Owner *B* cannot sue Owner *A* for drainage and is prohibited by State action from producing water to offset Owner *A*'s drainage, then the State action amounts to confiscation of Owner *B*'s property, as is seen below.

C. Property Rights in Groundwater Are Constitutionally Protected

In 1916, the people of the State of Texas amended its constitution to require the legislature to pass laws for the preservation and conservation of the natural resources of the State.¹⁰² Thus, while ownership of the groundwater is clearly vested in the owner of the surface, that ownership is

⁹⁹*Id.* at 15 (quoting *Seagull Energy E & P, Inc. v. R.R. Comm'n*, 226 S.W.3d 383 (Tex. 2007)).

¹⁰⁰Tex. Water Code Ann. § 36.119(b) (Vernon 2008).

¹⁰¹*See id.* § 36.119(c).

¹⁰²Tex. Const. art. XVI, § 59.

nevertheless subject to the police power of the State. Such police power is exercised, in the instance of groundwater, through Chapter 36 of the Texas Water Code. This being true, the question becomes what limitations, if any, apply to the exercise of the police power of the State through its groundwater districts? As with any exercise of the police power of a State, a natural tension exists between lawful exercise of the police power and impermissible interference with private property.

While Texas courts are still grappling with the limits of the application of the police power through groundwater districts, considerable guidance can be gleaned from well-established case law relating to the other famous fugacious substances: oil and gas. From the early part of the last century, Texas courts have been called upon to determine the limits of the lawful exercise of authority by the Texas Railroad Commission, the entity that exercises regulatory authority similar to (but not nearly as fractured as) groundwater districts. These cases are instructive regarding the nature of the correlative rights of adjoining owners of groundwater (the "fair chance doctrine") and the implications for both the State and the landowner when regulations unnecessarily abridge the rights of groundwater owners.

An enlightening discussion of the fundamental constitutional issues at play here is found in *Marrs v. Railroad Commission*.¹⁰³ There, certain mineral rights owners challenged a ruling by the Texas Railroad Commission concerning production allowances in a field long shown to be productive of oil.¹⁰⁴ In somewhat simplified terms, a group of mineral owners in the northern portion of the field had established early production from numerous wells, thereby establishing a pressure sink that would cause oil to migrate toward the area.¹⁰⁵ Owners in the southern portion of the field had developed wells at a slower pace, but were able to demonstrate that substantial reserves of oil existed in their area, particularly as compared to the northern area which had been subject to greater depletion over the years.¹⁰⁶ Before the regulatory action in question, the owners in this southern area had established a line of wells between the two areas that produced at maximum capacity and essentially established a shield protecting them from drainage from the northern area.¹⁰⁷ The Railroad

¹⁰³ 142 Tex. 293, 304, 177 S.W.2d 941, 948 (1944).

¹⁰⁴ *Id.* at 294, 177 S.W.2d at 943.

¹⁰⁵ *Id.* at 295-98, 177 S.W.2d at 943-45.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 298, 177 S.W.2d at 945.

Commission then established field rules which prevented this line of shield wells from producing their maximum capacity.¹⁰⁸ The effect of this was to permit oil from the southern area to once again migrate toward the pressure sink in the north area.¹⁰⁹ The suit was predicated on the theory that production in the south area was so restricted by the Commission's proration orders that the owners there were unable to recover their oil before it drained away to more densely drilled section to the north.¹¹⁰

The questions presented were whether the Commission's orders were subject to judicial review, and if so, whether the actions of the Railroad Commission were arbitrary, unjust and discriminatory, and deprived plaintiffs of their just property rights.¹¹¹ Answering those questions in the affirmative, the Texas Supreme Court stated:

Under the settled law of this State oil and gas form a part and parcel of the land wherein they tarry and belong to the owner of such land or his assigns and such owner has the right to mine such minerals subject to the conservation laws of this State. Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation.¹¹²

As to the practical implications of this confiscation, the court continued:

As the oil is taken from the depleted Church-Fields area it is replaced by oil drained from petitioners' property. If petitioners were free to fend for themselves they could mine the oil under their land and thus prevent its escape to the adjoining area. But the orders of the Railroad Commission here complained of prevent petitioners from so doing. As a result, petitioners are being forever deprived of their property. It is the taking of one man's property and the giving it to another.¹¹³

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 299-300, 177 S.W.2d at 946.

¹¹² *Id.* at 303, 177 S.W.2d at 948 (citations omitted).

¹¹³ *Id.* at 304, 177 S.W.2d at 948.

The supreme court then elaborated at length concerning the legal implications of this taking:

Our Constitution authorizes the conservation of our natural resources. The authority to execute this constitutional provision in so far as it applies to oil and gas has been vested by the Legislature in the Railroad Commission of the State. Undoubtedly, in carrying out this constitutional purpose, the Commission must, as far as possible, act in consonance with the vested property rights of the individual. While our Constitution thus provides for the conservation of our natural resources for the benefit of the public, there are other constitutional provisions for the protection of the property rights of the individual. Article I, Section 17, of our State Constitution prohibits the taking of one's property for public use without adequate compensation therefor. Article I, Section 3, provides for equal rights for all men, and Article I, Section 19, provides that no citizen shall be deprived of his property except by the due course of the law of the land. The Fourteenth Amendment to our Federal Constitution provides that no State shall deprive any citizen of his property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. We need not here determine to what extent the State may confiscate one's property, or deprive him of the use thereof, without compensation, where this is necessary in order to conserve the natural resources of the State. It is sufficient to point out that the trial court here found that the drainage complained of was not necessary in order to avoid waste, and that finding is supported by the evidence. It was further found that the orders of the Railroad Commission were unreasonable, unjust, and discriminatory. This Court has many times said that the Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields, or between different owners in the same field.¹¹⁴

¹¹⁴*Id.* at 948-49 (citations omitted).

In this remarkable passage, the Texas Supreme Court identifies a sweeping panoply of rights on which the Railroad Commission must not trample: (1) Texas Constitution, Article I, Section 17, prohibiting the taking of one's property for public use without adequate compensation; (2) Texas Constitution, Article I, Section 3, providing for equal rights for all men; (3) Texas Constitution, Article I, Section 19, providing that no citizen shall be deprived of his property except by the due course of the law; and (4) U.S. Constitution, 14th Amendment, providing that no State shall deprive any citizen of his property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Because groundwater is a vested private property right, the same principles apply: every owner is entitled to a fair chance to recover groundwater in or under his land, and any denial of such fair chance amounts to confiscation, or stated differently, a taking of private property that is prohibited by the United States and Texas constitutions.

D. Unreasonable Regulatory Discrimination

In *Marrs*, the Texas Supreme Court outlined a second prong of legal considerations by which administrative agencies are bound: an agency of the state cannot promulgate rules or issue orders that are "unreasonable, unjust, and discriminatory."¹¹⁵ The Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields, or between different owners in the same field.¹¹⁶ The prohibition announced by the court could just as accurately state that groundwater conservation districts cannot indulge in unjust, unreasonable, or arbitrary discrimination between different aquifers, or between different owners in the same aquifer.

What are the limits on a groundwater conservation district under this unreasonable regulatory discrimination standard? Again, instruction is readily available from cases in the oil and gas arena. For example, in *Railroad Commission v. Shell Oil Co.*, the Texas Supreme Court had before it a Rule 37 case dealing with the authority of the Railroad Commission to grant exceptions to its well spacing rules.¹¹⁷ The court noted:

¹¹⁵ *Id.* at 949.

¹¹⁶ *Id.*

¹¹⁷ 139 Tex. 66, 161 S.W.2d 1022, 1023-24 (1942).

It is a well-established principle of constitutional law that any statute or ordinance regulating the conduct of a lawful business or industry and authorizing the granting or withholding of licenses or permits as the designated officials arbitrarily choose, without setting forth any guide or standard to govern such officials in distinguishing between individuals entitled to such permits or licenses and those not so entitled, is unconstitutional and void.¹¹⁸

The court explained that there must be some factual basis for classifying some applicants as subject to the general spacing provisions of the rule and other applicants as within the exception.¹¹⁹ The grant or denial of rights cannot be made on the basis of conditions that exist equally in any other part of a field. As the court noted:

In order to be valid a discrimination between persons must have a reasonable basis in fact. There must be some factual basis for classifying some applicants as subject to the general spacing provisions of the rule and other applicants as within the exception. This reasonable basis can only be a showing of unusual conditions peculiar to the area where the well is sought to be drilled—not testimony that would be equally applicable to any other part of the field.¹²⁰

Continuing to describe the conditions that might allow differential treatment of persons in the same field (aquifer), the court opined:

Upon a showing that in a particular field, or in a particular section of a field, on account of the peculiar formation of the underground structure or other unusual circumstances, a closer spacing of the wells is essential to recover the oil, undoubtedly the Commission would have authority to grant the exception, provided that it includes all those and only those coming within the exceptional situation, and providing further that it did not unduly discriminate in any other manner against producers in other areas or fields.¹²¹

¹¹⁸ *Id.* at 1025.

¹¹⁹ *Id.* at 1026.

¹²⁰ *Id.*

¹²¹ *Id.* at 1027.

In *Edwards Aquifer Authority v. Day*, the San Antonio Court of Appeals recognized the ownership of groundwater and the constitutional consequences of that ownership: "This court recently held landowners have some ownership rights in the groundwater beneath their property. Because Applicants have some ownership rights in the groundwater, they have a vested right herein. Applicants' vested right in the groundwater beneath their property is entitled to constitutional protection."¹²²

Thus, a water district may justify disparate treatment of adjoining landowners in the same aquifer only if there is some rational basis in the facts that justifies different treatment. If there is no "peculiar formation of the underground structure or other unusual circumstances"¹²³ affecting adjoining owners, there can be no differentiation in treatment without violating the equal rights and equal protection clauses of the United States and Texas Constitutions.

THE CURRENT CHALLENGE FOR DISTRICTS

Returning, then, to the original question: why are groundwater districts, legislators and other raising the issue of groundwater ownership today, given the long-standing line of cases holding that the landowner is the absolute owner of groundwater? What process is afoot that drives the proponents of an opposite position?

Texas Water Code section 35.004 required the Texas Water Development Board (TWDB) to designate GMAs covering all the major and minor aquifers in the state before September 1, 2003.¹²⁴ These GMAs were to be formed with the objective of providing the most suitable area for the management of the groundwater resources.¹²⁵ By statute, the TWDB was instructed that "to the extent feasible, the groundwater management area shall coincide with the boundaries of a groundwater reservoir or a subdivision of a groundwater reservoir."¹²⁶ Pertinent to this discussion, section 35.002(6) defines "groundwater reservoir" as "a specific subsurface

¹²²274 S.W.3d 742, 756 (Tex. App.—San Antonio 2008, pet. filed) (citations omitted).

¹²³*Shell Oil Co.*, 139 Tex. at 75, 161 S.W.2d at 1027.

¹²⁴Tex. Water Code Ann. § 35.004 (Vernon 2008).

¹²⁵Arguably, groundwater districts themselves should have been created in such a manner as to provide for the most suitable area of the management of groundwater resources; the GMA process is legislative recognition that the groundwater districts in existence today fail to adequately do so.

¹²⁶Tex. Water Code Ann. § 35.004(a) (Vernon 2008).

water-bearing reservoir having ascertainable boundaries containing groundwater.” Similarly, “subdivision of a groundwater reservoir” is defined to mean:

A definable part of a groundwater reservoir in which the groundwater supply will not be appreciably affected by withdrawing water from any other part of the reservoir, as indicated by known geological and hydrological conditions and relationships and on foreseeable economic development at the time the subdivision is designated or altered.¹²⁷

Given the importance of and constitutional constraints on regulating groundwater, it is fitting that the primary concern in creating a GMA should be observance of and adherence to the hydrology of an area, not its politics.

Section 36.108 provides for “joint planning in management area.” Subparagraph (b) states that if two or more districts are located within the boundaries of the same GMA, each of those districts shall prepare a comprehensive management plan covering its respective territory. Each district is then required to forward a copy of its new or revised management plan to the other districts in the GMA.¹²⁸ At least annually, these districts are to meet together to review the management plans and accomplishments for the GMA.¹²⁹ Notably, the GMA itself does not promulgate a management plan for the area as a whole; the districts included within the GMA are to each fashion their own management plans. Section 36.108(d) imposes a specific task on the districts within a GMA:

Not later than September 1, 2010, . . . the districts . . . shall establish desired future conditions for the relevant aquifers within the management area The districts may establish different desired future conditions for: (1) each aquifer, subdivision of an aquifer, or geologic strata located in whole or in part within the boundaries of the management area; or (2) each geographic area overlying an

¹²⁷ *Id.* § 35.002(7).

¹²⁸ *Id.* § 36.108(b).

¹²⁹ *Id.* § 36.108(c).

aquifer in whole or in part or subdivision of an aquifer within the boundaries of the management area.¹³⁰

Note that section 36.108(d)(2) permits the districts within a GMA to establish different desired future conditions ("DFC") for each geographic area overlying an aquifer. Some apparently believe that this phrase can be used to justify establishing different DFCs for different political subdivisions within a GMA or even within a district, including different DFCs from county to county within a district.

The rub comes in the fact that there are several districts in virtually every GMA. The legislature allowed the creation of separate districts along political lines, largely ignoring whether this patchwork of districts coincided in any way with the boundaries of aquifers. This gives rise to the possibility that landowners on either side of a political line called a "groundwater district" may be subject to differing rules and regulations designed to implement and achieve differing DFCs. This results from the fact that there may be disagreement between those districts as to the DFC to be established for a GMA. Is it permissible for the districts of a GMA to establish different DFCs for each district? Is it permissible for a district within a GMA to establish more than one DFC for areas within that district?

These questions can be answered by looking to the enabling legislation and, ultimately, to the constitutional constraints on each district. The term "geographic area" is not defined in Chapter 36. Therefore, the term must be construed according to ordinary principles of statutory construction. In construing a statute, words will be given their ordinary meaning unless given a specific statutory definition.¹³¹ Dictionary definitions of the word "geographic" can therefore be used to illuminate the meaning of the phrase "geographic area." "Geographic" is defined as "belonging to or characteristic of a particular region."¹³² The word "geography" is defined as "a science that deals with the description, distribution, and interaction of the diverse physical, biological, and cultural features of the earth's surface."¹³³ From this definition, some argue that differing DFCs can be based on such human arrangements as political subdivisions, such as county

¹³⁰ *Id.* § 36.108(d).

¹³¹ Tex. Gov't Code Ann. § 311.011(a) (Vernon 2005) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."); *Cities of Austin, Dallas, Fort Worth & Hereford v. Sw. Bell Tele. Co.*, 92 S.W.3d 434, 442 (Tex. 2002).

¹³² MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 523 (11th ed. 2006).

¹³³ *Id.*

lines or even water district boundaries. This construction cannot stand for several reasons. First, the term "political subdivision" is in fact a defined term in both Chapters 35 and 36 of the Water Code.¹³⁴ This demonstrates that the legislature knew of the existence and meaning of the term, but did not use the term in section 36.108(d)(2) as a basis for establishing different DFCs.

Second, the use of political subdivisions as a basis for differing DFCs runs counter to the overarching philosophy of the legislation establishing GMAs. As noted above, the TWDB's marching orders were to establish GMA boundaries to coincide with aquifer boundaries, with subdivisions of an aquifer defined to mean areas such that one area will not experience appreciable effects from withdrawing groundwater from another area.¹³⁵ County lines and even water district boundaries do not fit this standard unless they happen to coincide with a hydrological or surface feature (such as a river or canyon) that prevents water flow across the man-drawn boundary on the map.

Third, by TWDB Rule, if a GMA establishes different DFCs for different geographic areas overlying an aquifer or subdivision of an aquifer, the DFCs have to be "physically possible, individually and collectively."¹³⁶ This rule again emphasizes that groundwater management should be driven by hydrology rather than by other factors.

Fourth, and ultimately, are the constitutional considerations that constrain the actions of water districts as they attempt to regulate groundwater. The terms "aquifer," "subdivision of an aquifer," or "geologic strata" are straightforward and appear to depend upon objectively identifiable criteria that equate with the term "field" in Railroad Commission cases examined above. As long as the districts in a GMA afford equal treatment to all of the areas (users) in a hydrologically

¹³⁴Tex. Water Code Ann. § 35.002(13) (Vernon 2008 & Supp. 2008) ("Political subdivision" means a county, municipality, or other body politic or corporate of the state, including a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, a state agency, or a nonprofit water supply corporation created under Chapter 76, Acts of the 43rd Legislature, 1st Called Session, 1933 (Article 1434a, Vernon's Texas Civil Statutes)); *Id.* § 36.001(15) ("Political subdivision" means a county, municipality, or other body politic or corporate of the state, including a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, a state agency, or a nonprofit water supply corporation created under Chapter 67.").

¹³⁵*Id.* §§ 35.004(a), 35.002(7).

¹³⁶31 Tex. Admin. Code § 356.2(8) (2007) (Tex. Water Dev. Bd., Groundwater Mgmt.).

definable aquifer, constitutional issues should not be encroached. Conversely, any attempt to define different DFCs for areas within the same aquifer would likely be met with a constitutional challenge. Because groundwater is owned in place, treating users of the same aquifer in a different manner is suspect, and requires justification on some constitutionally permissible basis.

Thus, if the districts within a GMA are unable to agree a DFC for a shared aquifer, and instead attempt to set different DFCs that will lead to different regulatory approaches for the groundwater owners within the GMA, those owners will almost certainly have the right to a constitutional challenge. For example, if District *A* shares an aquifer with Districts *B* and *C*, but determines that it will regulate its portion of the aquifer differently, that action will affect water rights owners in one or more of the areas. If District *A* sets a more restrictive DFC than District *B*, and limits production of water accordingly, then the owners of water rights along the political boundary between the Districts will be treated in a disparate manner. Some of those owners will be restricted from pumping as much as a neighbor literally across the road, and will therefore be unable to protect against drainage by exercising such landowner's constitutionally-protected "fair chance" to produce. Their inability to produce to protect against drainage will be the result of state action. Vested property rights will be subjected to a taking for which they will be entitled to compensation. It is imperative, therefore, that districts overlying a single shared aquifer regulate in a manner that recognizes the fair chance doctrine and honors constitutional rights.

CONCLUSION

Ownership of groundwater in Texas could have correctly been called "well settled" in 1909. Debate about ownership of water today represents an effort to re-define vested property rights in Texas, not clarify them. Pressure from cities eager for predictable and long-term supplies of water, and from water districts eager to exercise regulatory control over that same water without takings challenges, drives the current controversy. But the legislature in 1840 decided the ownership of groundwater by adopting the English common law; the Texas Supreme Court's recognition of this reality some sixty-four years later in *East* changed nothing, but confirmed everything we now need to know. If the proponents of state ownership of this resource want to change the law now, they need legislative, not court, action. It is doubtful that many legislators in Texas will be willing to stand

before their constituents to say that this precious resource, long the property of landowners, will now be deemed the property of the State.¹³⁷ In any event, the debate should be recognized for what it is: the law is well settled, and the proponents of change are advocating state ownership of the means of production for most agricultural producers of the State. A paradigm shift in property ownership thought will need to precede any such sweeping change in groundwater ownership in Texas.

¹³⁷Significantly, no one advocating that groundwater does not belong to landowners will then state the necessary legal corollary—that the groundwater belongs to the State.