# OWNERSHIP OF GROUNDWATER IN PLACE BEFORE AND AFTER SENATE BILL 332

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Although mostly eclipsed by the Battle of the Budget, a far-reaching fight was waged in the 82nd Legislature over an issue so fundamental as to command the attention of virtually every landowner association and groundwater conservation district in Texas. Ultimately, the Legislature passed and the Governor signed Senate Bill 332, relating to the ownership of groundwater in place under the state. The purpose of this paper is to examine the state of the law in Texas concerning groundwater ownership both before and after SB 332, and to explore some of the potential future implications of SB 332.

## THE LAW PRIOR TO SB 332

*A. Ownership*. The analysis of groundwater ownership begins with the adoption of English common law as part of the first Texas Constitution. Under English Common law, water belonged to the surface owner as did all materials from the surface to the center of the earth.[1] This principal was implicitly adopted by the Texas Legislature in 1840 when the Texas Legislature adopted the common law of England.[2]

In 1860, the Texas Supreme Court expressly adopted this ownership principle in *Williams v. Jenkins*, 25 Tex. 279, 1860 WL 5835, at *6 (1860) ("We may, with confidence, appeal to the time-honored legal maxim, *Cujus est solum,ejus est usque ad caelum*; which has given to the term *land* an extension bringing within its scope everything which exists naturally, or has been fixed artificially, between the center of the earth and the confines of the atmosphere.") (emphasis in original).

Later, the Texas Supreme Court specifically addressed groundwater ownership in *Houston & T.C. Railway Co. v. East*, where Mr. East claimed that the railroad dried up his well by drilling and producing water from its own well.[3] The railroad company did not deny the effect of its well, but pointed to English common law to conclude that it could not be held liable for this inconvenience. Applying common law principles, the Court held that a landowner has absolute ownership of groundwater and adopted the corollary principle (later denominated as the rule of capture) that a landowner has no liability for draining his neighbor's water. The Texas Supreme Court would later define the nature and extent of the rights of a landowner as follows:

> 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

[1] See *Acton v. Blundell*, 12 M&W 324 (Exchequer Chamber 1843).
[2] *See* Laws of the Republic of Texas, Act of January 20, 1840, *reprinted in* 2 H.P.N. Gammel, The Laws of Texas 1922-1987, at 177-78 (Austin, Gammel Book Co. 1989 (recodified as amended at Tex. Civ. Prac. & Rem. Code Ann. § 5.001 (Vernon 2002)).
[3] 98 Tex. 146, 81 S.W. 279 (1904).

> 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.[4]

Subsequent Texas cases adhere to the *East* holding. For example, in *Friendswood*,[5] the Supreme Court had before it 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 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.[6]

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. 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."[7] The Court concluded this discussion by stating "This ownership of underground water comes with ownership of the surface; it is part of the soil."[8] 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:
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> > "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.[9]

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."[10]

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[4] *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798, 802 (1955) (emphasis added).
[5] *Friendswood Development Company v. Smith-Southwest Industries, Inc.*, 576 S .W.2d 21 (Tex. 1978).
[6] *Id*. at 24.
[7] *Id*. at 27.
[8] *Id*. at 30.
[9] *Id*. at 27.
[10] *Id*. at 29.

In 1984, the Supreme Court once again confirmed the ownership of groundwater in *Moser v. United States Steel Corp.*,[11] saying that groundwater "belong[s] to the surface estate as a matter of law."[12]

The San Antonio Court of Appeals neatly summarized the law regarding groundwater ownership in *Bartley v. Sone*,[13] 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.' TEX. WATER CODE ANN. § 52.001(3) (1972).[14] The Water Code expressly recognizes 'the ownership and rights of the owner of the land . . . in underground water . . ..' TEX. WATER CODE ANN. § 52.002 (1972).[15] <u>These statutory provisions are but the embodiment of well settled rules relating to the ownership of percolating waters</u>.[16]

Given the unfaltering adherence to the idea that landowners own the groundwater in place beneath their property, it is surprising that the issue of ownership would rise to a level that would require legislative time and attention. However, some advocates apparently misconstrued the "rule of capture" articulated in *East* to mean that the landowner did not actually own groundwater until it was "captured" at the surface. This misconstruction of the rule of capture falls when the nature and purpose of that legal principle are examined.

*<u>B. The Rule of Capture</u>*. There are two separate and distinct concepts surrounding water rights – the rule of capture and the absolute ownership theory. As noted above, 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.[17] Groundwater, as the property of the landowner, is subject to sale, just like any other type of property.[18] This "absolute ownership theory" permits a landowner to sever groundwater from the surface

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[11] 676 S.W.2d 99 (Tex. 1984).

[12] *Id*. at 102. *See also, Gifford-Hill & Co., Inc. v. Wise County Appraisal Dist.*, 827 S.W.2d 811, 815 n.6 (Tex. 1992). (groundwater belongs to the surface estate as a matter of law).

[13] 527 S.W.2d 754, 759-60 (Tex. App.—San Antonio 1974, writ ref'd n.r.e.).

[14] Section 52.0001 *et seq.* of the Water Code has been repealed and replaced by § 36.002, which states that "the ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized."

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[16] *Bartley*, 527 S.W.2d.at 559-560(footnotes and emphasis added, internal citations omitted).

[17] *See City of Del Rio v. Clayton Sam Hamilton Trust*, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied.) (citing *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 281 (1904)); *see also* Colleen Schreiber, *Attorneys Discuss Latest Twists as Groundwater Case Law Evolves*, Livestock Weekly, Oct. 16, 2008, http://www.livestockweely.com/papers/08/10/16/whl16watercaselaw.asp.

[18] *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App.-San Antonio 2008, pet. denied).

by a reservation in a deed.[19] The rule of capture, on the other hand, is "a doctrine of nonliability for drainage, not a rule of property."[20] 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."[21]

As noted above, the rule of capture was first articulated as to groundwater in the case of *Houston & T.C. Ry. Co. v. East*,[22] 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. This well produced water in such quantities that it caused a neighbor's well to go completely dry.[23] The neighbor sued claiming to have sustained $206.25 in damages to his land caused by the drying up of his well.[24] The Texas Supreme Court held that the neighbor was not entitled to recover damages as a result of his well going dry.[25] In making that holding, the Court relied upon the decision from *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 underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria,[26] which cannot become the ground of an action.[27]

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 "helpless uncertainty;" and (2) any recognition of such correlative rights would interfere with business and commerce to the detriment of the commonwealth.[28] 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

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[19] *See Fain v. Great Spring Waters of America, Inc.*, 973 S.W.2d 327, 329-30 (Tex. App.—Tyler 1998) *aff'd sub nom. by Sipriano v. Great Spring Waters of America, 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.*

[20] *Id*.

[21] *Id*. (citing 1 Ernest E. Smith & Jacqueline Lang Weaver, *Texas Law of Oil & Gas* § 1.1(a) (2d ed. 2007)).

[22] 81 S.W. 279 (Tex. 1904).

[23] *Id*. at 280.

[24] *Id*.

[25] *Id*. at 281-82.

[26] A loss without an injury.

[27] *Id*.

[28] *Id*. at 281.

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."[29]

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*,[30] where a landowner had conveyed 15 acres to a city, expressly reserving in the deed all rights to the groundwater. After the transaction closed, the city drilled a water well on the 15 acre tract and began producing groundwater from beneath it. 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. 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."[31] 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. *See City of Sherman*, 643 S.W.2d at 686 ("A corollary to absolute ownership of groundwater is the right of the landowner to capture such water."). 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*, 98 Tex. 146, 81 S.W. 279, 281 (1904). *See Friendswood*, 576 S.W.2d at 25-27. "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." 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL & GAS § 1.1(A) (2d ed. 2007). 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. Id. This rule probably arose out of practical necessity - the inability of courts to determine the source of a well's production. *Id*. Thus, the rule as developed

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[29] *Id*.; *see also City of San Marcos v. Tex. Comm'n on Envtl. Quality*, 128 S.W.3d 264, 270 (Tex. App.—Austin 2004, pet. denied).

[30] 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied).

[31] *Id*. at 617.

> was "a doctrine of nonliability for drainage, not a rule of property." *Id*.; *see also Riley v. Riley*, 972 S.W.2d 149 (Tex. App.--Texarkana 1998, no pet.) ("The rule of capture is a doctrine of nonliability for drainage."). "It did not give an operator the 'right' to drain his neighbor's tract but merely refused to impose liability for doing so." 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL & GAS § 1.1(A) (2d ed. 2007).[32]

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 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.

**TEXAS WATER CODE SECTION 36.002 BEFORE SB 332**

Prior to September 1, 2011, Texas Water Code Section 36.002 provided as follows:

> Sec. 36.002. 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.

While the language of Section 36.002 seems straightforward, various lawyers representing groundwater districts posited that this legislation did not settle the ownership question. For example, in its Reply to Response to Petition for Review, filed in the Supreme Court in connection with its appeal in *Edwards Aquifer Authority v. Burrell Day and Joseph McDaniel*,[33] the Edwards Aquifer Authority claims that Section 36.002 does not resolve the ownership question and does not create a vested ownership interest in groundwater in place. Instead, the EAA insisted that Section 36.002 was merely a legislative statement that "Whatever ownership and rights in groundwater a landowner may have, we recognize them."[34]

Proponents of ownership in place agreed that Section 36.002 did not create rights in groundwater—because those rights were recognized in Texas from its inception—but noted that the section clearly recognized the rights theretofore proclaimed by several Supreme Court decisions.

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[32] *Id*. at 617-18.

[33] Edwards Aquifer Authority's Reply to Response to Petition for Review and *Amici Curiae* Briefs, filed in Edwards Aquifer Authority v. Burrell Day and Joseph McDaniel, No. 08-0964, Texas Supreme Court.

[34] *Id*. at 7.

**TEXAS WATER CODE SECTION 36.002 AS AMENDED BY SB 332**

SB 332 was thereafter filed to resolve any perceived lack of specificity in Section 36.002 of the Code. As passed and signed by the Governor, SB 332 alters the first sentence of Section 36.002 to read:

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

*A. Ownership in Place*. The first sentence of SB 332 does several important things. First, SB 332 directly responds to the assertion that Section 36.002's prior iteration failed to recognize ownership in place. SB 332's first sentence should lay to rest any misconstruction of Texas law on this subject. It expresses legislative recognition that, under the law of this State, groundwater is owned by the landowner while it is beneath the surface and as real property.

Recognition of ownership while beneath the surface, or in place, is important. It refutes the notion that a landowner has no possessory right in groundwater until it is produced at the surface. It lends credence to those who assert that cases from the oil and gas arena directly apply to issues concerning groundwater ownership rights. In that regard, SB 332 renders pertinent the discussion in *Texas Co. v. Daugherty*,[35] where 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. 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 fee.…"[36] 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 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

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[35] 107 Tex. 226, 176 S.W. 717 (1915).
[36] 176 S.W. at 719.

> 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.[37]

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. 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 state . . . ."[38] 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."[39] 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."[40]

*B. The Nature of the Right.* SB 332 helps clarify the nature of the interest owned: it is owned as real property, not as personal property. For those who conflated rule of capture with ownership, SB 332 refutes the argument that groundwater is only owned when reduced to possession at the surface. If that were the case, groundwater at the surface and in the possession of anyone would simply be personal property, not real property. As noted above, oil and gas are clearly considered to be real property in Texas, and the Supreme Court has consistently denoted groundwater as "part of the soil." To the extent that the "captured at the surface" argument had any viability, SB 332 lays it to rest by noting that groundwater is owned "beneath the surface" and as real property.

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[37] *Id*. at 719-20 (emphasis added).
[38] *Id*. at 720. (emphasis added).
[39] *Id*.
[40] *Id.*

**THE OTHER PROVISONS OF SB 332**

While the first sentence of SB 332 immeasurably clarifies the law concerning ownership of groundwater in place, several other aspects of the bill are worth examining. As passed, the full text of SB 332, as it relates to Section 36.002, reads as follows:

SECTION 1. Section 36.002, Water Code, is amended to read as follows:

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

(b) The groundwater ownership and rights described by this section:

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

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

(c) Nothing [~~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 granting the authority to deprive [~~depriving~~] or divest a landowner, including a landowner's lessees, heirs, or assigns, [~~divesting the owners or their lessees and assigns~~] of the groundwater ownership and rights described by this section [~~or rights, except as those rights may be limited or altered by rules promulgated by a district~~].

(d) This section does not:

(1) prohibit a district from limiting or prohibiting the drilling of a well by a landowner for failure or inability to comply with minimum well spacing or tract size requirements adopted by the district;

(2) affect the ability of a district to regulate groundwater production as authorized under Section 36.113, 36.116, or 36.122 or otherwise under this chapter or a special law governing a district; or

(3) require that a rule adopted by a district allocate to each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres owned by the landowner [~~A rule promulgated by a district may not discriminate between owners of land that is irrigated for production and owners of land or their lessees and assigns whose land that was irrigated for production is enrolled or participating in a federal conservation program~~].

(e) This section does not affect the ability to regulate groundwater in any manner authorized under:

(1) Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, for the Edwards Aquifer Authority;

(2) Chapter 8801, Special District Local Laws Code, for the Harris-Galveston Subsidence District; and

(3) Chapter 8834, Special District Local Laws Code, for the Fort Bend Subsidence District.

Section (b)(1) of SB 332 expressly recognizes a landowner's right to drill for and produce that which belongs to him. As will be noted below, this significant right stems from the fact that an owner cannot be foreclosed from exploiting his real property in a manner consistent with reasonable regulation. The legislation clearly delineates that owners have the right to produce their groundwater, a right that merits constitutional protection.

Section (b)(2) clarifies that the legislation does not affect the separate but related rule of capture. SB 332 neither expands nor restricts the freedom from liability an owner of groundwater enjoys in terms of causing adverse effects on his neighbor through lawful pumping of groundwater.

Section (c) makes it clear that nothing in Section 36.002 as amended should be construed as granting regulatory authority to deprive a groundwater rights owner of any rights in that groundwater. This should be read in conjunction with Section (d), where the legislation shelters groundwater districts from some perceived impacts of ownership. Many groundwater districts expressed concern that the recognition of a "vested" property right in groundwater would impede regulation of groundwater. They further argued that recognition of ownership would result in takings that would exhaust the public fisc.

With respect to the ability to regulate, the Texas Alliance of Groundwater Districts submitted a post-argument amicus brief in the *EAA v. Day and McDaniel* matter pending before the Supreme Court in which it claimed that recognition of ownership in groundwater in place would mean that groundwater districts could not enforce conservation rules without violating the Texas Constitution.[41] Continuing in this dire vein, TAGD predicted:

> Thus, the adoption of Respondents's position by this Court would effectively dismantle the Legislature's comprehensive approach for managing and conserving groundwater. If a district is unable to say "no" to any landowner's permit for groundwater production without facing a regulatory or physical takings claim, groundwater conservation in Texas is dead.

Apparently not ready to attend the funerals of so many groundwater districts, the Legislature used Section (d) to reassure those districts that the legislation was not intended to prohibit districts from regulating groundwater. However, Section (d)(3) likely goes too far in attempting to assuage districts' fears. That section appears to give legislative approval to regulatory schemes that fail to recognize proportionate rights based on surface acreage owned. Several such schemes come to mind. Some districts, for example, base regulation of groundwater on historic use—if a landowner proves she was using groundwater during some (necessarily arbitrary) period of time, then she may continue using water

[41] Post-Submission Amicus Brief of the Texas Alliance of Groundwater Districts, filed in Edwards Aquifer Authority v. Burrell Day and Joseph McDaniel, No. 08-0964, Texas Supreme Court, at 12.

at that rate or at some rate proportionately with other historic users. On the other hand, if a landowner was conserving groundwater by not producing during the designated period, the district's rules prohibit production or make it subordinate to the rights of historic users. Other districts parcel out an owner's groundwater to him based on the crop being raised or other use to which the water is put. In either situation, owners who are side-by-side on the ground may end up with different allowable production amounts. This governmental action results in one owner being allowed to drain his neighbor. Because the rule of capture precludes a lawsuit by the neighbor being drained, the recourse should be a takings claim against the governmental entity that imposed the scheme.

This criticism of Section (d)(3) is not merely speculative. In the oil and gas context, regulatory schemes allowing disparate production limits from the same field have not fared well. For example, in *Marrs v. Railroad Commission*,[42] certain mineral rights owners challenged a ruling by the Texas Railroad Commission concerning production allowances in a field long known to be productive of oil.[43] 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 their wells.[44] 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.[45] Before the regulatory action in question, the owners in the 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. The railroad commission then established field rules which prevented this line of "shield" wells from producing at their maximum capacity.[46] The effect was to permit oil from the southern area to once again migrate toward the pressure sink in the northern area. 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 areas in the north.[47]

Striking down the Railroad Commission's field rules, the Texas Supreme Court stated:

> Under the settled law of this date oil and gas form a part in parcel of the land wherein they tarry and belong to the owners 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

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[42] 177 S.W.2d 941 (Tex. 1944).
[43] *Id*. at 943.
[44] *Id*. at 944-46.
[45] *Id*.
[46] *Id*. at 945.
[47] *Id*.

> 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.[48]

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.[49]

The court concluded: "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."[50]

Application of oil and gas law to the groundwater arena will likely yield the same result. Applying the *Marrs* decision in groundwater cases, one can see a variety of ways for cases to be lodged against GCDs. Nothing the Legislature does in terms of statutory permission to the groundwater districts can overcome the constitutionally protected rights of groundwater owners. Accordingly, Section (d)(3) of SB 332 is likely subject to appropriate challenge; at best, it will not prove to be a defense to a takings claim. It is regrettable, however, that a landowner must litigate this issue in order to preserve constitutionally protected rights, particularly in view of the one-sided attorneys' fees provisions currently embedded in the Water Code.[51]

Section (e) of newly amended Section 36.002 continues the theme of Section (d) by assuring certain specific groundwater and subsidence districts that the legislation is not intended to affect their ability to regulate. However, as noted above, unreasonable regulation that results in a taking of property will not be shielded by this provision.

**IMPLICATIONS FOR DESIRED FUTURE CONDITIONS**

For many of the reasons noted above, the ownership of groundwater—as affirmed by SB 332—has potential implications for the desired future conditions process mandated by Texas Water Code Section 36.108. There, the Legislature has required that the groundwater districts sharing a "groundwater management area" (or "GMA") to engage in "joint planning," including the establishment of "desired future conditions" for the aquifers within the management area.[52] Based on these DFCs, the TWDB calculates an amount of "managed available groundwater" for the districts of the GMA.[53] In turn, the

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[48] *Id*. at 948 (internal citations omitted).
[49] *Id*.
[50] *Id*. 949.
[51] *See* TEX. WATER CODE § 36.066(g).
[52] TEX. WATER CODE § 36.108.
[53] TEX. WATER CODE § 36.108(o).

MAG value becomes the basis for issuing permits to produce water. Accordingly, users in a district are paying great attention to the DFC process—a restrictive DFC will result in production curtailments.

Some argue that DFCs amount to no more than rules or policy decisions for which review should be narrowly circumscribed. However, as is noted above, the establishment of DFCs leads to a calculation of managed available groundwater. Once this MAG calculation is made, districts are circumscribed in terms of the permits that can be issued relating to that managed available groundwater. Accordingly, although DFCs have some policy aspects, they also have regulatory implications. In either event, many districts sit astride the same aquifer as their neighboring districts. Obviously, if each district sets its own DFC, and then promulgates rules to achieve the DFC, those owners on the borders of the districts will probably be subjected to different production rates. Neighbor A in the Blackheart Groundwater District may be able to produce 2 acre feet per acre owned per year, while Neighbor B, next door in the Whitehat Groundwater District, may only be permitted to produce 0.5 acre feet per owned acre per year. In that scenario, Neighbor A is draining the adjacent Neighbor B as a result of governmental action. Because SB 332 explicitly recognizes the ownership rights of Neighbor B, a takings claim in the nature of *Marrs v. RRC* would seem to be viable.

**CONCLUSION**

Strictly speaking, SB 332 did nothing to alter the ownership of groundwater in place in Texas. Ownership in place ("as part of the soil") was long recognized in this State. SB 332 merely lays to rest the facile arguments to the contrary. That said, the full ramifications of ownership, and of SB 332, remain to be determined, probably in the board rooms of groundwater districts and the courtrooms of the State. Proponents of non-ownership have already fired the first shot, claiming that SB 332 does not actually mean that landowners own groundwater in place.[54] Naturally, those who advocate ownership of groundwater beneath the surface as real property have rejoined.[55] It is clear that the interests involved in this important issue do not intend to let it go quietly into that good night.[56] Or as a West Texas district judge once said, "There's never been a pancake so flat that it didn't have two sides."

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[54] *See* Letter Brief of Edwards Aquifer Authority, filed in Edwards Aquifer Authority v. Burrell Day and Joseph McDaniel, No. 08-0964, Texas Supreme Court. EAA takes the position that because the word "vested" is not found in SB 332, the Legislature did not actually recognize ownership of groundwater in place. The EAA position conflates the concepts of ownership and vesting, a mistake the Legislature avoided by using precise language to describe the nature of the real property interest at issue.

[55] *See* Amicus Curiae Letter of Texas Farm Bureau, et al, Edwards Aquifer Authority v. Burrell Day and Joseph McDaniel, No. 08-0964, Texas Supreme Court.

[56] With apologies to Dylan Thomas.