LANDOWNERS' RIGHTS IN TEXAS GROUNDWATER: HOW AND WHY TEXAS COURTS SHOULD DETERMINE LANDOWNERS DO NOT OWN GROUNDWATER IN PLACE

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I. BACKGROUND

For over one hundred years, Texas courts have upheld the common law rule of capture for groundwater withdrawals.[1] The Texas Supreme Court adopted the rule in the 1904 landmark case *Houston & Texas Central Railway Co. v. East* (*East*).[2] Absent malice or waste,[3] the rule of capture allows landowners to pump as much groundwater as they like without liability to their neighbors for harm caused by that pumping.[4] The rule has proven controversial; Texas courts have criticized the rule of capture as outdated for more than fifty years.[5] Courts have refrained from altering the rule, however, because they defer to the Texas Legislature for guidance on groundwater-related issues.[6] The Texas Constitution's Conservation Amendment forms the basis of this deference.[7] The people of Texas added the Conservation Amendment, Article 16, Section 59, to the state constitution in 1917, after droughts in 1910 and 1917.[8] The conservation amendment declared the preservation and conservation of the state's natural resources to be the duty of the state, and authorized the legislature to pass all laws necessary to achieve those ends.[9]

The legislature enacted the statutory authority for the formation of groundwater conservation districts in 1949,[10] but districts only began to

[1] *See* Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 80–81 (Tex. 1999); *see also* Houston & T.C. Ry. Co. v. East, 98 Tex 146, 81 S.W. 279, 280 (1904).

[2] 98 Tex. 146, 81 S.W. 279 (1904).

[3] City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798, 801 (1955).

[4] *East*, 81 S.W. at 280.

[5] *See Sipriano*, 1 S.W. at 82–83 (Hecht, J., concurring); Friendswood Dev. Co. v. Smith-Sw. Indus., Inc., 576 S.W.2d 21, 28–29 (Tex. 1978); *Corpus Christi*, 276 S.W.2d at 805 (Wilson, J., dissenting).

[6] *Corpus Christi*, 276 S.W.2d at 803.

[7] Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 633 (Tex. 1996); *Friendswood*, 576 S.W.2d at 30; *see Corpus Christi*, 276 S.W.2d at 803.

[8] TEX. CONST. art. XVI § 59(a); *Sipriano*, 1 S.W.3d at 77.

[9] TEX. CONST. art. XVI § 59(a).

[10] *See* Act of May 19, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559–94.

proliferate after the enactment of Senate Bill 1 in 1997.[11] Currently 89 districts exist, 84 of which have been confirmed in local district elections, and 5 of which have yet to be confirmed.[12] A majority of the districts are single-county districts defined by county boundaries.[13] The Texas Water Code authorizes these districts to regulate groundwater withdrawals within their boundaries through permitting, well-spacing, and production limitations,[14] which limit the previously unfettered rule of capture.

Texas's 2007 State Water Plan estimates the state's population will more than double by 2060, and water demand will grow by 27% in that time.[15] Existing water supplies will not be enough to meet future demand in times of drought.[16] Groundwater currently serves the water needs of 59% of the state.[17] Management strategies identified in the state-water-planning process estimate groundwater sources could add 800,000 acre feet of water to existing supplies by 2060.[18] Historically, the majority of the groundwater use in the state has served agricultural needs,[19] but as municipal water demand increases, market forces will shift water from rural to urban areas, potentially causing clashes between landowners and districts.[20] The combination of a nascent groundwater market and increased regulation by districts has already spawned litigation over how strictly districts may regulate groundwater.[21]

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[11] *See Sipriano*, 1 S.W. at 81 (Hecht, J., concurring) (pointing out that the *Sipriano* record indicated only forty-two districts had been created).

[12] Tex. Water Devt. Bd., GCD Facts, *available at* http://www.twdb.state.tx.us/gwrd/GCD/facts.htm (last visited Jan. 24, 2008).

[13] Tex. Water Devt. Bd., GCD Facts, *available at* http://www.twdb.state.tx.us/gwrd/GCD/facts.htm (last visited Jan. 24, 2008). Fifty-nine of eighty-nine districts are single-county districts.

[14] TEX. WATER CODE ANN. § 36.116(a) (Vernon Supp. 2007).

[15] 1 TEX. WATER DEVT. BD., WATER FOR TEXAS 2007, at 2.

[16] *Id.* at 5.

[17] 2 TEX. WATER DEVT. BD., WATER FOR TEXAS 2007, at 176.

[18] 1 TEX. WATER DEVT. BD., WATER FOR TEXAS 2007, at 6.

[19] 2 TEX. WATER DEVT. BD., WATER FOR TEXAS 2007, at 176. Currently, seventy-nine percent of groundwater use is for irrigation.

[20] *See, e.g.*, Edmond R. McCarthy, Jr., *A Property Owner's Guide to Negotiating Agreements for the Capture, Development, and Transmission of Groundwater*, TEXAS WATER LAW INSTITUTE, Tab 14, at 1 (Dec. 2006) (briefly explaining intersection between budding water markets and locally-controlled groundwater conservation districts).

[21] *See, e.g.*, Guitar Holding Co., v. Hudspeth County Underground Water Conservation Dist. No.1, 209 S.W.3d 146, 151 (Tex. App.—El Paso 2006, pet. granted) (landowner sued district for establishing historic-use period that prevented him from getting large water rights permits when

Texas landowners are especially sensitive to groundwater regulation because in some situations they feel groundwater district regulation encroaches on their private property rights.[22] Recently litigation has broached the extent of that property right, and the question whether landowners hold a vested right in groundwater in place has been increasingly important in groundwater litigation.[23] Some commentators stress that the Texas Supreme Court has always recognized a property right in groundwater in place,[24] while others believe Texas groundwater case law only uses the rule of capture as a tort rule of non-liability.[25] These commentators disagree over whether a landowner has a vested property right in groundwater in place, or whether the right vests only at capture. Either way, the Texas Supreme Court has never addressed the question facing today's districts and landowners, namely, does a landowner own groundwater in place? And if he does have a vested property right in unpumped groundwater, does groundwater conservation district regulation potentially effect a compensable taking or affect groundwater's severability from the surface estate?[26]

his neighbors did); Mike Mrkvicka, *Behind the Dell City Water Deal*, El Paso Inc., March 14–20, 2004, Section E, *1, 2, http://www.texaswatermatters.org/pdfs/news_155.pdf; Robert Elder Jr., *Water Wars in Texas*, LAREDO MORNING TIMES, *1–4, August 24, 2003, http://madmax.lmtonline.com/textarchives/082403/s19.htm (explaining business deals and lobbying that enabled landowners falling within Hudspeth district's historic use period to obtain permits that would enable them to sell water to El Paso).

[22] Joe Nick Patoski, *Water Wars*, TEXAS PARKS AND WILDLIFE MAGAZINE, July 2005, at 59, *available at* http://www.joenickp.com/water/waterwars.html (quoting Kinney County landowners who believe the district's pumping caps amount to a taking).

[23] *See, e.g.*, Coates v. Hall, 512 F. Supp. 2d 770, 788 (W.D. Tex. 2007); *see* Order Denying Motion for Summary Judgment at *3, Bragg v. Edwards Aquifer Auth., No. SA-06-CV-1129-XR, 2008 WL 163575, at *1 (W.D. Tex. Jan. 16, 2008) (Bragg II); Clayton Sam Colt Hamilton Trust v. City of Del Rio, No. 24424 (83d Dist. Ct., Val Verde County, Tex. judgment Oct. 10, 2006) (City of Del Rio).

[24] *See, e.g.*, Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still Misunderstood After All These Years*, 37 TEX. TECH. L. REV. 1, 53 (2004).

[25] *See, e.g.*, Greg Ellis, *Regulatory Takings and Texas Groundwater Law*, TEXAS WATER LAW INSTITUTE, Tab 4, at 15 (Dec. 2006).

[26] The Texas Supreme Court acknowledged the question in *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 625 (Tex. 1996), stating, "[t]he parties simply fundamentally disagree on the nature of the property rights affected by this Act." The court decided the constitutional questions before it without deciding the nature of the property right in groundwater. *Id.* at 626.

Texas courts faced a similar question early in the twentieth century as they pondered the nature of the property right in oil and gas in place.[27] The Texas Supreme Court squarely faced the question and declared that landowners owned oil and gas in place.[28] The way oil-and-gas cases met these questions head-on illuminates how little Texas courts have considered this question in the context of groundwater.[29]

This Article recommends that the Texas Supreme Court use whichever appropriate groundwater property case first comes its way to clarify the extent of a landowner's property right in groundwater. It analyzes Texas groundwater case law and contrasts it with oil-and-gas case law deciding the question whether landowners owned oil and gas in place. This Article further suggests the court should decide that landowners do not own groundwater in place, because recognizing a property right in place would require protecting landowners' correlative rights similarly to oil-and-gas law. But the policy reasons for regulating groundwater differ from the reasons we regulate oil and gas, and those policy considerations favor not recognizing a property right in groundwater in place.

II. TEXAS GROUNDWATER CASE LAW REVIEW: TEXAS LAW REMAINS UNCLEAR ON GROUNDWATER OWNERSHIP IN PLACE

Seminal Texas groundwater decisions turn on a variety of legal determinations; the cases encompass tort questions, property rights, statutory interpretation, and constitutional questions.[30] But none of these cases carefully delineates the boundaries between tort and property rules; most cases address tort questions with property-laced terminology.[31] Once *East* adopted the English rule, courts tended to address all groundwater questions with the same convenient language, never needing to answer the question whether a landowner owns groundwater in place.[32] Most significantly, none of the oft-cited Texas groundwater cases explicitly

[27] *See* Texas Co. v. Daugherty, 107 Tex. 226, 234–36, 176 S.W. 717, 719–20 (1915); *see* A.W. Walker, Jr., *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEX. L. REV. 125, 127 (1928).

[28] *Daugherty*, 176 S.W. at 720.

[29] *Id.*

[30] *See, e.g.*, Sipriano v. Great Spring Waters of Am. Inc., 1 S.W.3d 75, 80–81 (Tex. 1999); Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 280 (1904).

[31] *See* Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?* 17 ST. MARY'S L.J. 1281, 1288–93 (1986).

[32] 1 S.W.3d 75 (Tex. 1999).

addresses whether landowners own groundwater in place. This section describes significant Texas groundwater cases, analyzes how they characterize landowners' rights in groundwater, and concludes that the property-right-in-place question remains unanswered. This section will also highlight some of the groundwater cases currently making their way through the court systems that are asking the right question.

A. Terminology

Texas groundwater cases use terminology inconsistently, which has probably contributed to today's confusion about landowners' property interest in groundwater.[33] This Article uses the term "rule of capture" to refer to the rule of non-liability for drainage adopted in *East* and reaffirmed in *Sipriano v. Great Springs Waters of America, Inc.*[34] This Article uses the term "absolute ownership" to refer to the idea that a landowner owns groundwater in place by virtue of surface-estate ownership, based on the maxim that surface ownership includes everything from the depths of the earth upward into the sky.[35]

Of course, the term "absolute" has caused some of the confusion over groundwater law concepts. Professor Corwin Johnson clarified that the term "absolute ownership" does not mean a landowner's right in groundwater is a "super-right subject to no limitations whatever, even legislative control."[36] Instead, it serves to distinguish the American rule of reasonable use, which the *East* court rejected, from the "English rule" the *East* court chose to follow.[37] Professor Johnson's clarification indicates the term "absolute" refers only to the scope of a landowner's right to pump and does not accurately describe the scope of the property right in groundwater, which enjoys no judicial protection from harm by a neighbor.[38] But Professor Johnson's distinction, while accurate, does not describe what courts, pro-property-rights commentators, and older oil-and-gas property commentators seem to mean when they discuss "absolute ownership."

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[33] *See* Drummond, et al., *supra* note 24, at 53 (listing Texas groundwater law's many names for its legal concepts).

[34] 1 S.W.3d at 80–81.

[35] *See* A.W. Walker, Jr., *Theories of Ownership and Control of Oil and Gas Compared with Those of Ground Water*, WATER LAW CONFERENCE 121, 121 (1956).

[36] Johnson, *supra* note 31, at 1288.

[37] *Id.* at 1289.

[38] *Id.*

In Texas groundwater jurisprudence, the term "absolute ownership" probably comes from *East's Pixley v. Clark* quote, which states, the "owner of the land is the absolute owner of the soil and of percolating water . . . ."[39] So even though surface-estate-ownership based groundwater ownership is not an "absolute" right, this Article uses the phrase "absolute ownership" to refer to groundwater ownership in place based on surface-estate ownership.

B. What Texas Groundwater Case Law Has Addressed and How Case Law's Terminology Varies over Time

In *East*, a landowner sued the railroad company next door for drying up his home's well with its larger well.[40] The trial court applied the American doctrine of reasonable use, and found the defendant had used groundwater unreasonably.[41] The Texas Supreme Court reversed, choosing to apply the English rule of non-liability, as articulated in *Acton v. Blundell*, over the American rule of reasonable use.[42] The court chose the English rule based on two policy rationales previously recognized in an Ohio groundwater case: that groundwater's movement was too secret and occult to regulate, and because recognizing correlative rights in groundwater would impede economic progress.[43]

East's quote from *Acton* describes what we call the rule of capture:

> '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 underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot become the ground for an action.'[44]

[39] Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 281 (1904) (quoting Pixley v. Clark, 35 N.Y. 520, 527 (N.Y. 1866).

[40] *Id.* at 280.

[41] *Id.*

[42] *Id.* (quoting Acton v. Blundell, 12 Mees. & W. 324, 354, 152 Eng. Rep. 1223, 1235 (Ex. Ch. 1843)).

[43] *Id.* at 281 (quoting Frazier v. Brown, 12 Oh. St. 294, 294 (1861)).

[44] *Id.* at 280 (quoting Acton v. Blundell, 12 Mees. & W. 324, 354, 152 Eng. Rep. 1223, 1235 (Ex. Ch. 1843)).

The *East* court also quoted language describing the absolute-ownership rationale for choosing the rule of capture:

> '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 land is the absolute owner of the soil and percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface.'[45]

Landowner advocates believe *East*'s absolute-ownership language establishes a landowner's property right in groundwater in place.[46] Other commentators argue that the rule described in *Acton* and adopted in *East* only limits liability between landowners for groundwater withdrawals.[47] Although *East*'s effect was only to limit the defendant's liability, it is impossible to ignore the significance of *East*'s absolute ownership language. The concept acknowledges the ancient maxim that a surface owner owns from the depths to the heavens, and if groundwater exists under his property, then he owns it while it is there.[48]

In *Texas Co. v. Burkett*, plaintiff Burkett sold his water rights to the Texas Co. for one year.[49] Burkett sued when the Texas Co. breached the contract, and the Texas Co. responded in defense that the contract was invalid because the water Burkett contracted to sell actually belonged to the state.[50] *Burkett* turned on whether Burkett's groundwater was his property or the state's.[51]

The *Burkett* court examined the record, and because the evidence did not show the groundwater to be subsurface streams within defined channels, it presumed the groundwater to be "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."[52] The *Burkett* court's

[45] *Id.* at 281 (quoting New York's articulation of the English rule in Pixley v. Clark, 35 N.Y. 520, 527 (1866)).

[46] *E.g.*, Michael Powell, TEXAS WATER LAW INSTITUTE, Tab 4, at 3 (Dec. 2006).

[47] *E.g.*, Ellis, *supra* note 25, at 7.

[48] Walker, *supra* note 35, at 121.

[49] 117 Tex. 16, 296 S.W. 273, 274 (1923).

[50] *Id.*

[51] *Id.* at 278.

[52] *Id.*

language was less precise than *East's* in describing what it believed was the legal origin of Burkett's alienable water right, unless by "exclusive property," the court meant to express the absolute-ownership concept.[53] The court held the groundwater belonged to Burkett, and he could validly sell it.[54]

Pecos County Water Control & Improvement District No. 1 v. Williams (*Comanche Springs*), on the other hand, more precisely pinpoints land ownership as the legal basis for a landowner's groundwater ownership, which may indicate the court intended to recognize absolute ownership.[55] In *Comanche Springs*, the El Paso Court of Appeals rejected plaintiff's request for recognition of its rights in springflow with which groundwater pumping interfered and a declaration of its correlative rights to the groundwater sources of Comanche Springs.[56] The *Comanche Springs* court allowed landowners' rule-of-capture rights to defeat vested surface water rights,[57] because Texas groundwater cases "seem to hold that the landowner owns the percolating water under this land and that he can make a non-wasteful use thereof, and such is based on a concept of property ownership."[58] The decision exemplifies Texas's separate surface and groundwater legal regimes and demonstrates the power of Texas's rule of capture. Although the injury in this case was similar to that in "tort" cases such as *East*, because the defendant's pumping dried up the plaintiff's water supply, the Comanche Springs irrigators were not just seeking damages; they sought declarations of their property rights in relation to the defendant's property rights.[59]

The Comanche Springs opinion distinguished Texas groundwater law from other states' groundwater law, because "Texas came into the Union claiming ownership of her lands, . . . and . . . such lands, when patented as these have been to defendants, carry with them as a property right the ownership of percolating underground water."[60]

In *City of Corpus Christi v. City of Pleasanton* (*Corpus Christi*), the Texas Supreme Court construed a statute about wasteful transport of

[53] *Id.*

[54] *Id.*

[55] 271 S.W.2d 503, 505–06 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

[56] *Id.*

[57] *Id.* at 504. The plaintiff's irrigators had used the waters of Comanche Springs for 90 years.

[58] *Id.* at 505 (emphasis added).

[59] *Id.*

[60] *Id.* at 506.

artesian water.[61] The City of Pleasanton sued the City of Corpus Christi for an injunction under the statute for transporting the water in a wasteful manner, causing harm to the plaintiffs' water supply.[62] The court found for the City of Corpus Christi because the statute only prohibited waste in eventual use, not waste in transport, and no evidence showed the City of Corpus Christi had wastefully used the water.[63] The Texas Supreme Court stated that "percolating waters are regarded as the property of the owner of the surface . . . ,"[64] but the court's language offers no hints as to its belief on the provenance or extent of that property interest. The court discussed groundwater common law to emphasize that landowners had the right to transport and sell groundwater, and that the statute in question did not make such uses unlawful.[65]

The *Friendswood Development Co. v. Smith-Southwest Industries, Inc.* (*Friendswood*) court likewise respected a landowner's rights in groundwater and believed the rule of capture was based on those rights.[66] In *Friendswood*, the Texas Supreme Court considered whether Texas groundwater law allowed it to compensate plaintiffs whose property had been damaged by groundwater-withdrawal-caused subsidence.[67] The plaintiffs alleged negligence and nuisance causes of action.[68] The Texas Supreme Court based its denial of relief on the idea that Texas groundwater law consisted of established property rules.[69] The *Friendswood* court created a prospective exception to the rule of capture for subsidence caused by negligent groundwater withdrawals.[70] It did not apply the exception retroactively to the *Friendswood* defendants, however, because it stated doing so would have been improper in the context of a property rule.[71]

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[61] 154 Tex. 289, 276 S.W.2d 798, 800 (1955).

[62] *Id.* at 803. Defendant City of Corpus Christi bought water from the Lower Nueces River Supply District, which flowed water from its wells to Corpus Christi in the Nueces River. Evidence showed that between 63 and 74% of the water was lost to seepage and evaporation along the way. *Id.* at 800.

[63] *Id.* at 803–04.

[64] *Id.* at 800.

[65] *Id.* at 802.

[66] 576 S.W.2d 21, 28–29 (Tex. 1978).

[67] *Id.* at 21–22.

[68] *Id.* at 22.

[69] *Id.*

[70] *Id.* at 30–31.

[71] *Id.*

The *Friendswood* court used the term "absolute ownership," but as a label rather than a property concept, equating the term with "the common law rule," and the '"English rule.'"[72] The court later mentioned that the *East* court based its decision on "the absolute-ownership doctrine of underground percolating waters." *Friendswood* went on to quote *East's* approving *Frazier v. Brown* quote.[73] That *Frazier v. Brown* quote stated the common law recognized no correlative rights in percolating groundwater.[74] As will be discussed more fully below, recognition of surface-estate-based groundwater ownership in place, or what this Article terms "absolute ownership," requires recognition of correlative rights in groundwater. *Friendswood* apparently failed to differentiate these concepts, and the case serves as a good example of the confused state of Texas's groundwater law.

In 1983, the Texas Supreme Court decided *City of Sherman v. Public Utility Commission*.[75] The court was called upon to decide whether the Public Utility Commission of Texas (PUC) had jurisdiction over a utility's groundwater production.[76] *City of Sherman* is one of the only Texas cases that attempts to distinguish the relationship between the rule of capture and the concept of absolute ownership; it states "the absolute ownership theory regarding groundwater was adopted by this Court in [*East*]. A corollary to absolute ownership of groundwater is the right of the landowner to capture such water."[77] It used that principle to explain that the Texas Water Code was the only source of statutory regulation of groundwater production, and that nothing in the Texas Water Code authorized the PUC to regulate groundwater production.[78] As in *Friendswood*, the *City of Sherman* court failed to appreciate the logical inconsistency of the coexistence of absolute ownership of groundwater and the rule of capture.[79]

As has been discussed above, from *East* through the *City of Sherman* decision, the Texas Supreme Court used the absolute-ownership concept to decide various questions unrelated to whether landowners own groundwater

[72] *Id.* at 25.

[73] *Id.*

[74] *Id.* (quoting Frazier v. Brown, 12 Oh. St. 294, 294 (1861)).

[75] 643 S.W.2d 681 (Tex. 1983).

[76] *Id.* at 685.

[77] *Id.* at 686 (internal citations omitted).

[78] *Id.*

[79] *See* discussion *infra* Part II.C.

in place. But by the 1990s, the court used property-related language more carefully.

For example, the *Sipriano* court carefully avoided mentioning property rights; it discussed the rule of capture in terms of the remedies it did not provide to landowners whose neighbors deprived them of their water.[80] *Sipriano*'s facts are similar to *East*'s, although they occurred nearly 100 years later. Plaintiff landowners sued Defendant Ozarka for negligently draining their wells by pumping 90,000 gallons of water a day, seven days a week.[81] The plaintiffs asked the Texas Supreme Court to replace the rule of capture in Texas with the rule of reasonable use.[82] The court declined to do so, recognizing that groundwater regulation in Texas is a legislative function, and that the legislature had just acted to regulate groundwater in the 1997 omnibus water bill Senate Bill 1.[83] The *Sipriano* opinion describes *East* as a case that "refused to recognize tort liability against a railroad company whose pumping of groundwater under its property allegedly dried the neighboring plaintiff's well."[84]

Similarly, the Texas Supreme Court's opinion in *Barshop v. Medina County Underground Water Conservation District No. 1* also carefully avoids property terminology, describing *East* as a case in which the court refused to award damages, and calling the right to withdraw groundwater "absolute," as opposed to saying the rule of capture is based on a landowner's absolute ownership of groundwater.[85] *Barshop* involved a facial constitutional challenge to the Edwards Aquifer Act.[86] Landowners claimed that regulation under the act would result in unconstitutional takings of their vested property right in groundwater.[87] The Texas Supreme Court acknowledged the tension between the state's and landowners' positions but resolved the constitutional questions before it without deciding whether landowners own groundwater in place.[88]

[80] Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 81 (Tex. 1999).

[81] *Id.* at 75–76.

[82] *Id.* at 76.

[83] *Id.* at 80.

[84] *Id.* at 77 (emphasis added).

[85] 925 S.W.2d 618, 625 (Tex. 1996) (emphasis added).

[86] *Id.* at 623.

[87] *Id.* at 625.

[88] *Id.* at 626.

C. How the Cases Might Be Read

In every one of the major Texas groundwater cases discussed above, groundwater ownership in place was irrelevant to the court's resolution of the case. *East*, *Friendswood*, and *Sipriano* were all tort-based actions whose resolutions were based on the rule of capture.[89] *Corpus Christi* turned on statutory interpretation.[90] Even *Burkett* and *Comanche Springs*, although based on what landowners can do with their rights in groundwater, could have been based on a usufructuary water right; the cases would have turned out the same whether the landowners owned groundwater in place or whether their right vested on capture.[91] Groundwater case law's intermingling of property and tort rules contrasts with how early twentieth century courts addressed these issues as related to oil-and-gas and struggled with the tension between the rule of capture and absolute ownership theories.

The *East* court acknowledged absolute ownership while choosing not to protect that property right, but the court seemed unconcerned with the confusing implications of using both rule of capture and absolute ownership rationales.[92] At the same time, courts across the country were trying to reconcile the two concepts in oil-and-gas cases.[93] The Texas Supreme Court's early oil-and-gas cases did consider the implications of using both rule of capture and absolute ownership rationales.

In *Texas Co. v. Daugherty*, the Texas Supreme Court first recognized a landowner's ownership interest in oil and gas in place despite their fugitive natures.[94] While *Daugherty* did not explicitly address the rule of capture's implications, *Stephens County v. Mid-Kansas Oil & Gas Co.* stated that "[t]he objection lacks substantial foundation that gas or oil in a certain tract of land cannot be owned in place, because subject to appropriation, without the consent of the owner of the tract, through drainage from wells on

[89] *Sipriano*, 1 S.W.3d at 75; Friendswood Dev. Co. v. Smith-Sw. Indus., Inc., 576 S.W.2d 21, 24, 28–29 (Tex. 1978); Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 149, 81 S.W. 279, 280 (1904).

[90] City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798, 804 (1955).

[91] *See* Johnson, *supra* note 31, at 1291.

[92] *See East*, 81 S.W. at 281–82. *But cf.* W. L. Summers, *Property in Oil and Gas*, 29 YALE L.J. 174, 179 (1919) (lamenting that "absolute ownership doctrine is used to make legal the act of taking and is refused when a remedy for the taking is asked").

[93] *See generally* Summers, *supra* note 92, (describing courts' struggle to protect absolute-ownership property rights because oil and gas tended to escape from under landowners' property).

[94] 107 Tex. 226, 176 S.W. 717, 719–20 (1915).

adjacent lands."[95] The court dismissed the rule of capture's troublesome nature by pointing out that each landowner has the right potentially to drain his neighbor's land.[96]

Stephens County and *Brown v. Humble Oil & Refining Co.*, another important early oil-and-gas case, both cite *East* for the rule-of-capture proposition.[97] But both *Stephens County* and *Brown* cite *Daugherty*, among other cases, for the proposition that oil and gas are capable of ownership in place.[98] None of the cases cite *East* for the absolute-ownership proposition, and even if they had, these cases' holdings are still only applicable to oil and-gas law. None of these cases purport to be establishing groundwater law. And although *East* set Texas's groundwater rule of capture on a strong foundation, it never intended to establish groundwater ownership in place.

Returning to groundwater case law, *Burkett* only addressed how Burkett could use his groundwater, not when his property right in groundwater vested.[99] The case confirmed that groundwater did not belong to the state, and that the surface owner could sell the right to pump groundwater.[100] The court did not address whether *Burkett* owned the groundwater in place. Resolving that issue was unnecessary to determining whether Burkett had validly sold his right to pump to the Texas Company, and that the Texas Company breached its contract.

Subsequent groundwater cases like *Comanche Springs*, *Corpus Christi*, *Friendswood*, and *City of Sherman* used magic words about property rights in groundwater, but the cases did not address whether the defendant landowners held a property right in groundwater in place. Each of these cases affirmed the broad scope of Texas's rule of capture.[101] In each case, the court's holding turned on the meaning and scope of the rule of capture,

[95] 113 Tex. 160, 254 S.W. 290, 292 (1923).

[96] *Id.*

[97] Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 940 (1935); *Stephens County*, 254 S.W. at 292.

[98] *Brown*, 83 S.W.2d at 940; *Stephens County*, 254 S.W. at 292.

[99] *See* Tex. Co. v. Burkett, 117 Tex. 16, 296 S.W. 273, 276–77 (1927).

[100] *See id.* at 278.

[101] *See* City of Sherman v. Pub. Util. Comm'n of Tex., 643 S.W.2d 681, 686 (Tex. 1983); Friendswood Dev. Co. v. Smith-Sw. Indus., Inc., 576 S.W.2d 21, 25–27 (Tex. 1978); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798, 802 (1955); Pecos County Water Control & Improvement Dist. No. 1 v. Williams, 271 S.W.2d 503, 505 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

despite the fact that the courts also mentioned "property."[102] Regardless of the court's language, *Friendswood*'s resolution actually turned on the tort-law concept of the rule of capture; plaintiffs could not state nuisance and negligence claims against groundwater withdrawers when Texas's groundwater law explicitly allowed a landowner to harm his neighbor.[103] *City of Sherman* just established a state agency's powers under the Texas Water Code.[104]

By the time the Texas Supreme Court decided *Sipriano* in 1999, the debate over the property right in groundwater had already begun. The Edwards Aquifer Authority (EAA) and the State of Texas had already presented their argument in *Barshop* that landowners do not own groundwater until capture,[105] and the *Barshop* court knew what was potentially at stake. *Sipriano*'s silence on property rights indicates that while the rule of capture is alive and well in Texas groundwater common law, the rule of capture is not itself a property rule. The *Sipriano* court did not base its decision on the concept of absolute ownership; it based it on a tort rule and a policy of deference to the legislature in the groundwater-law arena.[106] The *Sipriano* court was not asked to answer a property-right question and its characterization of the *East* decision indicates that *East* is about tort liability regarding groundwater withdrawals.[107]

[102] *City of Sherman*, 643 S.W.2d at 686; *Friendswood*, 576 S.W.2d at 25–27; *Corpus Christi*, 276 S.W.2d at 802; *Comanche Springs*, 271 S.W.2d at 505.

[103] *See Friendswood*, 576 S.W.2d at 24–26.

[104] 643 S.W.2d at 686.

[105] Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 625 (Tex. 1996) ("The State insists that, until the water is actually reduced to possession, the right is not vested and no taking occurs."). The State of Texas has actually argued landowners do not own groundwater until capture since long before *Barshop*. *See* City of Altus, Okla. v. Carr, 255 F. Supp. 828, 839 (W.D. Tex. 1966). The *City of Altus* court did not need to address groundwater ownership in place to answer the question presented in that case—whether a Texas statute prohibiting groundwater export to other states violated the Commerce Clause of the U.S. Constitution. *See id.* at 837, 839–40.

[106] *See* Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 80–81 (Tex. 1999).

[107] *See id.* at 76.

D. Groundwater Ownership in Place? Today's Cases Ask the Right Questions

1. *Bragg* I and II

The Braggs own pecan orchards in Medina County, which is located within the boundaries of the EAA.[108] There is a well on each of their two pecan orchards; one was completed in 1979 (the Home Place Orchard), and the other was completed in 1995 (the D'Hanis Orchard).[109] Under the EAA's permitting rules, the Braggs received an initial regular permit for the Home Place Orchard well in the amount of the statutory maximum of two acre-feet per acre irrigated during the historical period.[110] The statutory historical period ran from June 1, 1972 through May 31, 1993.[111] The EAA's general manager recommended denying the Bragg's permit application for the D'Hanis Orchard well because it had produced no water during the historical period.[112]

In 2001, the Braggs sued the EAA for promulgating permitting rules without performing a takings impact analysis as required by the Property Rights Act (*Bragg I*).[113] The court held the EAA was not required to perform a takings impact analysis because the EAA's actions fell into exceptions for actions taken under a political subdivision's statutory authority to prevent waste or protect rights of owners in groundwater.[114] The court also held the EAA's actions on the Bragg's permits were covered by the exception for enforcement of a governmental action.[115] Because the court decided the case based on statutory interpretation, it did not have to consider the underlying question inherent in whether EAA regulation could effect a taking: whether a property right existed that could be taken.

The EAA formally denied the Braggs' D'Hanis Orchard well application on September 21, 2004.[116] Two years after that denial, the

[108] *See* Bragg v. Edwards Aquifer Auth., 71 S.W.3d 729, 731 (Tex. 2002) (*Bragg I*).

[109] *Id.*

[110] *Id.* at 732.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 730.

[114] *Id.* at 730–31.

[115] *Id.* at 731.

[116] Bragg v. Edwards Aquifer Auth., No. SA-06-CV-1129-XR, 2008 WL 163575, at *1 (W.D. Tex. Jan. 16, 2008).

Braggs sued the EAA in federal district court under the Texas and United States Constitutions, alleging Equal Protection and Due Process violations (*Bragg II*).[117] *Bragg II* is one of many cases asking courts to decide issues that turn on whether landowners own groundwater in place under Texas law. These cases differ from earlier groundwater cases because they require such a determination. As discussed above, Texas courts have never addressed this question in the context of groundwater.

The *Bragg II* court recently denied the Braggs' motion for summary.[118] The court concluded summary judgment was inappropriate because assuming the Braggs held a vested property right in the groundwater beneath their land, the EAA's denial of their permits had not effected a *per se* regulatory taking under takings jurisprudence.[119] The *Bragg II* court disposed of the rest of the Braggs' federal claims by granting summary judgment in favor of the EAA on March 25, 2008.[120] The *Bragg II* court then declined to exercise supplemental jurisdiction over the Braggs' state-law takings claims because they "raise important, complex issues of Texas constitutional law."[121] The court remanded the state-law takings claims to the 38th Judicial District Court in Medina County,[122] where the case will surely be watched closely by landowners, attorneys, and commentators.

Bragg I and *Bragg II* are good examples of the struggle between landowners and regulation in the Edwards Aquifer Authority region. The

[117] *Id.* at *2.

[118] *Id.* at *7–8.

[119] *Id.* It is puzzling Plaintiffs felt they were "entitled to a judgment as a matter of law" in such an unsettled and hotly-contested area of law. FED. R. CIV. P. 56(c). Although the court's January 16, 2008 order tidily denied the motion by concluding no taking had occurred, even if takings jurisprudence had allowed the court to find a taking had occurred, awarding summary judgment on a taking claim would require an initial determination that Texas landowners own groundwater in place under Texas law. However, in *Coates v. Hall*, the same court acknowledged "the Texas Supreme Court has not addressed the scope of a landowners' 'cognizable property interest' in groundwater beneath their land," and did not decide the question. 512 F. Supp.2d 770, 786 (W.D. Tex. 2007). The *Coates* court also expressed a preference for abstention out of respect for the novel issues of state law. *Id.* at 21. *See id.* 781–84.

[120] Bragg v. Edwards Aquifer Auth., No. SA-06-CV-1129-XR, 2008 WL 819930, *10 (W.D. Tex. March 25, 2008).

[121] *Id.*

[122] *Id.*

EAA will not be issuing new permits.[123] The Edwards Aquifer Act set a cap on aquifer withdrawals, and the EAA ended up awarding more acre-feet of water under initial regular permits than the cap allowed.[124] This means that no new permits are available, and the Braggs will not be able to produce groundwater at their D'Hanis orchard beyond exempt amounts again without buying a permitted water right.[125] For landowners who always believed they owned the groundwater under their land, the government's ability to take that right away for good must feel like a "taking" whether a court agrees or not.

On the other hand, the legislature charged the EAA with the difficult task of managing the water supply of 1.7 million people in the San Antonio area, the only large city in the country that remains entirely dependent on one aquifer for its water source.[126] The EAA's provenance also reflected the state's desire to protect endangered species and prevent federal regulation of such an important water source.[127] Managing the Edwards Aquifer with a growing city and environmental protection in mind requires groundwater pumping limits.[128] Cases like these clarify the extent of a landowner's property right in groundwater, and will help both sides better understand how much they can get out of litigation, perhaps keeping these types of conflicts out of Texas courts in the future.

The *Bragg II* court's January 16, 2008 denial of the Braggs' motion for summary judgment also highlights that even if the Texas Supreme Court someday decides landowners own groundwater in place, takings lawsuits may not turn out to be viable or lucrative landowner endeavors. Now that some cases have worked their way through the courts, it is clear that scare

[123] *See* EDWARDS AQUIFER AUTH., FACT SHEET: FINAL GROUNDWATER WITHDRAWAL PERMIT AMOUNTS ESTABLISHED, at *1 (2005), http://edwardsaquifer.org/pdfs/fact%20Sheets/Final%20Order%20Attachment.pdf.

[124] *See id.*

[125] *See id.*

[126] TEX. COMM'N ON ENV'T QUALITY, PROTECTING THE EDWARDS AQUIFER: REGULATIONS AND SCRUTINY FOCUS ON ONE OF THE MOST PRODUCTIVE AQUIFERS IN THE U.S., at *1 (2007), http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/pd/020/08-01/protectingtheedwardsaquifer.html; Todd H. Votteler, *The Little Fish that Roared: The Endangered Species Act, State Groundwater Law, and Private Property Rights Collide Over the Texas Edwards Aquifer*, 28 ENVTL. L. 845, 845 (1998).

[127] *See* Votteler, *supra* note 123, at 845–46, 859–60.

[128] *See id.* at 876.

tactics estimating the state's potential takings debt in the billions were just that.[129]

2. *Clayton Sam Colt Hamilton Trust v. City of Del Rio*

Clayton Sam Colt Hamilton Trust v. City of Del Rio (*City of Del Rio*) is another important case in which litigants are asking Texas courts to resolve whether landowners own groundwater in place. Unlike other recent groundwater cases, the case does not involve landowners' conflicts with districts over regulation.

The Clayton Sam Colt Hamilton Trust (Trust) sold 15 acres out of a 3,200-acre tract to the City of Del Rio in 1997.[130] In the deed conveying the property, it reserved "all water rights associated with said tract . . . ," but expressly relinquished its right to enter the tract to produce water.[131] When the city pumped groundwater on the tract a few years later, the Trust sued based on its reservation of the water rights. The City responded that the Trust could not have reserved its groundwater rights when it sold the land because landowners do not own the groundwater beneath their land, and therefore cannot reserve it.[132]

The 83rd Judicial District Court in Val Verde County rendered judgment in favor of the Trust, holding the reservation was valid.[133] The Fourth Court of Appeals affirmed on February 27, 2008.[134] The appeals court agreed with the Trust's position that the term "absolute ownership," as articulated in *East, City of Sherman, Friendswood,* and *Burkett* indicated groundwater ownership such that the Trust could validly sever the groundwater estate when it transferred the surface estate to the City.[135]

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[129] *See* Drummond et al., *supra* note 24, at 91 (estimating the state's potential takings liability in the $24.5 billion to $170 billion range).

[130] Clayton Sam Colt Hamilton Trust v. City of Del Rio, No. 24424 (83d Dist. Ct., Val Verde County, Tex. Oct. 10, 2006); Brief of Appellant City of Del Rio at 1–2, City of Del Rio v. Clayton Sam Colt Hamilton Trust, No. 04-06-00782-CV (Tex. App.—San Antonio, 2008).

[131] Brief of Appellant City of Del Rio, *supra* note 129, at 3 n.3.

[132] Clayton Sam Colt Hamilton Trust v. City of Del Rio, No. 24424 (83d Dist. Ct., Val Verde County, Tex. Oct. 10, 2006).

[133] *Id.*

[134] City of Del Rio v. Clayton Sam Colt Hamilton Trust, No. 04-06-00782-CV, 2008 WL 508682, * 1 (Tex. App.—San Antonio, 2008, no pet. h.).

[135] *Id.* at *3.

The Fourth Court of Appeals accepted, as stated in *City of Sherman*, that the rule of capture is a corollary to the rule of absolute ownership.[136] The *City of Del Rio* court stated that under the rule of capture, a landowner owns the oil and gas beneath his land, but that the rule of capture is also a rule of nonliability for drainage.[137] Therefore, because a landowner owns the groundwater in place, he is not liable for draining his neighbor's groundwater. While this statement of the rules of absolute ownership and capture might sound appealing to the drainer, it is less appealing to the drainee; under the above-described rule, he owns his groundwater too, and yet the rule of capture denies him a remedy when it is drained, so in what sense does he own it? As discussed below, as soon as it is presented with the opportunity, the Texas Supreme Court should acknowledge this tension and construct a response to the inconsistency. It would make more sense to accept that the rule of capture, a rule of non-liability for drainage, means that a landowner *does not* own groundwater in place.

The Fourth Court of Appeals seemed persuaded by the Trust's "bucket argument," by which the Trust argued that if a landowner only gains ownership of groundwater upon capture, then transfers can only take place based on the size of the "bucket" he uses to capture and transport the water from the surface.[138] The Trust argued the "bucket" scenario ignores the reality of groundwater transfers taking place across the state.[139] The court worried this reading of the law would bring groundwater transfers to a standstill.[140] Although initially a compelling argument, these implications of groundwater rights vesting upon capture are not necessarily true. The bucket argument ignores that groundwater severance is not the only way, or best way, to measure groundwater capture in a way that facilitates transfer. Districts across the state are required to permit all wells drilled, altered, or operated within their boundaries.[141] Permits provide better "buckets" to facilitate groundwater marketing than free rein to sever and transfer unquantifiable and unprotected groundwater rights, and arguably the permit itself is what creates a vested right in a certain amount of groundwater.[142] Landowners know this and have supported the idea of creating groundwater

[136] *Id.* at *4.

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

[138] *Id.* at *3.

[139] *Id.*

[140] *Id.*

[141] TEX. WATER CODE ANN. §§ 36.113, 36.115 (Vernon 2000 & Supp. 2006).

[142] *See* Votteler, *supra* note 126, at 874–75.

districts for the purpose of groundwater marketing.[143] Granted, the state's groundwater-conservation-district-regulation scheme does not apply in *City of Del Rio*, as there is no groundwater conservation district in Val Verde County.[144] It remains unclear whether the City of Del Rio will appeal the Fourth Court of Appeals' decision, but as yet, courts have not addressed the inconsistency between the rules of absolute ownership and capture.[145]

III. THE TEXAS SUPREME COURT SHOULD DECIDE THERE IS NO PROPERTY RIGHT IN GROUNDWATER IN PLACE

Even if the Texas Supreme Court still used absolute-ownership terminology a few decades ago,[146] it has not necessarily decided the question of ownership in place. The case law's terminology indicates the court has not seriously considered the nuances of the property-right question as applied to groundwater. Today's Texas Supreme Court could go either way without overruling a century of precedent; no on-point cases exist.[147]

At its first opportunity, the Texas Supreme Court should clarify that Texas landowners do not own groundwater in place. This choice will facilitate necessary groundwater regulation through groundwater conservation districts. The court can make this choice despite the property

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[143] *See* Patoski, *supra* note 22, at 61 ("[O]ne of the first things WaterTexas . . . told [a Kinney County landowner interested in marketing groundwater] was that Kinney County needed a groundwater district before exportation could begin.").

[144] Creating a groundwater conservation district in Val Verde County has been the subject of discussion and dispute in both the 79th and 80th Legislative sessions. *See, e.g.*, Tex. S.B. 1896, 79th Leg., R.S. (2005); Tex. H.B. 3484, 79th Leg., R.S. (2005); Bill Sontag, *Groundwater Conservation District Legislation Moribund, Thanks to Local Squabbles*, SOUTHWEST TEXAS LIVE, April 25, 2007, *available at* http://www.swtexaslive.com/node/3898; Bill Sontag, *City of Del Rio and Citizen Groundwater Environmental Interests Approve Draft Water Legislation Despite Landowner Boycott*, SOUTHWEST TEXAS LIVE, April 20, 2007, *available at* http://www.swtexaslive.com/node/3866.

[145] *See* Bill Sontag, *City of Del Rio's Losses Approaching $1 Million in Water Rights Case*, SOUTHWEST TEXAS LIVE, February 27, 2008, *available at* http://www.swtexaslive.com/node/6290.

[146] *See* Friendswood Dev. Co. v. Smith-Sw. Indus., Inc., 576 S.W.2d 21, 21 (Tex. 1978).

[147] Johnson, *supra* note 31, at 1292 ("If one takes the view that *stare decisis* is applicable to the decision of a case and not necessarily to the rationale for that decision, it would be proper for the Supreme Court of Texas to announce in the next case before it involving this issue that it is rejecting the corporeal ownership rationale in favor of the usufructuary rationale . . . ." (citing Goodhart, *Three Cases on Possession*, 3 CAMBRIDGE L.J. 195 (1927))).

leanings of older groundwater case law by focusing on groundwater case law's emphasis on policy choices that benefit the state. The court should recognize and reject the conceptual difficulties inherent in recognizing both rules of capture and absolute ownership; historic acknowledgment of both doctrines meant Texas groundwater law was always flawed. Although the court could recognize groundwater ownership in place by following older case law's property rhetoric, or by analogizing to oil-and-gas law, there are important policy reasons to avoid that choice. Groundwater serves different purposes than oil and gas, and the reasons we regulate the resources differ. The ownership in place decision should reflect those fundamental differences.

A. Why the Court?

The court should feel free to answer the groundwater-ownership-in-place question because analyzing Texas groundwater case law demonstrates lack of precedent on this exact issue. On the other hand, groundwater opinions recognize strong precedent establishing the rule of capture; they reiterate how the *East* court "made a deliberate choice" of the rule of capture over the rule of reasonable use.[148] When the *Daugherty* court chose ownership in place for Texas oil-and-gas law, it avoided basing its decision on the parties' contract and instead "pass[ed] over that to the determination of the naked question."[149] The Texas Supreme Court should make a similarly deliberate choice on groundwater ownership in place.

In making this deliberate choice, the Texas Supreme Court should appreciate that it is facing a question of first impression. It has done so in past groundwater cases. The *Friendswood* court, for example, cited *East*, *Corpus Christi*, and *Comanche Springs* to explain landowner non-liability for harmful groundwater withdrawals, but recognized that it had never addressed subsidence in connection with the English rule of capture.[150] The *Friendswood* court did not base its decision on cases that did not address the same question; instead, it tackled the question with persuasive authority.[151] Likewise, when faced with the question whether a landowner owns groundwater in place, the Texas Supreme Court should take a

[148] *Friendswood*, 576 S.W. at 25; City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798, 801 (1955).

[149] Tex. Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717, 719 (1915).

[150] *Friendswood*, 576 S.W.2d at 27.

[151] *See id.* at 27–28.

moment to acknowledge that its prior groundwater precedent does not address the question, and then review the policy implications of the decision it faces instead of reiterating language inapplicable to the situation.

Although the Texas Supreme Court traditionally defers to the legislature on groundwater questions, and the legislature has acted since Senate Bill 1, it seems unlikely the legislature has the political will to pass a bill clarifying the extent of the property interest in groundwater.[152] The court correctly deferred to the legislature in rule-of-capture cases because under the Texas Constitution, it is the legislature's job to dictate the means of conserving natural resources, and establishing groundwater regulation requires myriad policy decisions.[153] But whether landowners own groundwater in place is a legal question the court should feel free to answer. Granted, the resulting decision will drive policy choices and the form groundwater regulation takes, but the legislature needs to know the legal principles on which it bases its policy decisions, if it chooses not to make that law itself. If not, landowners and regulators will face the confusion caused by the state arguing for a usufructuary rule,[154] but also passing legislation recognizing property rights in groundwater in place.[155] The court can avert this confusion by clarifying the extent of the property right in groundwater.

The court should avoid recognizing groundwater ownership in place because avoiding that recognition will prevent courts from dealing with groundwater regulation issues in a piecemeal fashion.[156] If landowners do own groundwater in place, then groundwater conservation districts and courts will face individual takings cases that may result in courts doing districts' and the legislature's work for them. The court can avoid this problem by clearly stating that no property right exists in groundwater in place. Then courts, who "are not equipped to regulate ground water

[152] *See* Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 79–81 (Tex. 1999); Senate Bill 1041 in 2003, authored by Senator Kip Averitt, would have clarified that groundwater property rights only vest at capture. The bill did not get a hearing, however, so it is hard to know how legislators would have reacted to debate on the issue. Tex. S.B. 1041, 78th Leg., R.S. (2003), *available at* http://www.lrl.state.tx.us.

[153] TEX. CONST. art. XVI, § 59(a).

[154] *See* Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 625 (Tex. 1996).

[155] *See, e.g.*, TEX. PROP. CODE ANN. § 21.0421 (Vernon Supp. 2007) (directing political subdivisions condemning property to value groundwater separately from the land).

[156] *See Friendswood*, 576 S.W.2d at 30.

uses . . . on a suit-by-suit basis"[157] will not have to face situations in which they must effectively regulate groundwater. The Texas Supreme Court could better achieve deference to the legislature by refusing to acknowledge a property right in groundwater in place, which will keep courts out of the business of regulating groundwater.

Keeping courts out of the business of regulating groundwater also serves the policy goal set forth in *East* of choosing easily-applicable legal rules.[158] The *East* court chose the rule of capture because recognizing correlative rights in groundwater would have impeded economic progress.[159] Today's court might better serve the state's interest in establishing groundwater regulation by avoiding stepping into a situation in which it must adjudicate every disgruntled permit applicant's takings challenge. Even if many takings challenges to regulation could be dismissed based on the stringency of takings jurisprudence, valid exercise of police power, or the constitution's mandate, it seems the state would want to avoid facing the constitutional challenges that oil-and-gas law did by choosing ownership in place.[160]

B. Lessons from Oil-and-Gas Law About the Rule of Capture and Absolute Ownership

Courts deciding early oil-and-gas cases based their property-right decisions on ancient groundwater common law, which recognized a landowner's property right in percolating water in place by virtue of his absolute ownership of the soil.[161] Courts eventually clarified oil-and-gas law property concepts early in oil-and-gas law's evolution,[162] whereas groundwater law is only beginning to face the dilemma. States' oil-and-gas property regimes vary among ownership in place (a property "right"),

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[157] *Id.*

[158] *See* Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 280–81 (1904).

[159] *See id.* at 281.

[160] *See* Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 941 (1935) (listing cases upholding the Railroad Commission's constitutional and police power authority to enact rules to regulate oil and gas.).

[161] *See* Summers, *supra* note 92, at 178; *see also* Robert. E. Hardwicke, *The Rule of Capture and its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391, 399 (1935); Tex. Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717, 721 (1915) (quoting JOHN M. GOULD, GOULD ON WATERS § 291 (3d ed., Callaghan and Co. 1900)).

[162] *See generally* Summers, *supra* note 92.

qualified ownership (a property "interest"), and non-ownership doctrines (no property).[163]

In early oil-and-gas cases, courts refused to impose liability on landowners that drained oil and gas from under their neighbors' property.[164] Courts denied remedies for drainage because they had no way to quantify how much of the substance had migrated and because landowners did not know how to prevent that migration.[165] Courts responded to plaintiff landowners with the "offset well" rationale; if your neighbor is drilling a well, go out and drill your own so that you can protect your right to capture the resource.[166]

This rule of non-liability, the rule of capture, conflicted with the absolute-ownership concept, especially in states recognizing ownership in place.[167] Courts struggled with the common law's recognition of property rights when they could offer no remedy to a landowner whose rights were harmed. Courts eventually realized that if they recognized landowners' property rights or interests in oil and gas, they should also protect landowners' correlative rights to produce the resource.[168] Otherwise, a so-called property right or interest in the substance would be illusory.[169]

The Texas Supreme Court seemed unfazed by this conflict when it decided *Daugherty*, holding that oil and gas's fugitive nature did not preclude a landowner's ownership of oil and gas in place.[170] Eventually Texas oil-and-gas law dealt with the rule of capture's evils through Railroad Commission regulations protecting landowners' correlative rights.[171] As explained in *Ohio Oil Co. v. Indiana*, quoted by the Texas Supreme Court in *Brown v. Humble Oil*, if landowners have correlative rights in the oil and

[163] *See* Walker, *supra* note 27, at 126–27; A. W. Walker, Jr., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 TEX. L. REV. 1, 2 n.3 (1928); Hardwicke, *supra* note 161, at 400–01.

[164] *See* Hardwicke, *supra* note 161, at 397.

[165] *See id.* at 397, 403.

[166] *Id.* at 397.

[167] *Id.* at 393; *see, e.g.*, Summers, *supra* note 92, at 175–76.

[168] Summers, *supra* note 92, at 185–87 (explaining early oil-and-gas cases requiring reasonable use of oil and gas and recognition of correlative rights; comparing to reasonable use groundwater law); Walker, *supra* note 35, at 132.

[169] *See* Walker, *supra* note 35, at 133; *see* Summers, *supra* note 92, at 179 ("To put it shortly, the absolute ownership doctrine is used to make legal the act of taking and is refused when a remedy for the taking is asked.").

[170] Tex. Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717, 719–20 (1915).

[171] *See, e.g.*, Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 937–38 (1935).

gas beneath their land, then the state can regulate to protect each landowner's rights.[172] In general, this type of regulation became more feasible once science and engineering could quantify and value oil and gas in reservoirs, enabling legislatures to create regulatory schemes recognizing landowners' correlative rights to the resource that prevented the harms caused by the old remedy of offset.[173]

When the Texas Supreme Court faces the groundwater-ownership-in-place question in the near future, it can learn from courts' struggles with oil-and-gas law's property concepts. Ownership-in-place analysis should begin there instead of with the ancient percolating-water doctrines expressed in *East* and repeated in a century of groundwater case law. Professor A. W. Walker, Jr. considered the similarities between the resources and their legal regimes in 1956.[174] He pointed out that liquids in the earth are not necessarily "part of" the land such that they include the Anglo-law maxim that a landowner owns the depths and the heavens as well as his surface estate.[175] No legal principle requires that someone own tangible items that are not part of the land.[176] Solid minerals fixed in place can be thought of as part of the land, and are therefore property of the surface owner, but oil, gas, and groundwater's distinct properties keep them from automatically being lumped into this category.[177]

Instead, because of their fugitive nature, landowners can only own these resources if the law creates rights in them backed by legal remedies. But common law did not provide remedies for landowners whose neighbor sucked his well dry; this is the rule of capture that the Texas Supreme Court adopted in *East*.[178] To Professor Walker, this lack of enforceability prevents existence of a property right.[179] Although a century of Texas oil and gas and groundwater case law never recognized the tension, the concepts of absolute ownership in place and the rule of capture conflict because a property right cannot exist if the law refuses it a remedy.[180]

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[172] *Id.* at 942–43; Walker, *supra* note 35, at 132.

[173] *See* Hardwicke, *supra* note 161, at 398, 405–07.

[174] *See generally* Walker, *supra* note 35.

[175] *Id.* at 121.

[176] *Id.*

[177] *Id.* at 122, 124.

[178] Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 280 (1904).

[179] Walker, *supra* note 35, at 126.

[180] *See id.* at 125.

This is the opposite rationale of the *City of Sherman* court's holding, or that of today's landowner advocates, who read Texas case law as recognizing absolute ownership of groundwater in place by virtue of surface ownership, and the rule of capture as its tort-law tagalong.[181] Adhering to this ancient rule ignores oil-and-gas law's progress in delineating property rights and their protection. In Walker's analysis, the legal framework must precede recognizing a property right in place.[182] Surface ownership has nothing to do with the equation—only legal protection matters. Other states' groundwater law recognized this conflict.[183] For example, under Ohio groundwater law, which adopted the rule of capture in *Frazier v. Brown* and refused to recognize correlative rights in groundwater,[184] the logical corollary was subsequent recognition in *Warder v. City of Springfield*, that in the absence of correlative rights, groundwater was "'not property within the protection of the Constitution.'"[185]

Texas consistently affirmed the rule of capture without ever explicitly addressing groundwater ownership in place,[186] resulting logically in a combination where landowners own no property right in groundwater in place. Walker points out, however, that exceptions to the rule of capture create a better-protected right and greater reason to say a landowner owns groundwater in place.[187] Walker points to *East* and *Corpus Christi*'s recognition of exceptions for waste and malice as reason Texas's version of the rule of capture might create a property right in groundwater in place.[188]

Of course, in Texas that protection has proven only theoretical; the *Corpus Christi* court declined to apply the waste exception when it would have been appropriate, and malice is notoriously hard to prove.[189] The exceptions have not proven protective enough to create a property right in groundwater in place because no landowner can rely on them.

[181] City of Sherman v. Pub. Util. Comm'n of Tex., 643 S.W.2d 681, 686 (Tex. 1983).

[182] *See* Walker, *supra* note 35, at 121–24.

[183] *See id.* at 125–26.

[184] 12 Ohio St. 294, 311 (1862), *overruled by* Cline v. Am. Aggregates Corp., 474 N.E.2d 324, 327 (Ohio 1984).

[185] Walker, *supra* note 35, at 127 (quoting Warder v. City of Springfield, 9 Ohio Dec. Reprint 855 (1887)).

[186] *See* Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 280 (1904).

[187] *See* Walker, *supra* note 35, at 127–28.

[188] *Id.*

[189] City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798, 801 (1955).

Friendswood's prospective protection for negligently-caused subsidence differs from the waste and malice exceptions because it does not protect a landowner's water right; it protects a landowner's right to freedom from damage caused by water withdrawals.[190] To bolster the argument that a property right exists in groundwater in place, because it is among rights "which have the law back of them,"[191] the exception would need to protect the landowner's water right. Thus, *Friendswood*'s negligently-caused subsidence exception does not add a reason to find a property right in groundwater in place, leaving landowners with only the unhelpful waste and malice exceptions.

If the Texas Supreme Court chooses to recognize a property right in groundwater in place, based either on what it believes its prior precedent meant, or on analogy to oil-and-gas law, then it has to admit that its adherence to the rule of capture has never made sense, and that it must protect correlative rights going forward. Walker emphasized the importance of protecting landowners' correlative rights in groundwater at the inevitable coming of groundwater regulation.[192] Today's groundwater commentators have made similar observations about the perceived ills of the current regulatory framework.[193]

Walker also pointed out that the correlative rights in groundwater do not have to be the same as those recognized in oil and gas because of their different natures and uses.[194] Walker mentioned one of the differences is that groundwater is usually used on the tract from which it is produced.[195] Highlighting on-tract use of groundwater shows that the correlative rights Walker imagined being protected for groundwater involved each landowner's right to water his own crops and supply water to his home. Oil and gas correlative rights, on the other hand, involve each landowner's right

[190] Friendswood Dev. Co. v. Smith-Sw. Indus., Inc., 576 S.W.2d 21, 25 (Tex. 1978).

[191] Walker, *supra* note 35, at 126 (quoting Justice Jackson in United States v. Willow River Co., 324 U.S. 499, 502 (1945)).

[192] *Id.* at 133.

[193] Paul M. Terrill, Regulatory Takings from a Landowner Perspective, Address at the 16th Annual Texas Water Law Conference: Scarcity and Growth (Sept. 29, 2006).

[194] Walker, *supra* note 35, at 133.

[195] *Id.* Presumably, this means where oil-and-gas owners' protected correlative rights would center on rights to produce a fair share of the reservoir, groundwater owners' correlative rights would center on assuring each owner water to supply his tract of land. Of course, that difference between groundwater and oil and gas is less important to today's discussion than it once was; often today's discussion arises precisely because landowners want to treat groundwater like oil and gas by producing it for off-tract uses.

to produce his fair share of the resource for solely off-tract uses.[196] Walker might not have foreseen that groundwater would eventually be marketed in the same way as oil and gas, and that landowners would want to protect the same type of correlative rights in groundwater that were protected by oil-and-gas law. The problem with this approach to groundwater regulation is that protecting landowners' correlative rights to produce groundwater might prove an impossible way to regulate the resource, and vital state interests militate against legal recognition of a property right requiring impossible-to-achieve protection.

C. Why Protecting Correlative Rights in Groundwater Might be Impossible, and Why Groundwater Regulation Should Not Mirror Oil-and-Gas Regulation

1. A Brief Overview of Texas Water Code Chapter 36 and Groundwater Conservation Districts

Texas Water Code Chapter 36 governs the powers, duties, and administration of groundwater conservation districts.[197] The 74th Legislature first consolidated these laws in 1995.[198] In 1997, Senate Bill 1 revised Chapter 36 to facilitate district creation and increase district powers.[199] Senate Bill 1 declared that groundwater conservation districts were the state's preferred method of groundwater regulation.[200] Chapter 36 was also substantially altered by bills passed in 2001 and 2005.[201]

Groundwater conservation districts are local political subdivisions that adopt rules for "the conservation, preservation, protection, recharging, and prevention of waste of groundwater . . . and to control subsidence . . . ."[202] Districts may collect various types of information about the groundwater

[196] *See id.* at 132.

[197] *See* TEX. WATER CODE ANN. § 36.0015 (Vernon Supp. 2007).

[198] *See* Act of May 29, 1995, 74th Leg., R.S., ch. 933, § 2, 1995 Tex. Gen. Laws 4672, 4679–4701 (codified at §§ 36.001–.359).

[199] *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1010, §§ 4.24–.39, 1997 Tex. Gen. Laws 3610, 3643–53 (Vernon) (codified at TEX. WATER CODE ANN. §§ 36.0151–.374).

[200] *See* TEX. WATER CODE ANN. § 36.0015.

[201] *See* Act of May 27, 2001, 77th Leg., R.S., ch. 966, §§ 2.29–.57, 2001 Tex. Gen. Laws 1880, 1896–1909 (codified at TEX. WATER CODE ANN. §§ 36.018–.3035); Act of May 30, 2005, 79th Leg., R.S., ch. 970, §§ 2–17, 2005 Tex. Gen. Laws 3247, 3249–63 (codified at TEX. WATER CODE ANN. §§ 36.001–.419).

[202] TEX. WATER CODE ANN. § 36.0015.

resources they manage,[203] and must write a groundwater management plan.[204] The Texas Water Development Board (TWDB) delineated sixteen groundwater management areas across the state, whose boundaries generally coincide with the state's major aquifers.[205] Each groundwater management area must set the "desired future conditions" of the aquifers within it and the resulting "managed available groundwater" for each district in the groundwater management area.[206] Each district's management plan must quantitatively address the desired future conditions for its groundwater,[207] and must contain estimates of the managed available groundwater in the district.[208] The TWDB provides the managed available groundwater amount to the district based on the groundwater management area's desired future conditions, and the district uses that number to determine groundwater availability.[209]

Districts control groundwater withdrawals and modify the common law rule of capture by issuing water well permits.[210] Landowners within district boundaries may not drill, operate, or alter a well without obtaining a permit.[211] Districts may regulate well spacing[212] and well production.[213] Districts may exempt certain types of wells from permitting requirements, and some wells are always exempt from permit requirements, such as domestic wells or relatively small wells.[214] In limiting groundwater production, districts may write rules protecting historic groundwater use from before promulgation of the rules to the extent practicable under the district's management plan.[215]

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[203] *Id.* §§ 36.106, .109.

[204] *Id.* § 36.1072(a).

[205] ROBERT E. MACE ET AL., A STREETCAR NAMED DESIRED FUTURE CONDITIONS: THE NEW GROUNDWATER AVAILABILITY FOR TEXAS, 7th Annual The Changing Face of Water Rights in Texas, ch. 3.1, May 2006, 1–2 (2006).

[206] TEX. WATER CODE ANN. § 36.1071.

[207] *Id.* § 36.1071(a)(8).

[208] *Id.* § 36.1071(e)(3)(A).

[209] *Id.* § 36.108(n)–(o).

[210] *Id.* § 36.113 (Vernon Supp. 2007); *id.* § 36.115 (Vernon 2000).

[211] *Id.*

[212] *Id.* § 36.116(a)(1) (Vernon Supp. 2007).

[213] *Id.* § 36.116(a)(2).

[214] *Id.* § 37.117(a)–(b).

[215] *Id.* § 36.116(b).

Districts may require special permits for exporting groundwater from the district, but districts cannot prohibit groundwater export.[216] Districts may not impose stricter permit limitations on exporters than they do on existing in-district users.[217]

2. The Case Against Protecting Correlative Rights in Groundwater

Chapter 36 allows districts to protect historic groundwater use, potentially to the detriment of historic nonusers. Landowners' push to protect their correlative rights to produce groundwater arises at the dawn of a potential groundwater market. Landowner advocates object that when districts protect historic use to the detriment of nonusers, it approximates a prior appropriation system, instead of protecting landowners' correlative rights.[218] They claim this disrespects the common law's reliance on the rule of capture.[219] But the whole point of Texas's groundwater regulatory scheme is to override common law. The Texas Supreme Court implored the legislature to amend the rule of capture for years, and now it is doing so.[220] If groundwater regulatory frameworks were bound to enforce groundwater common law, they could not protect correlative rights, because Texas rejected protecting landowners' correlative rights in groundwater in *East*.[221] As long as districts stay within the boundaries of Chapter 36, they may choose a regulatory framework that overrides the rule of capture because Chapter 36 protects landowners' rights in groundwater, except as altered by district rules.[222]

The view that the law should protect landowners' groundwater ownership in place and their correlative rights to produce it assumes groundwater regulation, like oil-and-gas regulation should prioritize landowners' rights to produce the resource as a commodity. This view

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[216] *Id.* § 36.122(g).

[217] *Id.* § 36.122(c).

[218] *See* Terrill, *supra* note 193, at 15.

[219] *See* Russell S. Johnson, Groundwater Districts: Landowner Rights and Rule of Capture, Address at the 16th Annual Texas Water Law Conference: Scarcity and Growth (Sept. 29, 2006); Terrill, *supra* note 193, at 15. The analogy is imperfect because a prior-appropriation system would protect the oldest historic uses first, not necessarily the existing and recent uses.

[220] Friendswood Dev. Co. v. Smith-Sw. Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978); *see* City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798, 803 (1955).

[221] Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 281 (1904).

[222] TEX. WATER CODE ANN. § 36.002 (Vernon Supp. 2007).

ignores the many differences between groundwater and oil and gas, and the state's important reasons for regulating groundwater differently from how it regulates oil and gas.

First, groundwater regulation priorities must differ from those of oil and gas because at the advent of oil-and-gas regulation, there was no historic use to protect. No farmers had watered their crops with oil; no cities had supplied their citizens with clean oil to drink. But we use groundwater for these purposes and nascent regulatory schemes should not deprive existing groundwater users of that essential substance.

Second, oil-and-gas law regulates and prorates against the background fact that producing the resource mines the underlying reservoir.[223] The law protects landowners' correlative rights to produce oil and gas with the idea that everyone should get their fair share of the resource before it is gone.[224] But many districts, depending on the hydrogeology under regulation, do not regulate groundwater withdrawals with the notion that users are slowly mining the aquifer. Districts may choose to regulate sustainably, with aquifer-level-balance in mind, which might preclude them from regulating under the assumption that everyone overlying the aquifer can pull out his fair share of groundwater and sell it. Groundwater is not only for selling—it is also for drinking, for recreation, for agriculture, and for the environment. We will never stop needing it for those purposes, whereas oil and gas will only ever be used as a commodity.

Third, protecting existing and recent historic use recognizes existing land values and investments, whereas protecting correlative rights would result in windfalls beyond economic justification.[225] Groundwater use enables existing users and recent historic users, whether farmers or cities, to repay infrastructure investment costs. Nonuse or obsolete historic use creates no such reliance on groundwater, and land values reflect nonuse of groundwater.

Groundwater conservation districts' management plans must reflect the district's managed available groundwater quantity, which the TWDB provides to districts based on the desired future conditions of the

[223] Hardwicke, *supra* note 161, at 397.

[224] *See id.*

[225] *See, e.g.*, Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1, 209 S.W.3d 146, 152–53 (Tex. App.—El Paso 2006, pet. granted) (describing Plaintiff Guitar's background; his land had been irrigated between the 1940s and 1960s, but since then had been used for cattle ranching, whereas defendants' land had been irrigated during the recent historic-use period.).

groundwater management area in which each district lies.[226] Desired future conditions can include indicators such as water level, water quality, spring flows, or volume.[227] Such desired future conditions and the resulting managed available groundwater will affect how much water the district can permit to its groundwater users, and may result in a cap that prevents all landowners from obtaining their desired permit amounts. This result is especially likely when a district protects historic use before other uses, because the district will permit those uses first.

Problems will arise as groundwater markets continue to develop and some landowners get larger groundwater permit amounts than others. In this situation, not all landowners will be able to take advantage of the budding market. Before groundwater markets existed, legal protection for groundwater ownership in place and landowners' correlative rights to produce it were virtually irrelevant because there was generally enough groundwater to go around, and no one wanted to send it to faraway thirsty cities. This irrelevance partly explains Texas's long adherence to the rule of capture for groundwater, whereas it created a complex regulatory scheme to protect landowners' rights to produce oil and gas.

If the legislature created a regulatory scheme recognizing each landowner's ownership of groundwater in place, it would also have to protect that right by recognizing landowners' correlative rights to pump groundwater. That scheme would ensure that both historic users and nonusers could benefit from marketing groundwater. But protecting correlative rights, in a district with production caps set by its managed available groundwater, could require denying existing and historic users their current use, and might require reallocation of groundwater to historic non-users so they could sell it to faraway cities. That type of reallocation could impact municipal groundwater users, and might cause rate-payers to subsidize a historic non-user's windfall, while overvaluing that non-user's property.

On the other hand, today's groundwater regulation retains the common-law principle that landowners do not have correlative rights in groundwater.[228] The common law denied protection of landowners' groundwater rights, so they have lost nothing the law protected.[229] The

[226] *See* TEX. WATER CODE ANN. § 36.1071.

[227] 31 Tex. Admin. Code § 356.2(8) (2007) (Tex. Water Dev. Bd., Definitions of Terms).

[228] TEX. WATER CODE ANN. § 36.0015.

[229] Houston & T.C. RY. Co. v. East, 98 Tex. 146, 81 S.W. 279, 280 (1904).

districts' permitting schemes alter the rule of capture because now landowners may not capture groundwater without limit; they are restricted to permitted amounts.[230] The production limits in the permits protect groundwater users from some of the evils of the rule of capture. This is how the legislature chose to regulate groundwater, as the constitution authorized it to do.[231]

Some districts' rules potentially allow historic users to turn their permitted right into a new use, selling that water to the faraway city. That may seem wildly unfair as between neighboring farmers, who have historic use rights, and ranchers, who do not. But the historic non-user never put capital and sweat into perfecting his right, whereas the farmer did. If there were enough groundwater to go around, then all could benefit from the market, but the historic non-user's benefit would be greater than the historic user's, because it would be all profit, instead of return of investment. When there is not enough groundwater to go around, a system that protects investments is fairer than one that does not.

Potential injustices lurk in every regulatory scheme. Districts have to deal with difficult questions like when to cut off historic use periods. That decision inevitably leaves someone out in the cold. But the answer is not to reallocate all existing and historic uses so that each landowner can produce groundwater regardless of whether he did in the past. The answer has to be that interested landowners should participate in the district's decision-making processes, including setting desired future conditions and district rulemaking.

IV. CONCLUSION

Cases asking whether landowners own groundwater in place are already making their way through the courts, and the Texas Supreme Court will face this question soon. A century of groundwater case law demonstrates Texas's unwavering commitment to the rule of capture, but a commitment to the concept of groundwater ownership in place is less clear. *East* and some of its progeny's "absolute ownership" language probably evinces a belief that landowners own groundwater in place, but resolution of the question was never necessary to Texas groundwater cases' holdings.[232]

[230] TEX. WATER CODE ANN. § 36.002.

[231] TEX. CONST. art. XVI, § 59(a).

[232] *See, e.g.*, City of Sherman v. Pub. Util. Comm'n of Tex., 643 S.W.2d 681, 686 (Tex. 1983).

Any of Texas's groundwater cases could have turned out the same way under a usufructuary rule, under which a landowner's rights in groundwater only vest upon capture. Contrasting Texas groundwater law with Texas oil-and-gas law shows that Texas courts never fully pondered the question of groundwater ownership in place.[233]

The Texas Supreme Court should answer this question squarely at its next opportunity, and it should decide, for the sake of the state's groundwater regulatory scheme, that landowners do not own groundwater in place. Doing so will not conflict with precedent, because no on-point cases exist. Choosing an easily applicable legal rule—a non-ownership rule—best serves state groundwater policy goal of deference to the Legislature because it keeps courts from making groundwater decisions. Denying groundwater ownership in place will not take anything that the law protected; Texas's rule of capture was always inconsistent with the idea that landowners own groundwater in place because the law did not protect that ownership.

If the court chooses the alternative, recognizing groundwater ownership in place, then Texas groundwater policy should shift to protect landowners' correlative rights in groundwater in place. But insisting on protecting correlative rights through groundwater regulation may be incompatible with protecting existing and historic use, and there are important reasons the state's groundwater regulatory scheme should protect existing and historic use. Landowners must accept that groundwater is different from oil and gas.

Some groundwater conservation districts write rules that protect existing and historic users of water. These uses should be protected instead of protecting correlative rights to produce groundwater as a commodity. Protecting existing and historic use might mean some historic users will not be able to market groundwater. Due to recent statutory changes requiring groundwater management areas to set desired future conditions,[234] protecting correlative rights could require groundwater reallocation that would penalize existing users to fund a landowner's windfall. Protecting existing and historic uses protects investments and true land values without requiring this reallocation, and is therefore fairer in the long run.

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[233] *Compare id.*, *with* Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 942 (1935) (quoting Ohio Oil Co. v. Indiana, 177 U.S. 190, 202 (1900)) (the Court clearly blesses absolute ownership with respect to oil and gas but is less clear with respect to water).

[234] TEX. WATER CODE ANN. § 36.1071(a)(8).