

The Legal History and Evolution of Groundwater and the Rule of Capture in Texas

Since 1904, Texas has followed the English common law of absolute ownership, or the rule of capture, in determining liability for damages caused by the use of underground water. In that year, the Texas Supreme Court ruled in (*Texas in Houston and T.C. Railway Company vs. East*) that there is no other wells are depleted. The case arose as a claim for damages by a landowner against an adjacent landowner for injuries allegedly caused by new, large volume pumping by the nearby landowner. The landowner, in the Court's opinion, was free to capture and use as much water as could beneficially used WITHOUT WASTE. The Court recognized no right to recover damages for the loss of use of the plaintiff's wells. The Court refused to adopt a system that would limit the use of groundwater to prevent harm to nearby property owners or sanction a claim for damages.

In 1927, the Texas Supreme Court reaffirmed the rule of capture in (*Texas Co. vs. Burkett*). In this case, the Court expressly held that a landowner had the right to enter into a contract to sell groundwater produced from property, even though the water would not be used on the property from which the water would be produced.

In both of these important cases, the Court ruled the surface owner was permitted and had the right to take and use an unlimited volume of water, "waste" of the water was not authorized, despite the ownership by the landowner.

While the "waste exception" to the rule of capture has been recognized since its adoption in 1904, it was not until the Supreme Court decision in the 1955 case of (*City of Corpus Christi vs. City of Pleasanton*) that the extent to which the "waste exception" limited the rule of capture was actually tested. The facts of the case were straightforward. A river supply district and the City of Corpus Christi made an agreement under which the district would allow groundwater to flow from the districts artesian wells into a river, which would then transport the water 118 miles down stream to the City of Corpus Christi's reservoirs. The City of Pleasanton's water supply was threatened by the actions and it filed a lawsuit to enjoin performance of the contracts and prevent the "waste" of the groundwater caused by the loss of water during its transit downstream to the City of Corpus Christi. The plaintiff's claim was based upon proof that up to 75% of the water removed from the ground was lost to evaporation and seepage before it was actually used by the City of Corpus Christi. The plaintiffs relied upon a 1925 statute that defined waste in relation to artesian wells to be permitting the waters of an artesian well to run into any river unless it was put to lawful use. In reversing the lower courts' decisions enjoining (to prohibit or restrain by an injunction) the wasteful means of transporting the water, the Supreme Court found that it was "not" waste to transport water down a natural stream bed with consequent loss of 75% of the water by evaporation, transportation and seepage. The Court at the time asked the Texas Legislature to prohibit the use of any means of transportation of percolating or artesian water, which permitted the escape of excessive amounts, but it chose not to do anything.

Springs

Springs are the special place in Texas where groundwater subject to the rule of capture and presumptively owned by the landowner that obtains possession of it suddenly becomes surface water and property of the State of Texas. As early as the case of (Texas Co. vs. Burkett), the Supreme Court recognized that spring water which was neither surface water nor water in a subsurface stream with defined channels was exclusive property of the landowner.

The conflict between ownership and use of percolating groundwater ultimately emerging at springs and landowners that have historically benefitted from and used downstream flows from a spring resulted in court decisions addressing the issue in 1951. (Pecos County Water Control & Improvement District vs. Williams), Texas Civil Appeals – El Paso 1954. Defendant Williams owned large areas of land over groundwater formations, which historically had provided flow to Comanche Springs for 90 years. During the 1950's drought, defendant Williams began pumping large volumes of groundwater and Comanche Springs stopped flowing. Williams' extensive groundwater use was alleged to have caused the cessation of the spring flow and the downstream water users sued. The District Court refused to enjoin (to prohibit or restrain by an injunction) the use since it was not wasteful and refused to judicially declare correlative (mutually related) rights in the water issue. The Appeals Court ruled that recolating or diffused and percolating waters belong to the landowner and may be used by him at his will in a non-wasteful manner. Once again, the Court noted that the answer may be legislation. Forty-five years later, there is still no such legislative remedy.

Subsidence

(To sink or fall to the bottom)

Subsidence caused by unregulated groundwater withdrawals due to explosive growth in the 1940's, 50's and 60's in the Harris-Galveston County areas created the next conflict in which the rule of capture would be examined. Extensive groundwater pumping in this highly urbanized area had been shown to be causing subsidence. Once it became abundantly clear that a direct linkage between increasing groundwater withdrawals and subsidence had been established, the region recognized the need for limits on the hitherto unlimited right to capture and used groundwater in their area. The region sought legislation creating an underground water conservation district with the power to limit groundwater use and prevent further damage from subsidence.

In 1973, Smith Southwest Industries and other landowners in Harris County brought a class action lawsuit against Friendswood Development Company, alleging that severe subsidence of their lands was caused by the Defendants past and continuing withdrawals of vast quantities of groundwater. Friendswood was a residential real estate development company that was pumping groundwater into man made lakes for aesthetic purposes. The trial court granted a summary judgment in favor of the Defendants. The Court of Civil Appeals reversed the trial Court's decision and the Supreme Court reversed the Court of Appeals and affirmed the trial Court's judgment. However, the Court established a new cause of action "limiting" the future exercise of

the right to capture and use groundwater if such use is negligent and causes subsidence.

A majority of the Supreme Court reviewed plaintiff's argument that the absolute ownership rule should not "insulate" defendants from damages due to nuisance or negligence in the manner by which they made use of their property and found that it was, in effect, a contention that the "reasonable use" doctrine should apply to groundwater. The Court concluded that if the landowner's manner of withdrawing groundwater from his land is "negligent", willfully wasteful, or for the purpose of malicious injury, and such conduct is the proximate cause of the subsidence of the land of others, he will be liable for the consequences of his conduct. The Court further called upon the Legislature to exercise its proper role in regulating and managing groundwater withdrawals in the State of Texas. The outcome of this case was in 1975, the Texas Legislature created the Harris-Galveston Coastal Subsidence District specifically in response to the subsidence problems caused by groundwater withdrawals in the Gulf Coast region.

The Sipriano Case

The last chapter in the common law history of the rule of capture in Texas was written in the Supreme Court decision in (Sipriano vs. Great Spring Waters of America) in 1999. Plaintiff Sipriano claimed that wells he owned were severely depleted by the defendants alleged nuisance, negligence, gross negligence, and malice and further asked the court to abandon the rule of capture and replace it with the rule of reasonable use. Defendant had purchased land, constructed wells and begun producing groundwater for bottling purposes. In this case, the District Court, the Appellate Court and the Supreme Court ruled in favor of the defendant and the rule of capture.

Groundwater Districts

Groundwater districts, at the urging of the courts, came into being via constitutional amendment that authorized the Texas State Legislature to address natural resource conservation and the Legislature's first exercise of this constitutional authority to create groundwater districts in 1949 and its subsequent efforts through the passage of Senate Bill-1 in 1997. SB-1 is highly important because the revisions increased the powers of the districts and revisions increased the powers of the districts and substantially streamlined the process of creating and empowering groundwater conservation districts to regulate private groundwater withdrawals.

Districts are now required to adopt management plans, which address specific, stated management goals. With mandatory language, the Legislature requires the district to identify the performance standards and management objectives under which the district will operate to achieve the management objectives under which the district will operate to achieve the management goals and to state the actions, procedures, performance and avoidance measures necessary to implement the plan. The plan also includes estimates of usable water groundwater, current usage ground water, current usage, annual recharge and projected demand. The District is obligated to adopt rules necessary to implement the management plan.

The Districts are empowered to include certain conditions, restrictions and limitations in permits to be issued for wells operated within the district. They are further authorized to establish conditions and restrictions on the rate and amount of withdrawal from wells.

****Please Note****

This information is in the process of being loaded to our website and is incomplete. There will be more forthcoming.