

Chapter 7

The Future of the Rule of Capture

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Introduction

In 1997, the Supreme Court of Texas shocked the state by agreeing to hear the *Sipriano* case. *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999). The Siprianos claimed that their domestic well dried up as a result of the Ozarka Company operating several large wells nearby. Ozarka disputed those facts, but relied on the Rule of Capture to deny any liability for damage to the Siprianos. By deciding to hear the case, the Court signaled that it may be open to overruling the *Houston & T.C. Ry. Co. v. East*, (*East*), 81 S.W. 279 (Tex. 1904) decision. The Court ultimately upheld *East*, but (once again) strongly urged the Legislature to take action to regulate groundwater withdrawals.

The debate over the Rule of Capture continues, and assuming the Legislature chooses to leave the Rule of Capture in place, there are still several issues yet to be determined. This paper discusses these issues.

Ownership of groundwater in place

The Absolute Ownership doctrine¹ and several court opinions seem to indicate that groundwater is owned in place, however the Rule of Capture seems to say the opposite: that any neighbor can take your water with impunity. Certainly captured water is the property of the person who captures it, but what of the water still in the ground? This unanswered question could lead to a number of difficult issues, primarily whether a groundwater conservation district (GCD) may restrict or even prohibit production of groundwater without causing a taking of private property. This very issue was raised in *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996), but the Court declined to answer it. At some point a GCD will deny a well construction permit and that landowner will file a “takings” lawsuit. The Supreme Court

¹ The Absolute Ownership Doctrine is old English law that provides that the owner of the surface estate also owns everything below or above that land. Land ownership begins with the presumption that any activity on the land is permissible (See *East's* discussion of *Pixley v. Clark*, 35 N.Y. 520, 91 Am. Dec. 72. (1866)), and only state action to limit those activities can prevent unfettered development of any kind. Over the last 100 years those state restrictions require permission from the state to perform almost any development activity, but the underlying property law presumption remains the same.

of Texas will finally have to answer this question, and the answer may dramatically affect groundwater regulations throughout the State.

The “takings” suit will probably be argued on several different levels. First, the landowner will argue that his groundwater has been taken by the District. The first hurdle will be proving that the groundwater is owned in place, but the second hurdle is trying to quantify the property right. Depending on the type of aquifer involved, groundwater generally does not remain in place beneath the surface estate. Instead it flows from property to property. Unlike minerals such as oil and gas, groundwater can also recharge or be discharged through springs, changing the amount of water beneath a particular piece of property on a regular basis. Any attempt to quantify the water right as the area of the aquifer beneath the surface estate ignores the fact that the water flows. Quantifying the water right as the amount that flows beneath the property in a given year ignores the rights of adjoining neighbors. Quantifying the right as the amount that can be recovered without affecting adjoining landowners creates a right dependant upon the amount of rainfall and the production habits of others. These problems with defining the nature of groundwater while it is still underground make any takings lawsuit very problematic. The real question is whether the ownership *interest* has evolved into a *vested* property right. It is much easier to define the moment of capture as the moment the property right vests, which leaves the landowner with nothing more than a mere expectation of production for water still in the ground.

The second level of attack will be about the other property affected by the permit denial. If a landowner has a business that requires water, and a district’s rules or permit decisions then deny access to that water, the property taken may be the business itself. If it is impossible for the landowner to continue the business without a permit, and through no fault of his own he cannot obtain a permit, he may have an excellent “takings” claim. Clearly, if a government agency steps in to close a business for any reason other than unlawful or nuisance activity, the business owner has a right to restitution. The picture is cloudier, however, where the property is not being used but there are defined plans for development. Again, a mere expectation for future development does not give rise to a vested right. But what if the landowner cannot implement *any* development plans without water? If the permit denial leaves the land without access to water and that removes 100% of the development rights, the land is now useless and the owner may have a legitimate “takings” claim. Proving the property cannot be developed without a well, however, should prove extremely difficult; much of west Texas was settled when the only water supply came from rainwater harvesting.

Finally, the landowner may try to file a “takings” claim under the Texas Real Property Rights Preservation Act. One landowner already tried such a suit against the Edwards Aquifer Authority, and the Texas Supreme Court found that groundwater conservation districts are generally exempt from the provisions of that Act. *Bragg v. Edwards Aquifer Auth.*, 71 S.W.3d 729 (Tex. 2002).

The nature of the property

Property can be divided into two categories: Real property (land and fixtures to the land) and personal property (anything that can be easily transported from one area to another). Water, like oil, gas and minerals, is a part of the soil underlying any piece of real estate. But once severed, it can be transported through pipelines, trucks or bottles. The water rights associated with a particular piece of real estate are difficult to quantify, especially where the aquifer regularly recharges. Groundwater conservation districts can quantify the withdrawal rights through a production permit, but in some cases even that permit is transferable. If the water in the ground is real property, is the permit personal property? Although this question provides great debate material for lawyers, it may not have much of a direct impact on the general population until various taxing entities try to tax water. Appraisal districts may begin to include the value of the water underground in the overall value of the property. There may be attempts to apply an oil and gas style severance tax. With the Legislature, counties, cities, and school districts all looking for revenues, this issue may come to a head sooner than later.

This issue may also affect questions of severability. In some aquifers the groundwater flow allows capture virtually anywhere along the surface. In others, production is limited to certain locations or properties. Landowners all over the state have been selling their “water rights” and severing those rights from the real estate, with or without the benefit of a permit from a groundwater conservation district.

A recent case in Medina County illustrates how the issue may play out across the state. The Lindsey family purchased property including a pecan orchard from the Herrmann family. Prior to the sale, the Herrmann’s had obtained from the Edwards Aquifer Authority an Initial Regular Permit for the irrigated land, and transferred the permit to other entities. The real estate contract for the land clearly reserved the groundwater withdrawal rights to the transferor. However, the Edwards Aquifer Authority’s enabling legislation includes a provision restricting the transfer of one-half of the irrigation permits, and based on that restriction the Lindseys sought one-half of the groundwater rights. The Lindseys prevailed at the EAA, at the trial court, and the 4th Court of Appeals. In each case, the Lindsey’s claim to the water rights prevailed over the contract, and the Court of Appeals even made it clear the Herrmanns are not due any additional consideration.

Despite the seeming unfairness of awarding the Lindseys something they have neither bargained nor paid for, the Herrmanns have no remedy in the form of rescinding or canceling the deed. The Lindseys proved they are the owners of one-half of the permitted water rights pursuant to the Edwards Aquifer Authority Act and therefore entitled to have the deed reformed to reflect their interest.

Herrmann v. Lindsey, ___ S.W.3d ___; 2003 WL 624906 (Tex.App.—San Antonio).

Although the Herrmann case turns on a specific statutory provision, this same scenario may play out over the rest of the state. Groundwater rights have been transferred by contract in some cases, and by deed in others. In some cases the transfers involve permits

issued by groundwater conservation districts, or there may not be a district covering the land in question. With so many different types of transactions it is only a matter of time before these questions lead to problems and eventually to lawsuit.

Areas that fail to approve GCD's or are otherwise unregulated

The primary complaint against the Rule of Capture is that areas outside groundwater conservation districts remain unregulated and therefore “wasteful” of the natural resources. If the courts decide to make a change in the common law it will undoubtedly be a result of a dispute in an unregulated part of the state. In his concurring opinion in *Sipriano*, Justice Hecht warned of potential action by the Supreme Court:

I agree with the Court that it would be inappropriate to disrupt the process created and encouraged by the 1997 legislation before they have had a chance to work. I concur in the view that, for now—but I think only for now—*East* should not be overruled.

Sipriano v. Great Spring Waters of America, Inc., 1 S.W.3d 75, 83 (Tex. 1999) (Hecht, J., concurring).

The message is clear: if the legislative scheme of regulation through groundwater conservation districts does not work, the Supreme Court will likely overturn the Rule of Capture in favor of one of the other tort theories: correlative rights, reasonable use, or the Restatement of Torts version. Although 90% of the State's usable groundwater is located within the boundaries of a groundwater conservation district, there are important areas that have either never had a district or never approved creation of a district. If these aquifers do not get protection, the resulting overproduction will inevitably lead to conflict, and quite possibly the end of the Rule of Capture in Texas.