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## GROUNDWATER

### THE ISSUE

For more than a century, Texas case law has recognized a landowner's property right in the groundwater beneath the surface estate of the property. Decided in 1904, in the landmark Texas Supreme Court case *Houston and Texas Central Railway v. East*, the court upheld a landowner's ownership in the groundwater under the land and the right to pump and capture that water even to the detriment of an adjoining landowner's wells. These rights to groundwater are recognized in Chapter 36 of the Texas Water Code and Chapter 21 of the Property Code (see section TWC 36.002 entitled "Ownership of Groundwater" and TPC 21.0421). Popularly labeled as the "Rule of Capture," Texas' primary legal doctrine governing groundwater is fundamentally different than the prior appropriation doctrine over surface water. For surface water, Texas law declares that the state owns title to the water and grants private rights to appropriate (use) water for stipulated beneficial purposes.

Since 1917, the Conservation Amendment (Article XVI) of the Texas Constitution provides state authority to regulate natural resources, including groundwater, for the preservation, conservation, and development of these resources. Over the last 10 years, landowners' private property rights in groundwater have been qualified by new additions to law. As early as 1949, Texas law established authority to create local Groundwater Conservation Districts (GCDs). Yet, it was enactment of SB 1 in 1997 and SB 2 in 2001 that enlarged the role and regulatory authority of GCDs, catalyzing creation of many districts now covering the majority of all Texas groundwater resources.

Additional authority over "privately owned groundwater" was enacted in the 79th Legislative session (see Chapter 35 of the Texas Water Code). The first state driven—not locally imposed—requirements include Texas Water Development Board (TWDB) formation of regional Groundwater Management Areas (GMAs). The boards of the GMAs must establish "a desired future condition" of the relevant aquifers subject to the approval of TWDB.

Texas groundwater law has become complicated, now subject to three distinct legal rubrics: common law landowner property rights in groundwater upheld in a century of case law, local Groundwater Conservation Districts, and state-administered Regional Groundwater Management Areas.

Legal ambiguity and uncertainty, created by these overlapping legal authorities, delay groundwater development projects in the regional water plans. If integrated, these multi-level authorities over groundwater may operate beneficially. Tensions, however, between

## TEXAS PUBLIC POLICY FOUNDATION

deep-rooted private rights and local and state authorities remain. Although the Legislature has the authority to limit, or even abrogate, vested property rights in groundwater, it does so with implications of “taking” constitutionally-protected rights for which the state would be liable to compensate the property owners.

In certain regions, conflicts have arisen between local district rules and landowner rights. In a May 2008 ruling, the Texas Supreme Court concluded that local districts could not use “historic use” rules to grant export permits to irrigators while denying such permits to ranchers who historically used less groundwater.

The Fourth Court of Appeals in San Antonio recently clarified that a landowner’s property right in groundwater can be severed from the surface estate in a warranty deed of sale. Although legislation gives local districts and the state the authority to limit exercise of groundwater rights, Texas courts consistently uphold private property rights to groundwater.

### THE FACTS

- ★ Texas has abundant groundwater resources in many diverse aquifers: nine major aquifers and 20 minor aquifers.
- ★ Total groundwater availability in 2010, as measured by the regional water planning groups, is 12.7 million acre-feet per year. Availability may decline to 9.9 million acre-feet by 2060.
- ★ Texas has 95 local groundwater districts covering all or part of 144 counties.
- ★ The Texas Water Development Board has delineated 16 Groundwater Management Areas based on hydro-geological parameters.

### RECOMMENDATIONS

- ★ Clarify that the landowner’s property rights to groundwater underneath the surface estate vest with legal ownership of the surface and not only by capture or possession of the groundwater.
- ★ Incorporate the Texas Supreme Court’s ruling in *Guitar v. Hudspeth County Underground Water Conservation District* in Chapter 36, Texas Water Code, provisions on groundwater district rulemaking authority.

### RESOURCES

- *Houston and Texas Centennial Railway Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904).
- *Guitar Holding Company v. Hudspeth County Underground Water Conservation District No. 1*, Texas Supreme Court (May 30, 2008).
- *City of Del Rio v. Clayton Sam Holt Hamilton Trust*, Fourth Court of Appeals (Feb. 2008).
- “The Rule of Capture in Texas—Still So Misunderstood After All These Years” by D. Drummond, L. Sherman, & E. McCarthy, Jr., *Texas Tech Law Review*, Volume 37 (Winter 2004) No. 1.
- “Water for Texas” by Texas Water Development Board, Volume II (2007).

