



Groundwater Rights

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THE ISSUE

Groundwater has long provided a major portion of the Texas water supply. Scientific assessment of the undeveloped groundwater indicates groundwater resources can help meet growing demand for water in Texas. Legal questions about groundwater rights, however, complicate timely development of groundwater and threaten long held property rights in groundwater.

Texas has two distinct legal systems governing water: groundwater and surface water. The state owns the surface water in Texas and grants water rights to use specific volumes of water for beneficial uses. A surface water right in Texas is a "usufructory" right or a right to use. In contrast, under Texas common law and statute, groundwater rights are a landowner's vested private property interest in the groundwater below the land. The landowner's property right in groundwater is often confused with the rule of capture. The right of capture is corollary to the landowner's ownership right. The rule of capture does not define the groundwater rights but explains the means by which a landowner may exercise the property right in groundwater.

For more than a century, Texas courts have recognized a landowner's vested property right in the groundwater below his/her land. Texas courts first articulated a landowner's vested property right in groundwater in the 1904 Supreme Court case, *Houston and Texas Central Railway v. East* (East):

"An owner of soil may divert percolating water ... It is the same as land, and cannot be distinguished in law from land. So the owner of land is the ab-

solute owner of the soil and of percolating water which is a part of, and not different from the soil."

Texas courts have consistently affirmed the absolute ownership rule to groundwater. "Historically, landowners have had property rights in the water beneath their land." *Barshop v. Medina Country Underground Water Conserv. District*, 925 S.W. 2d 618, 623 (Tex. 1996). Chapter 36 of the Texas Water Code also affirms the landowner's property right. "The ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized" (TWC 36.002)

Like fee title ownership of land, "absolute ownership" of groundwater always assumed reasonable regulation. As early as 1914, the East court acknowledged that the landowner's rights could be limited by "positive legislation." In 2010, Texas now has 95 local Groundwater Conservation Districts (GCDs) recognized in law as the state's "preferred method of groundwater regulation." (TWC 36:0015)

Regulation of groundwater has significantly expanded over the last 10 years. The 1917 Conservation Amendment (Article XVI) of the Texas Constitution created the state authority to regulate natural resources, including groundwater. In 1949, legislation provided authority for local GCDs. In 1995, the powers of GCDs were expanded to include pumping limits on wells and tract size. In 2001, SB 2 enlarged GCD authority including preservation of historic uses and creation of Groundwater Management Areas (GMAs) based on regionally shared aquifers. In 2005, passage of HB 1763 dramatically enlarged the scope of a groundwater regulation, opening the door for denial of a landowner's vested right to groundwater.

If the ownership of groundwater vests with ownership of the land, then it is a constitutionally-protected private property right. If the right only vests with capture, then there is no protected property interest. Although subject to reasonable regulation, private property rights are constitutionally protected by the U.S. and Texas Constitutions. If a regulation deprives a property owner of the use of his/her property, the regulatory authority is constitutionally liable to pay the property owner just compensation.

Two key court rulings in 2008 confirmed the landowner's ownership rights in groundwater but did not specifically address the fundamental questions: what is the landowner's ownership interest in groundwater and what is the constitutional limit of groundwater regulation? A case now pending before the Texas Supreme Court explicitly raises these questions. (*Edwards Aquifer Authority v. Day* 274 S.W.3d.742. (Tex. App.-pet. pending)

THE FACTS

- ★ By 2060, water demand in Texas is projected to increase by 27 percent.
- ★ Texas has abundant groundwater resources: 9 major aquifers and 21 minor aquifers. Total groundwater availability in 2010, as measured by the regional water planning groups, is 12.7 million acre-feet per year.
- ★ Total groundwater in Texas aquifers is estimated at 17.1 billion acre-feet.
- ★ Texas has 95 local groundwater districts covering all or part of 144 counties.
- ★ The Texas Water Development Board has delineated 16 GMAs based on hydro-geological parameters, i.e., shared or similar aquifers.

RECOMMENDATIONS

- ★ Clarify that the landowner's rights to groundwater below his/her land is a vested real private property right.
- ★ Amend HB 1763 to acknowledge a landowner's constitutionally protected property right in groundwater and to clarify that "desired future conditions" do not create authorized GCD-imposed caps on groundwater withdraw

RESOURCES

2007 State Water Plan, Texas Water Development Board (Nov. 2006).

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).

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

City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 W.W. 2d 798, 800 (1955).

Sipriano v. Great Springs Waters of Am., Inc., 1 S.W. 3d 75, 76, 83 (Tex. 1999). ★

