GROUNDWATER (BACKGROUND & RECENT CASES)

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I.

INTRODUCTION

When I was given the opportunity to prepare this paper for inclusion in the Texas Water Law Institute program, the first thing that came to my mind is how can I write a paper and prepare a presentation that is both informative and entertaining. After all, for the past 95 years, Texas has for the most part followed the same rule regarding the use of groundwater in this State – The Rule of Capture. In the Background section of my paper, instead of simply summarizing the few Texas groundwater cases of record, I have summarized the five (5) traditional groundwater allocation doctrines and have attempted to include some hopefully interesting facts and commentary relating to some of these early cases to assist the reader in his or her appreciation of how we in Texas have been able to follow the Rule of Capture for almost a century. As to the Recent Cases section of this paper, I have limited my comments to the two significant groundwater cases of the 1990's.

II.

BACKGROUND

A. Basic Principals and Facts to Consider.

(1) Proverbs 25:21: If your enemy is hungry, give him food to eat; if he is thirsty, give him water to drink.

Isaiah 58:11: . . . like a spring whose waters never fail.

(2) Groundwater accounts for 95 percent of the world's fresh water supply (excluding glaciers).

(3) Groundwater means water percolating below the surface of the earth. (§ 35.002, Texas Water Code) The term may also include underground flow in confined channels, artesian water and stream underflow. Groundwater is presumed to be percolating, unless proven otherwise.

(4) The definition of State water does not include groundwater. (§ 11.021, Texas Water Code) Surface water is considered State water and is property of the state.

(5) Laws and administrative rules relating to the use of surface water do not apply to groundwater. (§ 35.003, Texas Water Code)

(6) Ownership and rights of the owners of the land and their lessees and assigns in groundwater are recognized by the State and nothing in the Texas Water Code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, subject to rules promulgated by a groundwater conservation district. (§ 36.002, Texas Water Code.)

(7) Groundwater is considered the property of the owner of the surface estate and treated much like a mineral or oil and gas.

B. Traditional Groundwater Allocation Doctrines

(1) Absolute Ownership. (The English Rule a/k/a the Rule of Capture in Texas.)

The rule of absolute ownership was first formally announced in Acton v. Blundell, 12 M&W 324, 152 E. R. 1223 (Ex. 1843). In the Blundell case, a groundwater irrigator sued a coal miner who dried up the groundwater that supplied springs located on the irrigator's land. The irrigator's land was adjacent to the coal miner's land. The court held for the coal miner stating that the coal miner had a right to use his land which he owned "from the heavens above to the center of the earth below" and that groundwater is "unknown and unknowable."

Under the rule of absolute ownership, a landowner is free to pump unlimited quantities of water from under his land, for any use, regardless of the impact that action might have upon his neighbor's ability to obtain water on his own land. Neither an injunction nor damages will be able to prevent such action.

(2) Rule of Reasonable Use. (The American Rule.)

The rule of reasonable use allows a landowner a usufructory right to the percolating water beneath his or her land subject to a reasonable use on the land from which the water is extracted. The term "reasonable use" is tied to beneficial use. The rule limits uses on non-overlying lands, uses on lands outside of the basin and sales. Groundwater may be extracted and transported "off the land" so long as no neighbor can show that he or she is injured by such transportation off the land.

(3) Correlative Rights.

This doctrine first appeared in Katz v. Walkinsow, 141 Cal. 116, 70 P. 663, 74 P. 766 (1902). This doctrine provides that when there is an inadequate groundwater supply for all users of the same underground source, the landowners must prorate use in proportion to the relative percentage of land area the landowner owns over the underground source.

(4) The Restatement Rule.

The Restatement of Torts (Second), § 858 (1979) provides as follows:

> "(1) A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless
>
> > (a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,
> >
> > (b) the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water, or
> >
> > (c) the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.
>
> (2) The determination of liability under clauses (a), (b) and (c) of Subsection (1) is governed by the principles stated in ss 850 to 857."

(5) **Prior Appropriation.** Some western states (e.g., Colorado and New Mexico), by court decision or statute, have applied the prior appropriation system to groundwater. As applied to groundwater, the prior appropriation system provides first in time is first in right.

C. Texas Follows The Rule Of Capture

(1) In Houston & T.C. Railway Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904), the Texas Supreme Court adopted the absolute ownership (English rule) of Acton v. Blundell, 12 M&W 324, 152 E.R. 1223 (Ex. 1843).

Mr. East's well was five (5) feet in diameter and about thirty-three (33) feet in depth and was located on property that Mr. East owned in fee simple adjacent to the Railroad Company's property and was used for household purposes. Mr. East's well was dug prior to the Railroad Company's well.

Houston & Texas Central Railroad Company's well was twenty (20) feet in diameter and about sixty-six (66) feet in depth and was located on property that the Company owned in fee simple in the City of Denison, Grayson County, and was used by it in its locomotives and machine shops.

Mr. East's well dried up after the Railroad Company began using its well. Mr. East sued the Railroad Company for both past and prospective injury in the amount of $206.25. The District Court ruled in favor of the Railroad Company. The Court of Civil Appeal reversed in favor of Mr. East finding that the Railroad Company's use of its land was an artificial use and unreasonable under the doctrine of reasonable use, as applicable to defined streams. The Supreme Court reversed holding in favor of the Railroad Company. In its opinion, the Court quoted from Frazier v. Brown, 12 Ohio St. 294 (OHIO, 1861) as to the reasons for the necessity of the absolute ownership doctrine.

> "the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible. (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility."

(2) The Comanche Springs case, Pecos County WCID No. 1 v. Williams, 271 S.W.2d 503 (Tex. Civ. App. – El Paso 1954, writ ref'd n.r.e.), applied the principles of the

East case to the effect of groundwater uses of surface water supplies. The plaintiff, a statutory senior appropriator of surface water, complained that defendant's well had reduced springflow of Comanche Springs to such an extent that insufficient water was available for irrigation. The court ruled that the plaintiff's right to use the water attached only after the water emerged from the ground. Prior to such emergence, the defendant could use any amount of water he chose, regardless of the impact upon others.

(3) Groundwater need not be used on the premises of the surface estate. It may be sold for off-site use by a third party. Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927).

(4) The use of groundwater at a distant location, even though the majority may be lost in transportation, is permissible. In City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W. 2d 798 (1955), the Texas Supreme Court approved Corpus Christi's transportation of artesian well water 118 miles down surface watercourses to its diversion point, even though at times as much as two thirds to three fourths of the original supply was lost in transit to evaporation, seepage, and transpiration. A landowner's right to capture and use groundwater cannot be done maliciously and with the purpose of injuring a neighbor or amount to wanton and wilful waste of the groundwater.

This case was decided by a divided court. Of interest is the dissenting opinion by Justice Will Wilson in that it includes a plea for reappraisal of the doctrine of the *East* case because of its obsolescence in the light of present-day (1955) scientific knowledge. Justice Wilson wrote:

> "I have this to say about reaffirming the rationale of the East case, Frazier v. Brown, and Acton v. Blundell. These cases were decided (1843-1904) before the development of most of our present knowledge of geology and hydrology and there has been a great advance in knowledge since these decisions. In the East case the court takes its rationale from Frazier v. Brown which is, essentially, that, (one) the movement of underground waters "are so secret, occult and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible," and (two) "'* * * Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.'"
>
> This dire prediction – like much prophecy – overlooked the possibility of advance in knowledge and technique. It is understandable that this rationale should appeal to this court in 1904 but I regret to see us reaffirm it now, as the majority does, in 1955 – especially in view of the development since 1904 of our comprehensive knowledge and experience in oil and gas regulation.
>
> I am convinced that the rationale of Frazier v. Brown has been rebutted and answered by the course of our history and the entire trend of our jurisprudence since that decision and since the East case. Although this

> court can close its eyes to the advancement of scientific and legal knowledge and governmental techniques by reaffirming this rationale as the majority do here, I do not believe that this court will always do so, and for that reason the substance of this dissent seems worth filing."

(5) In Bartley v. Sone, 527 S.W.2d 754 (Civ. App. ref. n.r.e. 1974), the Court held that where all water in the ditch came from springs located wholly on the landowner's property, the landowner owned all the water in the ditch. The owner of land "owns also all ordinary springs and waters arising thereon." Toyaho Creek Irrigation Co. v. Hutchins, 52 S.W. 101 (Tex. Civ. App. – Fort Worth, writ ref'd 1899).

With regard to water percolating below the surface (not including defined subterranean streams or underflow of river) the Court held that the owner of land owns such water.

(6) In Friendswood Development Co. v. Smith-Southwest Industries, Inc., 576 S.W.2d 21 (Tex. 1978), the Supreme Court held that an action for damage would lie for negligent pumping of groundwater which caused subsidence of neighboring land.

(7) In City of Sherman v. Public Utility Commission of Texas, 643 S.W.2d 681 (Tex. 1983), the Supreme Court acknowledged the East case as being the law in Texas, despite much criticism. The Court noted that a corollary to absolute ownership of groundwater is the right of the landowner to capture such water.

(8) In the Kickapoo Springs case, Denis v. Kickapoo Land Company, 771 S.W.2d 235 (Tex. App. – Austin 1989, writ den'd), an identifiable cavity (located 13 feet "upstream" of the spring orifice) did not qualify as an underground stream, nor did the fact that springflow made a sufficient addition to streamflow to be of benefit to downstream riparian owners.

III.

RECENT CASES

In this section of my paper, two cases are highlighted, both of which are significant Texas Supreme Court cases in the on-going development of Texas groundwater law.

(1) Barshop v. Medena County UWCD, et al., 925 S.W.2d 618 (Tex. 1996). Landowners and others filed suit for a declaratory judgment that the Edwards Aquifer Act creating the Edwards Aquifer Authority was facially unconstitutional. The Texas Supreme Court held otherwise.

Landowners asserted that the Act did more than just regulate the use of the aquifer water, but that it actually deprives the landowner of a vested property right.

Two distinct property rights theories were argued regarding this "vested property right." On the one hand, the landowners maintain that they own the groundwater

beneath their lands and that they have a vested property right in this groundwater. The State, however, insisted that until the groundwater is actually reduced to possession, the property right is not vested and no taking occurs. The Court acknowledged that the parties disagreed as to whether a Texas landowner owns groundwater before taking possession of it, but the Court deemed it unnecessary to resolve this issue.

In upholding the constitutionality of the Act, the Court relied on the 1917 Conservation Amendment of the Texas Constitution. (Const. art. XVI, § 59(a).) This provision of the Constitution applies to "all" of the natural resources of the state. It is not limited to surface water. The Court said that the State has the responsibility under the Texas Constitution to preserve and conserve water resources of all Texans. Barshop, 925 S.W.2d at 623.

The Court also observed: "Water regulation is essentially a legislative function." Id. at 633. This observation by the Court appears to play a key role in the Court's decision in the "Ozarka" case decided earlier this year, again upholding the rule of capture in Texas.

(2) Sipriano, et al. v. Great Spring Waters of America, Inc., et al., ____ S.W. 2d ____ (Tex. 1999) (copy attached).

In this case, commonly referred to as "the Ozarka case," Henderson County landowners sued Ozarka claiming that Ozarka's pumping of 90,000 gallons per day, seven days a week of groundwater near the landowner's land depleted the landowners' groundwater wells. The landowners sought injunctive relief, as well as actual and punitive damages for Ozarka's alleged nuisance, negligence, gross negligence and malice. The Supreme Court was specifically confronted with the issue of whether Texas should abandon the rule of capture and replace it with the rule of reasonable use.

The trial court granted summary judgment in favor of Ozarka relying on the rule of capture. The Tyler Court of Appeals affirmed, concluding that "for so well-settled law as the rule of capture, we conclude that it would be more appropriate for the legislature or the Supreme Court of Texas to fashion a new rule if it should be more attuned to the demands of modern society.

The opinion of the Supreme Court is an excellent history of the rule of capture beginning with the Court's decision in East through its decision in Barshop. In deciding not to change the law, the Court stated:

> "By constitutional amendment, Texas voters made groundwater regulation a duty of the Legislature. And by Senate Bill 1, the Legislature has chosen a process that permits the people most affected by groundwater regulation in particular areas to participate in

> democratic solutions to their groundwater issues. It would be improper for courts to intercede at this time by changing the common-law framework within which the Legislature has attempted to craft regulations to meet this state's groundwater-conservation needs. Given the Legislature's recent actions to improve Texas's groundwater management, we are reluctant to make so drastic a change as abandoning our rule of capture and moving into the arena of water-use regulation by judicial fiat. It is more prudent to wait and see if Senate Bill 1 will have its desired effect, and to save for another day the determination of whether further revising the common law is an appropriate prerequisite to preserve Texas's natural resources and protect property owners' interests.
>
> We do not shy away from change when it is appropriate. We continue to believe that "the genius of the common law rests in its ability to change, to recognize when a timeworn rule no longer serves the needs of society, and to modify the rule accordingly." And Sipriano presents compelling reasons for groundwater use to be regulated. But unlike in East, any modification of the common law would have to be guided and constrained by constitutional and statutory considerations. Given the Legislature's recent efforts to regulate groundwater, we are not persuaded that it is appropriate today for this Court to insert itself into the regulatory mix by substituting the rule of reasonable use for the current rule of capture. Accordingly, we affirm the court of appeals' judgment."

The Court decision was unanimous. However, Justice Hecht, joined by Justice O'Neill also filed a separate concurring opinion. In his opinion, Justice Hecht seriously questions whether there is really any groundwater management going on in Texas and concludes that the two reasons cited by the East Court for adopting the rule of capture are no longer valid today.

Justice Hecht suggests that Section 858, Restatement 2d, is preferable to the rule of capture, absent an effective legislative solution. In conclusion, Justice Hecht states:

> "Nevertheless, I am persuaded for the time being that the extensive statutory changes in 1997, together with the increasing demands on the State's water supply, may result before long in a fair, effective, and comprehensive regulation of water use that will make the rule of capture obsolete. 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."