

## CHAPTER 4

# Groundwater Law and Regulation

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### I. Introduction

This chapter will review the law of groundwater as established and applied by Texas courts and the regulation of the exercise of those rights under the Conservation Amendment, article 16, section 59 of the Texas Constitution. Although Texas adopted the common law as a republic in 1840 (*see* Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 3–6, *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 177–78 (Gammel Book Co. 1898)), prior to 1904 Texas had not expressly addressed the law applicable to groundwater. In the early 1900s, the need to use large quantities of groundwater and the ability to raise it to the surface with submersible pumps led to conflicts that required resolution by the courts. The Texas Supreme Court in *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904), adopted the common-law absolute ownership rule. More than one hundred years of jurisprudence have left the law little changed and much criticized. Despite the fact that the common law applicable to groundwater remains the same, the nature of a landowner’s right to produce groundwater has not been thoroughly examined, nor have any significant cases addressed constitutional takings claims arising out of groundwater conservation district decisions to limit or deny groundwater production by landowners.

The chapter will also outline the law related to groundwater conservation districts, describe the expansion of groundwater conservation district authority since 1995, and discuss court decisions addressing groundwater conservation district powers. The role of priority groundwater management areas and groundwater management areas in the exercise of groundwater regulatory powers will also be examined. Court decisions involving legislative efforts to regulate groundwater use in the Edwards Aquifer, within the Harris-Galveston Subsidence District, and groundwater conservation districts will likewise be reviewed. Finally, the chapter will examine areas of potential future conflict between landowners and groundwater conservation districts. The current status and operation of groundwater conservation districts and subsidence districts are discussed in Chapter 13 of this book.

Under the Conservation Amendment, article 16, section 59 of the Texas Constitution, the state has, through the creation of groundwater conservation districts (or similar governmental agencies), authorized the regulation of the exercise of groundwater rights by landowners. *See* [Tex. Const. art. III, § 59](#); Tex. Water Code Ch. 36. As discussed below, legislative changes in 1997, 2001, and 2005 substantially increased the powers of groundwater conservation

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districts, creating the opportunity for conflict between landowner rights and the exercise of these regulatory powers. This chapter will review the development of the law of groundwater and examine the common law applicable to groundwater, from the adoption of the absolute ownership rule to its most recent reaffirmance, as well as the relationship of this rule to groundwater regulation by local groundwater districts.

## II. What Is Groundwater?

Although this question seems simple, the fact that groundwater is part of the hydrologic cycle means that the same molecule of water was probably, at some point, surface water or diffused surface water, and thus considered state water. Entirely different laws and regulations applicable to these types of water make categorization extremely important. Because the definition of state water includes underground rivers and streams and the underflow of surface rivers and streams, the fact that water is found underground is not definitive proof of its character as groundwater. See [Tex. Water Code § 11.021\(a\)](#) (underflow); *Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927); *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279, 280 (Tex. 1904); *Pecos County Water Control and Improvement District No. 1 v. Williams*, 271 S.W.2d 503, 506 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.) (underground rivers and streams); *Cantwell v. Zinser*, 208 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1948, no writ). Chapter 36 of the Texas Water Code defines groundwater as water percolating below the surface of the earth, [Tex. Water Code § 36.001\(5\)](#), while the regulations implementing the state's water rights statute define groundwater as “[w]ater under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving.” [30 Tex. Admin. Code § 297.1\(21\)](#). Thus in determining the legal classification of water found beneath the ground, one must first determine whether it is state water. If not, it is legally groundwater and will be subject to the rule of capture as modified by groundwater conservation districts and discussed below.

Groundwater emerging from springs and entering a watercourse loses its character as groundwater and is properly classified as surface water. See *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 236 (Tex. App.—Austin 1989, writ denied). Groundwater discharged into a river or stream loses its status as groundwater and becomes surface water. See *City of San Marcos v. Texas Commission on Environmental Quality*, 128 S.W.3d 264, 277 (Tex. App.—Austin 2004, pet. denied).

## III. Texas Adopts the Absolute Ownership Rule for Groundwater

In the *East* case, the Texas Supreme Court was presented with its first opportunity to address the ownership of groundwater and liability for its use. The case arose as a claim by a landowner for injuries allegedly caused by new, large-volume pumping by an adjacent landowner. The plaintiff had historically used groundwater, but that water became unavailable because the defendant had purchased nearby land, drilled a well, and installed a steam pump to pump groundwater to cool locomotives, which were located some distance from the railroad

company's well. The court reversed lower court rulings and found there was no right to recover damages for the loss of use of the plaintiff's wells nor could the plaintiff prevent the railroad's use of the water, even though the railroad company's use clearly deprived the plaintiff of a historically exercised right. 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. The court expressly rejected the American rule, which limits the use of the water to the reasonable amount for the land from which it is produced. Landowners were, in the court's opinion, free to capture and use as much water as could be beneficially used without waste. The court expressed considerable concern about the adverse economic consequences of adoption of the American rule, particularly in the context of the railroad industry's need for water along its growing network of lines.

Although not discussed in the *East* case, the origins of the English common law of absolute ownership are interesting and informative in understanding the ownership right. The rule is said to trace its origins back to original concepts of real property ownership developed by the Greeks and Romans. The rule was formally adopted by the English courts in *Acton v. Blundell*, 152 Eng. Rep. 1233 (1843). See Dylan O. Drummond et al., *The Rule of Capture in Texas*, 37 Tex. Tech L. Rev. 1 (2004). Ownership was described as giving the landowner all that lies beneath his surface, including the right to dig therein and apply all that is found to his own purpose even if he drains his neighbor's well, the resulting injury described as *damnum absque injuria*. *East*, 81 S.W. at 280–81. The *East* court adopted the absolute ownership rule after a thorough discussion of the argued alternative—the American, or reasonable use, rule. The court gave two reasons for adopting the absolute ownership rule:

1. Because the existence, origin, movement, and course of such waters and the causes that govern and direct their movements are so secret, occult, and concealed, any attempt to administer a set of legal rules with respect to them would be involved in hopeless uncertainty and would therefore be practically impossible. *East*, 81 S.W. 279 at 281.
2. Any consideration of correlative rights would interfere to the material detriment of the commonwealth with drainage and agriculture, mining, the construction of highways and railroads, sanitary regulations, building, and the general progress of improvement of works of embellishment and utility. *East*, 81 S.W. 279 at 281.

Even though described as an absolute ownership rule, the court recognized the common-law limitations on the exercise of the right. The groundwater must be put to a beneficial use without waste, and the action must be without malice. *East*, 81 S.W. 279 at 281. The court also acknowledged that, by noting its absence in Texas, the rule applies only when there exists no legislation limiting the exercise of the right. *East*, 81 S.W. 279 at 280.

In 1927, the Texas Supreme Court reaffirmed the rule of capture in *Texas Co. v. Burkett*, 296 S.W. 273 (Tex. 1927). The court expressly held that a landowner had the right to enter into a contract to sell groundwater, even though the water would not be used on the property from which the water would be produced.

Despite extensive criticism concerning the absence of a remedy for a landowner or other interest adversely affected by the exercise of the right to produce groundwater, the absolute ownership rule has remained the common law in Texas. The Texas Supreme Court had the opportunity to repeal the rule in 1999 in *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999), but declined to do so. The defendant purchased land, constructed wells,

and produced groundwater for bottling purposes. Sipriano claimed that the wells he owned were severely depleted by the defendant's alleged nuisance, negligence, gross negligence, and malice. In the lower court, Sipriano argued that his claims fell within recognized exceptions to the rule of capture and, further, that Texas should abandon the rule of capture and replace it with the rule of reasonable use. These arguments were rejected; the defendant obtained a summary judgment denying all of the plaintiff's claims, which was affirmed by the court of appeals. See *Fain v. Great Spring Waters of America, Inc.*, 973 S.W.2d 327 (Tyler 1998). Sipriano abandoned the argument that he had stated a claim under a recognized exception to the rule of capture in arguments to the supreme court and argued only that the rule of capture should be abandoned.

The Texas Supreme Court affirmed the lower court judgments applying the rule of capture to groundwater. In doing so, the court reviewed the history of the rule of capture and the cases interpreting the rule, including the common-law exceptions to the rule that a landowner was not liable to his neighbors for injury caused by the use of water so long as the water was not wasted, negligently withdrawn, or maliciously removed.

For over ninety years, this Court has adhered to the common-law rule of capture in allocating the respective rights and liabilities of neighboring landowners for use of groundwater flowing beneath their property. The rule of capture essentially allows, with some limited exceptions, a landowner to pump as much groundwater as the landowner chooses, without liability to neighbors who claim that the pumping has depleted their wells. We are asked today whether Texas should abandon this rule for the rule of reasonable use. . . . Because we conclude that the sweeping change to Texas's groundwater law Sipriano urges this Court to make is not appropriate at this time, we affirm the court of appeals' judgment.

*Sipriano*, 1 S.W.3d at 75.

Although the court's decision upheld the rule of capture, it is instructive to consider the reasoning provided in the majority and concurring opinions. The majority opinion stated that there were compelling reasons for abandoning the rule and replacing it with the reasonable use rule. Furthermore, the court stated that it had the power to make such a change and would not be reluctant to do so in the future if the legislature did not adequately address regulation of groundwater production.

In the majority opinion, the court cited the Conservation Amendment as ample justification for the legislature to authorize regulation of groundwater production and stated that Texas voters had made groundwater regulation "a duty of the legislature." *Sipriano*, 1 S.W.3d at 80. The court noted that the legislature had recently passed Senate Bill 1 (Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610, eff. Sept. 1, 1997), which provided a process to create local groundwater conservation districts. *Sipriano*, 1 S.W.3d at 79–80. The court stated, with a major caveat, that changing the common law upon which this process was intended to act would be improper.

In deferring to the legislature, the supreme court in the majority opinion specifically referenced amendments to Texas Water Code provisions applicable to groundwater districts contained in S.B. 1. The court pointed to amendments giving more authority to groundwater conservation districts to regulate and manage groundwater withdrawals and regulate water transferred outside the district. They "save[d] for another day the determination of whether further revising the common law is an appropriate prerequisite to preserve Texas' natural resources and protect property owners' interests." *Sipriano*, 1 S.W.3d at 80.

The concurring opinion by Justice Hecht, joined by Justice O’Neill, presents a slightly different view. While agreeing to defer to the legislature, Justice Hecht makes a persuasive argument for the abandonment of the rule of capture in favor of the “beneficial purpose doctrine” set out in section 858 of the Restatement (Second) of Torts. This doctrine would impose liability (1) for withdrawal of groundwater that unreasonably causes harm to neighboring land through lowering the water table or reducing artesian pressure, (2) for water use that exceeds the landowner’s reasonable share of the annual supply or total store of groundwater, or (3) for water use that has a direct and substantial effect on a watercourse or lake and unreasonably causes harm to a person entitled to use its water. *Sipriano*, 1 S.W.3d at 83 (citing Restatement (Second) of Torts § 858).

## IV. Exceptions to the Rule of Capture

### A. Waste

Although the waste exception to the rule of capture has been recognized since its adoption in 1904, it was not until *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798 (Tex. 1955), that an appellate decision addressed the extent to which the waste exception limited the rule of capture. A river supply district and the City of Corpus Christi made an agreement under which the district would allow groundwater to flow from the district’s artesian wells into a river, which would then transport the water 118 miles to Corpus Christi’s reservoirs. Pleasanton’s water supply was threatened by these actions, and it sought to enjoin performance of the contract and prevent the “waste” of the groundwater caused by the loss of water during its transit to Corpus Christi. The claim was based on proof that up to 75 percent of the water removed from the ground was lost to evaporation and seepage before it was actually used by the citizens of Corpus Christi. The plaintiff relied on a 1925 statute that defined waste, in relation to artesian wells, as 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 the transporting of water because it constituted waste, the supreme court found that it was not waste to transport water down a natural stream bed with consequent loss of water by evaporation, transpiration, and seepage. Examining the limitations on the rule of capture right, the supreme court noted:

About the only limitations applied by those jurisdictions retaining the “English” rule [rule of capture] are that the owner may not maliciously take water for the sole purpose of injuring his neighbor, or wantonly and willfully waste it.

*City of Corpus Christi*, 276 S.W.2d at 801 (citations omitted).

In examining whether the facts justified a finding that the water had been wasted, the court noted that no common-law limitation of the means of transporting the water to the place of use could be found and that the question of whether the use to which the water is put is lawful or unlawful cannot reasonably turn on whether some of the water put into the system escapes during transportation. The decision noted that the water transported was put to a beneficial use, despite the amount lost in transport. The court concluded that the legislature could prohibit the use of any means of transportation of groundwater that allowed the escape of excessive amounts, but that it had not done so. The court noted that the legislature was in session, would have the court’s opinion, and could address the problem by declaring that the

transportation of water that results in the escape of a large percentage of the groundwater was wasteful and unlawful. *City of Corpus Christi*, 276 S.W.2d at 803.

Justices Griffin, Wilson, and Culver dissented. All three were troubled by the large percentage of water lost. After lamenting the majority's finding, Justice Wilson wrote on the limitations of the rule of capture and suggested that the rule be abandoned and a correlative rights system be adopted. *City of Corpus Christi*, 276 S.W.2d at 808.

No other cases have made their way to the appellate courts in which a claim of waste of underground water has been alleged or found.

## **B. Subsidence**

Subsidence caused by unregulated groundwater withdrawals due to explosive growth in the 1940s, 1950s, and 1960s in the Harris-Galveston County area created the next conflict in which the rule of capture was examined. Extensive groundwater pumping in this highly urbanized area was causing subsidence. Once 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 use groundwater. The region sought legislation creating a district with the power to address groundwater use and limit further damage from subsidence. The legislature responded in 1975 by creating the Harris-Galveston Coastal Subsidence District. See Harris-Galveston Coastal Subsidence District Act, 64th Leg., R.S., ch. 284, 1975 Tex. Gen. Laws 672. A lawsuit for damages for subsidence allegedly caused by excessive groundwater use in this same part of the state was decided in *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21 (Tex. 1978).

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 Friendswood's past and continuing withdrawals of vast quantities of groundwater. Friendswood filed third-party actions against other landowners withdrawing groundwater in the area. The trial court granted summary judgment in favor of all defendants. The court of civil appeals reversed and remanded, holding that the plaintiffs had stated a cause of action for nuisance and negligence, raising issues of fact. Although the Texas Supreme Court reversed the court of appeals and affirmed the trial court's judgment, it established a prospective new cause of action limiting the future exercise of the right to capture and use groundwater if negligence in producing water from existing wells is established, or if new wells are drilled and produced in a negligent manner.

The supreme court found that plaintiffs' 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 was, in effect, a contention that the reasonable use doctrine should apply to groundwater. *Friendswood Development Co.*, 576 S.W.2d at 24. After a careful examination of the history and background of the rule of capture in other jurisdictions and in Texas, the court concluded that some aspects of the rule are harsh and outmoded and that the rule had been severely criticized since its reaffirmation by the court in the 1955 *City of Corpus Christi* case. The court stated:

On this subject we are not writing on a clean slate. Even though good reasons may exist for lifting the immunity from tort actions in cases of this nature, it would be

unjust to do so retroactively. The doctrine of *Stare decisis* has been and should be strictly followed by this Court in cases involving established rules of property rights.

*Friendswood Development Co.*, 576 S.W.2d at 29 (emphasis added).

The court then made a very significant ruling; the court created a common-law exception to the unlimited right to use groundwater by recognizing a cause of action for “future” subsidence proximately caused by negligence in the manner in which wells are drilled or produced. The court wrote:

Therefore, if the landowner’s manner of withdrawing ground water from his land is negligent, willfully wasteful, or for the purpose of malicious injury, and such conduct is a proximate cause of the subsidence of the land of others, he will be liable for the consequences of his conduct. The addition of negligence as a ground of recovery shall apply only to future subsidence proximately caused by future withdrawals of ground water from wells which are either produced or drilled in a negligent manner after the date this opinion becomes final.

*Friendswood Development Co.*, 576 S.W.2d at 30. The court also called upon the legislature to exercise its proper role in regulating and managing groundwater withdrawals in the state of Texas.

In a dissenting opinion, Justice Pope, joined by Justice Johnson, made a strong argument for recognizing a cause of action for damages caused to the land of another by groundwater withdrawals as distinguished from a claim for damages caused by the loss of the use of the water. The dissent preferred to limit the application of the no injury rule to claims for damages for loss of water, but not claims for damage to the land itself, linking it to an actual trespass. *Friendswood Development Co.*, 576 S.W.2d at 34.

## V. Application of the Rule to Spring Flow

As early as 1927, the Texas Supreme Court recognized that spring water, which is neither surface water nor water in a subsurface stream with defined channels, was the exclusive property of the landowner. See *Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927). The first court decision directly addressing the conflict between landowners who used percolating groundwater emerging at springs and landowners who had historically benefited from and used downstream flows from a spring was *Pecos County Water Control & Improvement District No. 1 v. Williams*, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.). The defendant owned large areas of land over groundwater formations that historically provided flow to Comanche Springs. The plaintiff was the owner of surface water permits based on historic spring flows and had used and enjoyed the waters of Comanche Springs for ninety years. During the 1950s drought, the defendant’s extensive groundwater use was alleged to have caused the cessation of spring flows from Comanche Springs. The downstream plaintiff, as the owner of the surface water permits, filed suit seeking an injunction and a declaration that their more senior appropriative rights had priority. See Chapter 3 of this book for a discussion of surface water rights.

The district court refused to enjoin the use because it was not wasteful and refused to judicially declare correlative rights in the water at issue. On appeal, the court declined to recognize the surface water rights predating the groundwater usage by the defendant as justification for injunctive relief against the groundwater use. The court held that the plaintiff’s

rights to the water only extended to the waters of Comanche Springs after they emerged from the springs and refused to extend those rights to the water underground. See *Pecos County*, 271 S.W.2d at 506–07.

The court also rejected the plaintiff’s claim that, because the water supplying Comanche Springs flowed in well-defined underground channels, it was not groundwater but rather surface water. *Pecos County*, 271 S.W.2d at 506. (See Chapter 3 of this book for a discussion.)

This decision was reinforced in *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235 (Tex. App.—Austin 1989, writ denied), in which an upstream landowner drilled a suction well into Kickapoo Springs, which fed Kickapoo Creek, pumped the water to Kickapoo Creek, and diverted it to irrigate his land. Flow of the creek downstream of the diversion was substantially reduced, and downstream users sued, claiming unlawful diversion of state surface water. The trial court granted summary judgment for the defendant well owner, and the court of appeals affirmed, holding that waters tributary to springs were treated the same as all other percolating waters and belonged absolutely to the owner of the land. The landowner could do what he pleased with them, even though abstracting the water dried up the springs. The court said it is immaterial that the springs so supplied with water were the sources of a stream or surface water course upon which rights had vested, provided that the water was intercepted while it was still percolating through the soil before it had reached the surface of the ground at the springs. *Denis*, 771 S.W.2d at 238–39.

## VI. Nature of the Ownership Right

Although the rule of capture has been the law of the state of Texas since 1904 and has been consistently described as a property right incident to ownership, the courts have never been called upon to define the exact nature of the right. Beginning with the *East* case, the courts have described it as a real property right but have never clearly defined when or if the right is vested. This is particularly important in the context of regulation of the exercise of that right discussed later in this chapter. In *East*, the Texas Supreme Court, citing New York authority, said:

An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.

*Houston & T.C. Ry. Co. v. East*, 81 S.W. 279, 281 (Tex. 1904) (quoting *Pixley v. Clark*, 35 N.Y. 520 (1866)). Similarly, in *Pecos County*, the court stated:

It seems clear to us that percolating or diffused and percolating waters belong to the landowner, and may be used by him at his will . . . . These cases seem to hold that the landowner owns the percolating water under his land and that he can make a non-wasteful use thereof, and such is based on a concept of property ownership.

*Pecos County Water Control & Improvement District No. 1 v. Williams*, 271 S.W.2d 503, 505 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.).

The supreme court in *Friendswood Development Co.* refused to abandon the rule, noting that it had become “an established rule of property law in this State, under which many citizens own land and water rights.” *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21, 29 (Tex. 1978).

In spite of these statements that seem to conclude that groundwater is owned by the landowner, the courts have been reluctant to provide a description of the nature of the ownership right embraced by the absolute ownership rule. In *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999), the supreme court deftly avoided a discussion of the nature of the ownership right and instead held that it was inappropriate for the court, given the legislature's efforts to expand the powers of groundwater conservation districts, to insert itself into the regulatory mix by substituting the rule of reasonable use for the rule of capture. *Sipriano*, 1 S.W.3d at 80.

In the one case where the issue was argued to be directly relevant, *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996), the supreme court avoided making a definitive decision on the issue. In *Barshop*, landowner plaintiffs claimed that the Edwards Aquifer Authority Act violated the Texas Constitution by taking their rights to use Edwards Aquifer groundwater governed by the rule of capture. The plaintiffs claimed that the act deprived the landowner of a vested property right in violation of the constitution. Plaintiffs conceded that the state has the right to regulate the use of groundwater, but maintained that they had a vested property right in the water, which the legislation took away. The state countered that the rule of capture, while an ownership right, was not vested until the water was actually reduced to possession and no taking occurs by virtue of regulation of use. *Barshop*, 925 S.W.2d at 625. The court held that the act was not unconstitutional on its face, ruling that the plaintiffs had failed to establish that, under all circumstances, the act would deprive landowners of their property rights. Therefore the court did not have to definitively resolve the clash between property rights in water and regulation of water—that is, whether the act, as it might be applied, resulted in an unconstitutional taking.

The issue of the nature of the groundwater right has been most recently addressed by the Fourth Court of Appeals in two decisions. In both decisions, the court was confronted with questions of law requiring analysis of the ownership interest in groundwater and in both decisions concluded that the right was a part of the real property ownership.

In *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613, 614 (Tex. App.—San Antonio 2008, pet. filed), the issue before the court was whether a seller's reservation in the conveyance of "all water rights associated with said tract" prevented the buyer from drilling a well and producing groundwater.

Litigation was initiated after the buyer, the City of Del Rio, drilled a water well on the purchased tract. The city argued that the trust's reservation of water rights could not be effective, that under the rule of capture, the corpus of groundwater cannot be owned until it is reduced to possession. 269 S.W.3d at 616. The court reviewed supreme court authority holding that percolating water is part of and not different from the soil, that the landowner is the absolute owner of it, and that it is subject to barter and sales like any other species of property. 269 S.W.3d at 617. The court distinguished the absolute ownership rule from the rule of capture, holding that the rule of capture is a tort rule denying a landowner any judicial remedy and was developed as a doctrine of nonliability for damage, not a rule of property. 269 S.W.3d at 617–18. The court concluded that "under the absolute ownership theory, the Trust was entitled to sever the groundwater from the surface estate by reservation when it conveyed the surface estate to the City of Del Rio." 269 S.W.3d at 617.

The court rejected the city's argument that a specific relinquishment of all right to surface access by the seller did not render the reservation ineffective, since the seller owned adjacent property. In *Edwards Aquifer Authority v. Day*, 274 S.W.3d at 742 (Tex. App.—San Antonio 2008, pet. filed), the court reviewed, among other issues, a

summary judgment in favor of the authority on Day and McDaniel's claim that the operation of the Edwards Aquifer Authority legislation and its decision denying Day and McDaniel's permit application constituted a taking under [Tex. Const. art. I, § 17](#). The authority has argued that the takings claim failed because the landowner "did not have a constitutionally protected vested interest in the groundwater." *Day*, 274 S.W.3d at 756. The court cited its decision in *City of Del Rio v. Hamilton Trust* and held that landowners have ownership rights in the groundwater and therefore have a vested right therein. The court further held that the landowner's "vested right in the groundwater beneath their property is entitled to constitutional protection." *Day*, 274 S.W.3d at 756.

Either or both of these cases could be reviewed by the Texas Supreme Court. For now they represent the most definitive treatment of the nature of the real property groundwater right.

## **VII. Legislative Regulation of Groundwater**

The concept that the legislature has the authority to amend or repeal the rule of capture is based on the Conservation Amendment to the Texas Constitution adopted in 1917. Section 59(a) requires the state to engage in the preservation and conservation of all natural resources of the state and specifically authorizes the legislature to pass laws that may be appropriate. *See* [Tex. Const. art. III, § 59\(a\)](#). The Conservation Amendment makes water regulation a legislative function, recognizing that preserving and conserving natural resources are public rights and duties. Despite this clear authority, the Texas legislature did not authorize the creation of local districts, groundwater conservation districts, or underground water conservation districts until 1949 (Act of June 2, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559 (codified at Tex. Rev. Civ. Stat. art. 7880-3c), *repealed by* Act of April 12, 1971, 62d Leg., R.S., ch. 58, § 2, 1971 Tex. Gen. Laws 658) and did not actually form a groundwater conservation district until the creation of High Plains Underground Water Conservation District No. 1 in 1951. The original legislation authorized a petition process for creation of a groundwater conservation district subject to a confirmation election.

Since their authorization in 1949, the state has described groundwater conservation districts as the state's preferred method of regulating production of groundwater. *See* [Tex. Water Code § 36.0015](#). There are currently ninety-one functional groundwater conservation districts, with four awaiting confirmation. See Plate 2, Texas Water Development Board, Groundwater Conservation Districts, *available at* [http://www.twdb.state.tx.us/mapping/maps/pdf/gcd\\_only\\_8x11.pdf](http://www.twdb.state.tx.us/mapping/maps/pdf/gcd_only_8x11.pdf).

## **VIII. Groundwater Conservation Districts**

Chapter 36 of the Texas Water Code provides for creation of groundwater conservation districts (subchapter B), their means of governance (subchapter C), and their powers and duties (subchapter D). In 1995 the Texas legislature consolidated all groundwater conservation district law into this one chapter, moving these types of districts from title 4 of the Water Code authorizing various types of special-purpose districts for purposes other than management of groundwater to title 2 concerning water administration. Act of May 25, 1995, 74th

Leg., R.S., ch. 715, 1995 Tex. Gen. Laws 3755, eff. Sept. 1, 1995. Groundwater conservation districts are to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater and of groundwater reservoirs or their subdivisions and are to control subsidence. [Tex. Water Code § 36.0015](#). Groundwater conservation districts are to act through rules developed, adopted, and promulgated in accordance with the provisions of chapter 36. *See* [Tex. Water Code § 36.101](#).

Groundwater conservation districts can be created in one of three ways. First, groundwater conservation districts can and often are established through the action of the legislature. Typical legislation outlines a district's powers, usually including all chapter 36 powers and any additional powers the legislature chooses to describe, and establishes a procedure for confirmation of the district and for board membership. In recent years, many legislatively created districts have excluded (1) the exercise of eminent domain and (2) assessment of ad valorem taxes from the districts' powers. The vast majority of groundwater conservation districts have been established through the action of the legislature. Second, a groundwater conservation district can be created by landowners through a petition procedure outlined in subchapter B of chapter 36. The landowner petition is filed with the Texas Commission on Environmental Quality (TCEQ), which must find that the boundaries of the proposed groundwater conservation district provide for effective management of the groundwater resources and determine whether the proposed groundwater conservation district can be adequately funded to carry out its purposes. *See* [Tex. Water Code § 36.013](#). Upon certification by the TCEQ, temporary directors are named and an election is held on whether to confirm the district. [Tex. Water Code §§ 36.015–.021](#). Third, a groundwater conservation district can be created by the TCEQ on its own motion. This action is limited to areas within a priority groundwater management area that have failed, through local actions, to create a groundwater conservation district or become part of an existing district within two years after the date of designation. *See* [Tex. Water Code § 36.0151](#). In addition to creating a new groundwater conservation district, landowners in an area can petition a groundwater conservation district individually, as a group, or as an entire county, to be annexed into an existing groundwater conservation district. *See* [Tex. Water Code §§ 36.321–.331](#).

Groundwater conservation districts typically are empowered to prevent waste and manage the groundwater resources by requiring permits for water wells, developing comprehensive management plans, and adopting rules that limit production based on the authority contained in chapter 36 and the district's adopted management plan. The groundwater conservation district can require that all wells, with certain exceptions, be registered and permitted. Wells that require permits are subject to groundwater conservation district rules establishing minimum spacing requirements, drilling, equipping, completion and alteration requirements, and production limits. Wells used solely for domestic use or for providing water for livestock are exempt from all permit requirements if they are incapable of producing more than 25,000 gallons per day, they are not located in a subdivision requiring platting, and the property is at least 10 acres, although the district may require their registration. Wells used solely to supply water for a rig actively engaged in drilling or exploration operations for an oil and gas well permitted by the Railroad Commission of Texas are exempt from the permitting requirements of the district but are required to be registered by the district and may be required to comply with the district's production or spacing limits. Water wells necessary for mining activities authorized by a permit issued by the Railroad Commission of Texas are exempt from permitting requirements and spacing requirements, but must be registered with the district. An extensive discussion of groundwater district powers, procedures, and authorities is found in Chapter 13 of this book.