A PRIMER FOR UNDERSTANDING TEXAS WATER LAW

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In dealing with Texas water law, it is useful to understand that, under the law, water exists in three states. First, there is groundwater. As the name implies, this is water occurring under the surface of the land other than underflow of a surface water river or stream. See *Pecos County WCID No. 1 v. Williams,* 271 SW2d 503 (Tex.Civ.App.--El Paso 1954, error ref'd n.r.e.). Second, there is water in a watercourse. This water is referred to as "surface," "public" or "state" water in that it belongs to the State. Tex.Water Code §11.021 (Vernon 1988). So, what is a "watercourse?" The definition of a watercourse comes from case law. In *Hoefs v. Short,* 114 Tex. 501-511, 273 S.W. 785, 40 ALR 833 (1925), the Supreme Court approved the following principles as to the legal requirements for a watercourse: It must be a definite stream of water in a definite natural channel, with well defined bed and banks, from a definite source or sources of supply. However, the bed and banks may not be discernable for the watercourse's entire length. The flow of the stream may be intermittent or at irregular intervals. The third category of water is "diffused surface water." In general, diffused surface water is water which, in its natural state, occurs on the surface of the ground prior to its entry into a watercourse, lake or pond. See Hutchins, *The Texas Law of Water Rights* (Austin, 1961) 515.

A word about bed and banks: under Spanish-Mexican civil law and the Republic of Texas, until 1837, the bed and banks of only perennial streams belonged to the sovereign. Consequently, the bed of a non-perennial stream included within the limits of a grant made by the Mexican State of Coahuila and Texas passed to the grantee, and did not remain in the sovereign to vest later in the State. McCurdy v. Morgan, 265 SW2d 269 (Tex.Civ.App.–San Antonio 1954, error ref'd).

In 1837 matters changed. In that year the Republic discarded the perenniality criterion in favor of a measurement criterion, which remains with us to this day. Now, a "'navigable stream' means a stream which retains an average width of 30 feet from the mouth up." TEX.NATURAL RESOURCES CODE §21.001(3). The whole of the law, Acts of December 14, 1837, p. 63, is now

found at TEX.NATURAL RESOURCES CODE §§21.001(3), 21.011 and 21.012. The challenge is from what point does one measure to determine the width. That question was resolved in *Motl v. Boyd,* 286 S.W. 458 (Tex. 1926) and *Diversion Lake Club v. Heath*, 86 SW2d 441 (Tex. 1935). In those Texas Supreme Court cases the boundary line between public and private ownership along streams was declared navigable by statute to be the gradient of the flowing water, which is midway between the lower level of the flowing water that just reaches the cut bank and the higher level of it that just does not overtop the cut bank. This test is called the "Stiles Gradient Boundary Theory" and it was adopted by the United States Supreme Court in the contest between Texas and Oklahoma as to the location of the boundary between the two states. *Oklahoma v. Texas*, 265 U.S. 500 (1924).

This paper discusses public or state water and groundwater. Because the development has been so different, the paper is divided into two parts. First, we will focus on public water, then, in part two, we will deal with groundwater.

PART I

Our surface water law began with the arrival of Cortez and the conquest of Mexico in 1519. The significance of the conquest cannot be overestimated for all land, water, forests and so forth were made part of the royal patrimony, that is, they belonged to the king. As was noted by Lasso de la Vega in his "Reglamento," "No one can take public waters upon his private grounds for irrigation without Royal permission." Dobkins, *The Spanish Element in Texas Water Law,* University of Texas Press, 1959, p. 99. Prior to the *Valmont Plantations* case 1962, there was considerable argument whether the Spanish system involved a riparian rights system as found under the common law. *Valmont Plantations v. State of Texas,* 355 SW2d 502 (Tex. 1962). See Davenport, *Development of the Texas Laws of Waters*, 21 Vernons Texas Civil Statutes, XIII. *Valmont* settled the question, holding that the Spanish system was one whereby the Crown or its officials made specific grants of water rights.

The Spanish system was quite simple. All land was classified (and paid for) according to its value for irrigation, dry land farming, or pasture land. If the land was classified as irrigable, the grant would state the measure of water to be accorded to it. Irrigable land was the most expensive

and pasture land the cheapest. Recalling that during the time period Spain had sovereignty of Texas, until it ended in 1821, and the general conditions of Indian hostility that existed, few were willing to seek to have their land classified as irrigable and pay the substantially higher price. Thus, over all, there were relatively few of these Spanish water rights found in Texas.

It was during the Spanish period that one of our first water controversies arose. This occurred in the San Antonio area. The viceroy, who settled these types of disputes, entered a decree to resolve it. Hence, in September, 1731, in what appears to be a dispute between the missions and the Canary Island settlers, as an example, the viceroy decreed that the disputed waters were to be divided among the first four settlers and the missions, each being allowed turns by hours of the day or night for irrigating their land. The water was to be allowed to flow freely to the next neighbor's land so that "all would be provided with plenty of water for their lands in cultivation without injuring each other." Dobkins, Supra at 115 (quoting Baron de Ripperda, Decree to Inhabitants of Bexar, January 10, 1776).

Those who are interested in pursuing an understanding and more detail of the Spanish system will enjoy reading the case concerning the grant of Padre Island to Nicholas Balli. It is cited as *State of Texas v. Balli*, 190 SW2d 71 (Tex. 1944), certiorari denied 328 U.S. 852 (1946).

With Mexico's successful revolt against Spain in 1821, while the government changed, the system of water rights did not. As the Supreme Court concluded in *Valmont*, Spanish and Mexican land grants did not have appurtenant riparian irrigation rights. *Valmont Plantations* at 503.

Although it is irrelevant now that Texas has adjudicated virtually all its rivers and streams, a strong argument could be made that by statute, the Republic and State of Texas continued the Spanish-Mexican system of water rights. The county commissioners courts simply stepped into the place of the Crown or Republic of Mexico representatives. *See* 3 Laws of Texas 958 (Gammel 1852). However, the Texas courts took the initiative and created a new legal authority for water rights derived from the Eastern United States, where, no doubt, the judges had obtained their experience. This right is referred to as the "riparian" right and is based on the adoption of the

common law. It should be noted, however, that the courts did recognize that Spanish civil law prevailed in connection with the decrees and statutes of Mexico after independence from Spain, and that the Republic of Texas also retained the civil law as the rule of decision for the four year period prior to the adoption of the common law in 1840. *Miller v. Letzerich,* 121 Tex. 248, 49 SW2d 404, 85 ALR 451 (1932).

The case that enunciated the riparian rights doctrine is the 1856 case of *Haas v. Choussard*, 17 Tex. 588 (1856). Choussard was the owner of lands around Castroville, which were partially overflowed by the backwaters resulting from a dam constructed by Haas. Relying on Kent's Commentaries and several English Chancery cases, the Supreme Court concluded, citing Kent:

> Every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, (*currere solebat,*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usefruct while it passes along. *Aqua currit et debet currere* is the language of the law. [Water runs and ought to run as it has used to run.] Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel, when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it.

Haas at 589-590.

This holding set the stage of creating a dual system of water rights which prevailed in Texas until the adoption of the Water Rights Adjudication Act of 1967, Tex.Water Code §§11.301-11.341 (Vernon 1988). It is significant that until the adoption of the Adjudication Act, the Legislature never adopted the riparian doctrine. Indeed, the course set by the Legislature was to the contrary.

Over the years, the courts and the state administrative agency responsible for water matters defined the scope of the riparian right as follows.

1. The riparian right to use water for irrigation does not attach to lands granted or patented on or before 1840, unless the original grant specifically authorizes such use.

2. Riparian rights do not attach to the flow of a stream above its normal and ordinary stage. The line of highest ordinary flow is the highest line of flow which the stream reaches and maintains for a sufficient length of time to become characteristic when its waters are in their ordinary, normal and usual conditions, uninfluenced by recent rainfall or surface runoff.

3. All land abutting upon a running stream is riparian as to that part of the survey which lies within the watershed of the stream. The boundary of riparian land is restricted to land, the title to which is acquired by one transaction.

4. A parcel of land may lose its riparian rights when separated from the stream by grant or deed. Any interruption of the owner's land with contact with the water will deprive him of his riparian rights. Thus the granting of a strip of land next to the water, or the laying out of a road or highway along the water, the title to which is in the public, will deprive the original owner of his riparian right.

5. As between riparian owners priority of use establishes no priority of right, i.e., one cannot claim a superior right merely because he used the water first.

6. The riparian right is neither created by use nor lost by non-use.

7. A riparian has the right only in common with every other proprietor, and none of them has a property in the water itself. Each of them may simply use it as it passes along, hence no one can use it to the prejudice of another. All riparians have correlative rights to the normal flow of the water in a stream; therefore, one riparian owner has no right to make an excessive use of the

water to the detriment of others having an equal right.

8. The riparian owner is subject to the doctrine of reasonable use which limits all rights to the use of water to that quantity reasonably required for beneficial use and prohibits waste or unreasonable use, or unreasonable methods of use or diversion. It has been the attitude of the Commission that a riparian's use of water for irrigation is inferior to the use of water for sustaining human life and the life of domestic animals.

9. A riparian right may be impaired or lost to an upstream user by prescription.

10. A riparian right cannot be transferred to use upon another parcel of land.

11. Water cannot be stored and withheld for a deferred use under a claim of riparian right.

Texas Water Commission, *Rules, Regulations and Modes of Procedure* 36-37 (1964). These criteria were omitted from the Commission's 1976 revision of the rules. The Commission, then in the midst of adjudicating water rights, feared that by setting the riparian criteria out in its rules, it could have problems defending its adjudications on appeal.

The Legislature was not entirely inactive during the 1852 to 1889 period. However, the focus was not regulation, but rather development. In 1871, the Legislature provided authority on a state wide basis for the creation of private corporations for the purpose of irrigation 7 Laws of Texas (Gammel 1871). Several years later, the Legislature passed an act authorizing the donation of as much as 16 sections of public land to "canal" companies for each mile of canal constructed of at least three miles in length. 8 Laws of Texas (Gammel 1875). This law was replaced in 1876 to provide a donation of land to "any person, firm, corporation or company" who constructed a canal for navigation or irrigation. Of interest, in both the 1875 and 1876 acts, the Legislature provided "that any such canal company shall have the free use of the water of the rivers and streams of this state." Unfortunately, the courts frustrated this legislative effort in the 1889 *Mud Creek* case. *See Mud Creek Irr. Co. v. Vivian*, 11 S.W. 1078 (Tex. 1889). There the Supreme Court interpreted this language of a "grant" of water to mean that the act of incorporation of the canal company

conferred the right to acquire a water right, but did not confer the right itself.

During the interim period from the founding of the Republic of Texas and the Legislature's first adoption of a general irrigation law in 1889, the Legislature also passed a number of specific laws--special acts--granting individuals, cities and corporations the power to use water for power generation, irrigation and other purposes. These laws were specifically identified in the excellent paper entitled, *"Adjudication of Water Rights--A General Discussion of Water Rights and Recent Legislation to Administer Water Rights in Texas"* by Frank Booth. State Bar Legal Institute on Water. . .and the New Texas Law, 1968. That paper notes that the first general law on irrigation was enacted in 1852, which *Tolle v. Correth*, 31 Tex. 362 (1868) concluded was "intended to carry out the principles of the Mexican laws."

Although not a part of Texas water law, but what every water lawyer should be knowledgeable of is the "Desert Land Act" passed by the United States Congress in 1877. 19 Stat. 377, 43 U.S.C. §321. The Act was designed to encourage the settlement of the arid lands of the West through irrigation. It provided for the sale of 640 acres at $1.25 per acre to any person who would irrigate the land within three years after entry into the land. As to water rights, it contained the following significant provision:

> * * * Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres, shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. (Emphasis supplied.)

Ch. 107, 19 Stat. 377. This language, the U.S. Supreme Court has held, effected a severance of water from the public domain. California Oregon Power Co. v. Beaver Portland Cement Co.,

295 U.S. 142 (1935) ("Through this language, Congress 'effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself.'") Since Texas has New Mexico and Oklahoma to the North and West, which states were subject to the Act, students of water law should be knowledgeable of it.

While the courts continued with expounding the riparian doctrine, a contrary course was embarked upon by the Legislature. In 1889, the 21st Legislature adopted the first Irrigation Act, based on the appropriative system, the keystone of which is the "doctrine of prior appropriation. The reason given for the Legislature to take this action a drought cycle that had halted westward expansion of agriculture and had imperiled the pastoral economy of the western portions of the State. Davenport, *Development of the Texas Laws of Waters,* 21 Vernon's Annotated Revised Civil Statutes, XIII, XXIV.

The first Irrigation Act was significant in other respects as well. Section 2 of the Act declared that all the unappropriated waters of every river or natural stream within the arid portion of the state to be the property of the public and may be acquired by appropriation for the uses and purposes set out in the Act. Acts 1889, 21st Leg., R.S., p. 100. The method for acquiring an appropriation was by filing an affidavit for recordation in the office of the county clerk where the head water of the diversion was to be located, along with a map. The affidavit was to show the name of the ditch or canal, the point at which the head water is situated, the size of the ditch or canal in width and depth and its carrying capacity in cubic feet per second, the name of the stream from which the water is taken, the time when work was commenced and the names of the owners of it. The map was to show the route of the ditch or canal. Acts 1889, 21st Leg. R.S., §5, p. 101.

Diligent prosecution of the work on the proposed ditch, canal or reservoir was required, with work to begin within 90 days of the date the affidavit was filed. Acts 1889, 21st Leg. R.S., §6, p. 101. By complying with the Act, a claimant's right to use water related back to the time when the work of excavation or construction was commenced, provided that a failure to file the affidavit shall "in no wise work a forfeiture of such heretofore acquired rights, nor prevent such claimants of such heretofore acquired rights from establishing such rights in the courts. Acts 1889, 21st Leg. R.S., §8, p. 101.

The Legislature modified the Act in 1893 and 1895 without significant difference. All three acts were limited to the arid portions of the state. However, the map and statement process of acquiring a water right remained the same.

The courts recognized the Legislature's efforts to allow persons the right to use the publicly declared water through the statutes. *Motl v. Boyd*, 116 Tex. 82, 266 S.W. 458 (1926); *Miller v. City of Ballinger*, 204 S.W. 1173 (Tex.Civ.App-Austin, 1918,). However, it appears that it was the El Paso Court of Appeals which was to be first when it held, in *Biggs v. Miller*, 147 S.W. 633, 636 (Tex.Civ.App.-El Paso 1912), that "non-riparian lands acquire rights by statutory appropriation." The decision was also followed in *Biggs v. Lee*, 147 S.W. 709 (Tex.Civ.App.-El Paso 1912).

From time to time, collisions occurred between riparians and appropriators. In the case of *McGhee Irrigation Ditch Co. v. Hudson*, 85 Tex. 587, 22 S.W. 398 (1893), the court held that the Irrigation Act could not deprive riparians of their right to water. However, lending support to the appropriation doctrine, the Supreme Court made clear in 1905 that a riparian could not take water and use it on non-riparian land, a constraint not applicable to a statutory appropriator. *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733 (1905).

The next landmark change in our water law occurred in 1913. One should keep in mind that significant events were occurring in Texas in the last decade of the Nineteenth Century and the first decade of the Twentieth. There was the institution of rice agriculture in southeastern Texas; the beginning of large scale irrigation in the Lower Rio Grande Valley due to the development of the modern irrigation pump; a series of damaging floods on the Brazos River in 1899 and the Lower Rio Grande in 1904; and the increased use of Rio Grande water in Colorado and New Mexico, imperiling historical irrigation in the El Paso area. Furthermore, there was the problem of control over the statutory approprietors in protecting prior approprietors. There was no central depository of water rights since the maps and affidavits were filed on a county basis. As a result, the Legislature completely revamped the water rights system in 1913, by the adoption of the "Burges-Glasscock Act." The map and affidavit system was abandoned and a new state agency, the Board of Water Engineers was created to administer a permit system. Acts 1913, 33rd Leg. R.S.,

Ch. 171, p. 358. The permit system remains with us to this day as the manner by which new water rights are obtained. Persons holding a water right based on the old maps and affidavits (and those persons who had not made their filings were directed to do so) were directed to obtain certified copies of them and record them with the new Board. This resulted in the water right known as a "certified filing." These water rights were filed and numbered on the basis of the time of receipt by the Board as opposed to making an effort to file them in accordance with their time priority.

The Legislature revisited the irrigation laws in 1917, with the passage of the "Canales Act." Acts 1917, 31st Leg., Ch. 88, p. 211. One commentator viewed the 1917 Act as having the real purpose of destroying riparian rights. Davenport, Id., XXXIII. This was due to the sections of the law, §§105-132, which were copied from the laws of Nebraska by way of Wyoming, providing for the legal evaluation of water rights. These sections were held unconstitutional in *State Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S.W. 301 (1921).

McKnight involved a suit to enjoin an adjudication proceeding concerning the waters of the Pecos River. The injunction was refused by the district court but granted by the court of civil appeals. The Supreme Court sustained the court of civil appeals decision, holding, among other things, that the Legislature had attempted to confer powers on persons belonging to the executive department that properly belonged to the judicial department and without express permission of the constitution. As a result of the Court's decision, Texas would not see another water rights adjudication act for over 45 years. People will recall that the *McKnight* case was somewhat revisited in the oil and gas case of *Corzelius v. Harrell*, 143 Tex. 509, 186 SW2d 961 (1945).

In the meantime, in 1917, Texas took a significant step forward with the approval by the voters of Article XVI, Section 59 of the Constitution--the "Conservation Amendment."

> By the adoption of the 1917 amendment to the State constitution, said the supreme court in *Corzelius v. Harrell*, it was not intended to change the constitutional rule dividing the State government into three distinct departments--legislative, executive, and judicial--and forbidding persons in any department to encroach upon the powers properly attached to

each of the others. It was held that the statutes that authorized the Railroad Commission to adjust correlative rights of owners of land in a common reservoir, subject to review by the courts, fell within the mandate to the legislature contained in article 16, §59(a), and did not violate the provisions of article 2, §1. Consequently, the decision in *Board of Water Engineers v. McKnight*, which related to statutes that were enacted before the constitutional amendment of 1917 was adopted, did not control the decision in the instant case.

Hutchins, supra p.13. Many water lawyers believed that if a water rights adjudication was ever passed again, that *Corzelius* would be used to overrule the *McKnight* case. Implicitly, when the issue arose again, they were right.

We now come to the year 1926 and the profoundly important case, which for many years was the epitome of Texas water law in the decades that followed: *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926). It seemed as though that a resolution of any water law question began and ended with *Motl*. Because this case had such an impact on our jurisprudence, detail about is included from Hutchins, pp 139-141:

The controversy in *Motl v. Boyd* arose between owners of lands riparian to Spring Creek in Tom Green County, the several parcels having been patented by the State of Texas in 1857, 1858, and 1863, respectively. The downstream owners (plaintiffs) claimed the use of water of the creek under appropriative rights. Thirty-five years before the action was filed, a predecessor of plaintiffs built an impounding dam on the upstream lands in controversy now owned by defendants, with the verbal permission of Lee, the then owner, but without the payment of any consideration. He also constructed a ditch leading from the dam to his downstream lands; and from then until the controversy arose, he and his successors in title continued to impound the water upstream and to convey it to their downstream lands for the irrigation of a large acreage. During the 35-year period that followed the construction of the impounding and diversion works, none of the upstream land on which the dam was located was irrigated and only a small acreage was cultivated. Just before the expiration of this period, defendants purchased the upstream land on which the plaintiffs' dam was located and filed an application with the State Board of Water Engineers for a permit to

divert water from the reservoir for the irrigation of part of this land. The Board denied the application and refused to issue the permit "under existing circumstances." Notwithstanding this denial, defendants installed a pump and engine and began to pump water from this reservoir for the irrigation of their riparian land, whereupon plaintiffs applied for and obtained a temporary injunction. Plaintiffs had judgment in the district court, defendants in the Austin Court of Civil Appeals, and plaintiffs in the Texas Supreme Court.

The lengthily opinion of the supreme court, from which no dissents are reported, was written by Chief Justice Cureton. It went into many matters and made many observations, of which those chiefly germane to the establishment of the riparian doctrine in Texas may be briefly summarized thus:

Predicated on the history of land legislation of the successive governments of this jurisdiction, the court believed that riparian rights were not only recognized, but were granted by Mexican Government on consideration to its colonization grantees; and that after 1840, under legislation enacted by the Republic and State of Texas, the rights of owners of lands bordering streams must be determined in light of the common law and legislative enactments. Therefore, from the Mexican decree of 1823 down to the State appropriation act of 1889, the fixed governmental policy was to recognize the right of the riparian owner to use water not only for domestic and household purposes, but for irrigation as well. This, said the court, accords with its own previous decisions. (116 Tex. at 99-108.)

Spring Creek was held to be a public statutory navigable stream. Title to its waters is in the State in trust for the following purposes and uses: first, for navigation; second, for uses by the riparian owners; third, as to non-riparian waters, for the best interests of all the people; fourth, for other uses and benefits not here involved. (116 Tex. at 111.)
Riparian waters were held to be the waters of the ordinary flow and underflow of the stream. Riparian rights do not attach to waters that rise above the highest ordinary flow. "The line of highest ordinary flow" is defined by the court as "the highest line of flow which the stream reaches and maintains for a sufficient length of time to become characteristic when its waters are in their ordinary, normal and usual condition, uninfluenced by recent

rainfall or surface run-off." The appropriation acts of 1889 to 1917 were held to be valid and constitutional insofar as they did not violate this principle. (116 Tex. at 111-124.)

At the conclusion of the opinion, after considering the possibilities of title in the plaintiffs by limitation and by oral grant, license, or easement, the supreme court held squarely that Lee (the previous upstream owner who had orally permitted the plaintiffs' predecessor to build his irrigation works on Lee's upstream land) and his successors in title (including defendants) were estopped to revoke the license and deny the right of plaintiffs to maintain their dam and ditch and take their own appropriated waters and the defendants' riparian waters as they had done for 35 years. (116 Tex. at 127-129.)

Though *Motl* was the "bible" for water lawyers for a number of decades, today we know that *Motl* contained substantial erroneous dicta. Nevertheless, the influence of the case remains with us even to today.

The next case worth of noting in this discourse is *Clark v. Briscoe Irr. Co.*, 200 SW2d 674 (Tex.Civ.App.--Austin, 1947; no writ). One may wonder why, if *Clark* is so noteworthy, is it a "no writ" case from an intermediate court? Specifically, among the case law, certain cases significantly advance the law: *Clark* is one of these cases. The opinion in this case recognized and accorded to the Board of Water Engineers significant powers over water rights and the development of our water resources. Clark, the named defendant who was also the chairman of the Board of Water Engineers, and the board were so delighted that the Board granted Briscoe everything desired to cause the appeals to cease. The board was successful and its wisdom was prophetic, for *Clark* has been a benchmark for future judicial rulings.

Clark involved a vested water right holder who applied to the Board for an amendment to the water right, specifically a permit. Initially, the Board denied the application and Briscoe appealed. So, the question before the Austin Court of Civil Appeals was whether an appropriator, whose permit had ripened into a vested water right by virtue of the application of water to a beneficial use, was required to receive from the State an amendment to the permit as a prerequisite to changing the purpose and place of use of the water. Rationalizing, based on *Motl v. Boyd,* that

the Board had the duty to reject applications if the proposed use was contrary to the public welfare, then "necessarily the Board is invested with the power and duty to ascertain the facts relevant to that issue and with the discretion to determine the effect thereon of such facts; and, by parity of reasoning, to resolve the factual issue as to whether a proposed change in the place or purpose of use would be 'detrimental to the public welfare' within the statutory meaning of that term." 200 SW2d at 684.

This rule of law was believed by the State and many water lawyers to be applicable to all water rights as opposed to just permits, but, we will see when we discuss the Nueces case later, the Court of Civil Appeals did not agree, which caused a legislative reaction resulting in Tex.Water Code §11.122. Now, it is undisputed that the State has supervisory authority over all water rights with respect to any changes to be made to them.

We have now reached the decade of the 1950s and the influential drought that occurred during that period. The effects, from a legal point of view, will set the stage for many significant changes to come.

The first major change was the adoption by the Legislature of the 10-year cancellation statute, codified at that time as Article 7519a, and now, after substantial revision, Subchapter E, Texas Water Code. As originally adopted, the act provided that all permits and certified filings on file with the Board of Water Engineers more than ten years before the effective date of the act and under which no part of the water authorized to be withdrawn had been put to beneficial use for a ten consecutive year period are hereby canceled and shall be of no further force and effect. Notice was required to be sent to the appropriator prior to the effective date of the cancellation but no mention of a hearing was proscribed. The Legislature amended the statute at length in 1957, which we will come to directly.

This statute somewhat complimented two other "cancellation" statutes already on the books for many years. These are Tex.Water Code §11.030 and §11.146. The first statute concerned abandonment of a water right. However, the problem for the state in using this statute was the requirement that abandonment had to be proved. *City of Anson v. Arnett,* 250 SW2d 450

(Tex.Civ.App-Eastland 1952). Since this element of proof was required, the statute was ineffective. The second statute provided that if construction of facilities and other works was not commenced and completed within the time set by the Board of Water Engineers, the appropriator "forfeits all rights to the permit, subject to notice and hearing. Of interest, there are no recorded decisions pertaining to this statute.

Also in the 1950's, the courts substantially strengthened the Board of Water Engineers by holding that reviews of its orders and decisions would be under the substantial evidence rule. *Southern Canal Co. v. State Board of Water Engineers*, 318 SW2d 619 (Tex.1958). The Legislature precipitated *Southern Canal* by passing a law that provided for all appeals from the Board to be tried *de novo*. The courts had already held in *Briscoe* that in granting permits, the Board was acting in an administrative, as opposed to a judicial, function. The Austin Court of Civil Appeals concluded that the appeals statute was invalid on the grounds that it conferred a purely administrative duty on the trial court, contrary to Article II, §1, of the Constitution. 311 SW2d 938. The Supreme Court affirmed the judgment of the Court of Civil Appeals, holding that the appeals statute provisions were so inharmonious and conflicting as to render it impossible to execute.

Though it will most likely be discussed in the presentation on groundwater, a second case in the 1950s that should be mentioned here is the 1955 case of *Corpus Christi v. Pleasanton*, 154 Tex. 289, 276 SW2d 798 (1955). Recalling that 1955 was a period in the middle of the drought, the City of Corpus Christi found itself virtually out of municipal water. The City drilled wells at Campbellton, discharged the water into a riverbed to flow 118 miles downstream to the City. Substantial losses occurred. The plaintiffs asserted that the heavy loss was waste, prohibited by the statutes. The Supreme Court disagreed, saying that the heavy loss was not waste as contemplated by the Legislature

Back to cancellation, it was not until 1957, when the Legislature amended Article 7519a, and put teeth into it, that Texas had an effective cancellation statute. Although forfeiture actions by the state all cited the provisions of sections 11.030 and 11.146 in the cancellation process, as well as Article 7519a, it was under the latter statute that cancellations were effectuated.

As amended in 1957, the article provided that if no water had been used under the water right for a 10 consecutive year period prior to the commencement of the forfeiture proceedings, then the water right was presumed to have been wilfully abandoned and the state was directed to cancel it. The law also dealt with partial uses of water by requiring forfeiture of the unused portion if all the water had not been used and the owner was not justified in the non-use and did not have a bonafide intention of putting the water to a beneficial use within a reasonable time after the forfeiture proceeding.

As a result of preparations to initiate the adjudication of the Rio Grande in 1967, the agency, now called the Texas Water Rights Commission beginning in 1965, noticed two water rights outside of Laredo for cancellation under Article 7519a. After forfeiting the water rights for 10 years of non-use, appeals were taken. When the appeals reached the Supreme Court, a definitive opinion was handed down, holding that the vested rights were limited to beneficial use; the permittees were not vested with the right of non-use of the water for an indefinite period of time; at all relevant times the state had rights as the owner of the water and the constitutional duty to preserve and conserve its water; and, the act provided for a constitutional method by which "the State may fulfill its duty to conserve its water resources from continuous non-use." *Texas Water rights Commission v. Wright*, 464 SW2d 642 (Tex.1971) at 651. The Commission's cancellation was sustained.

The other significant legislative action of the 1950s was the creation of the Texas Water Development Board in 1957. Acts 1957, 55th Leg., ch. 425. One should keep in mind that up until 1957, the Board of Water Engineers had virtually no staff and depended on the U.S Geological Survey to make measurements and calculations for it. Texas Research League, *Structure and Authority for State Leadership of Water Development in Texas*, 1965, at 16. At this time the Development Board was also a very small agency, literally consisting of the part-time board, executive director and a secretary. The purpose of the creation of the Development Board was to supervise funds from the sale of bonds for the purpose of assisting political subdivisions in financing surface water resources projects and laid the foundation for the separation of State water planning from water rights administration..

On the judicial side of the ledger, another major event was brewing during the 1950s. In 1954, Falcon Dam was completed on the Lower Rio Grande. In June, 1954, an extraordinary rainfall in the Rio Grande watershed filled Falcon Reservoir to capacity. The United States share of the impounded water was approximately 1,300,000 acre-feet. Subsequent lack of rain and irrigation use resulted in the supply dropping to 50,000 acre-feet by June of 1956. Literally, the reservoir had been drained. Although earlier litigation had occurred over the water supplies of the Rio Grande, on June 23, 1956, litigation was commenced on what became generally known as the "Big Valley Water Suit." The state, acting through the Attorney General, the Board of Water Engineers, joined by numerous cities in the Lower Rio Grande Valley, sued Hidalgo Water Control and Improvement District No. 18 and thirty-nine other water districts and over 650 private corporations and individuals, constituting the diverters from the Rio Grande below falcon Dam. The state requested the court to take judicial custody of the remaining waters in Falcon Reservoir and to enjoin all the defendants from diverting the waters released from the dam for other than domestic, municipal and livestock purposes.

The court granted the injunction and appointed a special water master. This appointment began the use of water masters in Texas. A spin-off case, the *Valmont Plantations* case, resolved the question that Spanish-Mexican land grants did not have riparian rights to use water for irrigation. And, the water rights of the Lower Rio Grande Valley were judicially adjudicated. See *State v. Hidalgo County WCID No. 18*, 443 SW2d 728 (Tex.Civ.App-Corpus Christi 1969, writ ref'd n.r.e.).

The significance of this litigation cannot be over estimated due to its time and expense. More than 90 lawyers appeared before the court; almost 3,000 pieces of evidence were introduced; 25,000 pages of testimony were produced; and, the legal costs to the litigants were estimated at from five to ten million dollars. Texas Research League, *Texas Water Rights and Water Resource Administration,* 1965 pp. 9-10. It resulted in the general acceptance of the idea of an administrative adjudication of water rights. The Legislature responded with the passage of the Water Rights Adjudication Act of 1967. See Tex. Water Code, Subchapter G.

In the meantime, the Research League made its report and the Legislature found it appropriate to reorganize the water agency, then called the Texas Water Commission since 1962. Texas Research League, *Water Rights and Water Resource Administration,* 1965, at 30. The Legislature responded to the League's recommendations by abolishing the Texas Water Commission and creating the Texas Water Rights Commission with three full-time commissioners and to essentially transfer the old commission's technical staff to the Texas Water Development Board.

Practice found this arrangement unsatisfactory such that the Water Rights Commission developed its own technical staff, albeit smaller than the Development Board's. The Water Rights Commission continued the permit issuing functions historically exercised by the Board of Water Engineers. However, the passage of the Water Rights Adjudication Act provided a new mission to the agency.

Under the Water Rights Adjudication Act, all persons who believed themselves possessed with a water right, except holders of permits and certified filings and domestic and livestock users, were required to file a claim of that right on or before September 1, 1969, based on beneficial use occurring during any calendar year from 1963 through 1967. Tex. Water Code §11.303. A later filing was required of persons who desired recognition of a right based on use from 1968 to 1970. Tex. Water Code §11.303.

The administrative agency adjudication strategy was to begin with the Middle Rio Grande (the area between Falcon Dam and Amistad Dam), then the Upper Rio Grande (from Amistad Dam to the Dave Gill Dam in Hudspeth County). From there the Commission moved north, from river basin to river basin. The method of approach was to break each river basin down to manageable size which proved its efficiency by speedily and economically enabling the state to adjudicate water rights such that now, with the exception of the Rio Grande in the area of El Paso, all water rights have been adjudicated. This clearly contrasts with the 13 year agony that occurred in the Lower Rio Grande Valley.

Although expected by many to be followed by a deluge of litigation, litigation activity

regarding the administrative adjudication was slim. The first several adjudications were virtually contested in the courts. Indeed, it was not until the Guadalupe River was adjudicated that litigation reached the Supreme Court. In two 1982 cases the Supreme Court upheld the constitutionality of the Act. *In Re Adjudication of Guadalupe River Basin*, 625 SW2d 353 (Tex.App-San Antonio 1981), affirmed 642 SW2d 438; *Schero v. Tex. Dept. Water Resources*, 630 SW2d 516 (Tex.App-Waco 1982), affirmed in part, reversed in part on other grounds 642 SW2d 446. The substance of the Supreme Court's holding was that the Water Rights Adjudication Act did not violate the separation of powers doctrine and after notice and the reasonableness of the Adjudication Act, the termination of riparian's continuous non-use of water during the 1963-1967 period was not a taking of their property.

The year 1966, saw a further noteworthy development in the authority of the Texas Water Rights Commission. In that year the Supreme Court handed down its decision in the controversy between San Antonio and the Guadalupe-Blanco River Authority ("GBRA") over the water of Canyon Reservoir. *City of San Antonio v. Texas Water Commission*, 407 SW2d 752 (Tex.1966). In sustaining the Commission's decision to deny water rights to San Antonio and grant them to GBRA, the Court reaffirmed that appeals from Commission orders were under the substantial evidence rule and, significantly, with respect to transbasin diversions, that as to any water found in the originating basin found to be in excess of the amount necessary to protect existing water rights, the Legislature intended that the Commission should, in a balancing process, take into consideration the future benefits and detriments expected to result from a proposed transbasin diversion and that there would only be prejudice to a person or property if the benefits from the diversion were outweighed by detriments to the originating basin. 407 SW2d 758-759. It was not until Senate Bill 1 in the 75th Session of the Legislature that this rule was changed.

Although it was believed that the Commission's authority over amendments to water rights was solidified under the *Clark v. Briscoe* case, a challenge to that proposition was presented in the early 1970s by the holder of a certified filing, the Nueces County WCID No. 3. The genesis of the problem was that the water supply for the WCID and the City of Corpus Christi was a "natural deepening and widening" of the Lower Nueces River, from which both parties diverted. The WCID possessed a certified filing for irrigation purposes and a small amount of the water was allocated for municipal purposes, which water was supplied to Robstown. Corpus Christi

asserted that the water in the natural deepening and widening area belonged to it, due to Corpus Christi's construction of a salt water barrier at the mouth of the Nueces River, that kept the up stream area fresh. The WCID filed an application with the Commission to convert some of the irrigation water from irrigation to municipal: Corpus Christi opposed the application. To bring some understanding to the water rights of both parties, the Commission set both parties' water rights for cancellation. Virtually on the day of the hearing on the WCID's application and the forfeiture, the WCID withdrew its application. The Commission proceeded with the forfeitures. In *Nueces County Water Control and Improvement District No. 3 v. Texas Water Rights Commission*, 481 SW2d 924 (Tex.Civ.App-Austin 1972,) the Court concluded that the forfeiture statute had been misused and the Commission's order of forfeiture was overturned. In the next case, decided the same day, *Nueces County Water Control and Improvement District No. 3 v. Texas Water Rights Commission*, 481 SW2d 931 (Tex.Civ.App-Austin 1972,) the Court held that the WCID could change the use of irrigation water under its certified filing to municipal use without the approval of the Commission.

The Court's opinion did not articulate whether the right of the WCID was due to the fact that a certified filing was involved or by virtue of certain statutes in the Water Control and Improvement District law, Chapter 52 of the Water Code. Nevertheless, the Legislature provided redress by passing Tex.Water Code §11.122, which gave clear statutory authority to the Commission to supervise and approve all modifications to all water rights.

In 1997, in the well known Senate Bill 1, the statute was amended to add the "four corners" doctrine. The proposition behind this amendment was that if an applicant was making no change that would enlarge the water right, the application would be handled almost as an administrative change. The proposition was, however, recently challenged in *City of Marshall and the Texas Commission on Environmental Quality v. City of Uncertain et al.*, Tex.Sup.Ct. No. 03-1111, June 9, 2006. In a nutshell, the Supreme Court held that while there were matters that the Commission did not have to explore, there were other parts of the Water Code that should be inquired into and a contested case hearing was possible on those matters. The amendment process is now a big mess while the Commission sorts out what it must do and the topic is ripe for further legislative action.

The 66th Session of the Legislature brought about the next major change to water rights regulation in 1977. During this Session, the Legislature reorganized all the water agencies--the Texas Water Rights Commission, the Texas Water Development Board and the Texas Water Quality Board-- in a far-reaching fashion by creating and merging the agencies into the Texas Department of Water Resources. Acts 1977, 65th Leg., RS, ch. 870, p. 2207. Using the constitutional doctrine of separation of powers as a frame work, the three agencies were merged on the basis of their executive, legislative and judicial functions. The Texas Water Development Board, the part-time board with State financing powers, acted as the legislative arm. It made all budget requests to the Legislature and passed all agency rules. The Texas Water Rights Commission was dissolved and the new agency that took its place was the Texas Water Commission, which was to exercise the quasi-judicial functions of the new agency. The executive side of the agency was under the executive director, who had the responsibilities of carrying out the decisions of the Water Commission and implementing the rules of the Board.

Few understood the philosophical organization and only saw the inherent tension between the agencies within the agency. As a result, 1985 saw a further reorganization along the traditional lines. Acts 1985, 69th Leg., R.S., ch 795. Gone was the separation of powers delineations and in its stead was a new Texas Water Commission exercising all necessary powers over water. The planning and financing functions were put back under the Texas Water Development Board. The only name and agency not to be revived was the Texas Water Quality Board, as those functions remained absorbed by the Water Commission.

In 1984, the Supreme Court handed down its decision in the *Stacy Reservoir* case, a traumatic case for the Commission and the advocates for that reservoir. *Lower Colorado River Authority et al. v. Texas Department of Water Resources et al.,* 689 SW2d 873 (Tex.1984) *Stacy* concerned an application by the Colorado River Municipal Water District to construct Stacy Dam on the Colorado River, near San Angelo. The Lower Colorado River Authority ("LCRA") opposed the reservoir, asserting impairment of its downstream reservoirs. In evaluating the application, the Commission followed its practice of determining whether water was available for appropriation, a statutory criterion, by reviewing the nature and extent of the water rights issued

and then considering the actual and historic uses under those water rights. Under this test, there was water available. Under the LCRA advocated test, to review only the outstanding, issued water rights in light of the water in the river, there was insufficient water.

The Supreme Court came down on the side of the LCRA, basing its holding on the 1926 decision of *Motl v. Boyd*, that the proper construction of "unappropriated water" should be that water granted under an uncancelled permit was not subject to a new permit. The Court remanded the case to the Commission for application of the proper legal standards.

Stacy threw the Commission into chaos, since substantial portions of the rivers and streams in Texas were "over appropriated" using the Supreme Court's requirement. If there was no unappropriated water available for appropriation, then the Commission was essentially out of business. A number of innovative techniques began to be applied to continue issuing permits and were sanctioned by legislative action. But, back to *Stacy*, a political compromise was reached between the parties that enabled a permit to be issued and the dam was constructed, now known as "Lake Ivie," after the Colorado River Municipal Water District's long-time general manager, O. H. Ivie.

There is one bit of law that has not yet been touched upon and should be: the small domestic and livestock reservoir rights. This authority is currently codified as Tex. Water Code §11.142. Simply stated, this statute gives a person the right to construct on his own property a dam or reservoir to impound or contain not more than 200 acre-feet of water for domestic and livestock purposes. Should the owner wish to use the water for other purposes, an application is required and a permit be granted. See Tex. Water Code §11.143.

The proposition goes back to the Nineteenth Century where in the 1889 Irrigation Act, we find the oblique reference pertaining to corporations organized for the purpose of constructing canals, and the right of any person who holds a possessory right to land adjoining the canal and who has secured the right to be supplied from it, to have water for domestic uses. Further, "the party so entitled shall first make available his said land for agricultural or grazing purposes, and shall provide cisterns, wells, or storage reservoirs for water for domestic purposes." Acts 1889,

21st Leg. R.S., ch. 88, §10. The 1895 Act improved upon this language by providing: "Whenever any person, corporation or association of persons shall become entitled to the use of any water of any river, stream, canyon, or ravine, or the storm or rain water hereinbefore described, it shall be unlawful for any person corporation, or association of persons to appropriate or divert any such water in any way, except that the owner whose land abuts on a running stream may use such water therefrom as may be necessary for drinking purposes for himself, family and employees, and for drinking purposes for his and their livestock. . . ." Acts 1895, 24th Leg., RS, ch. 21, §10.

Repealed in the 1913 Irrigation Act, the authority was again included in the 1917 Irrigation Act, with a cap on the amount of water that could be impounded set at 500 acre-feet. Acts 1917, 35th Leg., RS, ch 88, §16. The 1925 Session of the Legislature dignified the authority by changing it from an exception to an outright affirmative right, and reduced the size to 250 acre-feet, Acts 1925, 39th Leg., RS, ch. 136, §5. At the same time, the right was codified as Article 7500a in the 1925 revision of the water laws.

The Attorney General ruled the 1925 Act unconstitutional, Tex.Atty.Gen., Opinion No. O-1993 (1940), but the Legislature immediately reenacted it, reducing the impoundment further:

> Anyone may construct on his own property a dam and reservoir to impound or contain not to exceed fifty (50) acre-feet of water for domestic and livestock purposes without the necessity of securing a permit therefor. Acts 1941, 47th Leg., RS, ch. 37, p.53.

The quantity was increased back up to 200 acre-feet in 1953, where it remains today. Acts 1953, 53rd Leg., RS ch. 235, p. 592. Then, in 1959, the law substantially in its present form was adopted. Acts 1959, 56th Leg., RS., ch. 151, p. 260. Section 1 provided the same language as the 1953 enactment, while Section 2 set out the mechanism to secure a permit for uses other than domestic and livestock purposes.

In 1957, the Attorney General had occasion to consider the statute. He concluded that on a stream that is a navigable watercourse, a landowner may not construct a dam located on his own

land and irrigate therefrom without a permit from the then Board of Water Engineers, even if the storage capacity of the reservoir was less than 200 acre-feet. Tex.Atty.Gen. Opinion No. WW-97 (1957). The key to understanding the conclusion of the Attorney General is that on a navigable stream, the beds and banks are owned by the state. Thus, a reservoir constructed thereon could not be entirely on the landowner's property. The only case law on the statute occurred in 1966 in *Garrison v. Bexar-Medina-Atascosa Counties WID No. 1*, 404 SW2d 376 (Tex.Civ.App-Austin 1966, writ ref'd, n.r.e.). The Court of Civil Appeals concluded that the statute did not apply to streams which were navigable within the definition of navigable streams contained in Article 5302. This holding affirmed the earlier conclusion of the Attorney General.

Senate Bill 1 in the 75th Legislative Session refined the exemption to provide that the impoundment of not more than 200 acre-feet of water was at the normal storage level of the reservoir. Senate Bill 1 also provided that such reservoirs may be built for sediment control purposes as part of a surface coal mining operation under the Surface Coal Mining and reclamation Act.

We may summarize the statute by saying that the watercourse must be a non-navigable stream and the impoundment may not cross property lines, so as to be entirely upon a person's property; the reservoir must be not more than 200 acre-feet at its normal storage level; and, its use must be for domestic and livestock purposes or for sediment control as part of a surface coal mining operation. If other uses of the water is desired, a permit must be obtained

PART II

The development of the law on groundwater contrasts significantly with surface water because, for the most part, it is contemporary. In terms of legal development, groundwater is a late-comer. Our first judicial decision occurred in 1904 and the first legislative action occurred in 1949. Recall that surface water began with the Spaniards and legislative action happened in 1889. However slow the beginning was, the speed of activity is now picking up substantially.

Texas follows what is called the "rule of capture." This is significantly different from the other states in the United States, which follow rules such as correlative rights and the "American" rule. *See* 2 Hutchins, *Water Rights Laws in the Nineteen Western States* 631 *et seq.* Some would call the rule of capture the law of the biggest pump. Others would say that our rule of capture is antiquated and unfair. But, over the years, our Supreme Court has declined to make changes and the Legislature is only now beginning to come to grips with it.

This part of the paper is about the development of Texas groundwater law. It traces the development of the law both in the courts and before the Legislature in a chronological order.

The Texas law begins just after the turn of the Twentieth Century in Denison, Texas. There, Houston and Texas Central Railroad Company owned six lots and, in 1901, dug a well twenty feet in diameter, sixty-six feet deep. The railroad placed a steam pump on the well and pumped about 25,000 gallons of water per day. The water was used in the railroad's locomotives and machine shops. The well was supplied entirely from percolating groundwater and not an underground stream of any kind.

Before digging the well, the railroad investigated the surrounding area. The investigation involved drilling test holes. It even examined the well of a neighboring landowner, W.A. East, who consented to it.

Mr. East's well was about five feet in diameter and thirty-three feet deep. The well was on his homestead and he and his family used the well for domestic purposes. After the railroad dug its well and began pumping it, the East well dried up. East blamed the railroad and sued for damages in the amount of $206.25.

The district court ruled for the railroad and East appealed. The court of civil appeals reversed the district court and the railroad appealed to the Supreme Court. The Supreme Court

reversed the court of civil appeals, saying: "We are of the opinion that this judgment is wrong and that of the District Court right." *Houston & Texas Central Railroad Company v. East*, 81 S.W. 279, 280 (Tex. 1904). This case is where Texas groundwater law begins.

The Supreme Court was familiar with the English case of *Acton v. Blundell*, 12 M. & W. (1843). The *Acton* case was based on the Latin maxim, *cujus est solum, ejus est usque ad coelum et ad inferos* (to whomsoever the soil belongs, he owns also to the sky and to the depth). Consequently, application of the *Acton* doctrine was: "That the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria,*[1] which cannot become the ground of an action." *Id at* 280.

The Supreme Court's language about groundwater is often quoted. It came from language in the Ohio Supreme Court's opinion in *Frazier v. Brown*, explaining that the reason for the rule of capture is because: "In the absence of express contract and a positive authorized legislation, as between proprietors of adjoining land, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly form 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 of agriculture, mining, the construction of highways and railroad, with sanitary regulations, building, and the general progress of improvement in works of embellishment and

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[1] *Damnum absque injuria* means a loss or injury which does not give rise to a lawsuit for damages against the person causing it.

utility." *Id at* 280-281.

The Legislature gave no attention to the result of the *East* case. However, the Legislature did propose and the voters adopted, in 1917, the "Conservation Amendment" to the Constitution. See TEX. CONST. ART. XVI, §59. The Conservation Amendment will play a more significant role later.

The next activity involving groundwater occurs in court about a quarter of a century later. There, in *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273 (1927), the Supreme Court had an aspect of groundwater before it. In the main, *Burkett* was a surface water case, but the Supreme Court's opinion sheds a bit more light on the court's views and is referred to in later groundwater cases. The groundwater involved in the litigation was accessible by excavating on the banks of a river. There was no evidence in the record that these waters were derived from an underground stream. Of importance, however, the Supreme Court wrote that ". . .the presumption is that the sources of water supply. . .are ordinary percolating waters, which are exclusive property of the owner of the surface. . . ." *Id.* at 278. This results in the law as we find it today, that a judicial presumption exists that all water under the ground is percolating.

As a surprise, in 1940, the Attorney General weighed in. In Opinion No. O-2402, Attorney General Gerald Mann took the position that all groundwater in known sands or reservoirs belongs to the State and is not susceptible of private ownership. The Attorney General stated:

> ". . .we find the public need for reliance upon stratum water in Texas is so great, as to impel, we believe, the courts to declared it to bear a public interest not subject to private ownership any more than our surface or subsurface streams. . . .
>
> In answer to your inquiry, therefore, underground water courses and bodies of water, including strata, but not mere percolating waters, are public bodies of water. . . ."

The opinion classified known underground reservoirs and strata as "underground streams" and limited percolating water to unknown, occult, vagrant droplets aimlessly migrating through the

ground but not in known sands. As will be seen in the *Corpus Christi v. Pleasanton* case, the Supreme Court apparently rejected the proposition.

Twenty more years passed before the next case. This litigation was the 1948 case of *Cantwell v. Zinser,* 208 SW2d 577 (Tex.Civ.App.-Austin 1948). People from Austin will recognize the area from where the case arose–Spicewood Springs. There, Zinser owned land on which a spring was located. Cantwell owned the adjacent land through which the water that fed the spring came. The case began before a jury, but the trial court removed the case from the jury, being of the opinion that no issues of fact were presented by the evidence. The trial court gave judgment to Zinser for the reason that, in the court's opinion, "the spring was 'the natural outlet of underground waters flowing through the land of appellant in a well defined channel.'" *Id.* at 578. The appeals court disagreed and remanded the case for a new trial.

The basis of the appeals court's decision was that the evidence was sufficient to support a jury finding that the intercepted groundwaters were percolating and the trial court was wrong to remove the case from the jury. But of importance to the appeals court was its observation of the evidence that Cantwell placed the groundwater in an earthen tank, which leaked badly. The court expressly suggested that while the law of the *East* case would give Cantwell the right to cut off the percolating groundwater, *East* did not pass upon the right of a person to intercept and waste the percolating groundwater. That right, the court said, does not exist. The appeals court then noted that:

> "Waste of natural resources is against the public policy of this State. Many conservation laws have been enacted by our legislature which evidence such policy. They apply to privately owned as well as publically owned resources. These laws need not be cited as they are generally well known. We do call attention to Articles 7600-7602, inc., Vernon's Ann.Civ.St. [now TEX.WATER CODE §§11.202-11.205 (Vernon pamph. 2000], which make a nuisance the waste of water from artesian wells."

Id. at 579. We will see in the later case of *Corpus Christi v. Pleasanton,* the Supreme Court did not accept this proposition.

In the meantime, Texas began to recognize that it had problems with groundwater conservation. In 1950, it was estimated that in the High Plains, 1,860,000 acre-feet of groundwater was removed from the Ogallala Reservoir when only 50,000 acre-feet of natural recharge occurred. Arthur P. Duggan, *Texas Ground Water Law*, Water Law Conference, University of Texas, 1952, page 11, 12. In 1949, the Legislature acted.

In 1949, under the strength of the Conservation Amendment to the Constitution, Article XVI, Section 59, the Legislature passed the Texas Underground Water Conservation Act. Codified at that time as Article 7880-3c, the law in now found in Chapters 35 and 36 of the Water Code.

The new law provided for the creation of groundwater conservation districts. Indeed, groundwater districts were the only entities empowered to exercise the powers of the law. The district creation process began with a petition to the Board of Water Engineers to designate a groundwater reservoir, or subdivision thereof. After designation, a petition could then be filed with the Board or a county commissioners court for creation of a groundwater district over the designated area. The system paralleled the creation of water control and improvement districts. Districts were empowered to issue permits before drilling wells, though wells producing less than 100,000 gallons per day were exempt. Additional powers enabled districts to adopt rules, prohibit waste, provide for spacing of wells, establish proration requirements, and provide for education and planning.

Groundwater districts were created pursuant to this law. However, they were primarily located in the Panhandle and West Texas area. The groundwater district law will be amplified when we come to the current situation.

Meanwhile, we return back to the courts. During the 1950s there were two significant, indeed, landmark, cases considered by the Texas courts. Their influence remains with us to this

day.

The first case is often referred to as the *Comanche Springs* case. It is cited as *Pecos County Water Control and Improvement District No. 1 v. Williams*, 271 SW2d 503 (Tex.Civ.App–El Paso 1954, writ ref'd n.r.e.).

The *Comanche Springs* case arose in Pecos County. At Fort Stockton, Texas, there were large, prolific springs, named Comanche Springs. The springs provided a water supply for numerous irrigators in the Pecos County Water Control and Improvement District, which upon development, supplied water to irrigate over 6,000 acres. The spring was one of the great historic springs of Texas, being first noted in the literature in 1684. G. Brune, *Major and Historical Springs of Texas*, Texas Water Development Board Report 189 (1975), page 56.

Up gradient from the springs was land owned by Clayton Williams, the father of the recent gubernatorial candidate, Clayton Williams. At the time the case arose, Texas was in the early stages of the Great Drought of the 1950s and Williams needed water for his crops. He developed a well field and began to pump water from the formation. The pumping resulted in drying up the springs, which cut off the water supply for the irrigators in the district. Litigation followed.

The irrigators asserted that they and their predecessors had owned the location and flow of the spring and that they had used the water beneficially for ninety years. By virtue of this, they alleged, they acquired the right to be protected in the subsurface source of the water. They also plead in the alternative that if they did not own the source of the water supply, they were nevertheless entitled to a fair share of the source of supply. The gist of this argument was that they had a correlative right to the water. They also alleged that the spring was not fed by percolating groundwater, but rather by a well-defined underground stream in which they acquired rights by virtue of claims filed with the Board of Water Engineers. The remedy they sought was an injunction against Williams' pumping.

Williams countered by filing exceptions to the plaintiffs' petition. He asserted that the water was percolating groundwater and since no waste had been alleged, he was entitled to a judgment on the basis of the *East* case. He also asserted that the plaintiffs' allegation about a well-defined underground stream was insufficient because the source, location, beds and banks and course of the so-called well-defined channel were not provided. The trial court sustained Williams' exceptions. The irrigators appealed.

The El Paso Court of Civil Appeals affirmed the trial court judgment. The court held that Williams absolutely owned the water beneath his land and the plaintiffs had no correlative rights in it. As to the general allegation about the well-defined stream, Williams' exceptions were well taken because there was no evidence to support the proposition. As to the failure of the spring when Williams pumped, that did not prove the existence of a well-defined underground channel.

On appeal to the Texas Supreme Court, the plaintiffs attempted to avoid the effect of the *East* case with an interesting argument. The argument was that the percolating groundwater referred to in the *East* case did not include water moving in well-defined underground strata. Percolating groundwater, according to modern hydrology, is divided into two classes: first, "diffused percolating water," defined as slowly moving water which cannot be traced directly as the source of a natural stream, and, second, "percolating water feeding a natural water course," defined as water which supplies a surface water stream. The former definition was what was used to define percolating groundwater at common law, so *East* did not apply.

The significance of this argument was, if the Supreme Court adopted the definitions, *East* would have been stripped of its significance. This is because the facts about most groundwater are known or subject to being known. Thus, once groundwater reached a known water sand, it would no longer be percolating water subject to private ownership as provided by *East*. This comports with the Attorney General's earlier opinion.

The Supreme Court declined to take the case and did not write an opinion. By declining

to take the case, we can only infer that the Supreme Court apparently rejected the proposition.

The second case is referred to as the *Pleasanton* case. Its proper citation is *Corpus Christi v. Pleasanton*, 276 SW2d 798 (Tex. 1955). This case was also argued against the backdrop of the 1950's drought. The City of Corpus Christi relied on the Nueces River for its water supply. It had a salt water barrier dam at the mouth of the river and a small dam, the Mathis Dam, upstream. However, with the drought, the impounded water was virtually exhausted. Indeed, when the case was argued, the city's remaining water supply was measured in days.

Fearful about running out of water, Corpus Christi went upstream, next to the Atascosa River, a tributary of the Nueces, and drilled some wells. Water was pumped from the wells into the Atascosa River to flow down to the city's water treatment plant. The channel losses of the groundwater were significant, but water reached the city and saved it from the drought.

All parties to the case conceded that the groundwater was subject to the rule of capture as defined in the *East* case. The complaint was, however, the city was committing waste of the water by virtue of the channel losses. The waste, they argued, was contrary to Article XVI, Section 59, of the Texas Constitution, the "Conservation Amendment," and old Article 7602, now TEX.WATER CODE §11.205 (Vernon Pamph. 2000). As it existed at the time of the case, Article 7602 provided:

> Waste defined. Waste is defined for the purposes of this Act, in relation to artesian wells to be the causing, suffering or permitting the waters of an artesian well to run into any river, creek or other natural water course or drain, superficial or underground channel, bayou, or into any sewer, street, road, highway, or upon the land of any other person than that of the owner of such well, or upon the public lands or to run or percolate through the strata above that in which the water is found, unless it be used for the purposes and in the manner in which it may be lawfully used on the premises of the owner of such well.

The code, though changed over the years, still contains the gist of the law as it existed then:

> Unless the water from an artesian well is used for a purpose and in a manner in which it may be lawfully used on the owner's land, it is waste and unlawful to wilfully cause or knowingly permit to water to run off the owner's land or to percolate through the stratum above which the water is to be found.

TEX.WATER CODE §11.205 (Vernon Pamph. 2000).

It was not disputed that large quantities of the water were lost. Consequently, the argument was that the city was withdrawing more water than it was putting to beneficial use and more than if it used more efficient means of transporting it.

The trial court found as a fact that the city's means of transportation was wasteful and enjoined its use. However, because of the city's urgent need for the water, the injunction was stayed until the city could complete and fill a dam and reservoir, or, at the most, for five years.

The San Antonio Court of Civil Appeals affirmed the trial court's judgment. But, when the case reached the Supreme Court, the trial court's and court of civil appeals' judgements were reversed and the injunction was dissolved.

The Supreme Court said:

> The rights of the landowner in percolating water beneath his land were adjudicated in England just over 100 years ago. In Action v. Blundell, 12 Mees. & W. 324 (1843), it was said: cThat the person who owns the surface may dig therein, and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intrecepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action.c In the course of time this became known as the ccommon-lawc or cEnglishc rule and it remains the rule in England and in a great many of the states of this Union today. Under this rule percolating waters are regarded as the property of the owner of the surface who may, cin the absence of malice, intercept, impede, and appropriate such waters while they are upon his premises, and make whatever use of them he pleases, regardless of the fact that his use cuts off the flow of such waters to adjoining land, and deprives the adjoining owner of their use.c

55 A.L.R. 1390. In the course of time, also, another rule, known variously as the cAmerican,c creasonable use,c and ccorrelative rightsc rule grew up in some of the American jurisdictions. It had its origin in the New Hampshire case of Bassett v. Salisbury Mfg. Co., 43 N.H. 569, 82 Am. Dec. 179. As the titles imply, this rule recognizes that the right of the surface owner of land to take water from a common reservoir is a limited right. To exactly what extent it is limited is not here pertinent. The modern tendency is toward this latter rule. For the general history, limits and application of the two rules, see 56 Am. Jur., Waters, Secs. 111-121, pp. 593-604; 55 A.L.R. 1385-1408; 109 A.L.R. 395-403; 67 C.J., Waters, Secs. 254-258, pp. 837-841.

> With both rules before it, this Court, in 1904, adopted, unequivocally, the cEnglishc or cCommon Lawc rule. Houston & T.C. Ry Co. v. East, 98 Texas 146, 81 S.W. 279, 280, 107 Am. St. Rep. 620, 66 L.R.A. 738. The opinion in the case shows quite clearly that the court weighed the merits of the two rules -- cThe practical reasons upon which the courts base their conclusion (applying the 'English' rule) fully meet the more theoretical view of the New Hampshire Court (applying the 'American' rule) and satisfy us of the necessity of the doctrinec -- and, whether wisely or unwisely, made a deliberate choice. That the choice was considered and deliberate is made doubly clear when it is considered that the Court of Civil Appeals had made the opposite choice in the same case (77 S.W. 646, 647), choosing to follow the reasoning of Bassett v. Salisbury Mfg. Co. rather than that of Action v. Blundell. It may be noted that the Court of Civil Appeals gave its approval to the holding of the Vermont Court that the right to take percolating water was climited to the amount necessary for the reasonable use of the land, as land,c suggested that to apply the 'English' rule to the facts of the case cwould shock our sense of justice,c and spoke of the rights of adjoining owners as ccorrelative.c In differing with the Court of Civil Appeals this Court approved the language of the Supreme Court of Ohio in Frazier v. Brown, 12 Ohio St. 294, where it said: c'In the absence of express contract and a positive authorized legislation, as between proprietors of adjoining land, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth * * *'.c
276 SW2d at 800-801.

After discussing the *East* case and referring to *Texas Company v. Burkett,* in which the Supreme Court held that percolating groundwaters were "the exclusive property of the owner of the soil, and subject to barter and sale as any other property," the court concluded:

> It thus appears that under the common-law rule adopted in this state an owner of land could use all of the percolating water he could capture from wells on his land for whatever beneficial purposes he needed it, on or off of the land, and could likewise sell it to others for use off of the land and outside of the basin where produced, just as he could sell any other species of property. We know of no common-law limitation of the means of transporting the water to the place of use.

Id. at 802.

The Supreme Court's attention was called to the earlier case of *Cantwell v. Zinser* in which it was suggested that placing groundwater in a leaky pond was waste. However, other than noting the case, the Supreme Court dismissed it saying that *Cantwell* had no writ history and there was no basis for modifying the holding of the *East* case. *Id.* at 802.

Both judicial and legislative activity picked up pace during the next forty years, with both major and minor groundwater cases. The first of the minor cases was *Bartley v. Sone*, 527 SW2d 754 (Tex.Civ.App.-San Antonio 1975, ref. n.r.e.). Bartley is interesting, however, even though aspects of surface water law became involved.

Sone owned a piece of property on which one or more springs were located. There is no evidence that the springs formed the headwaters of a watercourse. Nevertheless, the Sone's predecessor in title complied with the 1889 Irrigation Act and filed a declaration of intent to appropriate water from the spring for irrigation. Bartley's predecessor received water from the ditch Sone's predecessor constructed, by extending the ditch and also filed a declaration of intent. Both declarations were filed with the Board of Water Engineers pursuant to the 1913 Irrigation Act and became recognized as certified filings.

The problem between Sone and Bartley began when Sone refused to allow Bartley to enter the Sone land to clean out the ditch and suit resulted. The trial court gave judgment to Sone and Bartley appealed. On appeal, the an Antonio court sustained the trial court's judgment on the theory that Sone owned all the water in the ditch because the water comes from a spring located wholly on his land. "However, in the absence of evidence that the flow of the spring in question had its source in a subterranean stream, or was of sufficient magnitude to be of any value to riparian proprietors, or was the source of, or added perceptibly to the flow of, a stream, it will be presumed that the spring was of such character that plaintiff 'had the right . . . to . . . the use of their waters for any purpose, either on riparian or non-riparian land.'" *Id* at 760. This last quoted statement is right out of *Texas Company v. Burkett.* Consequently, the *Bartley* case is consistent with the traditional view of groundwater rights.

A variation of the *Bartley* case was found in the 1989 case of *Denis v. Kickapoo Land Company*, 771 SW2d 235 (Tex.Civ.App.-Austin 1989, no writ). There, Kickapoo owned a tract of land with a spring on it. The spring formed the principal source of water for Kickapoo Creek. Kickapoo drilled into the earth adjacent to the spring and placed a suction pipe in the water, capturing it before it reaches the surface. The quantity of water was metered and discharged into the creek where it flowed downstream. At a point downstream, Kickapoo pumped the water, taking no more that was metered above. Kickapoo filed a motion for summary judgment asserting that the water from the spring was percolating groundwater and that he, as the landowner, had the absolute right to make whatever use he chooses to make of the water. Denis resisted asserting that the springs were not percolating groundwater and the water was state-owned because

it contributed perceptibly to the flow of Kickapoo Creek and benefitted downstream riparian owners.

Basically, the appeals court applied the principles of the *East, Burkett,* and *Pleasenton* cases. "When squarly faced with the issue, the Supreme Court has consistently adhered to the English rule." *Id.* at 238.

Then six significant events occurred, three in the Legislature and three in the courts. The legislative events were, first, the creation of the Harris-Galveston Coastal Subsidence District, second, creation of the Edwards Aquifer Authority and, third, the consideration and passage of Senate Bill 1, Acts 1997, 75th Leg., R.S., Ch. 1010, p.3610. The judicial events were the *Friendswood case*, *Friendswood Development Company v. Smith-Southwest Industries,* 576 SW2d 21 (Tex. 1978), the *Barshop* case, cited as *Barshop v. Medina County Underground Water Conservation District*, 925 SW2d 618 (Tex.1996), and the Ozarka case, *cited as Sipriano v. Great Spring Waters of America, Inc.*, 1 SW3rd 75 (Tex.1999). Because a discussion of Senate Bill 1 will lead to the current state of statutory groundwater district law, it will follow the *Ozarka* case.

The Harris-Galveston Coastal Subsidence District legislation concerned the creation of a groundwater district with special powers designed to combat the subsidence problem affecting the Harris and Galveston counties area. On attack by landowners, claims were considered challenging the process of adopting the legislation and the powers the Legislature accorded to the district. The allegations were rejected by the Supreme Court. First, the Supreme Court concluded that the Conservation Amendment was sufficient authority to sustain the district and the powers delegated to it. Second, the court upheld the district's fee authority and that the fees were not a tax, since the fees had as their primary purpose regulation. And, third, the court found that the failure of the Legislature to include certain lands within the district did not violate the equal protection provisions in the Constitution. *Beckendorff v. Harris-Galveston Coastal Subsidence District*, 558 SW2d 75 (Tex.Civ.App. [14th Dist.] 1977 ref. n.r.e. per curiam 563 SW2d 239 Tex.1978)).

The *Friendswood* case came out of Harris County. Smith-Southwest brought suit against Friendswood alleging that Friendswood's withdrawal of groundwater on Friendswood land caused severe subsidence of Smith-Southwest's land. The trial court ruled for Friendswood and the appeals court reversed. The reversal was based on Smith-Southwest stating a cause of action in nuisance and negligence. The Supreme Court reversed the appeals court and affirmed the judgment of the trial court. However, in doing so, the court made a modification in the rule of capture.

In a remarkably short opinion, the court concluded that negligence in withdrawing groundwater, so as to cause damage to land of another, was to actionable in the future.

> 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.

576 SW2d at 30. It is noteworthy that no cases are reported utilizing the court's exception.

In 1993, the Legislature abolished the Edwards Underground Water District and created in its stead the Edwards Aquifer Authority. Acts 1993, 73rd Leg., R.S., ch. 626, p. 2350. Due to the U.S. Department of Justice refusal to grant pre-clearance to the law, due to changing an elected board of directors to an appointed board, the Legislature made modifications to the law in the next Session. See Acts 1995, 74th Leg., R.S., ch. 261. The newly created district received significantly greater powers over permitting Edwards Aquifer water. Challenges were brought to court in the *Barshop* case.

Landowners in the counties over which the Edwards Aquifer Authority is imposed sued the Authority asserting that the Act violated their right to withdraw groundwater from their property. Upon receiving a favorable ruling in the district court, a direct appeal to the Supreme Court was taken. The Supreme Court considered the casefrom the perspective of whether the Act was constitutional on its face, not whether it is unconstitutional when applied to a particular landowner. This is referred to as a "facial" challenge. Under these circumstances, the plaintiffs had the obligation to show that the statute, by its terms, always operates unconstitutionally. The Supreme Court concluded that the plaintiffs did not sustain their burden and reversed the judgment of the trial court. *Barshop v. Medina County Underground Water Conservation District*, 925 SW2d 618 (Tex.1996).

At issue was the plaintiffs assertion that the Act did more that merely regulate use of the aquifer in that it actually deprives the landowner of a vested property right. The State countered by insisting that until the water was actually reduced to possession, the landowners had no vested right and, therefore, no taking occurs.

After discussing the *East* and *Pleasanton* cases, the court noted that: "While our prior decisions recognize both the property ownership rights of landowners in underground water and the need for legislative regulation of water, we have not previously considered the point at which water regulation unconstitutionally invades the property rights of landowners." *Id at p.* 626. However, the court did not reach this issue for the reason that the question before it was whether the Act was constitutional on its face. Nevertheless, there are some insights to be gained from the court's opinion. This concerns the ability of the State to regulate water. The court said:

> Water regulation is essentially a legislative function. The Conservation Amendment recognizes that preserving and conserving natural resources are public rights and duties. TEX.CONST. art. XVI, §59(a). The Edwards Aquifer Act furthers the goals of the Conservation Amendment by regulating the Edwards Aquifer, a vital natural resource which is the primary source of water in south central Texas. The specific provisions of the Act, such as the grandfathering of existing users, the caps on water withdrawals, and the regional powers of the Authority, are all rationally related to legitimate state purposes in managing and regulating this vital resource. The Act is sufficiently rational to meet constitutional due course requirements. We therefore conclude that Plaintiffs have not met their burden to establish that the Act is unconstitutional under the substantive component of the due course of law clause.

Id at p. 633.

> Concerning the retroactive effect of aspects of the Act:
>
> Plaintiffs are correct that the Act may have retroactive effects. This Court recognized it *Wright* [*Texas Water Rights Comm'n v. Wright*, 464 SW2d 642 (Tex.1971)] that a statute which allows an agency to take into consideration conduct occurring before the effective date of the statute possesses a retroactive effect. {Citation omitted.) The Edwards Aquifer Act, similar to the statute in *Wright* that was held to be retroactive, takes into account the landowner's use of water in the years preceding the effective date of the legislation in determining future entitlement to water. However, "mere retroactivity is not sufficient to invalidate a statute." *Id.* A valid exercise of hte police power by the Legislature to safeguard the public safety and welfare can prevail over a finding that a law is unconstitutionally retroactive.

Id. at 633-634. Thus, the Edwards District legislation was sustained.

The facts of *Ozarka* are that in 1996, Ozarka, a bottled water company, began pumping nearly 90,000 gallons of groundwater per day, seven days a week. Sipriano and adjacent landowners found the water in their wells dropping and becoming exhausted. They sued Ozarka for negligently draining their wells. Injunctive relief and actual and punitive damages were requested for Ozarka's alleged nuisance, negligence, gross negligence and malice.

The trial court granted summary judgment in favor of Ozarka and the Court of Appeals sustained the decision. Both courts expressed sympathy for Sipriano but believed it to be the role of the Supreme Court or the legislature to make modifications to the common law rule of capture.

To the surprise of everyone, the Supreme Court granted the petition for review. The Supreme Court affirmed the lower courts saying: "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." 1 SW3d at 2. Further, the Court noted that with the adoption of the Conservation Amendment to the Constitution, it was the Legislature's responsibility to make such changes ("This constitutional amendment, proposed and passed after our common-law decision in *East*, made clear that in Texas, responsibility for the regulation of natural resources, including groundwater, rests in the hands of the Legislature.")

Of particular interest was the Court's discussion of the evolution of groundwater law. But in the final analysis, the Court deferred to the Legislature, which had passed Senate Bill 1 in 1997: 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. *Id* at 80.

The concurring opinion filed by Justice Hecht contained an ominous note. That being, while the court was deferring to the Legislature, this judge was ready to make a more far reaching

decision, but would give Senate Bill 1 an opportunity to work.

The last case to mention is the *Kitten Trust* case. *South Plains Lamesa Railroad, Ltd. and Kitten Family Living Trust v. High Plains Underground Water Conservation District No. 1,* 52 SW3d 770 (Tex.App.–Amarillo, 2001, no writ). *Kitten Trust* is a powerful case for those who feel negative towards groundwater districts. However, the value of the case was significantly diminished by the 2001 Session of the Legislature. In fact, in our constitutional scheme of separation of powers, the Legislature demonstrated its power to "reverse" the courts.

The facts were the groundwater district granted the Trust a permit to drill a water well on the Trust's easement covering a tract owned by the railroad. After the well was drilled, adjoining landowners protested and, after hearing, the district revoked the permit. The railroad then applied for the permit, remedying the deficiencies in the Trust's application. The district denied the permit based on the finding the permit proposed to allow a taking of a disproportionate amount of water compared to the size of the tract and the appeal followed. The court concluded that the common law rule of capture was not subject to the "reasonable use" test, and was the law in Texas. Under Section 36.002 of the Water Code, nothing in the Code was to be construed to deprive an owner of his groundwater rights, subject to a groundwater district's rules. However, the district involved in this case had no rule allowing the denial or revocation of a well permit, based on a taking a disproportionate amount of water compared to the size of the property. The district had no authority not clearly granted by the legislature. The Legislature was meeting when *Kitten Trust* was handed down. One might say that all the amendments to Chapter 36 of the Water Code found in Senate Bill 2 had for their purpose the reversing of the court's decision. As a result, districts can without question deny permits based on spacing and proportionate amounts of water.

At this point we are now seeing significantly greater legislative focus and activity on both

surface and groundwater. Senate Bill 1, in particular, in 1997 and Senate Bill 2 in 2001 made significant changes in Texas water law. Regional water planning has been implemented, with the initial plans identifying projects at substantial cost. However, all the cards are not on the table. Environmental considerations, for whatever the reason, have not been fully addressed. Additionally, cost ramifications have not been resolved. All this indicates that our water law, whether through the legislature, the administrative agencies, or the courts must, and will, continue to grow. We are a long way from the end of the chapter. The stakes are high. If local regulation of groundwater fails, then the only alternative will be regulation from the state level, for the days of unlicenced or unregulated groundwater withdrawals has passed.

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