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**“I DO.” “NO, YOU DON’T” “DO, TOO.” “DO NOT.” –
WHO OWNS UNDERGROUND WATER? AND WHEN?**

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WHO OWNS UNDERGROUND WATER? AND WHEN?**

Who owns groundwater in Texas?

This is a question that has been settled since 1904, when the seminal case *Houston & T.C. Railway Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904) was decided. But perhaps I should say that some of us thought it was a settled question.

In the *East* case, the Texas Supreme Court held that the owner of the land was also the “absolute owner of the soil and of percolating water, which is part of, and not different from, the soil.” The *East* Court also announced the so-called “rule of capture,” which provides, in essence, that (so long as he is otherwise legally producing water) a landowner is not liable to his neighbor for draining the neighbor’s water. The rule of capture is a tort law principle, a rule of non-liability.

Today, the 100-plus year-old property rule of *East* – “absolute ownership,” or “ownership in place” – is being challenged. Opponents, including some water districts, are trying to dismantle the principle of ownership in place. Some argue that the rule of capture is the paramount rule governing underground water; some argue *East* only adopted the rule of capture; others argue that a surface owner’s rights to underground water are merely usufructuary. All these approaches rely on an assertion that there is no ownership of underground water until and unless it has been produced and reduced to actual possession. That is, however, certainly not what the *East* opinion said.

Two recent cases from the Fourth Court of Appeals in San Antonio are representative of this attack. In *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269, S.W.3d 613 (Tex. App. – San Antonio 2008, pet’n denied), the Hamilton Trust sold the City of Del Rio a 15-acre surface tract but reserved “all water rights” to itself. The city drilled a well on the tract and began to produce. The Trust sued, arguing that the city had no water rights. The trial court agreed, and the Fourth Court of Appeals upheld, expressly recognizing the rule of ownership announced in *East*. The city sought review by the Texas Supreme Court.

The second case is *Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex. App. – San Antonio 2008, pet’n requested). In *Day*, landowners sought to establish historical use of well water for irrigation in order to obtain an “initial regular permit” for 700 acre-feet (“ac-ft”) of water, but the Edwards Aquifer Authority (“EAA”) determined that most of the historical use volume had been based on use of surface (state) water, not well water. The landowners sued, asserting that the EAA had mistakenly classified well water that had run into a watercourse from which there had been historical use for irrigation as being state (surface) water, and also asserting constitutional claims, including a taking claim. The trial court agreed with the landowners on the surface water versus groundwater issue, but granted the EAA summary judgment on the constitutional claims. Both sides appealed. The Fourth Court of Appeals reversed the trial court on the state water claim, and upheld the trial court’s summary judgment in favor of the EAA on the constitutional claims, except for the taking claim, as to which the court reversed. It cited the Fourth Court’s *Del Rio* case, held that the landowner had a vested property right in underground

water, and remanded the issue to the trial court. The landowners and EAA both sought review by the Texas Supreme Court.¹

When the organizers of this conference identified this topic, it was thought that the Supreme Court – which was still taking briefing in both petitions for review – might take one or both cases, and clarify what the law of underground water ownership is in Texas. The point of this pair of opposing papers was to try to enlighten (and perhaps entertain) you about the competing issues. But on September 25, 2009, following briefing on the petition for review and also full briefing on the merits, the Texas Supreme Court denied the petition for review in the *Del Rio* case.² At least half the mystery and speculation hoped for has therefore been removed. The best clue we are therefore left with after the Court refused to grant the petition in *Del Rio* is that ownership in place of groundwater is still the rule in Texas.

A bit of background on Texas water law, just a quick summary, is in order first, so that you may have some context for the arguments advanced by opponents of the rule of ownership in place in these two cases. Then I will turn to discussion of the cases themselves. I will spend more time on *Del Rio* as I believe the Supreme Court’s refusal to review it tells us more than the details of the *Day* case are likely to do.

BACKGROUND³

In 1904, the Texas Supreme Court held in *Houston & T.C. Railway Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904), that:

‘An owner of soil may divert percolating water, consume it or cut it off, with impunity. *It is the same as land, and cannot be distinguished in law from land. So the owner of the land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.* No action lies against the owner for interfering with or destroying percolating or circulating water under the earth’s surface.’

81 S.W. at 281 (quoting *Pixley v. Clark*, 35 N.Y. 520 (1866)) (emphasis added). This was the Texas Supreme Court’s adoption of the so-called “English Rule” of ownership of underground water,⁴ embodied in the English case *Acton v. Blundell*. That is, “ownership in place” became the recognized rule of property in Texas for underground water. The *East* Court also announced the adoption of the “rule of capture”:

¹ The EAA impleaded the State in a third-party action in the trial court for indemnification and contribution on the taking claim. The State is participating in the Supreme Court briefing on the “state water” and taking issues.

² *Del Rio* has filed a motion for rehearing, which is pending.

³ A discussion of all the cases recognizing or otherwise involving the doctrine of ownership in place, or “absolute ownership” in the Court’s parlance in *East*, or the role of the rule of capture in Texas water law, is well beyond the scope of this paper. Interested readers may find such summaries – including arguments pro and con about the significance and meaning of those cases – in the briefs of the parties in the *Del Rio* and *Day* cases. See also, e.g., Drummond, et. al., *The Rule of Capture in Texas – Still So Misunderstood After All These Years*, 37 TEX. TECH. L. REV. 1, 29-50 (2004).

⁴ The “American Rule”, which the Court declined to adopt, is a rule of “reasonable use” which recognizes that landowners have “correlative rights” in the common reservoir.

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 it, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor fall within the description of *damnum absque injuria*, which cannot become the ground of an action.

81 S.W. at 279. The rule of capture is a rule of non-liability for drainage of a neighbor's underground water. It is not a rule of property ownership.

Numerous Texas Supreme Court cases since *East* have recognized and reaffirmed the ownership-in-place rule. In *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W.2d 274 (Tex 1927), the Court noted that groundwater is the "exclusive property" of the landowner, and is "subject to barter and sale as any other species of property." 96 S.W.2d at 278.

More recently, the Supreme Court has reiterated the validity of the principle of absolute ownership. "In [East], this Court adopted the absolute ownership of underground percolating waters." *Friendswood Development Co. v. South-Southwest Industries, Inc.*, 576 S.W.2d 21, 25 (Tex. 1978). The *Friendswood* Court also expressly recognized that "ownership of underground water comes with ownership of the surface. It is part of the soil."⁵ *Id.* at 30.

In *City of Sherman v. Public Utility Commission*, 643 S.W.2d 681 (Tex. 1983), the Court remarked:

[T]he absolute ownership theory regarding groundwater was adopted by this Court in [East]. A corollary to absolute ownership of groundwater is the right of the landowner to capture such water. In *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21 (Tex. 1978), the Court had an opportunity to reconsider the propriety of this rule and to depart from it. Despite criticism of this theory, it remains the law today.

643 S.W.2d at 686.

In *Barshop v. Medina Underground Water Conservation District*, 925 S.W.2d 618, 623 (Tex. 1993), the Court noted that "historically, landowners have had property rights in the water beneath their land."

In *Sipriano v. Great Springs Water of America, Inc.*, 1 S.W.3d 75 (Tex. 1999), the Supreme Court was asked to reject the rule of capture but declined to do so. The *Sipriano* Court recognized "what was tacit in *East* – that the rule of capture is not absolute." 1 S.W.3d at 77. (For instance, this means that the pumper cannot waste the water or negligently cause subsidence of another's land without potential liability.) Opponents of the absolute ownership principle often cite this case – and the concurrence by Justice Hecht, which is critical of the *rule of capture* – for the proposition either that *East* only adopted the rule of capture, not ownership in place, or that the Court has expressly shown its impatience with the *East* rule of ownership in place. *See* 1

⁵ It may, however, be severed from the surface estate. *E.g.*, *Texas Co. v. Burkett*, 96 S.W.2d at 278; *Sun Oil. Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972) ("water, unsevered expressly by conveyance or reservation, has been held to be part of the surface estate."); *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.2d 613 (Tex. App. – San Antonio 2008, pet. denied).

S.W.3d at 80 (“we are reluctant to make so drastic a change as abandoning our rule of capture and moving into the arena of water-use regulation by judicial fiat.”); *id.* At 83 (Hecht, J., concurring) (“It is hard to see how maintaining the rule of capture can be justified as deference to the Legislature’s constitutional province when the rule is contrary to the local regulation that is the Legislature’s ‘preferred method of groundwater management.’”); *id.* (Hecht, J., concurring) (“Dissenting in *City of Corpus Christi v. City of Pleasonton* [footnote omitted] Justice Will Wilson cautioned in 1955 that this Court would not forever use deference to the Legislature to justify maintaining the *rule of capture* in the face of changing circumstances.”) (emphasis added); *id.* (Hecht, J., concurring) (“I concur in the view that, for now – but I think only for now – *East* should not be overruled.”). But the *Sipriano* Court was not discussing ownership in place, but only the rule of capture.

As nearly as I can tell, the Court has not directly criticized the principle of ownership in place, nor denied that *East* adopted it.

THE CITY OF DEL RIO CASE

[Please bear with me. I am going to describe this case in some detail, so that you will have context to understand why I conclude that the Supreme Court’s recent refusal of the City of Del Rio’s petition for review is noteworthy, and why I tentatively conclude from it that the principle of ownership in place announced in East is still the law of underground water property rights in Texas.]

In *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269, S.W.3d 613 (Tex. App. – San Antonio 2008, pet’n denied), the Trust owned an uninhabited 3200-acre tract in Val Verde County, located in the extraterritorial jurisdiction of the City of Del Rio, called the “Moore Ranch.” The Moore Ranch lies above the Edwards-Trinity Aquifer. In 1997, the Trust sold a 15-acre tract, carved from the western border area of the Moore Ranch located along a state highway, to the city as a “surface estate only” conveyance, with the proviso:

SAVE AND EXCEPT and Seller shall reserve unto Seller, its successors, heirs and assigns forever all of the oil, gas and other mineral rights in, on and under and that may hereinafter be produced and saved from therefrom beginning at 100 feet below the surface of the land and deeper. Seller hereby agrees and does relinquish all rights of ingress and egress in and on the property and covenants that no portion of the property being conveyed under the terms of this contract shall be used for any operations either of drilling, exploration, or producing of the minerals reserved by the Seller hereunder and Seller agrees there will be no surface operations whatsoever involving the property so conveyed.

Grantor RESERVES unto Grantor, its successors, heirs and assigns forever *all water rights associated with said tract*, however, Grantor may not use any portion of the surface of said tract for exploring, drilling or producing any such water.

269 S.W.3d at 615 (emphasis the court’s).

Notwithstanding this reservation of water rights by the Trust, in 2002 the city completed a well on the 15-acre tract and tested it capable of producing approximately 500 gallons per

minute; the well produced “several hundred thousand gallons” during the 10-hour testing period. Approximately six months later, on one of his infrequent visits to the Moore Ranch, the trustee of the Trust noticed the city’s drilling activity. The Trust’s attorney thereafter sent the city a cease and desist letter; and shortly after that asserted a half-million dollar claim against the city. The city rejected the Trust’s claim. The Trust filed suit against the city seeking a declaration that the Trust owned the groundwater beneath the 15-acre tract; and rejecting the city’s claims of ownership of water rights associated with the tract. The city counterclaimed, seeking declarations that the deed did not reserve to the Trust any rights, title or interest to groundwater pumped by the city from the 15-acre tract and that any groundwater pumped belonged to the city. *Del Rio*, 269 S.W.3d at 615.⁶

The trial court concluded that the Trust’s reservation of water rights was valid and enforceable; that the City’s argument that groundwater, until captured, cannot be owned, was not the law in Texas; and that the Trust owned the rights to underground water beneath the 15-acre tract. *Id.* at 616.

On appeal, the city asserted that the Trust’s water rights reservation was not effective to prevent the city from drilling into and producing the groundwater beneath the tract. The city argued that, since the Trust had never drilled or pumped on the 15-acre tract and had therefore never produced water from beneath the tract and reduced it to possession, the Trust had no ownership claim to the underlying water. *Id.* at 616-17. This argument is predicated entirely on the rule of capture, based on which the city argued that ownership of underground water does not vest until the water has been reduced to possession by actual production. The city also argued that the absolute ownership doctrine of *East* did not refer to ownership of the water beneath the land but only to the surface owner’s right to acquire possession of the water. *Id.* at 617. The city’s arguments sought to elevate the rule of capture to function as a rule of property, rather than merely as a tort rule of non-liability.

The appeals court agreed with the Trust that “the City has confused the interplay between the separate and distinct concepts of the rule of capture and the absolute ownership theory.” *Del Rio*, 269 S.W.3d at 617. In rejecting the city’s arguments, the Fourth Court expressly recognized the rule of ownership-in-place announced in *East*:

The Texas Supreme Court has stated that percolating water is a “part of and not different from, the soil” and the landowner is the “absolute” owner of it. [Citing *East*, *City of Sherman*, and *Friendswood Development Co.*] And, groundwater is the “exclusive property” of the owner of the surface and “subject to barter and sale as any other species of property. *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 278 (1927). Thus, under the absolute ownership theory, the Trust was entitled to sever the groundwater from the surface estate by reservation when it conveyed the surface estate to the City of Del Rio.

269 S.W.3d at 617. The court then looked at the role of the rule of capture, and characterized it as a “corollary” to the ownership-in-place doctrine:

⁶ In the alternative, the city pled for condemnation of any reserved water rights. That claim was severed and so is still pending.

A corollary to this absolute ownership theory is the rule of capture. *See City of Sherman*, 643 S.W.2d at 686 (“A corollary to absolute ownership of groundwater is the right of the landowner to capture such water.”) The rule of capture, a doctrine in both oil and gas law and water law in Texas, was first adopted by the Supreme Court in [*East*]. “Under the rule of capture a person owns all of the [water or] oil and gas produced by a well bottomed on his own land, even though the well may be draining the substances from beneath other property.” 1 ERNEST E. SMITH & JACUELINE LANG WEAVER, TEXAS LAW OF OIL & GAS § 1.1(A) (2d ed. 2007) (“SMITH”).

Del Rio, 269 S.W.3d at 617-18. In its further remarks about the rule of capture, the court got to its legal essence:

Further, the rule of capture denies the landowner whose property is being drained any judicial remedy; he can neither enjoin production from the draining well, nor obtain an accounting, nor obtain other equitable relief. [SMITH, *id.*] This rule probably arose out of practical necessity – the inability of courts to determine the source of a well’s production. *Id.*; *see also Riley v. Riley*, 972 S.W.2d 149 (Tex. App. – Texarkana 1998, no pet.) (“The rule of capture is a doctrine of nonliability for drainage.”). “It did not give an operator the ‘right’ to drain his neighbor’s tract but merely refused to impose liability for doing so.” [SMITH §1.1(A)].

Del Rio, 269 S.W.3d at 618.

The city also argued that the reservation of water rights by the Trust was ineffective. This argument was based on the Trust’s having given up its rights of access to the 15-acre tract. The city reasoned that “Texas courts do not recognize a common law right to sever the groundwater estate from the surface estate in a situation in which all rights of access to the surface estate for reaching the groundwater estate are relinquished.” Hence, according to the city, having expressly disclaimed any right of access to, or to use the 15-acre tract to drill or produce, the Trust’s reservation of underground water rights was legally ineffective to sever the underground water estate from the surface estate that was conveyed – meaning the Trust actually had conveyed the underground water rights to the city. *See Del Rio*, 269 S.W.3d at 618.⁷

The court made short shrift of this argument, however, noting that the city had simply ignored that the Trust

does not need access to the fifteen-acre surface estate to pump the ground water from beneath the fifteen-acre tract. The Trust can access the groundwater from the adjacent Moore Ranch. Thus, . . . , its relinquishment of its right to enter the surface estate of the

⁷ The city buttressed this argument with an argument that recognizing the Trust’s reservation and severance of the underground water rights would violate the Texas Constitution’s rule against perpetuities. *See* TEX. CONST. art. I, §26. That is, not having reserved a right of access to the surface estate, the Trust could not produce that underground water. Thus, the city argued, honoring the Trust’s reservation would mean no one else could produce that water, either, and thus “would take exercise of that interest, as well as the water itself, out of commerce forever.” *See Del Rio*, 269 S.W.3d at 618. Because the Trust could access this water from its adjacent property, however, there was no violation of the Constitutional prohibition. *Id.* at 619.

fifteen-acre tract is not a relinquishment of its water rights reservation or of its right to capture the water beneath the tract.”

Del Rio, 269 S.W.3d at 618-19.

Del Rio filed a petition for review by the Texas Supreme Court. In it, the city made the same arguments it had advanced below: in essence, since the rule of capture is the operative rule of property governing underground water, there is no ownership of underground water until it is reduced to possession;⁸ that the Trust, having never produced water from beneath the 15-acre tract, could not own the water beneath it, and therefore could not sever and reserve it;⁹ that the law of other jurisdictions supports this view;¹⁰ that no prior Texas cases “undercut” the rule of capture principle that groundwater in place is not owned until reduced to possession,¹¹ and that the statement of the Texas Legislature in Texas Water Code section 36.002¹² “adds nothing” to the Trust’s theory that ownership of ground water is ownership-in-place, but “only recognizes what is already present under the common law.”¹³

Much of the substance of these arguments was characterizing past Texas cases concerning underground water as being predicated on application of the rule of capture – which they were – but as if the rule of capture was the property ownership principle. These readings either ignore the ownership in place doctrine, or fail to recognize that the cases neither challenged the ownership in place principle nor turned on its application. That is, the arguments rely on reading the rule of capture cases as if they treat the rule of capture the only operative rule, when, however, the rule of capture was being applied merely in its usual role as a rule of nonliability for drainage, and the court was not addressing or did not need to address the ownership question.

Thus, an argument that Texas courts have continued to recognize and apply the rule of capture became an argument that the rule of capture was the source rule regarding rights to underground water, including ownership. This approach implicitly assumes that the rule of capture necessarily is analytically and logically contrary to the principle of ownership in place. We know this is not so, however, first, because the *East Court* adopted *both* principles. Second, the law of oil and gas in Texas has been able to harmonize these principles for over a hundred years now. The one principle does not of necessity negative the other. One is a principle of property law (ownership) and the other is a principle of tort law (nonliability).

⁸ Del Rio Brief on the Merits, *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, No. 08-0775, Texas Supreme Court (May 27, 2009) (“Del Rio Brief on Merits”), at 12-16.

⁹ Del Rio Brief on the Merits at 13.

¹⁰ Del Rio Brief on the Merits at 17-21. The city asserted that water law of Arizona, Kansas and Florida all recognize groundwater ownership only after the water is reduced to possession.

¹¹ Del Rio Brief on the Merits at 22-27.

¹² “*The ownership and rights of the owners of the land their lessees and assigns in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a district. . . .*” TEX. WATER CODE ANN. §36.002 (emphasis added).

¹³ Del Rio Brief on Merits, at 27.

The city also argued, more or less, that “rejection” of the rule of capture – in the city’s parlance, meaning recognizing ownership-in-place¹⁴ – would result in “endangerment” of water regulation and legislative prerogatives for governing regulation of water resources and ad valorem property taxation havoc, presumably because of a purported difficulty of measuring what would be owned under the ownership-in-place doctrine.¹⁵

The city argued that the law of oil and gas and the law of groundwater differ in “important ways.” Although the city did not explicitly say so, this distinction was presumably made to address the fact that oil and gas are owned in-place but are also subject to the ubiquitous rule of capture – that is, to disparage any analogy to the well-developed body of Texas oil and gas law that has clearly harmonized ownership in place with the rule of capture.¹⁶

After briefing regarding the petition for review, and full briefing on the merits, including participation in both stages by the city, the Trust, and several amici curiae, including Mesa Water, L.P., Texas Farm Bureau, San Antonio Water System, Canadian River Municipal Water Authority, Stewart Title Guaranty Company, the City of Amarillo and the Edwards Aquifer Authority, the Texas Supreme Court denied the petition for review, without comment.

Given the direct dependence of the court of appeals’ holding on the ownership-in-place doctrine of *East*, and its rejection of the city’s theory that the rule of capture was the source property rule, it appears to me that the *Del Rio* case afforded the Supreme Court a clear and relatively uncluttered opportunity to address the property principles governing underground water in Texas. The Supreme Court’s decision not to grant the petition and do so appears to me to be a sign that the Court agrees with the basic premises of the Fourth Court of Appeals in this case.

Surely if the Court were indeed going to reject ownership in place as the operative standard governing underground property ownership, this would have been an appropriate opportunity to have done so. I infer therefore that the majority of the Court agrees that groundwater is owned in place, and that the rule of capture is not a rule of ownership but merely a rule of nonliability – as, so far at least, all prior Texas Supreme Court cases have treated it. As was true for the *Friendswood Development* case, in the Court’s own words in *City of Sherman* about that case, “the Court had an opportunity to reconsider the propriety of this rule and to depart from it. Despite criticism of this theory, it remains the law today.”

¹⁴ The city’s arguments throughout the briefing implicitly presented the view that the *East* Court had adopted only the rule of capture, and that the Trust was now asking the Court to reject *East* by rejecting the rule of capture as the operative property rule, instead of addressing the fact that *East* had also adopted the ownership-in-place doctrine.

¹⁵ *Del Rio* Brief on the Merits at 28-29. See also *id.* at 32-33 (Texas Constitution requires ad valorem taxation of real property; just as oil and gas in place must be taxed, so will underground water have to be taxed; if severable, implying that underground water estates will be difficult to keep track of and tax).

¹⁶ Chief among the purported distinctions was that, unlike groundwater, “oil and gas derive their social utility only from extraction and transport elsewhere for processing and use; they are not vital to the region where they are found.” *Del Rio* Brief on the Merits at 30. The city also asserted that, because oil and gas are not renewable, whereas underground water is, some distinction (not spelled out) should be recognized. *Id.*

THE DAY CASE

The Fourth Court of Appeals had the honor to decide another case involving, at least in part, the question of ownership of underground water, for which review by the Texas Supreme Court has been sought: *Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex. App. – San Antonio 2008, pet'n requested). The Supreme Court has not yet acted regarding this case; briefing on the merits for this case is not yet concluded.¹⁷

Day is a more complicated case than was *Del Rio*, in part because it involved multiple claims only one of which directly involved the ownership issue. And the court of appeals remanded that issue to the trial court.

Day¹⁸ sought an “initial regular permit” from the Edwards Aquifer Authority for irrigation from an existing well. These permits are based on demonstrated historical use. During the period of historical use, the Day well was artesian (flowed freely without pumping, under hydraulic pressure of the aquifer) and its flow was not metered. It flowed into a man-made ditch, and then into a lake that had been created in the 1950s or 1960s by damming a stream; the lake had existed during the entire historical use period, never going dry. Day sought a permit for irrigation of 300 acres¹⁹ based on estimates of acres irrigated using water from the lake provided by the previous landowners, who had owned the land during the historical use period. The prior owners did not keep any records of the well’s flow or of their use of waters from the lake. After a lengthy process, including a contested case and hearing at SOAH, the EAA determined that Day had established historical use of only 14 ac-ft/yr, based on evidence that the man-made ditch sometimes flooded or was made to do so, resulting in irrigation of 7 acres by this direct application of well water. The EAA determined that the remaining well water, having joined a surface watercourse, became surface (state) water; thus, waters used from the lake were not entitled to be counted toward historical use of aquifer waters on the tract.

Day sued, challenging the determination that the well water became state water, and also asserting several constitutional claims: a substantive due process challenge based on EAA requiring proof of use of aquifer water during a period when records were not required to be kept, and requiring proof of beneficial use of groundwater by a standard of “convincing evidence” without defining the term; challenging statutes concerning the SOAH hearings process as unconstitutional because they violate the open courts guarantee of Texas Constitution article I, section 13; and a procedural due process challenge to statutes permitting certain ex parte contacts between SOAH examiners and EAA staff or board members.²⁰ After short analyses,²¹

¹⁷ As of the date of this writing, November 28, 2009, reply briefs remained to be filed.

¹⁸ There were two landowners, Burrell Day and Joel McDaniel. For convenience, I will refer to them collectively as “Day.”

¹⁹ Meaning, in effect, a minimum permitted volume of 600 ac-ft/yr, since the EAA enabling legislation calls for a minimum allotment for irrigation of 2 ac-ft/yr for each acre irrigated during the historical period. See discussion in *Day* at 274 S.W.3d at 747-48.

²⁰ Ex parte communication is permitted between an ALJ and an agency employee who has not participated in a hearing in the case, to assist the ALJ in evaluating evidence. See TEX. GOV'T CODE ANN. §2001.061(c). A due process challenge was rejected in *Smith v. Houston Chem. Servs, Inc.*, 872 S.W.2d 252, 278 (Tex. App. – Austin 1994, writ denied). See discussion in *Day* at 274 S.W.3d at 758-59.

the appeals court affirmed the trial court's grant of summary judgment to the EAA on these constitutional claims.²²

Of most interest for our topic, however, is the taking claim asserted by Day. Day asserted that the EAA's final order denying the historical use claim²³ constituted a confiscation of rights in underground water in violation of Texas Constitution article I, section 17. EAA had argued in the trial court that Day had no taking claim because Day did not have a constitutionally-protected vested interest in the underground water beneath the land. *See Day*, 274 S.W.2d at 756. On appeal to the Fourth Court of Appeals, Day asked the court to "confirm the precedent of groundwater ownership as an unconditional component of land ownership." *Id.* The Fourth Court opined:

This court recently held landowners have some ownership rights in the ground water beneath their property. *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, No. 04-06-00782-CV, 2008 WL 508682, *4 (Tex. App.- San Antonio Feb. 27, 2008, no pet. h.) (citing *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 281 (1904)). Because Applicants have some ownership rights in the groundwater, they have a vested right therein. *See Tex. S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 903 (Tex. App. - Houston {1st Dist.} 2007, pets. denied) (holding vested property right is one that has definitive, rather than potential, existence). Applicants' vested right in the groundwater beneath their property is entitled to constitutional protection. *See Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002) (holding vested right is property right protected by constitution). The trial court therefore erred in granting [EAA's] motion for summary judgment on this claim. Because [EAA] moved for summary judgment only on the ground Appellants have no vested property right, we must remand Applicants' constitutional taking claim for further proceedings.

274 S.W.3d at 756.

Everyone then sought review by the Texas Supreme Court. As it had in *Del Rio*, the Supreme Court took briefing on the petition for review, and then asked for briefing on the merits. As of this date (Nov. 28, 2009), briefing has not been concluded (petitioners' reply briefs not yet filed). The briefs in chief reveal that the arguments on the taking claim center around two issues: whether there has been a taking, which depends on the nature and degree of regulatory interference with property rights (this is the primary argument of the State, which was impleaded as a party in the suit), and whether there is indeed any vested ownership in place by the landowner (EAA's primary interest). In an interesting twist, EAA asserts in its petition for review of the takings issue that the landowners'

²¹ A number of claims were made, and some new arguments were advanced, by Day for the first time on appeal. The court declined to consider these claims or arguments. *See, e.g.*, 274 S.W.3d at 756, 759-60.

²² The substantive and procedural due process claims were disposed of following rational basis analyses. *See* discussion in *Day* at 274 S.W.3d at 756-58. The open courts claim was disposed of in *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996) (open court guarantees not implicated by EAA's permitting processes). *See* discussion in *Day* at 274 S.W.3d at 758.

²³ The originally asserted 300 acres of irrigation during the historical period became 150 acres based on an ALJ finding of fact that was not contested by Day. *See* discussion in *Day* at 274 S.W.3d at 748-49, esp. at 749 n.6.

claimed ownership derives from the rule of capture. Because it is a creature of the common law, the rule of capture can provide no constitutionally protected property interest. Therefore, by enacting the EAA Act, the Legislature displaced the common law rule without implicating individual constitutional guarantees. When the [EAA] rendered its decision on the [landowners'] permit application, [the landowners] possessed no common law groundwater rights . . . that could have been taken from them.²⁴

The EAA goes further in characterizing the rule of capture's effect:

Further, by its very nature, any "right" possessed by a landowner by virtue of the rule of capture cannot constitute a vested property interest. The rule of capture lacks the essential attributes of ownership of property, such as the right to exclude others and enforceability. Any concept of or a claim to "ownership" of groundwater in place beneath the surface prior to capture, under the rule of capture, is at best ephemeral and illusory. Because the rule gives everyone over the [Edwards] Aquifer as much of a "right" to capture the groundwater beneath a landowner's property as the landowner has, the landowner has no meaningful ownership interest in that water *until he captures it* by physically bringing it to the surface by means of a well, and then only with respect to the water actually captured. Thus the rule of capture does not create vested ownership in groundwater in place.²⁵

Agreed – that the principle of ownership in place does not derive from the rule of capture. But whatever happened to the rest of the *East* case?

The EAA's argument, as illustrated above, hinges on ignoring the part of *East* that constitutes the ownership in place principle. The argument is then made that the advent of the Conservation Amendment²⁶ puts responsibility for managing resources into the Legislature's hands, and that, since the rule of capture creates no vested rights, the acts of the Legislature in regulating use of natural resources can never per se interfere with any vested property rights.²⁷ EAA also asserts that the rejection of the "American Rule" of groundwater, based on "correlative rights," is a sign that the *East* Court was only adopting the rule of capture.²⁸

Neat.²⁹

²⁴ EAA Pet'n for Review at 4.

²⁵ EAA Pet'n for Review at 4.

²⁶ TEX. CONST. art. 16, § 59.

²⁷ Unsurprisingly, the same argument is advanced in EAA's brief on the merits.

²⁸ Indeed, in its brief on the merits, EAA effectively equates the rule of capture with *East* Court's announced "absolute ownership" rule: "Under the English common-law rule, also known as the rule of capture or the rule of absolute ownership, . . ." EAA Brief on the Merits at 9-10; *see also id.* at 19 ("conclusion is reinforced by the fact that the common law in Texas recognizes no correlative rights in groundwater (in contrast to oil and gas).). This conflation of the two distinct principles is the underpinning for all these "rule of capture is the only rule" arguments.

²⁹ The State makes similar arguments. *See* State's Brief on the Merits (*Day*) at 12-22.

But worrisomely incomplete. This, to me, is an unjustified dismissal of the “other” *East* rule, that of absolute ownership – by simply ignoring it.

It remains to be seen whether the Supreme Court will grant the petition for review concerning the taking claim in *Day*. The Court could – and I believe should – deny it and let the trial court (recall, the Fourth Court remanded this claim) determine whether a regulatory taking occurred. That issue might ultimately be resolved without having to address the question of whether there is ownership in place; and that possibility suggests the judicially prudent and minimalist approach is to wait and see, rather than to jump to address it. The other issues in *Day*, are, legally speaking, unexceptional. For example, the “it was state water” issue is based on clearly established Texas law, as are the various constitutional claims. The taking claim is the only one that has conceptual notoriety. I would like to think the denial of the petition in the *Del Rio* case is a clue to what the Supreme Court will do in *Day*, but because *Day* directly involves a water district’s regulatory actions, there may be more incentive from the Court to address the issues there. Still, it makes no sense to me why the Court would take the *Day* case to decide there is no ownership in place after having let the *Del Rio* case - on which the Fourth Court’s disposition of the *Day* taking claim is expressly predicated - stand.

We shall see, presumably shortly now.

INSIGHT FROM TEXAS OIL AND GAS LAW?

Distinction is made, by EAA and others, between the harmonization of the two competing principles announced in *East* – ownership in place and the rule of capture – that are also found coexisting in Texas oil and gas law, on the basis that correlative rights are recognized in oil and gas law, but not in water law. But these arguments ignore that the advent of correlative rights protections in oil and gas law derives from the imposition of regulatory regimes on those minerals. Correlative rights were not part of the original adoption of the ownership in place doctrine in Texas oil and gas law, and certainly – if they had been - were negated by the operation of the rule of capture. *Recognition of correlative rights was required in oil and gas law in order that the regulatory regimes would avoid confiscation in the administration and imposition of their conservation rules. See, e.g., Marrs v. Railroad Commission, 177 S.W.2d 941, 948 (Tex. 1944); Gulf Land Co. C. Atlantic Refining Co., 131 S.W.2d 73, 70-71 (Tex. 1939).* EAA appears to recognize this point, and then just ignores it.³⁰ In an appropriately-fashioned legislative regulatory scheme for underground water, we could expect the same result: recognition of ownership in place, effective diminution of the rule of capture, and protection of correlative rights - without overruling *East*.

³⁰ See EAA Brief on the Merits (*Day*) at 30. Interestingly, the “correlative rights” the Court discussed in *Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290, 292 (Tex. 1923), weren’t the same as today’s oil and gas correlative rights. The latter are based on the notion that, when regulation has been imposed and self-help (drilling his own competing wells) permitted under the rule of capture is no longer automatically available, each landowner is entitled to produce his “fair share” of oil and gas in the underlying reservoir. In contrast, the *Stephens County* Court meant that, if one landowner had the right under the rule of capture to drain his neighbor, so, too then did the neighbor have the “correlative right” under the rule of capture to drill his own competing well and drain *his* neighbor. Not the same thing at all.

CONCLUSION

Texas oil and gas law has long harmonized the rule of capture with the rule of ownership in place. There is no reason why that harmonization cannot be understood similarly in Texas water law. And oil and gas law provide a directly applicable model for the regulation of underground water, while recognizing what has long been an adjunct *regulatory* principle in oil and gas law, namely, protection of correlative rights.³¹ That is what the Texas Railroad Commission does when it administers its various acreage and spacing rules governing permitting and drilling of new wells, and when it administers its oil and (especially) gas “proration” regulations governing production of oil and gas (assignment of monthly production “allowables” to wells) in all fields in Texas, to permit each landowner an opportunity to produce his “fair share”³² of the underlying oil and gas. It is a system that has worked well and fairly for a long time. That is not to say that a different production allocation or well-permitting model for underground water would not pass constitutional muster.

It is to say that something other than abandoning the *East* rule of ownership available, and that overturning *East* rule would both be dire and is clearly avoidable. Dismissing the *East* rule of ownership in place would perhaps make water districts’ tasks easier and more unfettered (but when has that been a good reason to abandon established property rules?), but it would overturn 100 years of property law, and, among other things, threaten havoc to the established and still-developing water markets in Texas, something none of the parties has addressed.

Movement to dismantle the long-standing Texas rule of ownership in place for underground water is not only unnecessary, but would be an over-reaction, unnecessarily throwing the baby out with the bathwater. *Stare decisis* must still mean something. Convenience and expediency are not reasons to disestablish property rights.

(“No, you don’t!” “Yes, I DO!”)

³¹ Interestingly, Justice Hecht’s concurrence in *Sipriano* makes reference to oil and gas regulation as “prov[ing] that effective regulation of migrant substances far below the surface is not only possible, but necessary and effective.” *Sipriano*, 1 S.W.3d at 82 (Hecht, J., concurring). Justice Hecht does not discuss that the rule of capture has not been banished in oil and gas law, but only substantially displaced. It was always conditioned on *lawful* production, which the regulatory scheme has of course redefined.

³² This is a well-defined (no pun) legal standard in Texas oil and gas law. It means permitting each landowner a fair opportunity to recover that landowner’s relative proportion of the underlying resource from the common reservoir.