St. Mary's Law Journal

Volume 17 | Number 4 Article 6

1-1-1986

The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame.

Corwin W. Johnson

Follow this and additional works at: https://commons.stmarytx.edu/thestmaryslawjournal

 Part of the Environmental Law Commons, Health Law and Policy Commons, Immigration Law Commons, Jurisprudence Commons, Law and Society Commons, Legal Ethics and Professional Responsibility Commons, Military, War, and Peace Commons, Oil, Gas, and Mineral Law Commons, and the State and Local Government Law Commons

Recommended Citation

Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame.*, 17 ST. MARY'S L.J. (1986).
Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol17/iss4/6

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

THE CONTINUING VOIDS IN TEXAS GROUNDWATER LAW: ARE CONCEPTS AND TERMINOLOGY TO BLAME?*

CORWIN W. JOHNSON**

I. INTRODUCTION

The Texas law of groundwater,[1] compared with the Texas law of

---

* This article is a revision and expansion of an outline prepared for the University of Texas Law School Water Law Conference on October 3 & 4, 1985.

** Edward Clark Centennial Professor of Law, University of Texas Law School, Austin, Texas; B.A., J.D., State University of Iowa.

1. The term "groundwater" is used herein as excluding water in underground water-

Published by Digital Commons at St. Mary's University, 1985

surface watercourses and with groundwater law of other western states, is characterized by huge voids. The historic stance of the Supreme Court of Texas is one of non-involvement in conflicts over groundwater. Its hands-off position is justified, it has asserted, by the complexity of groundwater and its problems.[2] Management of groundwater is appropriately a problem for the legislature, the court has declared.[3] The Texas Legislature, however, has been slow to accept the challenge. In the main, the legislature has passed the buck to local communities by authorizing them to do something about groundwater if they wish to do so.[4] The response of local communities has been uneven and generally inadequate.

II. THE MAJOR VOIDS

The major voids in Texas groundwater law have been identified and discussed elsewhere.[5] They will only be summarized briefly here.

A. No Judicial Protection of Water Wells From Lowering of Water Levels by Pumping of Other Wells

In 1904, in *Houston & T. C. Ry. Co. v. East,*[6] the Supreme Court of Texas held that the owner of a domestic water well was not entitled to damages for the drying up of his well by heavy pumping of a new, large water well nearby for railroad uses.[7] The sole remedy of the

---

courses and underflow of surface watercourses. It is that class of water referred to by courts as "percolating" water.

2. *See* Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 148-49, 81 S.W. 279, 280-81 (1904). *See generally* Castleberry, *A Proposal for Adoption of a Legal Doctrine of Ground-Stream Water Interrelationship in Texas,* 7 ST. MARY'S L.J. 503, 514 (1975); Johnson, *Texas Groundwater Laws: A Survey and Some Proposals,* 22 NAT. RESOURCES J. 1017, 1018 (1982); Note, *Water Law—Underground Water Users Are Liable for Subsidence Proximately Caused by Negligent Drilling or Production,* 10 TEX. TECH L. REV. 1193, 1195 (1979).

3. *See* Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 148-49, 81 S.W. 279, 280 (1904); *see also* City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 296, 276 S.W.2d 798, 803 (1955).

4. *See* TEX. WATER CODE ANN. §§ 52.001 *et seq.* (Vernon 1972 & Supp. 1986). *See* Johnson, *Texas Groundwater Laws: A Survey and Some Proposals,* 22 NAT. RESOURCES J. 1017, 1020 (1982).

5. *E.g.,* Johnson, *Texas Groundwater Law: A Survey and Some Proposals,* 22 NAT. RESOURCES J. 1017 (1982).

6. 98 Tex. 146, 81 S.W. 279 (1904).

7. *See id.* at 148-49, 81 S.W. at 280-81. In *East,* the defendant railroad company dug a well to produce water to be used by its locomotives and machine shops. The well was supplied entirely by percolating water.

injured well owner, the court implied, was self-help, i.e., construction of a well powerful enough to pull water from the railroad's well—a prohibitively expensive remedy for one who needs water only for household uses.[8] Although this position has been much criticized, even by Justices of the Supreme Court of Texas, and has been rejected by courts or legislatures of western states and some eastern states,[9] it remains Texas law. The Supreme Court of Texas expressly reaffirmed the *East* decision in 1955 in *City of Corpus Christi v. City of Pleasanton.*[10]

Nor has the Texas Legislature departed significantly from *East.* The Texas Legislature has authorized the creation of underground water conservation districts[11] with power to require spacing of water wells and regulate pumping,[12] but many wells are outside such districts and there is no assurance of effective regulation by local districts.[13]

B. No Judicial Protection of Surface Watercourses from Reduction of Flow by Pumping of Wells

The logic of *East* was applied by the Texas Court of Civil Appeals in 1954 to deny relief to owners of water rights in a stream for drastic reduction of stream flow caused by pumping of water wells.[14] Groundwater rights and surface water rights were viewed by the court as separate legal regimes, despite hydrological relationships.[15] The consequence is de-stabilization of long-existing vested water rights.

C. Grossly Inadequate Sanctions Against Waste

The Supreme Court of Texas concluded in 1955 that no judicial doctrine or statute would forbid pumping hugh quanities of water

---

8. *See id.* at 151-52, 81 S.W.2d at 282.

9. *See* Aiken, *Ground Water Mining Law and Policy,* 53 U. COLO. L. REV. 505, 509-14 (1982) (compiling state statutes and case law rejecting *East* doctrine).

10. 154 Tex. 289, 276 S.W.2d 798 (1955).

11. *See* TEX. WATER CODE ANN. §§ 52.001 *et seq.* (Vernon 1972 & Supp. 1986).

12. *See id.* § 52.117 (Vernon Supp. 1986).

13. *Cf. id.* §§ 52.021 to -.026 (Vernon 1972 & Supp. 1986). *See generally* Comment, *Ground Water Management: A Proposal for Texas,* 51 TEXAS L. REV. 289, 294-99 (1973).

14. *See* Pecos County Water Control & Improvement District No. 1 v. Williams, 271 S.W.2d 503, 506-07 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

15. *See id.* at 505-06.

from wells into a stream for transport for use at a distant place, despite loss in transit of most of the well water.[16] Judicial doctrine would forbid only "wanton or willful" waste,[17] and the only pertinent statute would forbid such an escape of water from beneficial use only if the water is artesian water and the loss is 100%,[18] according to this decision. However, wells located within groundwater districts may be subject to more stringent regulations.[19]

D. No Stated Policy on the Proper Rate of Aquifer Depletion

Although most pumping of groundwater in Texas exceeds rates of natural recharge of aquifers,[20] neither the Texas Legislature nor any state agency has formulated a policy to address this situation. Groundwater districts have authority to adopt aquifer depletion policies,[21] but typically the districts lack jurisdiction over sufficient portions of aquifers and their constituents are not likely to support aquifer protection programs that restrict their pumping.[22] Needed are policies and programs to (1) preserve indefinitely aquifers that have substantial rates of natural recharge, and (2) deplete at an optimum rate, with due regard for future generations, aquifers with such slight natural recharge that they must be mined in order to be utilized. These are exceedingly difficult tasks, but they have been undertaken

---

16. *See* City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 297, 276 S.W.2d 798, 803-04 (1955).

17. *See id.* at 293-94, 276 S.W.2d at 801-02. For a discussion on the *City of Corpus Christi* case, see generally Johnson, *Texas Groundwater Law: A Survey and Some Proposals,* 22 NAT. RESOURCES J. 1017, 1018 (1982); and Johnson, *Legal Assurances of Adequate Flows of Fresh Water into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 619-20 (1973).

18. *See* TEX. WATER CODE ANN. § 11.205 (Vernon Supp. 1986).

19. *See id.* §§ 52.101, 52.117. Per section 52.101: "[a] district may make and enforce rules to provide for conserving, preserving, protecting, recharging, controlling subsidence, and preventing waste of the underground water of an underground water reservoir or its subdivisions." *Id.* § 52.010. Section 52.117 states: "[i]n order to minimize as far as practicable the draw down of the water table or the reduction of artesian pressure, to control subsidence, or to prevent waste, the district may provide for the spacing of water wells and may regulate the production of wells." *Id.* § 52.117. The district may require permits for the drilling, equipping, or competing of wells. *See id.* § 52.114 (Vernon 1972). Finally, the district may require open or uncovered wells to be capped when they are not in use. *See id.* § 52.119.

20. *See* II WATER FOR TEXAS, TECHNICAL APPENDIX II-10 (Tex. Dept. Water Resources 1984).

21. *See* TEX. WATER CODE ANN. §§ 52.101, 52.117(Vernon Supp. 1986).

22. *See* Comment, *Ground Water Management: A Proposal for Texas,* 52 TEXAS L. REV. 289, 294-99 (1973).

by some western states.[23]

III. SOME LIMITED VOID-FILLING

There have been some apparent recent beginnings, in both the judicial and legislative branches, to fill some of the voids in Texas groundwater law.

A. Judicial Actions

In *Friendwood Development Co. v. Smith-Southwest Industries, Inc.*,[24] the Supreme Court of Texas announced that subsidence of land due to the negligent pumping of water wells thereafter would be actionable.[25] The *Friendswood* court concluded, however, that *stare decisis* required that the no-liability rule of *East* be applied to pre-1978 subsidence.[26] An intriguing and important question suggested by *Friendswood* is whether it will lead to a total rejection in Texas of the English doctrine of groundwater ownership as represented in *East.* In its opinion, the *Friendswood* court pointed to Texas statutes authorizing underground water conservation districts.[27] This was said by the court to constitute an assumption of its "proper role" by the legislature, which the court applauded.[28] The court also stated that it agreed that "some aspects" of the English rule are "harsh and outmoded."[29]

One conceivably could read the *Friendswood* opinion as meaning that the court feels that, the legislature having acted, the next move is up to the court. I do not read the *Friendswood* opinion that broadly. No land involved in *Friendswood* was situated within an underground water conservation district, nor was any regulation by such a district in any manner involved. I do not find in the *Friendswood* opinion any reasonable basis for predicting that the court will overrule *East* at the next opportunity. The process of judicial void-filling may have both

---

23. *See* Fundlingsland v. Colorado Ground Water Comm'n, 468 P.2d 835, 839 (Colo. 1970); *see also* Mathers v. Texaco, Inc., 421 P.2d 771, 775-76 (N.M. 1966). *See generally* Aiken, *Ground Water Mining Law and Policy,* 53 U. COLO. L. REV. 505, 514-18 (1982).

24. 576 S.W.2d 21 (Tex. 1978).

25. *See id.* at 28.

26. *See id.* at 28-30.

27. *See id.* at 29-30.

28. *See id.* at 30.

29. *See id.* at 28.

begun and ended with *Friendswood*—insofar as the *East* doctrine is concerned.

B. Legislative Actions

The recent session of the Texas Legislature also engaged in some conditional void-filling of Texas groundwater law. After the adoption of a proposed constitutional amendment,[30] chapter 133[31] strengthened the Water Code provisions concerning underground water conservation districts. The bill's salient points include:

1. Creation of districts is encouraged by authorizing the Texas Water Commission to require local elections to create new districts or enlarge existing districts in areas determined by it to be "critical areas." An incentive to vote in favor of such proposals is provided: cities, counties, and water districts in such areas will be ineligible to receive state financial assistance for water projects if the voters reject the district.[32]

2. The boundaries of districts may be broader and more realistic.[33]

3. The capacity of wells subject to permit requirements has been reduced from 100,000 gallons per day to 25,000 gallons per day. It is mandatory that permits for such wells be obtained, but wells that produce no more than 100,000 gallons per day are entitled automatically to permits, and the standards for passing upon applications for permits remain discretionary with the district. However, if a district were to apply for state financial assistance, it would be subject to a general requirement of the act that the applicant adopt a program of water conservation meeting the Texas Water Development Board's

---

30. *See* Act of May 8, 1985, TEX. H.R.J. RES. 6, 1985 Tex. Sess. Law Serv. A-100 (Vernon). This amendment was adopted by the Texas electorate on November 5, 1985, by their approval of the following proposition:

> The constitutional amendment to authorize the issuance of an additional $980 million of Texas Water Development Bond, to create special water funds for water conservation, water development, water quality enhancement, flood control, drainage, subsidence control, recharge, chloride control, agricultural soil and water conservation, and desalinization, to authorize a bond insurance program, and to clarify the purposes for which Texas Water Development Bonds may be issued.

Id. at A-100

31. *See* Act of May 23, 1985, ch. 133, 1985 Tex. Sess. Law. Serv. 630 (Vernon) (codified at TEX. WATER CODE ANN. §§ 1.002 to 66.404 (Vernon Supp. 1986).

32. *See* TEX. WATER CODE ANN. § 52.0611 (Vernon Supp. 1986).

33. *See id.* §§ 52.053, 52.060.

standards.[34]

4. The definition of "waste" is broadened to include negligent, as well as willful, escape of groundwater.[35]

5. Districts are authorized to purchase, sell, transport, and distribute surface or groundwater—which may facilitate conjunctive use of such waters and initiation of recharge projects.[36]

Significant shortcomings still remain. The legislature declined to authorize any state agency to create districts without favorable elections or to regulate in rejecting district formation. It also declined to authorize any state agency to establish standards for district regulations or otherwise assure their adequacy. An existing district cannot be expanded unless the voters in each area—the existing district and the proposed annexation—approve.[37] Furthermore, no protection of watercourses from well pumping is provided.

A new provision in the Texas Water Code allows state agencies to exempt their state-owned land from district control.[38] This amounts to a legislative assumption that the missions of agencies managing state-owned lands are more important than groundwater management. The act does require that any agency electing not to include state-owned land within a district must establish its own groundwater management plan.[39] The provision is silent, however, as to the elements of such a plan, how it would be coordinated with district programs, and how this mandate to state agencies is to be enforced.

In general, the new groundwater legislation expands the involvement of state agencies in groundwater management, but the important decision-making process still remains with local communities.[40] State agencies must rely upon the carrot of financial assistance for water projects.[41] The effectiveness of that carrot remains to be seen. Even if it works as contemplated by the act, the role of state agencies in groundwater management will still be severely limited in the respects discussed in part II of this article.

---

34. *See id.* § 52.170.
35. *See id.* § 52.001(7).
36. *See id.* § 52.156.
37. *See id.* § 52.060(g).
38. *See id.* § 52.063.
39. *See id.* § 52.063.
40. *See id.* §§ 52.000 *et. seq.* (Vernon 1972 & Supp. 1986).
41. *See id.* § 52.0611 (Vernon Supp. 1986).

IV. CONCEPTS AND TERMINOLOGY AS OBSTACLES TO REFORM

There are many possible explanations for the reluctance of the Texas Legislature to act directly to fill the voids of groundwater law. One conceivable explanation is that legislative leaders, or their constituents, believe that property rights of landowners in groundwater cannot be substantially modified by the legislature without violating state and federal constitutions. This view has been expressed often, though usually by those who fear that their personal interests would be threatened by legislation. Those expressions may be dismissed lightly. But when public officials make the same assertion, as some have done,[42] it must be taken seriously.

A. The Term "Absolute Ownership"

The judicial doctrine of groundwater in force in Texas is referred to as the "English" rule and sometimes as the "absolute ownership" rule.[43] The latter term may conjure up in one's mind the notion that groundwater ownership in Texas is a super-right subject to no limitations whatever, even legislative control. The context in which the term "absolute ownership" has been used by courts and commentators shows that it has an entirely different meaning.[44] Its function is

---

42. *See* II WATER FOR TEXAS, TECHNICAL APPENDIX I-16 (Tex. Dept. Water Resources 1984). The Texas Water Plan states:

> Texas courts have followed unequivocally the "English" or "common law" rule that the landowner has a right to take for use or sale all the water he can capture from beneath his land. The judiciary early chose not to adopt the "American rule" with respect to groundwater, which is based on "reasonable use" and correlative rights. *Consequently, neither an injured neighbor nor the State can effectively exercise control over water-use practices involving ground water.*

Id. at I-16 (emphasis added).

43. *See, e.g.,* City of Sherman v. Public Util. Comm'n, 643 S.W.2d 681, 686 (Tex. 1983) ("absolute ownership" theory regarding groundwater remains law today); Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21, 25-27 (Tex. 1978) ("English" rule of "absolute ownership" applied); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 292-93, 276 S.W.2d 798, 800-01 (1955) (court follows "English" rule). *See generally* Castleberry, *A Proposal for Adoption of a Legal Doctrine of Ground-Stream Water Interrelationship in Texas,* 7 ST. MARY'S L.J. 503, 505-10 (1975); Tyler, *Underground Water Regulation in Texas,* 39 TEX. B.J. 532, 532-36 (1976); Note, *Water Law—Underground Water Users Are Liable for Subsidence Proximately Caused by Negligent Drilling or Production,* 10 TEX. TECH L. REV. 1193, 1195-99 (1979).

44. *See* Aiken, *Nebraska Groundwater Law and Administration,* 59 NEB. L. REV. 917, 923-24 (1980); Burns, *Blackstone's Theory of the "Absolute" Rights of Property,* 54 U. CINN. L. REV. 67, 67-68 (1985). The notion that property rights are "absolute" in the sense that they are beyond the reach of governmental power often has been attributed to Blackstone's Com-

to distinguish the English rule from the "American" or "reasonable use" rule. The "American" rule places restrictions on the right of a landowner to pump groundwater, which accordingly is not "absolute."[45] The "English" rule places almost no limitations upon the right to pump and only in this respect may be said to be "absolute."[46] The corollary of this rule is that the landowner is entitled to no judicial protection from harmful pumping by others.[47] Thus, his "ownership" lacks one of the most significant aspects of ownership. It certainly is not "absolute" in the sense that it is comprehensive.

In fact, the Supreme Court of Texas has rarely referred to its groundwater rule as the "absolute ownership" doctrine. The first time it did so, ironically, was in 1978, in its opinion in *Friendswood,* which imposed a new qualification on the right to pump groundwater and thus making even it no longer "absolute."[48] In *East,* the leading Texas case on the subject, the court's opinion showed that the court was more concerned with the practical effects of its decision than with its conceptual underpinning.[49] The *East* court's principal concern was that as of 1904 there was insufficient knowledge about the nature of groundwater to enable courts to manage the resource compe-

---

mentaries on the law of England. A recent scholarly article concludes that this is a mistaken attribution. *See* Burns, *Blackstone's Theory of the "Absolute" Rights of Property,* 54 U. CINN. L. REV. 67, 67-68 (1985).

45. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21, 25 (Tex. 1978); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 292, 276 S.W.2d 798, 800-01 (1955). *See generally* Aiken, *Nebraska Groundwater Law and Administration,* 59 NEB. L. REV. 917, 924-25 (1980); Tarlock, *Supplemental Groundwater Irrigation Law: From Capture to Sharing,* 73 KY. L.J. 695, 703 (1985); Note, *Water Law—Underground Water Users Are Liable for Subsidence Proximately Caused by Negligence Drilling or Production,* 10 TEX. TECH L. REV. 1193, 1198 (1979).

46. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21, 24-26 (Tex. 1978); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 293-94, 276 S.W.2d 798, 800-02 (1955). *See generally* Aiken, *Nebraska Groundwater Law and Administration,* 59 NEB. L. REV. 917, 923-24 (1980); Castleberry, *A Proposal for Adoption of a Legal Doctrine of Ground-Stream Water Interrelationship,* 7 ST. MARY'S L.J. 503, 505-06 (1975); Tarlock, *Supplemental Groundwater Irrigation Law: From Capture to Sharing,* 73 KY. L.J. 695, 701-04 (1985); Note, *Water Law—Underground Water Users Are Liable for Subsidence Proximately Caused by Negligent Drilling or Production,* 10 TEX. TECH L. REV. 1193, 1194-95 (1979).

47. *See* City of Altus v. Carr, 255 F. Supp. 828, 840 (W.D. Tex.), *aff'd,* 385 U.S. 35 (1966); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 293, 276 S.W.2d 798, 800 (1955); Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 280 (1904).

48. *See* Friendswood Dev. Co., v. Smith-Southwest Indus., 576 S.W.2d 21, 25-26 (Tex. 1978).

49. *See* Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 149, 81 S.W. 279, 281 (1904).

tently.[50] The *East* court also objected to the aspect of the "reasonable use" doctrine that restricts use of water to the overlying land.[51] The court's sole reference to the proprietary interest of a landowner in groundwater was a quotation from an opinion by a New York court.[52] Even that quotation did not use the adjective "absolute."

B. Corporeal Ownership

Both the "absolute ownership" rule and the "reasonable use" rule recognize that the landowner owns the corpus of the groundwater.[53] In this respect, they are to be distinguished from a third rule, which may be referred to as the "usufructuary" rule. According to this rule, a landowner only has a right to seek groundwater, which he becomes the owner of only when he reduces it to actual possession.[54] This rationale has been adopted in Louisiana,[55] Florida,[56] and Arizona.[57] The Supreme Court of Arizona, which earlier treated the landowner as the owner of the corpus of the groundwater, has changed its position and now adheres to the usufructuary rule.[58] The Supreme Court of South Dakota, holding that the legislature could lawfully, without compensation, abolish the absolute ownership rule and substitute for it prior appropriation, viewed the absolute ownership doctrine as a misnomer for the usufructuary rule.[59]

There still seems to be some vitality in the notion that ownership of the corpus of groundwater is not as amenable to legislative change as is ownership of a right to capture groundwater. That appears to be the view of the Arizona court, which apparently regarded its decision upholding sweeping legislative changes in groundwater law as better supported if the usufructuary doctrine were in force, which it

---

50. *See id.* at 149, 81 S.W. at 281.

51. *See id.* at 149-50, 81 S.W. at 281.

52. *See id.* at 150, 81 S.W. at 281 (quoting Pixley v. Clark, 35 N.Y. 520, 526 (N.Y. 1866)).

53. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21, 25-27 (Tex. 1978); Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 149, 81 S.W. 279, 281 (1904).

54. *See* Village of Tequesta v. Jupiter Inlet Co., 371 So. 2d 663, 667 (Fla. 1979).

55. *See* Adams v. Grigsby, 152 So. 2d 619, 624 (La. Ct. App.), *writ ref'd,* 153 So. 2d 880 (La. 1963).

56. *See* Village of Tequesta v. Jupiter Inlet Co., 371 So. 2d 663, 667 (Fla. 1979).

57. *See* Town of Chino Valley v. City of Prescott, 638 P.2d 1324, 1328 (Ariz. 1982).

58. *See id.* at 1328.

59. *See* Knight v. Grimes, 127 N.W.2d 708, 711 (S.D. 1964).

promptly declared to be in force.[60]

The view taken by the Arizona court does not stand up well under rigorous analysis or by reference to the judicial authorities. Both corporeal ownership and usufructory ownership are subject to the police power. In upholding regulation of oil and gas, the Supreme Court of Texas addressed this supposed distinction, and concluded that corporeal ownership of oil and gas nevertheless is subject to regulation—apparently to the full extent of the police power.[61] In *Beckendorff v. Harris-Galveston Coastal Subsidence District,*[62] the validity of groundwater regulation provisions of the Harris-Galveston Coastal Subsidence District Act was upheld without even addressing the supposed resistance of corporeal groundwater ownership to legislative regulations.

It also should be pointed out that all of the decisions by the Supreme Court of Texas relying upon the rationale that the landowner owns groundwater in the same way he owns soil could have been based upon the usufructuary rationale. *East* and *City of Corpus Christi* both held that a landowner may draw down water in the wells of others without liability;[63] the same result is reached by reasoning that no one owns groundwater until it is captured. The corporeal ownership concept was also relied upon in a decision that a suit could be maintained to recover the agreed consideration for conveyance of plaintiff's interests in groundwater.[64] The defendant had argued that plaintiff did not own the water rights he had contracted to convey.[65] The court declared that the landowner had "exclusive property" in the groundwater.[66] Here also the decision could have been grounded upon the usufructuary concept, as one could convey a right to capture.[67] Indeed, in this very opinion, the court held that a conveyance of appropriative rights in a surface stream by one who had no such rights would be effective nevertheless to convey the grantor's opportu-

60. *See* Town of Chino Valley v. City of Prescott, 638 P.2d 1324, 1328-30 (Ariz. 1982).

61. *See* Brown v. Humble Oil and Refining Co., 126 Tex. 296, 306, 83 S.W.2d 935, 940-41 (1935).

62. 558 S.W.2d 75 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

63. *See* Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 149, 81 S.W. 279, 281 (1904); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 292, 276 S.W.2d 798, 800 (1955).

64. *See* Texas Co. v. Burkett, 117 Tex. 16, 29-30, 296 S.W. 273, 278 (1927).

65. *See id.* at 29-30, 296 S.W. at 278.

66. *See id.* at 29-30, 296 S.W.2d at 278.

67. *See* Town of Chino Valley v. City of Prescott, 638 P.2d 1324, 1326, 1328 (Ariz. 1982); Adams v. Grigsby, 152 So. 2d 619, 624 (La. Ct. App.), *writ ref'd,* 153 So. 2d 88 (La. 1963).

nity to acquire such rights.[68]

If one takes the view that *stare decisis* is applicable to the decision of a case and not necessarily to the rationale for that decision,[69] it would be proper for the Supreme Court of Texas to announce in the next case before it involving this issue that it is rejecting the corporeal ownership rationale in favor of the usufructuary rationale, as the Arizona court did. I hasten to add that I am not recommending that it do this, as I consider it unnecessary and also possibly a source of confusion, especially for Texas oil and gas law, which incorporates the *East* rationale.[70] It is also conceivable that such a move by the Supreme Court of Texas would deprive farmers on the High Plains of their right to cost depletion under the income tax provisions of the Internal Revenue Code for groundwater mining.[71]

There is a possibility that the "usufructuary" concept of groundwater ownership already applies to some parts of Texas, namely, lands granted by Spain or Mexico. The Supreme Court of Texas has held that grantees of Texas land from Spain and Mexico did not receive implied irrigation rights in perennial[72] or nonperennial[73] streams as incidents of their land grants. It has also been held that establishment of a Spanish pueblo in what is now Texas did not impliedly convey water rights to the pueblo.[74] It would be consistent with those decisions to hold that Spanish and Mexican grants carried with them no implied grants of rights in groundwater. The opinion of the Supreme Court of Texas in *Adjudication of Water Rights in the Medina River Watershed of San Antonio River Basin,*[75] refers to an express Spanish grant in Mexico to Hernan Cortes of "percolating waters."[76] Such evidence has been relied upon in the Texas cases as

68. *See* Texas Co. v. Burkett, 117 Tex. 16, 27, 296 S.W. 273, 277 (1927).

69. *See* Goodhart, *Three Cases on Possession,* 3 CAMBRIDGE L.J. 195 (1928).

70. *See* Elliff v. Texon Drilling Co., 146 Tex. 575, 582, 210 S.W.2d 558, 563 (1948).

71. *See* United States v. Shurbet, 347 F.2d 103, 106-07 (5th Cir. 1965).

72. *See* Valmont Plantations v. Texas, 346 S.W.2d 853, 855 (Tex. Civ. App.—San Antonio 1961), *aff'd,* 163 Tex. 381, 355 S.W.2d 502 (Tex. 1962).

73. *See In re* Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin, 670 S.W.2d 250, 252-53 (Tex. 1984).

74. *See In re* Contests of the City of Laredo, *et al,* To the Adjudication of Water Rights in the Middle Rio Grande Basin and Contributing Texas Tributaries, 675 S.W.2d 257, 259 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

75. 670 S.W.2d 250 (Tex. 1984).

76. *See id.* at 253.

negating implied water rights.[77]

C. Legislative Recognition of Landowner Ownership of Groundwater

Landowners cannot claim a super-right in groundwater by virtue of constitutional or legislative grant. There is no relevant constitutional provision, and the pertinent statutes do no more than acquiesce in the court decisions. For example, section 52.002 of the Texas Water Code states:

> The ownership and rights of the owner of land and his lessees and assigns in underground water are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owner of his lessees and assigns of the ownership of rights, subject to the rules promulgated by a district under this chapter.[78]

Certainly the Supreme Court of Texas did not view this statute as any sort of restraint upon its power to modify groundwater ownership in the *Friendswood* case.[79]

D. The Absence of a Legislative Declaration of State "Ownership" of Groundwater

The Texas Legislature based its adoption of the prior appropriation system for watercourses on a declaration of state ownership of such waters.[80] This could be thought to make appropriative rights in watercourses more amenable to legislative change than groundwater ownership. But if the legislature could declare that the state "owns" water in watercourses, and the Supreme Court of Texas could conclude that this declaration was not in derogation of common-law ripa-

---

77. *See* Valmont Plantations v. Texas, 346 S.W.2d 853, 878 (Tex. Civ. App.—San Antonio 1961), *aff'd,* 163 Tex. 381, 355 S.W.2d 502 (1962); *see also In re* Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin, 670 S.W.2d 250, 252 (Tex. 1984).

78. TEX. WATER CODE ANN. § 52.002 (Vernon Supp. 1986).

79. *See* Friendswood Dev. Co., v. Smith-Southwest Indus., 576 S.W.2d 21, 30 (Tex. 1978).

80. *See* TEX. WATER CODE ANN. § 11.021 (Vernon Supp. 1986). Section 11.021 states in the pertinent part:

> [T]he water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the State.

Id. § 11.021.

rian rights, as it did in *Motl v. Boyd,*[81] it is at least possible that a legislative declaration today of state ownership of groundwater would be reconciled somehow with the rights of landowners. However that may be, effective regulation of groundwater does not require a legislative declaration of state ownership of such water. Regulation of groundwater in Texas by districts is not based upon state ownership.[82] In addition, common-law riparian rights have been brought within the water rights adjudication systems and coordinated with appropriative rights without a declaration that riparian rights are owned by the state.[83] It should be clear that legislative declaration of state ownership is of little or no relevance to the scope of legislative power to modify these water rights.

E. The Non-Applicability of the Public Trust Doctrine to Groundwater

In *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin,*[84] upholding substantial legislative alteration of riparian rights, the Supreme Court of Texas relied in part upon the doctrine that all navigable waters, including those made navigable by statute, are owned by the State in trust for the public.[85] It follows, said the court, that the vested rights of riparians are merely rights to a "usufructory use of what the State owns."[86] The opinion implied that such usufructuary rights may more readily be altered than other rights. Since groundwater is not navigable, and

---

81. 116 Tex. 82, 127, 286 S.W. 458, 474-75 (1926).

82. *See* TEX. WATER CODE ANN. § 52.002 (Vernon Supp. 1986).

83. *See In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 442-46 (Tex. 1982).

84. 642 S.W.2d 438 (Tex. 1982).

85. *See id.* at 444.

86. *See id.* at 444. Note that the term "usufructary" was used by the court in a different sense from its use in Arizona, Florida, and Louisiana groundwater cases. *See* Town of Chino Valley v. City of Prescott, 638 P.2d 1324, 1328 (Ariz. 1982); Village of Tequesta v. Jupitor Inlet Co., 371 So. 2d 663, 667 (Fla. 1979); Adams v. Grigsby, 152 So. 2d 619, 624 (La. Ct. App.), *writ ref'd,* 153 So. 2d 880 (La. 1963). Those opinions relied, not upon the public trust theory, but upon the theory that groundwater is not owned by anyone, including the sovereign, until it is reduced to possession. Water in surface watercourses has also been viewed as unowned and part of the "negative community." It has been suggested that these are merely different formulations of a single theory. *See* 1 WIEL, WATER RIGHTS IN WESTERN UNITED STATES §§ 6, 7 (1911). But there may be an important distinction for groundwater. The non-ownership (negative community) concept has not been stated as restricted to navigable waters. The public trust doctrine has been so restricted, at least by the courts of Texas and other states.

therefore presumably is not subject to the public trust doctrine, it may be supposed that groundwater rights are not as subject to legislative change as are riparian rights in navigable waters. However, the court elsewhere in its opinion relied upon the general police power of the legislature and did so in terms that leave no doubt that even "absolute and unqualified" water rights are subject to extensive legislative control.[87] The court's reliance upon the legislature's police power over all forms of property reduces its reference to the public trust to the status of a mere make-weight.

V. CONCLUSION

It is hoped that future proposals of reform in Texas groundwater law will be considered on their merits rather than shunted aside by the smokescreen of claimed invincibility of landowner property in groundwater.

One must be careful not to read into the words "ownership" and "property" meanings that are not there. The tendency to do so has created much confusion in many areas of law. Several years ago, Dean Frank Trelease challenged the misuse of these terms in certain water law controversies. One of his observations is especially pertinent:

> [I]f we were to say, 'ownership of property gives the right to do with it as the owner please,' and reason from there, we would reach all sorts of absurd results.[88]

---

87. *See In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 445 (Tex. 1982). The court quoted with approval the following from an opinion by the Supreme Court of Oregon:

> [W]ater rights, like all other rights, are subject to such reasonable regulation as are essential to the general welfare, peace, and good order of the citizens of the state, to the end that the use of water by one, *however absolute and unqualified his right thereto,* shall not be injurious to the equal enjoyment of others entitled to the equal privilege of using water from the same source, nor injurious to the rights of the public.

Id. at 445 (emphasis added). The *Upper Guadalupe* court also relied upon a decision upholding legislative termination of several mineral interests, to which the public trust concept is inapplicable. *See id.* at 445-46 (citing Texaco, Inc. v. Short, 454 U.S. 516 (1982)).

88. Trelease, *Government Ownership and Trusteeship of Water,* 45 CALIF. L. REV. 638, 649 (1957).