

# THE LEGAL INTERFACE AND RECONCILIATION OF GROUND AND SURFACE WATER LAW IN TEXAS

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*The movement of water from the ocean through clouds to fall on land as rain and its trip back to the ocean is called the hydrological cycle. It is not within the power of man to destroy water in any appreciable quantities but only to divert and control water as it flows towards the ocean.*<sup>1</sup>

The United States Geological Survey estimates that ground water is the source of nearly 40 percent of all streamflow in rivers and streams in the United States.<sup>2</sup>

“Twenty-nine aquifers underlie eighty-one percent of the State . . . groundwater sources supplied fifty-six percent of all water used in the State, including sixty-nine percent of agricultural needs and forty-one percent of municipal needs” (in 1992).<sup>3</sup>

## OVERVIEW

With the hydrological cycle and impact of groundwater on surface water in mind, this presentation explores the general development of ground and surface water law in Texas as it relates to the hydrologic connection between these two natural parts of our water resources in the hydrological cycle in respect to future water planning in Texas.

The historical development of Texas water law relating to ground and surface water is different and developed along separate and mostly independent paths. Texas law on groundwater is a combination of the common law rule of capture and statutory local groundwater districts organized generally with boundaries based upon political, *i.e.*, county line basis instead of hydrologic aquifer boundaries with the possible exception of the Edwards Aquifer. Texas law on surface water is the prior appropriation (“first-in-time-first-in-right”) and the common law riparian doctrine, which was also a dual system initially but which is now, after the adjudication of all surface water rights in the State pursuant to the Water Rights Adjudication Act of 1967, adjudicated water rights based on the prior appropriation doctrine.

The science of hydrology has grown and expanded our knowledge of the hydrologic cycle over the past 100 years since the evolution of Texas water law. Ground and surface water in many instances are hydrologically connected. In the past, our courts and legislature have not focused on this science. The court cases have been “*party related*,” disputes between individual water

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<sup>1</sup> Justice Wilson, dissent in *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (Tex.S.Ct. 1955), joined by Justices Griffin and Culver in this 1955 Opinion by Justice Calvert, a 6-3 decision.

<sup>2</sup> David W. Woody, et. al., *National Summary 1986, U.S. Geological Survey, Water Survey Paper No. 2325*, 3 (1988).

<sup>3</sup> *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, at 80, citing John B. Ashworth & Janie Hopkins, *Aquifers of Texas*, Texas Water Development Board Report 345, at 1 (Nov. 1995).

users, and courts have focused more on identifying whether water is “ground or surface” water as opposed to considering water from a hydrological and natural view point.

An **emerging issue** is what happens if a groundwater user adversely affects a surface water right holder’s use of water under an adjudicated surface water right or *vice versa*, coupled with existing plans of conjunctive use and groundwater development suggests an emerging policy issue in our state in reconciling existing established agriculture industry with a growing population, industrial development and the environment who depend upon a finite amount of water. How can this finite water be beneficial used and rights protected? In conjunctive use projects are we only “robbing Peter to pay Paul?”

This issue will become very significant to regional planning and management of our water resources in Texas in the future while recognizing existing rights to the water.

## **I. BACKGROUND**

A general review of the some of the significant ground and surface water law cases is necessary to understanding our current situation. Most, if not all, of our case law has arose in conflicts between groundwater users or surface water users, and substantially there are only few instances where there was a real conflict between a groundwater and surface water user, and unfortunately, they were resolved and decided on the pleadings, and not on a record of facts and hydrologic evidence.

### **A. The *East* Case**

The seminal Texas groundwater case on the common law rule of capture is *Houston & T.C. Railway Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904). In this 1904 case, the Texas Supreme Court adopted the English common law rule of *Acton v. Blundell*, 12 M. & W. 234, 152 E.R. 1223 (Ex. 1843), 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’ well, this inconvenience to his neighbor falls within the description of *damnum absque injuria* (an injury without a remedy), which cannot become the ground of an action.”

The Court also refused to adopt the argument “. . . in favor of the application to such cases of the doctrines applicable to defined streams of water . . .” following *Acton v. Blundell*. The Court was urged to apply the *prior appropriation doctrine* applicable to surface water, *i.e.*, *first-in-time-first-in-right*, but the Court on public policy grounds based upon the lack of knowledge about groundwater and the needs of the public at that time refused to do so. These public policy grounds will be discussed later.

### **B. Surface Water Law**

As to surface water, by this time Texas law recognized the common law riparian doctrine, and the Legislature had adopted the prior appropriation doctrine applicable to streams with the enactment of the 1889 (Tex. Gen. Laws 1889, ch. 88, p. 100) and 1895 Irrigation Acts. Thus,

development of Texas ground and surface water diverged and developed separately.

After the droughts in 1910 and 1917, the citizens of Texas voted in August 1917, to enact § 59 of article 16 of the Texas Constitution, which placed the duty to preserve Texas' natural resources on the State Legislature. This constitutional amendment passed after the Court's decision in the *East case*, and made clear that in Texas, responsibility for the regulation of natural resources, including both ground and surface water, lies with the State Legislature even though the courts have the authority to change the common law. *Sipriano v. Great Spring Waters of American, Inc.*, 1.S.W.3d 75, at 77 (Tex.S.Ct 1999).

### **C. Division of Surface and Groundwater Law**

The Legislature promptly responded regarding surface water by enacting various statutes providing for the organization of water districts and river authorities and established a more modern prior appropriation system in the 1913 (Tex. Gen. Laws 1913, ch. 1717, p. 358), 1917 and 1925 Acts. Many districts and river authorities were organized over the State on major streams to develop and manage surface water.

The legislation passed Article 7602 regarding waste of water of artesian wells. But, it did not respond as to groundwater until 1949 (Act of May 1949, 51<sup>st</sup> Leg., R.S. ch. 306, 1949 Tex. Gen. Law 559) when the Legislature exercised its constitutional authority to provide for the creation of groundwater conservation districts to manage and control groundwater use.

### **D. *Texas C. v. Burkett***

In 1917, the Texas Supreme Court responded in a case often cited with regard to aspects of ground and surface water law, and especially to the "underflow" of a stream as being surface not ground water, *Texas v. Burkett*, 117 Tex 16, 296 S.W. 273 (1917). This case involved a dispute over a contract, and not water law, where the landowner (Burkett) gave the oil company (the Texas Company) rights to take water from his land. What makes the case of interest here is that Burkett's land had several sources of water, Leon River, springs, groundwater wells and variations thereof. The Texas Company defended the case asserting "lack of consideration" which drove the Court into consideration of existing Texas water law in 1917 - riparian, prior appropriation and the rule of capture in its efforts to determine whether Burkett had rights to grant the oil company which represented legal consideration to support the contract.

In finding consideration to support the contract, the Court based upon evidence of law witnesses as to knowledge of the land's available water resources found, without the benefit of scientific hydrological evidence, the following:

- (a) The Leon River is a stream to which riparian rights attach, and the flood waters of which are subject to the appropriation laws of this State citing *Hoefs v. Short*, 114 Tex. 501, 273 S.W. 785.

(b) That Burkett's land had an abundance of water obtained from the following sources: "First, the waters of the ordinary flow (sometimes referred to as 'base flow') of the stream when it did flow; Second, storm and flood waters, when such were in existence or when caught in Burkett's reservoir made by (him); Third, the underflow of the stream through the gravel and sand beneath the surface, when it was not flowing over the surface of its bed; Fourth, percolating waters from Burkett's land, obtainable either at the Outerropping Springs or by excavations on the banks down to the level of the groundwater table for that immediate vicinity." 117 Tex. 16, at 24. A riparian has rights to the normal flow, however, flood waters are subject to the prior appropriation doctrine and flood waters of a stream "are those waters above the highest line of ordinary flow of the stream . . ." *Motl v. Boyd*, 286 S.W. 458.

(c) Although Burkett had not obtained a permanent water right through a statutory permit from the state, by virtue of the contract, either The Texas Company or Burkett could have obtained a permit.

(d) That a riparian owner has the right to divert riparian water to non-riparian lands where water is abundant, and no possible injury could result to lower riparian owners, *citing* among other out of state authorities, *Watkins Land Company v. Clements*, 98 Tex. 578, 585, 86 S.W. 733.

(e) A riparian right is one of use only. The riparian water rights holder does not own the water which flows past his land, but only the right to use the water.

(f) A riparian may lease use of his water, and it can be severed from the land and granted separately from the land.

(g) Springs made by percolating waters "coming out of the banks of the stream . . .," *where not otherwise shown* is neither surface water nor subsurface streams with defined channels, and are the exclusive property of the landowner (note there is no evidence in the record as to whether these springs came from percolating water), thus, the Court had to assume the actual nature of these springs.

(h) There is a presumption that sources of underground water is ordinary percolating water which is the exclusive property of the owner of the surface of the soil, and subject to barter and sale as any other species of property *citing Long on Irrigation*, §§45, 47. It is of interest that the Court did not cite the 1904 *East case*.

This opinion by Judge Cureton, also the author of the opinion in *Motl v. Boyd*, addresses many aspects of Texas water and groundwater law and their relationship between each other in the context of a contract action in which the Court was focused upon establishing legal consideration for the contract in question.

The Court in its Opinion recites the pertinent parts of the record which was based upon knowledge of lay persons about the land, and the nature of the wells and springs and flows in the river. There was no scientific evidence noted. For our purposes, it is an important case because it shows that in attempting to reconcile Texas water law in these early years that the issue is framed in terms of dividing groundwater at a certain physical location which could be observed by lay persons, and once the nature of the water was determined as either ground or surface water then the laws as to each regime was applied.

#### **E. *Comanche Springs Case***

Fifty years after the *East case*, and during the drought of the 1950s, a water district on the Pecos River with statutory senior surface appropriation rights on the Pecos River sued a groundwater user for reducing spring flow of Comanche Springs, a tributary of the Pecos River. This case raised the conflict between users of ground and surface water users, but unfortunately it was an appeal on special exceptions without the assistance of record of evidence, *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503 (Tex.Civ.App. – El Paso 1954, writ ref'd n.r.e.).

The *Comanche Springs* court applied the principles of the *East case*, as a matter of law. It resolved the case, based not on hydrological evidence as to the connection between ground and surface water, but on defining the physical location as to when groundwater becomes surface water. The plaintiff, a statutory senior surface water rights holder, complained that defendant's well had reduced the springflow of Comanche Springs to such an extent that insufficient water was available for irrigation out of the springs under its water rights, and requested an injunction against the defendant's pumping. The appeal was on the district court's sustaining special exceptions to the plaintiff's pleading as a matter of law. The court ruled that the plaintiff's right to use the water attached only after the water emerged from the ground based upon prior court cases. Prior to such emergence, the defendant could use any amount of water he chose, under the *East case*, regardless of the impact upon others. This included impacted surface water rights holders, since there was no showing that the water was not "percolating water" or was in a "well defined underground channel."

While the *Comanche Springs case* was being decided, another groundwater case was pending before the Texas Supreme Court, which gave the Supreme Court an opportunity to reflect upon the rule of capture.

#### **F. *Corpus Christi v. Pleasanton***

In *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955), the Texas Supreme Court approved transportation of artesian well water 118 miles in a surface watercourse to its downstream diversion point for use, even though as much as 74 percent of the original supply was lost in transit due to evaporation, seepage, and transportation. *See, Sipriano case*, 1 S.W.3d 75, at 17.

Even though this case arose over 50 years after the *East case*, history and tradition of the development of groundwater law based upon the *East case*, and probably the 1950s drought conditions, provided and resulted in the Court's adherence to the rule of capture. The Court, however, challenged the legislature to better define our state's water law. For our purposes, the dissenting Justices raised significant issues to be considered. Justice Wilson in dissent stated (154 Tex. 289, at 299-300):

The result actually reached by the court is to give to one person the unrestrained right to injure his neighbor. I have this to say about reaffirming the rationale of the *East case*, *Frazier v. Brown*, and *Acton v. Blundell*. These cases were decided (1843-1904) before the development of most of our present knowledge of geology and hydrology and there has been a great advance in knowledge since these decisions. In the *East case* the court takes its rationale from *Frazier v. Brown* which is, essentially, that, (one) the movement of underground waters "are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible", and (two) "\* \* \* Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.

This dire prediction – like much prophecy – overlooked the possibility of advance in knowledge technique. It is understandable that this rationale should appeal to this court in 1904 but I regret to see us reaffirm it now, as the majority does, in 1955 – especially in view of the development since 1904 of our comprehensive knowledge and experience in oil and gas regulation.

I am convinced that the rationale of *Frazier v. Brown* has been rebutted and answered by the course of our history and the entire trend of our jurisprudence since that decision and since the *East case*. Although this court can close its eyes to the advancement of scientific and legal knowledge and governmental techniques by reaffirming this rationale as the majority do here, I do not believe that this court will always do so, and for that reason the substance of this dissent seems worth filing.

Thus, Justice Wilson recognized that much more knowledge was available in the 1950's than was available 50 years earlier to the Court in the *East case*, and that ground water was no longer "... so secret, occult and concealed . . . so that legal rules could not be administered to them" and that "... the needs of the commonwealth had changed which strikes at the public policy underlying the Court's decision in the *East case*." Justice Wilson further noted:

In the field of water law, there is not consolidation to be found in the law of capture. Of what value would it be to the plaintiffs to offset defendants' wells and

produce an enormous amount of water for which they have no use? This would further deplete the reservoir, reduce the pressure, and lower the standing level with consequent increase of pumping expense. Why further injure their own wells? To refer them to the law of capture in this situation is simply to say that one who has been injured may go and inflict a like injury upon his neighbor. If the law of capture has any true application to underground water, it is an extremely limited one. No one can live in a vacuum. Therefore, all property rights are, to a certain extent, correlative.

These words sound true today even if they did not to the majority of the Court in 1955.

**G. *Bartley v. Sone* (1975)**

*Sarah E. Bartley v. Robert A Sone*, 527 S.W.2d 754 (Tex.Civ.App. – San Antonio, 1975), illustrates the state of water law in Texas at that time with respect to recognition of the hydrologic cycle and the relationship of ground and surface water law.

This case involved a dispute between two surface water appropriators of spring water. The plaintiff had diverted water from a spring into a ditch, and filed appropriate affidavits for appropriation of water under the 1889 Act based upon the water being “surface water.” The defendant attached a ditch to the plaintiff’s ditch for use of any excess waters. The defendant also filed an appropriation affidavit under the 1889 Act. The Spring flowed in a southerly direction across the plaintiff’s land into a creek on the plaintiff’s land which was a tributary of the Nueces River. At no time did any of the water from the Springs flow unto or across any portion of the defendant’s property. The issue, as framed by the Court, was centered around the amount of water that the plaintiff the senior appropriator could take from the stream.

The trial court held that the plaintiff had historically taken as much water “as he saw fit to take,” which could be all of the water of the spring. There was evidence that at times there was excess water that flowed into the defendant’s ditch for his use. The Appellate Court converted the case from a surface water case to a ground water case and held, citing the *East case* and the *Texas Company v. Burkett case* and provisions of the Water Code, which have now been repealed as authority, in holding that the plaintiff was the exclusive owner of the water flowing from the Springs, and that his rights did not depend on compliance with the appropriations statutes. The Court did not refer to the *Comanche Springs case*, which held that once Spring water became channelized, it was surface waters and subject to the prior appropriation doctrine. Apparently, this case was not brought to the attention of the Court. The case illustrates a confusion in Texas water law at the time, deciding cases from case to case.

**H. *Dennis v. Kickapoo Land Co.***

*Dennis v. Kickapoo Land Co.*, 771 S.W. 2d 235 (Tex.App. – Austin 1989, writ denied) illustrates the impact of the “absolute” English common law rule of capture. In this case, downstream landowners sought a declaration that upstream landowners had no authority to appropriate water



adjacent to Kickapoo Springs for irrigation purposes without obtaining a permit from the State because the water is surface water. The Court of Appeals held that absent proof that the subterranean watercourse possessed all the characteristics of a surface watercourse, the presumption of “percolating groundwater” is not rebutted even though the Springs were the principal source of water for Kickapoo Creek and made a sufficient addition to streamflow of the Creek to the benefit of downstream riparian owners, and the underground flow qualified as an underground stream.

It is noted that this is first case where expert testimony was presented, but the battle of experts was resolved in the case because the “source of the water” was “percolating waters.”

The Court noted that although the “English” rule has been criticized that under that rule all percolating groundwater is the property of the owner of the surface. The Court noted that in contrast under the so called “American” rule only “defused percolating groundwater” is subject to absolute ownership by the landowner which defines “defused percolating water” as water which is not tributary to any stream or other body of water either surface or subterranean. The landowner’s rights in percolating water, other than diffused, are correlative, and are governed by rules analogous to those governing riparian rights in surface streams citing *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663, aff’d on rehearing, 141 Cal. 116, 74 P. 766 (Cal. 1903). The Court also cited as authority Texas Water Code provisions adopting the English rule (*Tex. Water Code Ann.* §§52.002, 52.001(4) (which were repealed by the State legislature in 1999). Under this ruling, all groundwater is percolating water until it is in a well-defined subterranean channel or is an underground stream.

The reference to “defused percolating groundwater” may be a concept which could be applicable in our current law as will be discussed below.

### **I. *Edwards Aquifer***

The Texas Natural Resource Conservation Commission declared, that the Edwards Aquifer was an underground river. A Travis County District Court held that the Commission rules declaring the Edwards Aquifer to be an underground river, and thus state water, were void and of no effect, *Cause No. 92-05214; Danny McFadden & Texas Farm Bureau, et. al. v. Texas Water Commission, in the 331<sup>st</sup> Judicial District Court of Travis County, Texas*. The case was appealed, but dismissed as moot following the Commission’s repeal of the challenged rules. The Legislature then declared that the Edwards Aquifer though unique is not an underground stream.

One could wonder whether this legislative act was more of a decision based upon the political realities of the time, as opposed to a hydrological finding. Only time will tell.

### **J. *Friendswood case (subsidence exception to common law rule)***

*Friendswood Dev. Company, et. al. v. Smith-Southwest Industries, Inc., et. al.*, 576 S.W.2d 21 (Tex.Sup.Ct. 1978) is a case where considerable scientific evidence was presented in the record

showing the impact of ground water development on creating subsidence in the Harris - Galveston Counties area.

In 1975 the legislature created the Harris - Galveston Coastal Subsidence District “. . . to provide for the regulation of the withdrawal of groundwater within the boundaries of the District for the purpose of ending subsidence which contributes to or precipitates flooding, inundation, or overflow of any area within the District . . .” and gave the District the power to grant or decline permits for new wells, regulate spacing and production, and other regulations necessary to prevent further subsidence.<sup>4</sup>

This case interestingly was an action in tort (as was involved in the *East case*) based upon the rule that a landowner has a duty not to use his property so as to injure others. The Court held that this tort action could not be applied since in Texas the drawing of groundwater was unlimited under the rule of capture. In so holding, the Court had to deal with the “absolute” English common law rule of capture established by the *East case*. After tracing the development in cases in Texas, and elsewhere on the English common law rule, the Court held that creating subsidence would not be actionable under such tort rule. But, since the Legislature had spoken that the regulation of groundwater production as it relates to a subsidence is a legislative and not a judicial problem that the legislative action controlled. It applied the doctrine of *stare decisis*, and recognized that since the rule of capture had become an established rule of property law in the State relied upon by the defendants and others, that the legislature in 1975 had stepped into the field in respect to subsidence in the Houston - Galveston area in restricting the drilling of wells. All of the defendants’ wells had been produced prior to 1975. The Court established a new rule as an exception to the English rule of capture with respect to future withdrawals of groundwater which are negligently drilled and a proximate cause of subsidence of land of others, and encouraged compliance with the legislative policy. The legislative action allowed the Court “the opportunity to discard an objectionable aspect of the Court-made English rule as it relates to subsidence by stating a rule for the future which is more in harmony with express legislative policy.” 576 S.W.2d 31 at 30. The significance of this case is that the Court recognized the many criticisms of the strictness of the English common law rule of capture, but that it was up to the legislature to change court-made law when in the public interest.

## **K. 1985 Conservation Amendment**

Texas citizens have spoke once again regarding the development of water resources in our State in the enactment and passage of a constitutional amendment in 1985, which established State water policy to consider environmental concerns in the permitting of surface water rights. Since it appears established hydrologically that in some instances groundwater contributes to the base

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<sup>4</sup> Chapter 284, 64<sup>th</sup> Legislature, Regular Session, effective April 23, 1975. See, *Beckendorff v. Harris - Galveston Coastal Subsidence District*, 558 S.W.2d 75 (Tex.Civ.App. -- 1977, writ ref’d. n.r.e.), which upheld the constitutionality of the Act.

or normal flows of our rivers and streams, this policy established by our citizens could have impact in the future with respect to our ground and surface water laws.<sup>5</sup>

## II. CURRENT SITUATION

Again, focusing on the issue of the hydrologic connection between groundwater and surface water and the impact of groundwater withdrawals on the base flows of surface water in our streams, where do we find ourselves today?

To summarize where we have been, we see that in the early 1900s the English common law rule of capture was established with respect to groundwater in the *East case*. The Texas Supreme Court in *Mottl v. Boyd*, adopted a rule that established the line (*i.e.*, the location ) between normal or base flows in streams and flood flows in view of then existing common law riparian rights and the statutory provisions enacted by the legislature in the 1889 and 1895 Irrigation Acts. This has established the focus for both the Courts and the legislature. The 1917 Conservation Amendment delegated to the state legislature the regulation and management of state water resources. The legislature, after the 1917 Constitutional Amendment, reacted first in dealing with surface waters possibly because they could be seen and observed whereas groundwaters were considered “. . . so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to (it) would be involved and hopeless uncertainty, and, therefore be practicably impossible.” The legislature in 1949 provided for the creation of groundwater districts which has been revised from time to time thereafter gradually giving these local districts more authority to regulate use of groundwater. Thus, the legislature’s move on groundwater occurred almost 50 years following its first move on surface waters. In 1978, the legislature created a regional district in Harris and Galveston Counties to regulate groundwater in dealing with the subsidence problem in a local area. The Courts beginning in 1955 recognized the criticism in the recognition of the English common law rule of capture in Texas by the Court in 1904 with respect to water management of the State’s resources.

During this entire period of time all of the Court cases and the Texas legislature have reacted to either protecting groundwater users against other groundwater users, or surface water users against other surface water users, and in trying to define the terms “groundwater” and “surface water” and where does one begin and the other end? Very little attention has been given to the hydrologic cycle and the impact that withdrawal of groundwater has upon base flows in our rivers and streams and the environment.

### A. Recent Legislative Changes

In 1995, the legislature enacted groundwater legislation which provided a new definition of “terms” as we deal with ground and surface water issues. Some of these laws were later revised

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<sup>5</sup> See, Texas Water Code § 11.147.

by Senate Bill 1 in 1997, now Texas Water Code, §35.002(5), (6), and (7), provides as follows:

(5) “Groundwater” means *water percolating below the surface of the earth*.

(6) “Groundwater reservoir” means a specific subsurface water-bearing reservoir having ascertainable boundaries containing groundwater.

(7) “Subdivision of a groundwater reservoir” means a definable part of a groundwater reservoir in which the groundwater supply will not be appreciably affected by withdrawing water from any other part of the reservoir, as indicated by known geological and hydrological conditions and relationship and unforeseeable economic development at the time the subdivision is designated or altered.

These provisions could provide a basis for formulating future water policy as to the interface of ground and surface water law.

Also, the legislature in 1995 made it clear that surface water law does not apply to groundwater, *Texas Water Code* §35.003 provides “the laws and administrative rules relating to the use of surface water do not apply to groundwater.”

It is important to note that the legislature in these definitions is applying geological and hydrological conditions based on science. In the definition of “groundwater” seems to narrow the definition of groundwater to “water percolating below the surface of the earth.” This may be a definable hydrologic term suggesting that “percolating water” is “defused percolating water” as described by the Court in *Kickapoo*, and all other water would be “surface water” or some other category. If so, if supported by hydrological evidence, this could undermined cases as the *Comanche Springs case* and the *Kickapoo land case* where a defined channel was required in differentiating the water, and where the Court held that even if it could be in a channel that the “source” of the water was “percolating water.” This Water Code provision now suggests that once water is no longer “percolating below the surface of the earth,” and is no longer “defused” and begins its course to a spring, creek, or river then it is no longer “percolating water” and thus, surface water or some other category but not groundwater as defined in §35.002(5).

Senate Bill 1 also added other important provisions to the Texas Water Code in this respect. Section 36.113 was revised so as to add §36.113(d)(2) which provides that underground water districts in granting well permits or permit amendments shall consider whether “(2) the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders.”

Senate Bill 1 likewise added §11.151 which provides that the TCEQ in considering an application “for a permit to store, take, or divert surface water, the Commission shall consider the effects, if any, on groundwater or groundwater recharge.”

Taking these revisions into account could formulate the grounds for transition of law from the English common rule of capture which has been abandoned in all states except Texas to the

“American” rule applied in many other states, or the “correlative right rule” applied in California or the *Restatement of Torts* rule discussed below.

This brings us to the most current case on the subject matter decided by the Court in 1999.

**B. *Sipriano v. Great Spring Waters of America, Inc.***

In *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex.S.Ct. 1999), the Court had before it a direct challenge to the English common rule of capture. The Court deferred “at this time” to change the common law rule of capture while confirming its prior statement in the *City of Corpus Christi* case that the 1917 Constitutional Amendment imposed on the legislature the duty to regulate groundwater.

The Court extensively reviewed most all of the cases discussed above and others, but it decided to “. . . save for another day the determination of whether further revising the common law is an appropriate prerequisite to preserve Texas’s natural resources and protect property owners’ interests.” 1 S.W.3d 75, at 80. It did so while affirming that the Court does not “shy away from change when it is appropriate.” 1 S.W.3d 75, at 80.

It is important to note in this respect that Justice Hecht joined by Justice O’Neill in a concurring opinion agreed with Justice Wilson’s dissent in the *City of Corpus Christi* case discussed above that the public policy foundation of the *East* case is no longer valid. Justice Hecht stated:

The Court in *East* gave two reasons for adopting the rule of capture: (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible. (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.

Neither remains valid. 1 S.W.3d 75, at 82.

It is also interesting to note that Justice Hecht in his concurring opinion also referred to *Restatement (Second) of Torts*, § 858 (1979) as being “. . . preferable to the rule of capture.” (1 S.W.3d 75, at 83). These provisions of the *Restatement of Torts* sets out when there is liability by a groundwater user in drilling a well which affect other water users. It refers to impact on surface water users as follows:

Liability for use of groundwater

(1) a proprietor of land or his grantee who withdraws groundwater from the land and uses it for a beneficial use is not subject to liability for interference with the

use of water by another, unless . . . (c) the withdrawal of the groundwater has a direct and substantial effect upon a water course or lake and unreasonably causes harm to a person entitled to the use of its water.

This is a significant observation because the writers of the *Restatement of Torts* have been dealing with these issues for many years, and many other states have either wholly or partially adopted the approach of the *Restatement*.

The issue of reconciliation of our ground and surface water laws in recognizing the hydrologic connection between the two is very important to water planning for the future in Texas. Especially when coupled with the realization that there is a “finite” amount of water in the hydrologic cycle available for use by water users and the environment. Though “conjunctive use” may be a viable water management strategy in some areas it may be that by using groundwater on the one hand may dry up our rivers on the other hand. We don’t want to “rob Peter to pay Paul.”

We have other sources of water that are recommended in some planning regions which includes desalinization or the reverse osmosis of salt or brackish water, which is also a part of the hydrologic cycle but used to provide fresh water, and provides a new “source of supply.” All of these issues are of concern to water planners, realizing the importance of surface waters to the environment. For example, the Chairman of the Texas Parks and Wildlife Department recently noted in a communication to the Executive Administration of the Texas Water Development Board its concern in this respect as follows:

Streamflows throughout Texas are supported by groundwater discharge. Historical groundwater discharge is difficult to estimate, but as groundwater resources are more fully developed, it is reasonable to expect that the groundwater contribution to surface water flows will decrease. **TPWD recommends** that the Groundwater Availability Models (GAMs) be used to characterize the importance of springs and the significance of groundwater-surface water interactions and to provide an estimate of future decreases in aquifer discharges to surface waters. In addition, **TPWD recommends** that these decreases be incorporated into the WAM.<sup>6</sup>

Thus, it is important for the Courts and the Legislature to recognize the hydrologic cycle of water. The connection between groundwater and surface water is natural and must be recognized to better manage our water resources to meet existing agricultural, municipal, industrial needs and environmental needs as well as the growth in need that is expected in the future.

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<sup>6</sup> Letter dated February 17, 2006, from Larry D. McKinney, Ph.D., Director of Coastal Fisheries, Texas Parks and Wildlife, Austin, Texas, to Kevin Ward, Executive Administrator, Texas Water Development Board discussing “Input Regarding Improvements to Regional Water Planning Process.”

### III. EXPERIENCE IN OTHER STATES

In addressing this issue it is sometimes good to visit the efforts of other areas and states as to how they are dealing with the issues involved.

All but Texas have long ago abandoned the English common law rule of capture and have reached the next level of water law and water resources development and planning in dealing with conjunctive use and management of our total water resources, which includes both ground and surface water, in a holistic manner.

A most recent case in the state of Nebraska deals with this very issue in *Spear T. Ranch, Inc. v. Knaub, et. al.*, 269 Neb. 177, 691 (N.W.2d 116, 2005).

#### A. The Nebraska Solution

The Nebraska Supreme Court in several allied cases had to deal with this issue in the *Spear T. Ranch cases* in presenting the competing interests for water between ground and surface water users. *Spear T. Ranch* brought an action against groundwater users to recover for interference with its prior appropriation surface water rights to creek water on the tort law theories of conversion and trespass. The legal regimes in the State of Nebraska is similar to the current legal regime between ground and surface water in Texas. The Nebraska Department of Natural Resources (NDNR) controls and manages surface water under the prior appropriation doctrine. The State Legislature delegated the authority to regulate groundwater, including hydrologically connected groundwater, to regional natural resources districts.

The system of irrigation in Nebraska has its foundation in statutory enactments and constitutional provisions similar to the State of Texas. *See, In re: Complaint of Central Neb. Pub. Power*, 270 Neb. 108, 166-117, 699 N.W.2d 372, 377-78 (2005), where the Nebraska Supreme Court held that the NDNR had no independent authority to regulate groundwater users or administer groundwater rights for the benefit of surface water appropriators (similar to Texas Water Code § 35.003). In *Spear T. Ranch, Inc., v. The Nebraska Department of Natural Resources*, 270 Neb. 130, 699 N.W.2d 379, the Court held that the NDNR had no common law or statutory duty to regulate the use of groundwater in order to protect *Spear T's* surface water appropriations. Six months earlier in *Spear T Ranch, Inc. v. Knaub*, the Court held that the legislative agency charged with managing surface water right had no common law duty or authority to regulate groundwater, and that the regional water districts' (groundwater) only authority was to regulate groundwater and not to protect the rights of each source. This left it up to the Court to face up to this issue in this common law action between the appropriators of a surface water right and ground water right users.

There is a distinction between the water law in Nebraska and Texas with respect to groundwater in that its courts had previously adopted as common law the "American" rule as opposed to the "English law" rule of capture. As the Nebraska Court indicated, Texas stands out uniquely in the

U.S. recognizing the more strict English rule of capture citing the *Sipriano case*, 269 Neb. 177 at p. 187. The Court recognized that, hydrologically, ground and surface water are intricably and inextricably related.

Groundwater pumping can cause diminished stream flows. Stream flow can support the potential for subirrigation. Seepage from surface water supply canals, and deep percolation of applied irrigation water from surface projects can recharge groundwater aquifers . . . “all water is interrelated and interdependent. If groundwater were red, most streams would be various shades of pink; if groundwater were poisoned, the streams would also be poisoned.” 269 Neb. 177 at p. 183.

The Court describes Nebraska water law as follows:

. . . Nebraska water law ignores the hydrological fact that groundwater and surface water are inextricable linked. Instead of an integrated system, we have two separate systems, one allocating stream flows and the other allocating groundwater. Under constitutional and statutory provisions, stream flows are allocated by priority in time. (Citing authorities). Groundwater, in contrast, is governed by common law rule of reasonableness . . . and the statutorily created regional water districts) . . . moreover, the lack of an integrated system is reinforced by the fact that different agencies regulate groundwater and surface water. The Department of Natural Resources regulates surface water appropriations. (Citing statutory authority). In contrast, under . . . groundwater statutes) groundwater is statutorily regulated by each (regional) natural resources district . . . 269 Neb. 177, at 184.

The Court notes that: “. . . the tension between the two systems has long been recognized by commentators. . . . ‘Ground and stream diverters in Nebraska are on a collision course which may occur sooner than most people think’ that day has arrived.” 269 Neb. 177, at p. 184.

In discussing the English and American rule the Court notes that an extreme minority of jurisdictions still adhere to the English rule or rule that has the same effect as the English rule citing *Maddocks v. Jiles*, 728 A.2d 150 (Me. 1999); and *Sipriano v. Great Springs Waters of America*, 1 S.W3d 75 (Tex. 1999). The Court noted that these jurisdictions refuse to apply to groundwater the rules applicable to surface water, and treat groundwater as an entirely separate and unconnected resource that may be used at will by the owner of the overlying land. The Nebraska Court notes that the Courts in each of these two cases recognized the problems with the reasoning behind the English rule, but in Maine in the *Maddocks case* the Court deferred to the Legislature as did the Texas Court in *Sipriano*.

The Court notes that the California Courts recognized in *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663 (1902) the “correlative rights” rule. Under the common law correlative rights rule overlying landowners have no proprietary interest in the water under their land, and each owner over a



common pool has a correlative right to make a beneficial use of the water on his or her land, but subject to the rights of other water users. There is a difficulty with the correlative rights rule in how to allocate water in times of shortage. The Courts interpret the correlative rights rules as essentially the same as that contained in the *Restatement of Torts, Maddocks v. Jiles*, 728 A.2d 150 (Me. 1999). While others view the rule as providing apportionment in times only when there is insufficient supply for all users. *See, State v. Michaels Pipeline Construction, Inc.*, 63 Wis.2d 278, 217 N.W.2d 339 (1974).

In its extensive consideration of the English and American rules and the correlative rights rules, the Nebraska Supreme Court reviewed the approach of the *Restatement (Second) of Torts*, §858 (1979), which the Nebraska Court ultimately applies in this case and noted that it had been adopted in several states including Ohio and Michigan.

The *Restatement of the Law - Torts* (1979) states as follows:

§ 858. Liability for Use of Ground Water

(1) A proprietor of land or his grantee who withdraws water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, *unless*

(a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,

(b) the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water, or

(c) *the withdrawal of the ground water has a direct or substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.* (emphasis added)

The Court held, after finding that the statutory laws in Nebraska had not abrogated a common law claim by a surface water user against a groundwater user with the respect to necessary and indispensable parties, and that the plaintiff need not join all tortfeasors as party defendant in an action for damages, that each joint tortfeasor is liable for all damages to which he or her conduct has contributed and it is no defense that these damages would not have occurred without the concurring misconduct of another person, citing *Restatement (Second) of Torts*, §§858 and 850A, which deals with disputes between users of hydrologically connected groundwater and surface water.

The Court reversed and remanded the case for further proceedings allowing the plaintiff to replead his common law action in trespass and conversion in terms of the *Restatement of the Law - Torts* principles.

In summary, the Nebraska Court adopted the *Restatement* rule in disputes between ground and surface water users, which applies a correlative right approach to such cases.

## B. The Montana Situation

Montana's surface and groundwater water claims remain largely unadjudicated and unquantified. The State has pursued quantification of water right claims through adjudication since 1982, but is crawling at a snail's pace. It will be several years before all rights are quantified. Thus, the extent of valid water claims on Montana's water resources is unknown. However, it is generally accepted that in many of its basins surface water is fully appropriated and very likely over-appropriated. *The Water Report, Water Rights - Water Quality and Water Solutions in the West*, Issue No. 19 (September 15, 2005, p. 15).

In the late 1980s and early 1990s the Montana Legislature, acknowledging the over-appropriation of its rivers, enacted a series of basin-closure laws that place a moratorium, with some exceptions, on the processing or granting of new appropriation requests in specific regions of the State. See, for example, *Mont. Code Ann.* § 85-2-342-343 (Upper Missouri River Basin). These moratoriums are in place until rights are finally adjudicated. This approach is more of a river basin by river basin structure of water law. In Montana, a single agency manages both ground and surface water.

Under the Upper Missouri River Basin Closure statute mentioned above, *groundwater* is defined as “. . . water that is beneath the land surface, or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not *immediately or directly connected to surface water.*” *Mont. Code Ann.* §85-2-342(2) (emphasis added). This means that the Montana Department of Natural Resources and Conservation (MDNRC) will not even process an application for groundwater that is “immediately or directly connected to surface water.” Unfortunately, the terms “immediately or directly” are not hydrologic terms. The MDNRC in implementing the basin -closure statute is in the midst of interpreting what the legislature intended by this phrase “not immediately or directly connected to surface water” and this is a source of recent controversy and is subject to pending legal challenges in the Montana courts.

It is reported that it is documented by a series of departmental memos that the MDNRC has determined that groundwater is “immediately or directly” connected to surface water only if groundwater pumping pulls surface water into the aquifer, or “induces surface water infiltration.” Under this interpretation, even if a well captures groundwater that would otherwise discharge into a stream, it is not “immediately or directly” connected to surface water, and the MDNRC is currently processing the Applications for well water permits. This has resulted in a situation where surface water right holders are relegated to contesting each Application for water wells.

In the Smith River Basin, an environmental assessment on pending Applications revealed that the Smith River was a gaining stream that is hydrologically connected to groundwater and concluded that if new wells were permitted, they would reduce surface flows by an estimated 37 percent of the pumped volume in the first year with reductions in surface flows continuing to escalate over time. After 10 years of pumping, stream flows would be reduced by 80 percent of the volume pumped, and after 80 years flow would be reduced by 100 percent of the volume pumped. This was borne out in 2001, when portions of the River dried up, *The Water Report*, Issue 19

(September 15, 2005). This resulted in a suit filed in 2003 by several surface water right holders, some fishing interests, and Montana Trout Unlimited, in District Court, challenging the MDNRC's interpretation of the statute. The District Court held that the agencies interpretation was within its discretion, and also ruled on procedural grounds that the plaintiffs had failed to exhaust their administrative remedies. The case is currently pending before the Montana Supreme Court in *Montana Trout Unlimited, et. al. v. Montana Department of Natural Resources and Conservation*, Case No. 05-069.

#### **IV. CONCLUSION**

Obviously, the interrelationship between ground and surface water is an emerging issue in many States. The fact that all surface water rights have now been adjudicated and quantified in Texas places Texas ahead of Montana, even though Montana has a single State agency managing both ground and surface water. In Nebraska, the issue is similar to Texas, except its common law was the American rule of reasonable use. In Nebraska the Courts have entered into the determination of these issues based upon common law tort law, whereas Montana is addressing the issue through its Administrative water agency. This shows various options that may be considered along with other variations fitting the legal, political and hydrological circumstances that are present that are being pursued in dealing with this issue.