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While oil and water do not mix, they share a common trait. Both are subject to the Texas rule of capture (see "Who Owns Groundwater?," Center reprint 1377). Because of this, oil and gas controversies resolved by Texas courts may set precedents for similar cases involving water. One pertinent issue involves ownership of water stored underground.

San Antonio plans to purchase, transport and store water in an aquifer south of the city. The stored water will be tapped when needed. Pipeline companies do something similar with natural gas supplies. They transport and store the gas near large cities in underground cavities such as salt domes and depleted gas fields to meet peak demands during the winter.

But what happens if a landowner taps the water or gas reserve before the city or pipeline companies reclaim it? Does the rule of capture give ownership to the landowner?

The rule of capture originated in the common law of England. The courts compared underground liquids and gas to wild animals that roam across the surface. Wild birds and animals belong to no one until killed or captured, according to the rules of the state. This concept is sometimes referred to as *ferae naturae* or free in nature.

But what happens if the captured wild bird or animal escapes or is released? Does it again become free

in nature and subject to the rule of capture? The defendant applied this argument in *Lone Star Co. v. Murchison*, 353 S.W. 2d 870.

In this case, Lone Star Gas used the Tri-City Bacon Lime Field in Henderson County, an exhausted gas field, to store gas for the winter peak demand period. Lone Star purchased all the wells in the field to gain sole control of the injection and extraction of the gas.

A small portion of the field extended beneath land owned by the Jacksons. The Jackson tract was not under lease and contained no oil and gas wells.

In 1958, Murchison leased the Jackson tract for oil and gas exploration and production. Subsequently, Murchison drilled a well that tapped Lone Star's gas reserve. Murchison produced and sold the gas until Lone Star discovered the plunder. It sued Murchison for \$37,000, the value of the lost gas, and sought an injunction to end the drainage.

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At trial, Murchison successfully argued the rule of capture bestowed ownership on him by citing a similar 1934 Kentucky case, *Hammonds v. Central Kentucky Natural Gas Co.*, 75 S.W. 2d 204. The Kentucky court ruled that when produced gas is restored to its natural habitat by injection into a subterranean chamber it regains its status as free in nature and is again subject to the rule of capture.

On appeal, the Dallas Court of Appeals disagreed by quoting several distinguished authors on the subject. Basically, the court held that the comparison of oil and gas to wild birds and animals is not scientifically sound. Although it did not overturn the rule of capture, the court limited the doctrine to the *first or original capture*. It ruled that title to natural gas, once produced, becomes personal property and is not lost by subsequent injection into a natural underground reservoir.

Quoting from another case, the court concluded that the "free in nature" concept applies on first capture because the gas can be compared to a free-roaming wild animal. After first capture, however, the gas is more accurately likened to a domestic animal. If a horse strays onto a neighbor's land, the neighbor may be entitled to damages but does not by virtue of the trespass acquire title to the horse.

Thus, if San Antonio stores the water in an underground aquifer for

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Who Owns It?**

By Judon Fambrough

future use, the water belongs to San Antonio even if an adjoining landowner taps it.

The *Murchison* case left some questions unanswered. The storage field chosen by Lone Star was completely devoid of natural gas. How would the courts have ruled had the reservoir contained both unproduced and injected gas? Would the courts have apportioned the produc-

tion according to the amount of each in the formation at the time of production or followed the last-in-first-out method?

Oil companies often stimulate production by pumping massive amounts of crude oil under pressure into the ground. In these cases, oil companies reclaim their original oil and pay royalties only after all their oil is recovered. No case precedents support this practice.

The courts may answer the question of allocation if confronted with the issue of ownership of water stored underground in the future. ♣

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