

## Chapter 2

# What Should Texas Do About the Rule of Capture?

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### Introduction

There is increasing dissatisfaction in Texas with the groundwater rule of capture. Nearly all other states abandoned it long ago.

What are the merits and demerits of the rule of capture? All that can be said in favor of the rule of capture is that it leaves the market free to allocate water to uses regarded by the market as most valuable. In the short run, the rule of capture may accomplish this objective, but eventually its lack of restraint leads to diminishing, and eventual depletion, of the available supply of aquifers. In other words, some enterprises using groundwater shift some of their costs to others.

The rule of capture not only threatens the supply of water in Texas, but also deprives Texas landowners of rights they might otherwise have. They have no legal remedy for dewatering of their wells by others.

However, one criticism of the rule of capture is groundless. Some have asserted that the rule of capture is a serious obstacle to effective groundwater management. It is true, of course, that Texas courts are not managing groundwater, but the Texas Legislature is. Also, the Supreme Court of Texas has been supportive of groundwater management by the Texas Legislature.

A court can do nothing until a case comes to it. And in those cases, courts are generally constrained by the pleadings and precedent. A perfect legislative groundwater program would prevent cases that call for application of judicial groundwater doctrines from reaching the courts. But perfection is elusive. When a Texas groundwater case involving an issue not addressed by legislature comes to the Supreme Court of Texas, it seems that the court should undertake to fill the gap, unless there are sound reasons not to do so in the case presented.

### Alternatives to the Rule of Capture

If the Supreme Court of Texas decides to reconsider its position on the rule of capture, what should replace it? Presumably, the court would consider: (1) the reasonable use doctrine, (2) the correlative rights doctrine, and (3) the Restatement (Second) of Torts §858. The court would not

consider the prior appropriation, since in Texas that doctrine is a creature of the Legislature. The Legislature, not the court, would decide whether to extend prior appropriation to groundwater.

## Reasonable Use

The reasonable use doctrine provides judicial remedies for landowners whose reasonable use of groundwater is harmed by unreasonable use by others. Any use on any land other than the tract where the well is situated is categorically classified as unreasonable, no matter how beneficial it may be. Why? A conceptual explanation is that the on-tract limitation follows from the fact that land ownership is the source of the water right. The on-tract limitation is also an aspect of the law of riparian rights. A policy reason for the on-tract limitation is that it tends to prevent excessive use of water. The Texas Court of Civil Appeals in the *East* case<sup>1</sup> applied the reasonable use doctrine. The court ruled that since the railroad's use of water was not on the well-site tract, it was unreasonable. The court did not consider the importance of railroad use of water or the availability of other well-sites for the railroad. Nor did it consider the availability of other water supplies for Mr. East. Although the railroad would have lost the case if the judgment of the Court of Civil Appeals had been affirmed, the railroad would have suffered very little. It would not have been required to discontinue or modify pumping of its well. The railroad was required only to pay Mr. East less than \$300.00.

Suppose that Mr. East's well had been dewatered by a nearby well used to supply huge amounts of water for a catfish farm on the well-site tract. Would the courts, applying the reasonable use doctrine, have held the catfish farm owner liable for unreasonably harming Mr. East? Not according to the Supreme Court of Alabama.<sup>2</sup> That court considered only whether catfish farming, viewed independently, is a reasonable use of water. The court did not consider the impact of that use on nearby small irrigators. The Alabama court expressly rejected the balancing approach applied in nuisance cases. Regrettably, this decision is typical.

The Supreme Court of Texas should not adopt this reasonable use doctrine.

## Correlative Rights

One year before the Texas Supreme Court decided *East*, the Supreme Court of California announced that each landowner is entitled to a "fair and just" proportion of the supply of groundwater.<sup>3</sup> This right extends only to the quantity of water that is necessary for use on one's land. The surplus is available for appropriation by others. Those appropriators may use water for off-tract uses, but their rights are subordinate to correlative rights for on-tract uses. Thus, both the reasonable use doctrine and the correlative rights doctrine have an on-tract limitation. This is an undesirable obstacle to free market transfers of groundwater.

Another negative feature of the California correlative rights doctrine is the difficulty of ascertaining "fair and just" shares. Litigation is necessary, and those determinations may be

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<sup>1</sup> 77 S.W. 646 (Tex. Civ. App. 1903)

<sup>2</sup> *Adams v. Lang*, 553 So.2d 89 (Ala. 1989).

<sup>3</sup> *Katz v. Walkinshaw*, 74 P. 766 (Cal. 1903).

modified in subsequent litigation involving claims not litigated in earlier lawsuits. Also, landowners may decide to exercise their rights at anytime, forcing the scaling down of existing adjudicated shares. The destabilizing impact of unexercised correlative rights is the same problem Texas had with unexercised riparian rights prior to implementation of the Water Adjudication Act of 1967.

There is also the problem of choice of criteria for defining “fair and just” shares. A relatively easy criterion is the number of acres owned by each litigant overlying an aquifer. But this fails to take into consideration other relevant factors. One such factor is the suitability of the land for various uses of water. In areas where irrigation is a major use of water, irrigable acreage of a tract may be a better criterion than total acreage. What would be the fair share of an industrial plant on a small tract in an irrigated area? Another factor, in addition to variations in land use, is variations in the nature of the aquifer. California courts consider such factors. A recent decision by the Supreme Court of California demonstrates, however, that flexibility has its limits.<sup>4</sup> This was a complex lawsuit requiring adjudication of the groundwater rights of over 1,000 parties. Most of the parties agreed to a settlement. The trial court applied the settlement to all parties, including those who had not agreed to it, on the ground that it was equitable to do so. The Supreme Court reversed, holding that parties who had not agreed to the settlement could not be bound by it, even if it was equitable. This result makes adjudication of complex multi-party correlative rights suits very difficult to resolve. These suits are sometimes lengthy and costly.

## **Restatement (Second) of Torts §858**

A third judicial doctrine for groundwater is that found in the American Law Institutes Restatement (Second) of Torts at §858. The Institute is a prestigious body of lawyers, judges, and law professors who undertake to state concisely the best aspects of fields of American state laws. The Restatements are not model laws.

For groundwater, the Restatement adopts some aspects of both the reasonable use and correlative rights doctrines, but discards others. The traditional preference for on-tract uses is discarded. Reasonableness of uses of litigants is determined by comparing the reasonableness of their uses. Many factors are deemed relevant, including economic and social values.

Liability is imposed for withdrawal of groundwater that exceeds one’s “reasonable share” of the annual supply or total store of groundwater. “Reasonable shares” are to be determined on a case-to-case basis. “Rigid acreage formula” are not endorsed.

Still another significant departure from traditional doctrine is the Restatement’s imposition of liability for pumping groundwater that has a harmful “direct and substantial” impact that unreasonably harms holders of rights in streams or lakes. Most courts<sup>5</sup> have refused to do this unless the defendant’s pumping is from an underground stream or from the subflow of a surface watercourse. It is almost impossible to prove the existence of an underground stream. Subflow has usually been defined by courts as water in soil under or “immediately adjacent” to a stream. A well located a few feet from a stream is probably drawing water from the subflow, which is

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<sup>4</sup> *City of Barstow v. Mojave Water Agency*, 5 P.3d 853 (Cal. 2000).

<sup>5</sup> But not all. *Collens v. New Canaan Water Company*, 234 A.2d 825 (Conn. 1967).

deemed by courts to be part of the stream and subject to laws applicable to streams. The Supreme Court of Arizona, however, focusing on physical reality, broadened that definition so as to include much of a flood plain.<sup>6</sup>

According to the Restatement, the fact that separate water rights systems are applied by a state to surface water and groundwater is not a sufficient reason to bar liability for tortious harm to holders of water rights in streams. If the stream rights are only riparian rights, the similarity of riparian rights and the Restatement's reasonable use groundwater rights doctrine makes it feasible to resolve conflicts between surface and groundwater rights. It seems more difficult to resolve such conflicts if the surface water rights are prior appropriation. Despite this, the Restatement does not exclude non-riparian water rights from its coordination provision.

Although this provision of the Restatement imposes liability only to owners of water rights, environmental and other interests are incidental beneficiaries.

## **How Useful Are Judicial Groundwater Doctrines?**

All of these doctrines are property and tort law doctrines. They are not groundwater management laws, although they affect the way groundwater resources are utilized.

Let us consider briefly the relevance of judicial doctrine to significant groundwater problems.

### **Well Interference**

The Restatement deals adequately with well interference conflicts, but does nothing to prevent their occurrence. The Texas Legislature could do this by requiring that districts permit no new or enlarged wells absent proof that they are not likely to interfere with other wells. For wells outside districts, as in *Sipriano*,<sup>7</sup> similar permits from a state agency could be required.

### **Quantification**

Quantification of groundwater rights is helpful, if not essential, to effective marketing of groundwater. That is attempted by the California correlative rights doctrine, but it has been difficult to apply. Quantification has been achieved in the Edwards Aquifer by issuing permits for specific amounts of water, based on historic use, and by capping total aquifer pumping. This could be done for other aquifers.

Another alternative solution to the quantification problem would be legislative conversion of landowners' groundwater rights to appropriative rights, as the legislature has already done for landowners' riparian rights.

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<sup>6</sup> In re Gila River System, 9 P.3d 1069 (Ariz. 2000).

<sup>7</sup> *Sipriano v. Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999).

## **Overuse**

None of the judicial doctrines addresses adequately the critical problem of overuse of aquifers. The Texas Legislature can extend the useful life of aquifers by limiting total pumping.

## **Unprotected Interests**

All of the judicial doctrines expressly protect only persons with water rights, principally landowners. Economic and social interests are only “considered” by the Restatement in determining the reasonableness of uses by holders of water rights. Environmental, recreational, community, and other interests must look to the Legislature for protection. Interests of communities in impacts of transportation of groundwater from one region to another can be fairly balanced only at the state level by impartial officials. Interbasin transfers of surface water pose the same problem.

## **Groundwater—Surface Water Conflicts**

The Restatement provision imposing liability for pumping that has a harmful “direct and substantial” impact on holders of water rights in streams and lakes is helpful, but does not go far enough. It does not prevent harmful non-tortious pumping. When there are a multitude of pumpers, it is extremely difficult, if not impossible, to identify anyone whose pumping has a “direct and substantial” effect on a surface watercourse. The Texas Legislature could handle this by requiring districts to withhold permits to pump if additional pumping would harm surface water rights and interests.

## **Conclusion**

Substituting another judicial doctrine for the rule of capture would help Texas address some groundwater problems, but would help hardly at all in meeting the most serious groundwater problems confronting Texas.

What should the Supreme Court of Texas do about the rule of capture? It should not replace the rule of capture with either the traditional reasonable use doctrine or the California correlative rights doctrine. It should apply the Restatement (Second) of Torts §858. This would not interfere with legislative groundwater management. Conflicts would be resolved in favor of the statutes. The role of the Supreme Court of Texas would thus be limited to filling gaps in the statutes.

An issue related to the rule of capture, but not restricted to it, concerns the question whether any or all of these judicial doctrines establishes in the landowner ownership of the groundwater in place or merely the right to withdraw it. The first alternative probably accords with the understanding of landowners, but the second alternative accords with the physical nature of groundwater. Unlike oil, groundwater typically is in motion. Water that is beneath one’s land today may not be there next month or next year. What practical difference does it make? Possibly none. The issue should not affect the outcome of a suit for redress for dewatering a well. Nor should it affect the scope of governmental power to regulate groundwater, though it

might conceivably affect cases seeking compensation for regulations that constitute takings. The latter possibility is due to the position of the United States Supreme Court that a regulation of property is not likely to be a taking unless the plaintiff has been deprived of its entire property interest. Definition of the present interest is thus important for this purpose in theory. As a practical matter, however, both types of interests in groundwater would seem to have the same value. Terminology of conveyances of interests in groundwater would be affected by the choice of theory, but conveyancers could adapt to either theory. In short, the choice of the competing theories may not be very important. I recognize, however, that court decisions and lawyers are not in agreement on this issue.

What should the Texas Legislature do about the rule of capture? It could enact a statute declaring that the rule of capture for groundwater is replaced by one of the judicial alternatives, preferably the Restatement (Second) of Torts §858. The courts would apply it.

In lieu of enacting such a statute, the Texas Legislature might prefer to incorporate in a regulatory statute certain policies of judicial doctrines, as the Oklahoma Legislature has done.<sup>8</sup> Oklahoma's groundwater statute incorporates aspects of both reasonable use and correlative rights doctrines. It directs the state water agency to determine the maximum annual yield for groundwater "basins and subbasins" and to allocate that amount to overlying landowners on a per acre basis. These determinations are adjudicated. Landowners must obtain permits from the state agency before pumping. Permits are granted only if the state agency determines, among other things, that the proposed use is "beneficial." Historic use is protected, apparently even if to do so would exceed the per acre allocation.

This Oklahoma statute avoids some weaknesses of the California correlative rights doctrine, particularly the latter's on-tract restrictions and lack of aquifer caps, but it is less desirable in that its determination of shares is simplistic. The Oklahoma statute also enables landowners to hoard groundwater, which is contrary to the policy of Texas statutes limiting riparian rights to historic uses and requiring forfeiture of unused appropriative right. That policy is that non-use of water is waste.

Texas groundwater districts should not be authorized to choose a groundwater rights system. The reason is the likelihood that board members will have conflicts of interest.

The Texas Legislature could ignore the rule of capture, and continue on its present course of addressing directly groundwater problems. This might be the best alternative. The legislature has a variety of regulatory tools to address groundwater problems. Probably the most significant is the requirement that all pumping of significant volumes of water be allowed only by permits, granted only upon a showing that certain policies will be observed, and conditioned upon adherence to those policies. The Legislature has already done this for appropriation of water in surface water courses. It also has required such permits for some districts, notably the Edwards Aquifer Authority and the Harris-Galveston Coastal Subsidence District. In addition, the Legislature has capped total withdrawals from the Edwards Aquifer.

Legislative extension of the prior appropriation system to groundwater would be helpful to some extent. Groundwater rights would be quantified and integrated with surface water rights. Historic

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<sup>8</sup> Okla. Stat. Ann. Title 82, §1020.

use would be preserved. Excess water would be allocated to permittees who meet the requirements. An applicant would be required to establish, among other things, that appropriated water is available, that the proposed use is beneficial, that existing water rights will not be impaired, that the public welfare will not be harmed, that impacts upon water quality and environmental interests are considered, that the state water plan and regional plans will be observed, and that reasonable diligence will be used to avoid waste and achieve water conservation.

There are reasons for not extending prior appropriation to groundwater. The first-in-time, first-in-right preference would give the best priorities to shallow low capacity wells. This could result in under use of aquifers. Some western states have modified prior appropriation by requiring that wells be able to reach reasonable depths. There is also the general criticism that temporal priority is not as fair as other priority systems, such as proportional sharing of declining water supplies, or awarding priorities on the basis of the relative importance of uses. Finally, in Texas, extending prior appropriation to groundwater would require considerable restructuring of groundwater district law.

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