

## Chapter 4

# The Rule of Capture – “*If It Ain’t Broke . . . .*”

Douglas G. Caroom and Susan M. Maxwell  
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, LLP

We agree that some aspects of the English or common law rule as to underground waters are harsh and outmoded, and the rule has been severely criticized since its reaffirmation by this Court in 1955. Most of the critics, however, recognize that it has become an established rule of property law in this State, under which many citizens own land and water rights. The rule has been relied upon by thousands of farmers, industries, and municipalities in purchasing and developing vast tracts of land overlying aquifers of underground water.

– *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21, 28-29 (Tex. 1978).

To imply now that the rule of capture has not been addressed by the Legislature is inaccurate and overlooks a comprehensive water plan in which groundwater districts and regulation of groundwater pumping are an integral part. It is also a disservice to the individuals who so willingly serve on the groundwater district boards.

– J. E. ‘Buster’ Brown, *Legislature long ago addressed state’s water issues*, AUSTIN AMERICAN-STATESMAN, Jan. 26, 2004.

## Introduction

For 100 years, the legislature has had a standing invitation from the Texas judiciary to exercise its constitutional authority and modify the rule of capture if it believes that such an action would be in the best interests of the people of Texas.<sup>1</sup> For 100 years, the legislature has declined that invitation. Now, as the 79<sup>th</sup> Legislature approaches it is considering taking some further action regarding state policy and local management of groundwater resources. Among the study issues outlined in the first interim charge of the newly created Senate Select Committee on Water Policy are the rule of capture and the role of groundwater conservation districts.<sup>2</sup>

The rule of capture was adopted in Texas a century ago to provide a standard for resolving conflicts between adjoining property owners. Since then, as noted by the Texas Supreme Court in *Friendswood*, it has been relied upon by property owners and water suppliers throughout the state in making investments, acquiring property and planning water supplies for the future. In the authors’ opinion, abandoning the rule now is unnecessary. The vast majority of Texas’

groundwater resources are subject to regulation by groundwater conservation districts (GCDs) in which the rule of capture does not operate on an unrestrained basis.

Commentators are fond of bemoaning the harsh results produced by the rule of capture and characterizing Texas' status as "the last state still using the rule of capture" as an embarrassment. In so doing, they are wrong on both counts. Texas is not the only remaining state adhering to the rule of capture, in spite of statements by courts<sup>3</sup> and commentators to the contrary.<sup>4</sup> Several other states recognize the common law rule as their rule of groundwater ownership, although exceptions and limitations may have been applied to the rule, as in Texas. The states whose current groundwater regimes most closely resemble Texas' include Indiana, Louisiana, and Maine.<sup>5</sup> Like the Texas Supreme Court in *Sipriano*, the Supreme Judicial Court of Maine has recently declined an invitation to "depart from the common law absolute dominion rule" (in that case, to adopt the groundwater use rules set forth in the Restatement (Second) of Torts § 858). The reasoning of the Maine court, in response to an argument that the common law rule is based upon faulty science, echoes the current debate in Texas:

We decline to abandon the absolute dominion rule. First, we are not convinced that the absolute dominion rule is the wrong rule for Maine. . . . Although modern science has enlightened our knowledge of groundwater, this does not mean that the rule itself has interfered with water use or has caused the development of unwise water policy. . . . Furthermore, for over a century landowners in Maine have relied on the absolute dominion rule. In the absence of reliable information that the absolute dominion rule is counterproductive and a hindrance to achieving justice, we will not depart from our prior decisions.<sup>6</sup>

Commentators' schemes for classifying states' groundwater laws vary; however, there are a number of other states that continue to rely on a modified version of the common law rule of capture or absolute ownership for at least some of their groundwater resources. These include Connecticut, Georgia, Mississippi, and Maryland.<sup>7</sup> Other states, namely Rhode Island and Massachusetts, have been recognized as following the rule of absolute ownership, though their most recent court decisions have not squarely addressed the issue of groundwater *ownership*.<sup>8</sup> Texas is comparable. Most of its groundwater production is not under an unmodified rule of capture because most of it is within groundwater conservation districts.

The fundamental purposes of the *East* court in adopting the rule of capture were to provide the certainty necessary to support the investment of capital and economic development in Texas and to provide a clear rule for resolution of conflicts between property owners.<sup>9</sup> The rule of capture, as it has been implemented by the courts of Texas, fulfills these purposes admirably. Moreover, the harsh results feared by many have been infrequent in the past and are becoming less and less likely in the future. The reason for this is the availability of groundwater conservation districts that can be formed on a local option basis and provide a ready remedy to prevent abuse of the rule. The availability of these districts in areas needing groundwater management complements and limits the common law rule. As discussed in the section Groundwater Conservation Districts and Their Regulatory Approaches, most groundwater production in Texas is now regulated by GCDs. Moreover, in unregulated areas as demands on groundwater increase, the rule of capture provides a real incentive for landowners to exercise their option and form local groundwater districts, to allow effective and equitable planning and management of the resource.

This paper will examine the parameters of the rule of capture as it has been developed by Texas courts and GCDs' regulations of landowners' rights under the rule of capture. Additionally, in light of recent experience with local regulation, it offers some suggestions for refining the regulatory authority of GCDs to avoid interfering with those legitimate public policy goals that initially supported adoption of the rule of capture.

## **Parameters of the Rule of Capture**

### **To What Does it Apply?**

The rule of capture applies, with few exceptions, to “groundwater,” as that term is defined in the Texas Water Code – water percolating below the surface of the earth.<sup>10</sup> Not all underground water meets this definition. Specifically, two types of underground water are considered to be property of the State, and the principles governing allocation and use of surface water apply. First, “underflow” is that portion of the flow of a surface watercourse that flows through the sand and gravel deposits beneath the surface of the bed of the stream; underflow is hydrologically connected to the surface flow of the stream and moves in the same direction.<sup>11</sup> Second, the courts make a critical distinction between percolating groundwater and groundwater flowing in well-defined and known subterranean channels and streams. The landowner's rights with respect to the latter are the same as would apply for a surface watercourse. The subsurface watercourse, however, must have all the characteristics of a surface watercourse, namely beds, banks that form a channel, and a current of water.<sup>12</sup>

There is a presumption, however, that all underground waters are percolating groundwater. As the Texas Supreme Court has stated:

In the absence of [evidence of an underground stream with a defined channel], the presumption is that the sources of water supply obtained by such excavations are ordinary percolating waters, which are the exclusive property of the owner of the surface of the soil, and subject to barter and sale as any other species of property.<sup>13</sup>

### **Is it a Rule of Tort Law or a Rule of Property Law?**

Two labels are commonly utilized to characterize the common law rule of groundwater ownership: “absolute ownership” and “rule of capture.”<sup>14</sup> One is clearly suggestive of a rule of property law while the other could easily be limited to resolution of damage disputes between neighboring landowners. Each label can be misleading. The term “rule of capture” is suggestive of a common law rule of decision. In fact, as discussed in the section What Does the Property Owner Actually Own?, it is a rule of property law providing that the landowner actually *owns* the groundwater located under his property, whether it is used or not.<sup>15</sup> Similarly, as Professor Johnson has argued, the term “absolute ownership” misleads by implying that groundwater ownership is “a super-right subject to no limitation whatever, even legislative control.”<sup>16</sup> Such an implication is incorrect. Groundwater ownership is subject to reasonable regulation through the legislature's exercise of the police power, as evidenced by the statutory groundwater conservation district scheme in place for decades in Texas.

Unlike most other western states, Texas has a general regulatory program only for surface water, and not groundwater. In Texas, surface water is considered property of the State, while groundwater is considered the property of the owner of the surface estate, and is treated much like a mineral or oil and gas. The owner, however, has only the right to pump the water. Under common law he has no right to save it for later use or protect it against use by others.

## What is the “Rule of Capture” in Texas?

In *Houston & Texas Central Railway Co. v. East*,<sup>17</sup> the Texas Supreme Court adopted the English common law rule of *Acton v. Blundell*<sup>18</sup> that the owner of the land may pump unlimited quantities of water from under his land, regardless of the impact that action might have upon his neighbor’s ability to obtain water on his own land. Neither an injunction nor damages will lie to prevent such action.

The *Comanche Springs* case<sup>19</sup> applied the principles of the *East* case to groundwater uses that affect surface water supplies. The plaintiff, a statutory senior appropriator of surface water, complained that the defendant’s well had reduced springflow of Comanche Springs to such an extent that insufficient water was available for irrigation. The court noted that the plaintiff’s right to use the water attached only after the water emerged from the ground. Prior to such emergence, the defendant could use any amount of percolating water, regardless of the impact upon others.<sup>20</sup>

A surface estate owner need not use groundwater on the premises of the surface estate. The surface estate owner may sell the groundwater she captures below her surface estate for off-site use by a third party.<sup>21</sup> The use of groundwater at a distant location, even though the majority may be lost in transit, is also permissible. In *City of Corpus Christi v. City of Pleasanton*,<sup>22</sup> the Texas Supreme Court approved Corpus Christi’s transportation of artesian well water along 118 miles of surface watercourses to its diversion point, even though at times as much as two thirds to three fourths of the original supply was lost in transit due to evaporation, seepage, and transportation.

Only two significant limitations exist at common law on the landowner’s right to capture and use percolating water. First, the landowner cannot capture and use percolating water maliciously with the purpose of injuring a neighbor or in a manner that amounts to wanton and willful waste of the resource.<sup>23</sup> Second, since 1978 an action for damages would lie for the negligent pumping of groundwater that caused subsidence of neighboring land.<sup>24</sup>

In the *Barshop* case decided in 1996, a unanimous Texas Supreme Court recognized another exception to the rule of capture, legislation providing for regulation of pumping.<sup>25</sup> The Edwards Aquifer Act granted the Edwards Aquifer Authority (EAA) substantial power to regulate groundwater withdrawals by well from the Edwards Aquifer.<sup>26</sup> In *Barshop*, the Court upheld the constitutionality of the Act, which imposed caps on groundwater withdrawals within the jurisdiction of the Authority, against facial challenges that the Act deprived landowners of their rights under the rule of capture. Significantly, the Court recognized the necessity of compensating landowners for rights developed under the rule of capture that were taken through regulation by the EAA,<sup>27</sup> and reserved “as applied” constitutional challenges for a later date.

In the *Ozarka* case decided by a unanimous Texas Supreme Court in 1999, the Court was urged to reconsider the holding of *East* and to change the common law rule of capture to the beneficial

purpose doctrine or a rule of reasonable use.<sup>28</sup> The rule of reason would limit the common law right of a surface owner to take water from a common reservoir by imposing liability on landowners who “unreasonably” use groundwater to their neighbors’ detriment.<sup>29</sup> Acknowledging that the efficacy of the groundwater management methods chosen and implemented by the legislature “has been a matter of considerable debate,” the Court nevertheless declined to change the rule of capture. Because of the legislature’s attempt in 1997 to improve Texas’ groundwater management through Senate Bill 1 (“SB 1”),<sup>30</sup> the Court concluded it was inappropriate at this time to “insert itself into the regulatory mix.”<sup>31</sup>

## **What Does the Property Owner Actually Own?**

An issue has arisen in recent years, in both the judicial and legislative contexts,<sup>32</sup> as a result of a strategy by some groundwater conservation districts to limit or define a property owner’s rights under the rule of capture in order to insulate GCDs against claims that their regulations “take” the property owners’ groundwater rights in the constitutional sense. The issue is whether a “vesting” requirement exists in connection with the exercise of groundwater rights, that is, must a property owner have exercised his rights by pumping and putting groundwater to use under the rule of capture in order to have a constitutionally protected property right? In *Barshop*, the EAA staked out its position on this fundamental issue, arguing that the rights of property owners to pump water in the future could not be taken by the Edwards Aquifer Act because such a right was not yet vested and therefore not constitutionally protected. The court found it unnecessary to address the issue, expressly declining “to definitively resolve the clash between property rights in water and regulation of water.”<sup>33</sup>

The argument favoring the vesting requirement asserts that the property owner has no actual ownership interest in the groundwater beneath the surface of his land. Under this view, the rule of capture only gives the property owner a right to capture that water; until it is captured, the property owner does not actually own the water.<sup>34</sup> The contrary argument asserts that the water, like other resources beneath the surface of the land, is owned by the property owner so long as it is located beneath his land. Under this view, the fact that under the rule of capture the landowner cannot insist that the water be maintained in place does not detract from his ownership of the resource while it is there.

In the authors’ opinion, the argument for a vesting requirement misses the mark. Application of this rule, derived from surface water rights, to ownership rights in groundwater simply makes no sense. In the appropriative system for surface water, the water right holder effectively owns a license or inchoate right to appropriate a certain quantity of state water from a particular source, for a particular use. Only when such water is lawfully put to beneficial use is the water right perfected, and only at that point does the water right become vested property.<sup>35</sup> No such requirement has ever been articulated in connection with the rule of capture.

Quite to the contrary, the rule of capture’s alternative name, the rule of “absolute ownership,” as well as courts’ discussion of property owners’ rights under that rule, strongly refute the notion that the property owner has no ownership interest in groundwater beneath his property. The fact that rights under the rule of capture can, and have been, limited by local regulation does not alter the fundamental nature of groundwater ownership as a property right; every type of private property can be lawfully regulated in some way. The common law rule of groundwater

ownership is based on the idea that “he who owns the soil owns it to the lowest depth below.”<sup>36</sup> Under the rule, percolating groundwaters are considered part of the land in which they are found and therefore belong to the owner of the land.<sup>37</sup> In *East* and its subsequent major cases revisiting the common law rule, the Texas Supreme Court has repeatedly endorsed the premise that landowners have a property right in groundwater located underneath their property.<sup>38</sup> The Texas Legislature and the Attorney General have also recognized the landowner’s property rights in groundwater.<sup>39</sup>

Further support for the proposition that the landowner actually owns the resource prior to reducing it to possession is provided by recent legislation. In 2003, the legislature, through House Bill 803, amended the Texas Property Code to adopt specific procedural and substantive requirements for the condemnation of groundwater rights. One requirement is that the court must consider evidence relating to the market value of the groundwater rights “as property apart from the land in addition to the local market value of the real property” and whether evidence admitted at the hearing shows “that the real property may be used by the political subdivision to develop or use the rights to groundwater for a public purpose.”<sup>40</sup> If such findings are made, the court may assess damages to the property owner based on separate considerations of the market value of the real property and of the groundwater rights, with a variety of specific factors that must be considered in the valuation of the groundwater rights.<sup>41</sup> This treatment of groundwater rights as a component of property to be considered and valued apart from the land itself is entirely inconsistent with the idea that the property owner has no compensable ownership right that can be “taken” through GCD regulation.

## **Local Regulation of Groundwater Production and Use**

### **Groundwater Conservation Districts**

Groundwater, like other species of real property, is subject to reasonable regulation under the police power to protect the public health and welfare. Moreover, like oil and gas property rights, this general regulatory authority is supplemented by the mandates of the Conservation Amendment, Article XVI, §59 of the Texas Constitution. Exercise of the State’s regulatory authority to date has been limited to local or regional groundwater conservation districts, usually created on a local option basis, and usually based on county lines.<sup>42</sup> The legislature has explicitly emphasized in recent enactments that GCDs “are the state’s preferred method of groundwater management through rules developed, adopted, and promulgated by a district” in accordance with Chapter 36 of the Texas Water Code.<sup>43</sup> In recent years, the legislature has made various amendments to the Water Code to encourage the creation of groundwater districts, whose role is to manage and protect groundwater within their jurisdiction.

GCDs can be created either by the Texas Commission on Environmental Quality (TCEQ)<sup>44</sup> pursuant to provisions of general law, or by special act of the legislature. By far the more common practice has been legislative action. As part of Senate Bill 2 (“SB 2”),<sup>45</sup> the legislature ratified or created a number of new groundwater districts, and provided a streamlined process for creation of a district upon petition of landowners to TCEQ.<sup>46</sup> In creating a GCD by special legislation, the legislature may modify the powers, authorities, management, or funding

mechanisms provided by general law. In *most* cases, however, the regulatory and other authority of legislatively created districts tracks those of general law districts closely.

## General Law GCDs' Regulatory Powers

Regulatory authorities of a GCD are broad, and are implemented in two ways: rulemaking and permitting. First, the GCD has general authority to make and enforce rules, “including rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater . . . .”<sup>47</sup> Second, with the exception of “exempt wells,”<sup>48</sup> and “grandfathered” wells existing at the time of district creation (if the GCD chooses to exempt them), all wells in the GCD must receive a permit from the district. This permitting requirement provides an opportunity for the district to impose limits on spacing and production.

Groundwater conservation districts, however, have not had unfettered control over groundwater production and use. In the *High Plains* case,<sup>49</sup> the Amarillo Court of Appeals refused to recognize the authority of a district to deny or revoke permits for taking disproportionate amounts of water in relation to tract size. Reaffirming the rule of capture doctrine, the court rejected the district’s actions because GCDs lacked any “clear authority” to regulate pumping in this manner, as must be expressly given by the legislature.<sup>50</sup> The court further concluded that the legislature had not established reasonable standards to guide groundwater districts in exercising their rulemaking powers in this manner.<sup>51</sup>

The legislature responded to the *High Plains* decision through SB 2, amending Water Code § 36.116 to explicitly provide that a groundwater district may make and enforce rules limiting groundwater production based on tract size or well spacing.<sup>52</sup> That legislation also provided that in promulgating rules limiting groundwater production, a GCD may preserve “historic use” before the effective date of the rules, “to the maximum extent practicable consistent with the district’s comprehensive management plan.”<sup>53</sup> In regulating production based on tract size or acreage, a district may consider the service needs or service area of a retail water utility.<sup>54</sup>

In 2003, the 78th Legislature expressly provided authority for GCDs, based on their determinations of varying conditions, to adopt different rules for each aquifer, aquifer subdivision, geologic strata, or overlying area within their boundaries.<sup>55</sup> A district’s method of regulating groundwater production shall also be tailored according to the hydrogeological conditions of the aquifer(s) within the district, and may limit amounts of production based on contiguous surface acreage.<sup>56</sup>

One area of particular current interest is the ability of a GCD to impose limitations on the export of groundwater from the district. Water Code § 36.122, adopted as part of SB 1 and substantially amended by SB 2, provides express but limited authority for a GCD to regulate the transfer of water out of the district. A district may promulgate rules requiring a well permit (or permit amendment) for transfers of water from the district, but may not impose more restrictive permit conditions on transporters than it imposes on existing in-district users.<sup>57</sup> However, a district may also impose a reasonable fee or surcharge for an export fee under one of several statutory methods.<sup>58</sup>

In reviewing a proposed groundwater transfer, the district shall consider 1) the availability of water in the district and in the proposed receiving area, 2) the projected effect of the proposed transfer on aquifer conditions, depletion, subsidence, or effects on existing permit holders or other groundwater users within the district, and 3) the approved regional water plan and the district's certified management plan.<sup>59</sup> Permits involving a groundwater transfer must specify the amount of water that may be transferred out of the district, which may be periodically reviewed and limited, and the period for which the water may be transferred.<sup>60</sup> A district may not adopt rules expressly prohibiting groundwater export, and may not deny a permit based on the fact that the applicant seeks to transfer groundwater, but may limit a permit if the above mentioned conditions warrant.<sup>61</sup>

## **Water Management and Planning**

Each groundwater district is required to develop a comprehensive management plan that addresses various management goals. Those goals, as applicable, include promoting the most efficient use of groundwater, controlling and preventing waste and subsidence, and addressing conjunctive surface water management issues, natural resource issues, drought conditions, and conservation.<sup>62</sup> District management plans are to include specific objectives and performance standards, detailed actions and procedures designed to effect the plan, and estimates of useable groundwater, groundwater use, recharge, and projected water supply and demand within the district. Water supply needs are to be addressed in a manner "not in conflict" with the appropriate approved regional water plan. The district must also adopt rules necessary to implement its management plan.<sup>63</sup> The statute now requires GCDs to develop their plans (or any plan amendments) using the district's best available data, as well as any groundwater availability modeling information provided by the Texas Water Development Board (TWDB),<sup>64</sup> and to forward their plans to the regional water planning group for consideration in its planning process.<sup>65</sup> However, as discussed in the section Oversight of Groundwater Management Plans, state agencies have little or no substantive authority over the content or enforcement of GCDs' groundwater management plans.

## **Texas' Experience Under Local Regulation**

### ***Groundwater Conservation Districts and Their Regulatory Approaches***

As of September, 2003, there were eighty-eight (88) groundwater conservation districts throughout Texas, of which 80 have been confirmed.<sup>66</sup> The number of districts has doubled during the last five years. Over half of the total land area of Texas is within a groundwater conservation district. Even more significantly, however, almost 90 percent of groundwater produced in Texas comes from counties with such a district.<sup>67</sup> Any further judicial or legislative reexamination of the rule of capture and Texas policy on groundwater management must therefore take place against the backdrop of the regulatory track record of this system of districts.

The extent to which GCDs' substantial powers are exercised and the manner in which they are exercised are determined by the directors of each local district. A recent review of the regulatory approaches of GCDs, which included information regarding all but eleven (11) of the existing districts, demonstrates that most GCDs have adopted some form of regulations over well spacing

and groundwater production.<sup>68</sup> Of the districts identified with one or more types of spacing requirements, thirty-six (36) impose requirements on spacing from property lines, thirty (30) impose requirements on spacing from other wells, and eight (8) impose some other form of spacing requirement. Twelve (12) districts have regulations limiting the number of wells that can be located in a particular acre or section. Most districts also regulate well production on acreage or some other basis. Finally, thirty (30) districts have exercised their rulemaking authority over out-of-district groundwater transfers. Thus, the possibility of harming one's neighbor under the rule of capture has been addressed by virtually all GCDs.

### ***Districts' Experience With the Rule of Capture***

Whatever potential problems that pumping under the rule of capture theoretically may present, anecdotal water use and water management history in Texas does not appear to reveal many instances in which real problems have actually developed. In two well-known cases, problems caused by overpumpage have become the catalysts for creation of special law GCDs, namely the Edwards Aquifer Authority and the Harris-Galveston Coastal Subsidence District. To evaluate the impact of pumping under the rule of capture, an email questionnaire was sent out to most of the existing districts in Texas,<sup>69</sup> which sought rule of capture horror stories by posing the following two questions:

- 1) Are you aware of any such "horror stories," in which pumping under the rule of capture, either before or after formation of your district, has caused serious problems? If so, please give a brief description.
- 2) Have landowners' asserted rights under the rule of capture presented a serious regulatory problem for your district? If so, please give a brief description.

As of the time of publication, responses to the questionnaire had been received from general managers or board representatives of about 40 percent of the districts surveyed. These respondents represent a variety of locations in the Panhandle, Central and Southeast Texas, and the Big Bend area, and include relatively new districts and some that have been in place for half a century. While this type of survey is admittedly nonscientific, the results are significant for what they do not contain: *Few districts responding identified a significant problem related to either of these two questions.* (In fact, the most common responses were simply an unqualified "no.")

One district described a situation in which a local municipality, immediately prior to the district's formation, had opted to drill a series of wells within close proximity to each other and stated that, while these wells have sustained to date, the district is concerned regarding their viability in the future. Another identified an extremely large well that could have significantly impacted the aquifer and springflows, had it not been subject to district regulatory efforts. Another commented that the district's setback rule had alleviated a previous problem with wells being drilled immediately adjacent to other landowners' property lines. Several districts reported having had difficulty with improperly spaced competing wells, including some instances in which larger (municipal, irrigation, or water supply corporation) wells have impacted neighboring shallow domestic wells; districts also report, however, the effectiveness of their regulatory approaches, including spacing rules and hearing processes, in alleviating such

problems. Several districts reported instances in which general overpumpage in the area had caused wells (small domestic, or even large municipal) to fail. One major district reporting such problems, however, clarified that this occurs in the area where the district's rules have not yet been phased in, and further noted that the problem has led to reluctant but widespread support for district regulation.

Other respondents' comments also emphasized the effectiveness of district rules in tempering the rule of capture and protecting private property rights. One noted that, during his district's current process of rule revision, those landowners initially expressing concerns based on the rule of capture were satisfied once they understood the protections made available through the district's regulatory authority. Several respondents noted the benefit to all area landowners of the district's aquifer monitoring and evaluation studies, but acknowledged that it takes time to overcome misperceptions and to educate their constituents regarding the function and benefits of GCD management and regulation. To be sure, some districts have encountered resistance from some landowners, to the general notion that their property or privacy rights may be infringed or to the district's specific regulatory requirements. Several districts commented on the challenges of leveling the playing field among vastly competing interests, and noted that they anticipate resistance if they attempt to impose production limits. Regulatory methods have varied significantly – in both kind and degree – among districts, depending on local demands and the unique features of each aquifer. Various respondents commented on the need for local control precisely because it is responsive to this diversity. One remarked that the combination of the rule of capture and Texas' system for local regulation works well because it compels the creation of a GCD in areas of Texas that need local regulation. He further commented, however, that districts need the money, authority and enforcement tools to do their job effectively.

## **Property Rights Implications of Groundwater District Regulation**

### **Conflicts Between GCD Regulation and Landowners' Rights**

#### *Modifications of District Rules*

The Texas Water Code itself recognizes the tension between groundwater ownership under the rule of capture and the power of GCDs to regulate the exercise of those rights:

The ownership and rights of the owners of the land and their lessees and assigns to groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a district.<sup>70</sup>

Groundwater rights are recognized, but they are subject to regulation within constitutional limits. GCDs' regulatory authority is limited to the powers and duties given to them by the legislature in Chapter 36.<sup>71</sup> Moreover, at least one court has ruled that the legislative grant will be narrowly construed and will not provide discretionary authority for regulation in areas in which the

legislature had not provided clear authority or reasonable standards to guide the exercise of that authority.<sup>72</sup>

The proposed rule amendments of the Panhandle Groundwater Conservation District (PGCD) provide a good case study that illustrates the fine line that GCDs must walk in their attempts to regulate local production or groundwater export.<sup>73</sup> In September 2003, the district proposed to create two new types of permits – Initial Groundwater Availability Permits (IGAPs) and Off-Site Use Permits (OSUPs). The permits are intended to facilitate water marketing. The IGAP assures the landowner and prospective purchaser that PGCD will allow a specific amount of production. After the sale, an OSUP is required for production of the water. It is a unique regulatory approach, designed to address issues raised by the water marketing efforts of Boone Pickens and others.

These PGCD rules illustrate the regulatory dilemmas facing groundwater conservation districts. May a district require permits other than those permits identified by Chapter 36? May a district require a permit for off-site use (which necessarily includes all exports) that is not required for on-site use? May a district, rather than regulating use under the rule of capture, effectively replace the rule of capture with a correlative rights doctrine?

Another proposed rule impacts a permittee within PGCD that is contemplating delivery of groundwater using the bed and banks of a state watercourse in order to avoid the expense of hundreds of miles of pipeline. Can the district, in order to prevent waste, impose a requirement that water taken off premises must be delivered through a pipeline, even though TCEQ might authorize the delivery through a bed and banks permit under Water Code § 11.042? The *Corpus Christi* case suggests that efficiency of delivery is not an issue under the rule of capture, but Chapter 36 clearly allows districts to adopt rules to prevent waste.

Other issues addressed by PGCD's pending management proposal are equally difficult. The district is considering implementing its management goal of preserving at least 50 percent of the district's groundwater resources for 50 years by establishing an annual rate-of-decline limitation that would limit the permissible rate of groundwater level decline to 1 percent per year. Aside from factual questions about this approach, serious legal issues concerning the district's authority to adopt this regulatory approach are presented. May this limitation be applied to existing permit holders, some of which have invested millions of dollars in reliance upon being able to pump water authorized by recently issued permits from the district?

GCD rules may not cause an unconstitutional "taking" of a landowner's property. Among the constitutional challenges to the Edwards Aquifer Act rejected in the *Barshop* case, the court considered several takings arguments and noted that "[e]ven the State concedes that without some provision protecting existing users from a complete shutdown of their wells, this Act would not survive constitutional scrutiny under the takings clause."<sup>74</sup> Also, the court stated that, assuming plaintiffs possessed a vested property right in the water beneath their land, the compensation provisions in the Act demonstrate that the legislature intends to compensate plaintiffs for any taking that may occur; thus the court concluded that the Act does not violate Article I, § 17 of the Texas Constitution.<sup>75</sup>

Texas courts have long recognized that amendment of administrative rules may not operate to deprive a property owner of rights legally acquired in good faith under the preexisting rule. A clear example of this in the oil and gas context is presented by *Humble Oil & Refining Co. v. Railroad Commission*.<sup>76</sup> In that case, a tract subdivided from a larger tract in January 1932 would have been entitled to obtain a Rule 37 production permit from the Railroad Commission under the rules in effect at the time the property was subdivided and acquired. Under a subsequent amendment of the well spacing rules, the rule in effect at the time the owner applied for a permit, a permit could not be obtained on the subdivided tract. The Austin Court of Civil Appeals ruled that the owner was entitled to rely upon and obtain a permit under the prior rules. It stated:

A subsequent amendment of such spacing rule should not, however, be permitted to destroy a property right duly acquired in keeping with the provisions of such rule as they existed at the time such property was so acquired. And the right to develop said 2.5-acre tract should be determined, we think, by the provisions of rule 37 as they applied at the time the tract in question was segregated. Otherwise, an amendment to such rule, by increasing such spacings between wells, would in effect work a confiscation of vested property rights legally acquired in good faith and in keeping with such rule.<sup>77</sup>

This analogy from the doctrine of oil and gas rights and regulation provides a useful framework within which to consider the impact on private property rights of modifications of the longstanding rule of capture for Texas groundwater. These considerations should guide regulatory efforts at the local/district level, as well as any statewide change that the legislature may contemplate.

### ***GCDs as Players (or Pawns) in Water Marketing***

Although groundwater conservation districts have little ability to prevent the marketing and export of water to meet growing municipal demands, experience in recent years demonstrates that GCDs may nonetheless be key players in the growing water market. Two recent examples demonstrate the impact that a GCD can have on water marketing by limiting or allocating production among property owners in the district.

One such example has unfolded in response to the rules proposed by the newly formed Kinney County Groundwater Conservation District, located west of San Antonio at the edge of the Edwards Aquifer. Some landowners and private water developers have challenged those rules, specifically their pumping limits and their treatment of historic uses of groundwater, as unduly and arbitrarily limiting the amount of groundwater that they might produce. In 2003, the dispute reached the Texas Legislature, with Senator Frank Madla introducing legislation that would have modified the Kinney County GCD's enabling legislation to override certain of the district's rules, among other things to protect landowners' historic uses, to require that district decisions on new permits (including spacing and/or production limitations) be based on "specific hydrogeologic conditions," and to restrict the district's use of export fee revenues.<sup>78</sup>

In the case of the Hudspeth County Underground Water Conservation District, it is alleged that the district is being used as a vehicle for private water developers to corner available supplies in order to enhance their ability to market those supplies to El Paso or another purchaser. Because the district determined that the aquifer's sustainable supply is less than historical pumping levels,

all historic users were not recognized rights and future uses by property owners without existing uses are largely limited to domestic and livestock needs. Similarly, it has been suggested that the recent legislative expansion, tripling the area included within the district, was designed to ensure that water supplies from those areas formerly outside the district boundaries would not be available to market to El Paso.<sup>79</sup>

These examples and others demonstrate a real need for GCDs to base their regulatory decisions upon sound scientific data, and for an efficient and adequate means of reviewing GCD regulations.

## **Shortcomings, Perceived and Real, in Texas' Rule of Capture/Local Regulation Scheme**

It is the authors' thesis that the rule of capture, with Texas' overlay of local option regulation, "is not broke." Moreover, it has been the basis for business decisions, water supply plans and significant investments that are already in place. Thus, no overhaul or abandonment of the rule of capture is necessary or desirable. By the same token, Texas' existing law in this area is not perfect. Room for improvement exists. Potential changes regarding several specific issues, either raised in this paper or by other conference speakers, are addressed below.

### ***Draining Shallow Wells***

Under the rule of capture, no remedy exists for the nearby landowner whose shallow well is drained by a larger well. In many cases it is a problem that cannot be avoided; development of the resource will often unavoidably result in lowering the water level in the aquifer. Within a groundwater conservation district, however, it is an issue that can be successfully addressed by the district's rules and permit system.

As indicated by the non-scientific survey discussed in the section Districts' Experience with the Rule of Capture, it does not appear to be as large a problem as detractors of the rule of capture might suggest. The benefits of allowing development of the resource and providing a clear rule of decision for conflicts may outweigh any harm that is actually occurring. If not, formation of a local GCD is the solution.

### ***Harm to Surface Watercourses and Surface Water Rights***

Except in instances such as the Edwards Aquifer in which the legislature has specifically recognized the importance of springflow, declared preservation of springflow as a goal, or possibly instances in which the federal Endangered Species Act comes into play, the private property owner's right to utilize his property under the rule of capture is not limited by potential impact on surface water flows. This effectively gives the right to use a private resource preference over the public resource.

In the authors' view, it would be a mistake to change the established law in this regard on a broad basis. Specific instances of serious potential environmental harm can be addressed by specific legislation. The vast majority of GCDs have been created by special legislation. If

necessary in the opinion of the legislature, the enabling legislation of specific districts can be amended to include such authority. It is also possible that a GCD faced with specific natural resource issues might address those issues through its management plan.<sup>80</sup>

### ***Review of GCD Rules and Actions***

As discussed above, rules and permitting decisions of GCDs often give rise to questions regarding both the district's legal authority to take the proposed regulatory action and the technical basis for the action. In the authors' view, this is an issue that should be addressed and can be addressed in a fashion that will remedy other shortcomings of Chapter 36.

Under the current statute, a person affected by and dissatisfied with any rule or order made by a district is entitled to file suit against the district or its directors to challenge the validity of that law, rule, or order, once all administrative appeals to the district are final.<sup>81</sup> The burden of proof is on the petitioner, and the challenged law, rule, order, or act shall be deemed prima facie valid. The court is to review the GCD's action under the "substantial evidence" rule as defined in the Texas Administrative Procedure Act.<sup>82</sup> This standard of judicial review requires that a formal contested case hearing be conducted by the GCD in order to develop a complete administrative record upon which the district court will base its review.<sup>83</sup> It also means that the factual basis for the GCD's decision will be upheld if more than a "scintilla" of evidence exists in the record to support it.<sup>84</sup>

This standard of judicial review can be problematic on multiple grounds: (a) compiling a complete administrative record can be extremely burdensome and costly, something many districts are ill equipped to accomplish; (b) lack of express statutory authority to issue subpoenas and compel discovery could lead to due process challenges to the standard of review (because a party may be unable to develop the evidence required to present his case); (c) many GCDs have not yet developed the technical expertise or technical information that is required for the decisions they are making; and (d) locally elected, part-time directors can be susceptible to making their decisions on a political basis rather than a legal or technical basis.

These shortcomings could be remedied, and the technical expertise supplied, by providing that GCD decisions are subject to review by the TCEQ, through a contested case hearing process, prior to appealing to the courts. This would enable GCDs to make decisions informally and economically while ensuring the availability of an objective technical review in cases that merit the time and expense.

### ***Oversight of Groundwater Management Plans***

As discussed in the section Water Management and Planning, GCDs are statutorily required to develop a comprehensive management plan, which plans are to be considered in the regional water planning process. While districts' groundwater management plans are ultimately submitted to TWDB for certification, TWDB has only the power to review and certify a plan for administrative completeness, not for the substance or technical integrity of the plan.<sup>85</sup> Although TCEQ has certain mandatory statutory powers over a GCD that fails to submit or receive certification of a plan or amendment,<sup>86</sup> the current system lacks any substantive state-level review or coordination of groundwater management plans. The lack of substantive review of

management plans is particularly important because the plans are the basis for GCD rules and permitting decisions.

Expansion of TWDB authority to substantively review GCD management plans, to ensure the consistency of plans addressing different portions of the same aquifer, and to ensure the consistency of GCD management plans with regional water plans would be desirable for all stakeholders.

## **Conclusion**

In the authors' view, the rule of capture in combination with regulation by local option groundwater conservation districts has proven to be an effective means of developing and managing Texas' groundwater resources. As a practical matter, the days of operating under an unrestricted rule of capture in Texas are past. The vast majority of production occurs from resources that are included within GCDs where the rule of capture is significantly limited by district rules and permitting requirements. Replacement of the rule of capture with an alternative doctrine is not necessary,<sup>87</sup> but refinement – and some supervision – of regulation by the groundwater conservation districts would be beneficial. Moving forward into the twenty-first century, Texas, its landowners, and other stakeholders in groundwater protection and management will be best served by the hybrid of common law and local regulation that has evolved in Texas since the decision in *East*.

## Endnotes

1. See *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 77, 79-80 (Tex.1999); *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21, 24, 30 (Tex. 1978); *id.* at 31 (Pope, J., dissenting); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798, 803 (Tex.1955); *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 280-81 (1904).
2. Other issues also include the role of the Edwards Aquifer Authority, historic use standards, water marketing and, more generally, “the role of federal, state, regional and local governments, and their coordination in setting consistent, nondiscriminatory water policies.” See <http://www.senate.state.tx.us/75r/senate/commit/c750/c750.htm>.
3. See, e.g., *City of San Marcos v. TCEQ*, No. 03-02-00724-CV, 2004 WL 35541, at \*6 (Tex. App.–Austin Jan. 8, 2004, n.p.h.) (“The rule of capture for use of groundwater no longer exists in any state except Texas”); see also *Sipriano*, 1 S.W.3d at 81-82 (Hecht, J., concurring) (describing Texas as the “one lone holdout” among western states).
4. See, e.g., Eric Opiela, *The Rule of Capture in Texas: An Outdated Principle Beyond its Time*, 6 U. DENV. WATER L. REV. 87, 89 (2002); Ronald Kaiser, Frank Skillern & Bruce Lesikar, *Groundwater Management in Selected Western States: Options for Texas, excerpted in Senate Interim Committee on Natural Resources, Interim Report to the 77<sup>th</sup> Legislature, Texas Groundwater Resources*, at 51 (Nov. 2000) (“[T]oday Texas is the last major state to adhere to [the English common law rule] in its traditional form.”).
5. See *Wiggins v. Brazil Coal & Clay Corp.*, 452 N.E.2d 958, 964 (Ind. 1983); *City of Valparaiso v. Defler*, 694 N.E.2d 1177, 1180-82 (Ind. Ct. App. 1998); *Adams v. Grigsby*, 152 So.2d 619, 623-24 (La. App. 1963); *Maddocks v. Giles*, 728 A.2d 150 (Me. 1999); see also 3 WATERS AND WATER RIGHTS § 20.07(b) (Robert E. Beck ed., 1991 ed., 2003 replacement vol.); Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. ARK. LITTLE ROCK L. REV. 9, 73-77 (2002).
6. *Maddocks*, 728 A.2d at 153-54 (citing *Friendswood*, 576 S.W.2d at 29, for the significance of landowners’ reliance on the common law rule). The court also noted that such policy considerations were best left to the state legislature. *Id.* at 154.
7. See *Hartford Rayon Corp. v. Cromwell Water Co.*, 10 A.2d 587, 588 (Conn. 1940); *Roath v. Driscoll*, 20 Conn. 533, 541 (1850); *City of Atlanta v. Hudgins*, 19 S.E.2d 508, 516 (Ga. 1942); *Board of Supervisors of Clarke County v. Mississippi Lumber Co.*, 31 So. 905, 906 (Miss. 1902); *Bausch & Lomb, Inc. v. Utica Mutual Ins. Co.*, 625 A.2d 1021, 1034-36 (Md. 1993); see generally 3 WATERS AND WATER RIGHTS § 23.02 (Robert E. Beck ed., 1991 ed., 2003 replacement vol.).
8. See *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982); *Rose v. Socony-Vacuum Corp.*, 173 A. 627, 630 (R.I. 1934); *Preferred Mutual Ins. Co. v. Gordon*, No. 02-3147, 2003 WL 21077026 at \*13 (Mass. Super. May 13, 2003); *Gamer v. Town of Milton*, 195 N.E.2d 65, 67 (Mass. 1964); see generally 3 WATERS AND WATER RIGHTS § 20.07 (Robert E. Beck ed., 1991 ed., 2003 replacement vol.).
9. *East*, 81 S.W. at 280-81.
10. TEX. WATER CODE ANN. § 36.001(5) (Vernon Supp. 2004). Artesian water is groundwater confined under pressure by an impermeable geologic layer, capable of flowing “above the first impervious stratum below the surface of the ground” when properly cased in a well. See *id.* § 11.201 (Vernon 2000). Texas courts have applied the principles applicable to percolating water to artesian water. The only significant distinction between artesian groundwater and other groundwater is the existence of statutory provisions prohibiting the waste of artesian water and requiring TCEQ approval in certain circumstances for withdrawal. *Id.* §§ 11.202, 11.205. Additional restrictions are provided by §§ 11.202(d) and (e) for large artesian wells in sole source aquifers (e.g., for catfish farms).

11. *See id.* § 11.021 (defining state water); *id.* § 11.121 (permit requirement); 30 TEX. ADMIN. CODE § 297.1(55) (West 2003) (TCEQ definition of “underflow”).
12. *See Denis v. Kickapoo Land Co.*, 771 S.W.2d 235 (Tex. App.–Austin 1989, writ denied). In *Denis*, downstream landowners sought declarations that upstream landowners did not have any authority to appropriate waters adjacent to Kickapoo Springs for irrigation purposes. 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. *Id.* at 238.
13. *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 278 (1927).
14. *See, e.g., Sipriano*, 1 S.W.3d at 75 (“For over ninety years, this Court has adhered to the common-law rule of capture in allocating the respective rights and liabilities of neighboring landowners for use of groundwater flowing beneath their property.”); *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 625 (Tex. 1996) (“In *East*, we adopted the common law rule that the right to withdraw underground percolating water is not correlative, but is ‘absolute.’”).
15. *See* HENRY PHILIP FARNHAM, 3 THE LAW OF WATERS AND WATER RIGHTS § 937 (1904) (note that this treatise was published contemporaneously with the *East* decision).
16. Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY’S L.J. 1281, 1288 (1986).
17. 98 Tex. 146, 81 S.W. 279 (1904).
18. 12 M. & W. 324, 152 Eng. Rep. 1223 (Ex. 1843).
19. *Pecos County Water Control & Improvement Dist. No. 1 v. Williams*, 271 S.W.2d 503 (Tex. Civ. App.–El Paso 1954, writ ref’d n.r.e.).
20. *Id.* at 505-06.
21. *Burkett*, 296 S.W. at 278.
22. 154 Tex. 289, 276 S.W.2d 798 (Tex. 1955).
23. *Id.* at 801.
24. *Friendswood*, 576 S.W.2d at 30.
25. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996).
26. *See* Act of May 30, 1993, 73rd Leg., R.S., ch. 626, §§ 1.08, 1.14, 1993 Tex. Gen. Laws 2350, 2356, 2360, amended by Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505. Since the *Barshop* decision, the EAA’s statute has been further revised in several notable ways. *See* Act of May 27, 2001, 77<sup>th</sup> Leg., R.S., ch. 966, §§ 6.01-6.05, 2001 Tex. Gen. Laws 1991 (regarding the Authority’s rulemaking procedures); Act of May 23, 2001, 77<sup>th</sup> Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696 (amending the classification of water uses, for purposes of the Authority’s fees and regulations).
27. *Barshop*, 925 S.W.2d at 631.
28. *Sipriano v. Great Spring Waters of America, Inc. a/k/a Ozarka*, 1 S.W.3d 75 (Tex.1999).
29. WELLS A. HUTCHINS, 2 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 634 (1974). For a detailed

treatment of the development and current application of the reasonable use doctrine, see generally 3 WATERS AND WATER RIGHTS §§ 22.01-22.07 (Robert E. Beck ed., 1991 ed., 2003 replacement vol.).

30. Act of June 2, 1997, 75<sup>th</sup> Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610.

31. *Sipriano*, 1 S.W.3d at 80.

32. *See Barshop*, 925 S.W.2d at 625; Tex. S.B. 1041, 78<sup>th</sup> Leg., R.S. (2003) (bill authored by Senator Averitt, proposing to amend Water Code § 36.002 by clarifying that the surface owner's "property interest in groundwater vests as a property right at the moment of capture").

33. *Barshop*, 925 S.W.2d at 626.

34. *See* Stephanie E. Hayes Lusk, Comment, *Texas Groundwater: Reconciling the Rule of Capture With Environmental and Community Demands*, 30 ST. MARY'S L.J. 305, 345-48 (1998). For a discussion of this argument in the specific context of regulation by the Edwards Aquifer Authority, see Todd H. Votteler, *The Little Fish That Roared: The Endangered Species Act, State Groundwater Law, and Private Property Rights Collide Over the Texas Edwards Aquifer*, 28 ENVTL. L. 845, 874-76 (1998).

35. *See* TEX. WATER CODE ANN. §§ 11.021-11.023, 11.024-11.026 (Vernon 2000 & Supp. 2004). Conversely, groundwater is owned *by the individual landowner* and includes both the corpus and the right of use. *See* Act of June 2, 1949, 51<sup>st</sup> Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559, 559 (recognizing "individual ownership of underground water").

36. *See, e.g., Schenk v. Ann Arbor*, 163 N.W. 109, 112 (Mich. 1917).

37. *See* FARNHAM, *supra* note 15, § 937.

38. *See Barshop*, 925 S.W.2d at 626; *Friendswood*, 576 S.W.2d at 26, 27; *City of Corpus Christi*, 276 S.W.2d at 802; *Burkett*, 296 S.W. at 278; *East*, 81 S.W. at 279-80.

39. *See* TEX. WATER CODE ANN. § 36.002 (Vernon Supp. 2004); Op. Tex. Att'y Gen. No. JM-827 (1987).

40. TEX. PROP. CODE ANN. § 21.0421(a).

41. *Id.* § 21.0421(c)-(d).

42. In addition to this primary form of groundwater regulation, under certain circumstances a landowner's right to use groundwater, subject to the rule of capture, may also be limited by restrictive covenants or municipal ordinances that prohibit drilling water wells. *See, e.g., Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001, no pet.) (upholding restrictive covenants put in place by a subdivision developer).

43. TEX. WATER CODE ANN. § 36.0015.

44. Effective September 1, 2002, the Texas Natural Resources Conservation Commission has been renamed the Texas Commission on Environmental Quality (TCEQ). Act of June 15, 2001, 77<sup>th</sup> Leg., R.S., ch. 965, § 18.01(c), 2001 Tex. Gen. Laws 1985.

45. Act of May 27, 2001, 77<sup>th</sup> Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991.

46. *See* TEX. WATER CODE ANN. § 36.013 *et seq.*

47. *Id.* § 36.101. Another recent development regarding groundwater districts' rulemaking powers is the Texas Supreme Court's opinion in *Bragg v. Edwards Aquifer Authority*, 71 S.W.3d 729 (Tex. 2002). In that case, the Court

held that the Authority's adoption of well permitting rules was an exercise of its statutory authority to prevent waste and protect the rights of owners of an interest in groundwater. As a result, the requirement of the Private Real Property Rights Preservation Act, Texas Government Code Chapter 2007, for a takings impact assessment did not apply to the Authority in this context. *Id.* at 735-37.

48. Exempt wells are primarily small wells, usually of a domestic and livestock character, but may also include oil and gas and related wells. TEX. WATER CODE ANN. § 36.117.

49. *South Plains Lamesa R.R. v. High Plains Underground Water Conservation Dist. No. 1*, 52 S.W.3d 770 (Tex. App.—Amarillo 2001, no pet.).

50. *Id.* at 779-80.

51. *Id.* at 780.

52. TEX. WATER CODE ANN. §§ 36.101, 36.116(a).

53. *Id.* § 36.116(b). A district may also impose more restrictive permit conditions on new permit applications and increased use by historic users if those limitations apply to all such subsequent applications, regardless of type or location of use, bear a reasonable relationship to the district's existing management plan, and are reasonably necessary to protect existing use. *See id.* § 36.113(e).

54. *Id.* § 36.116(c).

55. *Id.* § 36.116(d).

56. *Id.* § 36.116(e).

57. *Id.* § 36.122(b)-(c); *but see id.* § 36.113(e), which qualifies this prohibition of discrimination against transporters; *see also id.* § 36.122(q) (requiring districts to be fair, impartial, and nondiscriminatory in applying § 36.122).

58. *Id.* § 36.122(e).

59. *Id.* § 36.122(f).

60. *Id.* §§ 36.122(h)-(k).

61. *Id.* §§ 36.122(o), 36.122(g).

62. *Id.* § 36.1071(a).

63. *Id.* §§ 36.1071(e)-(f).

64. *Id.* § 36.1071(h).

65. *Id.* § 36.1071(b).

66. *See* [http://www.twdb.state.tx.us/mapping/maps/pdf/gcd\\_only\\_8x11.pdf](http://www.twdb.state.tx.us/mapping/maps/pdf/gcd_only_8x11.pdf).

67. Organizational Meeting of the Senate Select Committee on Water Policy, 78<sup>th</sup> Leg., interim session (Jan. 14, 2004) (testimony of Kevin Ward, Executive Administrator, TWDB).

68. *See* Bill E. Couch, Turner Collie & Braden, *Groundwater Management in Texas: Spacing, Production &*

*Transfer*, Texas Water Law Institute, Texas Water Law 2003, Sept. 11, 2003 (copy on file with the authors).

69. The questionnaire was sent to all districts (69) for which an electronic mail address could be found.

70. TEX. WATER CODE ANN. § 36.002.

71. *South Plains Lamesa R.R.*, 52 S.W.3d at 779 (“a district ‘can exercise no authority that has not been *clearly* granted by the Legislature’”) (quoting *Tri-City Fresh Water Supply Dist. No. 2 v. Mann*, 135 Tex. 280, 142 S.W.2d 945, 948 (1940)).

72. *Id.* at 779-80.

73. Since the drafting of this paper, PGCD has modified its proposed rules and posted them for further public comment.

74. *Barshop*, 925 S.W.2d at 629.

75. *Id.* at 631.

76. 94 S.W.2d 1197 (Tex. Civ. App.—Austin 1936, writ ref’d).

77. *Id.* at 1197-98.

78. See Robert Elder Jr., *Bill might make groundwater export easier: Legislator’s move raises issues of local control and landowners’ rights*, AUSTIN AMERICAN-STATESMAN, Apr. 3, 2003.

79. See Mary Alice Robbins, *Water Fight Backdrop for Suit Against Firm*, TEXAS LAWYER, Feb. 2, 2004; Robert Elder Jr., *The battle for West Texas water: Landowners fight one another, outside investors for liquid gold*, AUSTIN AMERICAN-STATESMAN, Aug. 24, 2003.

80. TEX. WATER CODE ANN. § 36.1071(a)(5).

81. See *id.* § 36.251 (Vernon 2000).

82. *Id.* § 36.253 (invoking TEX. GOV’T CODE § 2001.174).

83. At least one special law district, the Edwards Aquifer Authority, is required to adopt rules for contested case hearings on permit applications consistent with the procedures set out in Chapter 2001 of the Government Code. See Act of May 30, 1993, 73<sup>rd</sup> Leg., R.S., ch. 626, § 1.15, 1993 Tex. Gen. Laws 2350; *as amended by* Act of May 28, 2001, 77<sup>th</sup> Leg., R.S., ch. 966, § 6.02, 2001 Tex. Gen. Laws 1880, 1961.

84. See, e.g., *Texas Health Enterprises, Inc. v. Texas Dep’t Health*, 954 S.W.2d 168, 171-72 (Tex. App.—Austin 1997, no pet.); *cf. Coalition for Long Point Preservation v. TCEQ*, 106 S.W.3d 363, 374 (Tex. App.—Austin 2003, pet. denied).

85. See TEX. WATER CODE ANN. §§ 36.1072(b), 36.1072(f) (Vernon Supp. 2004). Once this determination has been made, the executive administrator may request additional information from the district, if necessary to clarify, modify, or supplement previously submitted material, but such a request does not render the management plan incomplete. *Id.* § 36.1072(c).

86. See *id.* §§ 36.301, 36.303 (Vernon 2000).

87. Various commentators critical of the rule of capture in Texas have proposed abrogation of the rule of capture by adoption of one of the alternative doctrines of groundwater ownership and use. See Dylan O. Drummond, Comment,

*Texas Groundwater Law in the Twenty-First Century: A Compendium of Historical Approaches, Current Problems, and Future Solutions Focusing on the High Plains Aquifer and the Panhandle*, 4 TEX. TECH. J. TEX. ADMIN. L. 173, 224 (2003) (proposing correlative rights); Opiela, *supra* note 4, at 113-15 (proposing reasonable use); Lana Shannon Shadwick, Note, *Obsolescence, Environmental Endangerment and Possible Federal Intervention Compel Reformation of Texas Groundwater Law*, 32 S. TEX. L. REV. 641, 692-703 (1991) (proposing prior appropriation); *see also* Hayes Lusk, *supra* note 34, at 360-64 (recommending that Texas abrogate the rule of capture by legislation vesting ownership of groundwater in the State).

*This page intentionally blank.*