“It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Oliver Wendell Holmes

“War is too serious a matter to entrust to military men.” Georges Clemenceau

As a starting point in talking about the “Rule of Capture”, this panel’s topic, and “Sustainability”, the overall subject of the conference, I have to throw out those two quotes. Why, since they don’t seem to have much to do with each other? Or with the Rule of Capture or sustainability, for that matter? Actually, they do. Here’s how:

The Rule of Capture is arguably the most discriminatory, dangerous, and destructive principal that we have adopted in the body of beliefs, the philosophy, that is called “Texas Law”. In Holmes’ words, it is “revolting”. Those are pretty extreme statements. At the other extreme is the fact that many Texans will defend the Rule of Capture to the death. That is real extreme — death. And the two extremes are at war. Hence Clemenceau’s quote.

To make the war quote relevant to the war over the Rule of Capture, substitute “water professionals and politicians” for “military men”, and recognize that water wars are just as deadly and emotional as shooting wars (and, in fact, in the past have been known to degenerate into shooting wars). You then reach the conclusion that water is too important to leave to water professionals and politicians. Why? Because it affects everyone, and so-called (and sometimes self-styled) experts should not be making life and death decisions for you and me.

Who should? We should. Average Texans, you and me. Which is why my topic is “Thank God for Rio Nuevo and All the Other Stupid Schemes”. Rio Nuevo put water issues, previously sacrosanct water issues, on the table — the most important being the Rule of Capture. The Rule of Capture has never been on the table. Not ever. Not in the 100 years since the Supreme Court adopted it as the law of the land. Why? Because the Rule of Capture has been the bedrock of Anglo American water law for hundreds of years, and in Texas ever since the days of the Republic. It is so deeply embedded in Texas culture and history, and in the Texas psyche, that anyone who suggested changing it was branded a traitor. Until Rio Nuevo. Until now. Now it is on the table, and we have a chance to look at it. Thanks to Rio Nuevo.

For those of you unfortunate souls who are not from Far West Texas, some of you may not know who or what Rio Nuevo is (or what I am talking about). Briefly, here’s the background:

Sometime early in 2003, Far West Texans began to hear about a scheme that had been developed sometime earlier to pump groundwater into the Rio Grande and transport it for sale down-river. Never mind that 80% would probably be lost to evaporation and absorption. Rio Nuevo’s idea
was that it would renew the river, which led to the name: Rio Nuevo. The groundwater was to be produced from land owned by the State of Texas and managed by the General Land Office for the Permanent School Fund. Then-Commissioner Dewhurst and Commissioner Patterson agreed that Rio Grande idea was too screwy to consider. Rio Nuevo then changed the proposal so that the water would be transported by pipeline and sold to unnamed and unknown municipalities.

The problem for Rio Nuevo is that no municipalities wanted any part of their scheme. The problem for everybody else is that if they did find a customer all of the GLO’s neighbors could be drained. Why? The Rule of Capture. That “revolting” legal principle that many will defend to the death.

Whether landowners in Far West Texas would really be drained is debated by some. What cannot be debated — or even questioned — is that the visibility of water issues was automatically raised by Rio Nuevo. For example, is the Rule of Capture still viable? Can water districts really modify the Rule of Capture in fact as they do in theory? Can the Rules of a water district protect landowners in the district from the abuses of the Rule of Capture by other landowners? What about outside of a district? Who protects whom there, and how do they do it? Do districts have the financial and data resources to establish pumping and spacing rules that work, that are based on sound science, and that can be defended? How should districts be funded? Who will defend districts if their Rules are attacked? Is local regulation all that much better than state regulation? How can we empower private landowners to do their own “regulating”? Do we want to do so? If water districts are the State’s preferred method of managing groundwater, as the law says, have we given them the tools they need? Even if they are the “preferred method”, are they the best method?

These and a lot of other questions and issues were raised and — for the first time ever — are being considered by two Select Committees appointed by Governor Dewhurst. But for Rio Nuevo, it would not have happened.

I have already hinted that I am not too enamored of the Rule of Capture as it is. What about sustainability, since that is the overall topic of the conference — and the framework for our examination of the Rule of Capture? I feel pretty strongly about that, too.

I am a sixth generation Texas rancher. My daughter will be the seventh generation of her family to make at least a part of her living from a given set of natural resources. For that to happen, the key word is “sustainability”. If we use up the water, if we deplete the nutrients from the soil, if we over-graze the land, forget the sixth and seventh generations, much less the future. But I am not willing to do that, and I do not think most Texans are either. I want my daughter’s children and grandchildren to be able to enjoy Leocita Ranch just as I have, just as my mother, grandmother, and great grandparents did. It is a part of my heritage, and it is a part of Texas’ heritage. Do we want to let our heritage (and our future) slip away because we live in an age of increased scarcity of natural resources and competition for natural resources? And because we are afraid to change the rules to meet changed demands? As far as I am concerned, the answer is “Hell no!” We have no choice but to fight for our heritage and for our future, and that means
fighting for the health of our natural resources. We have no choice but to change with the times, and, as the song tells us, the times they are a-changing.

If the times are changing, that means that the rules of the game are changing. When Texas only had a couple of million people, sustainability was not a problem. Sustainability just happened, and nobody thought about it. There was simply not enough demand or competition for water to cause a problem 100 years ago — although Mr. East might disagree.

Mr. East is the fellow whose well dried up because the railroad, his neighbor, drained his well by pumping its well. The lawsuit he filed resulted in the formal adoption of the Rule of Capture in Texas. So even 100 years ago the Rule of Capture was a problem. It just did not affect all that many people. Today, it affects all of us. Tomorrow, when Texas is forecast to have a population of 40 million souls, the effects of an unfettered Rule of Capture could be devastating. Never mind sustainability, let’s talk survivability.

To stress just how weird the Rule of Capture is — and what a stretch it is to apply it to water in the first place — think about the fact that it really has to do with wild animals. The idea was that wild animals belong to no one until they are “captured”. Then they belong to whomever was smart enough to capture them. Read, “Kill them”. Because that’s what they meant, but even in the 16th century there was political correctness, apparently. Since it didn’t sound good to say “The Rule of Killing”, they called it the “Rule of Capture”. It is hard for me to see the logic of applying that particular — or peculiar — theory to water.

Many disagree, which is why I started out with a war quote. 12 or 15 years ago I disagreed also. I thought the Rule of Capture made a lot of sense, thank you very much. I was one of those who would have fought to the death for the Rule of Capture. We thought it was a valuable property right. And it was and still is. But if my neighbor can take my water under my land, and if I cannot do anything about it, how valuable is that right? And why can my neighbor take my water? The Rule of Capture, that’s why.

Many have argued — correctly — that the nature of the property right in water has yet to be defined by the courts or the legislature and that the lack of definition and certainty is a part of the problem. That’s true, but for today it begs the question. The question before us today, again thanks to Rio Nuevo, is, “Should the Rule of Capture be abandoned?”

Many will say, No, the Rule of Capture is not broken, does not need fixing, and should not be abandoned. Some of the soldiers in that camp are there because of the property rights argument. It’s a good argument, but it doesn’t convince me because of what my neighbor can do to me. And I do not want to protect myself by draining my neighbor, which is my only real remedy. Others are in this camp because they believe that water districts have already modified the Rule of Capture sufficiently and that the Rule of Capture is not a problem because my neighbor can’t abuse it any more. These are the newest warriors in the Rule of Capture War.
To those warriors I would say, first, the Rule of Capture remains a huge problem where there is no water district. The fact is inescapable that there is a significant amount of groundwater outside the boundaries of the existing districts. Some who argue against modifying the Rule of Capture say that the percentage of groundwater used outside of existing districts is small, but that dodges the issue. To those who use groundwater that is not subject to a water district’s rules — and who are therefore subject to the abuse of that water through the Rule of Capture — it is of small comfort to tell them that the water under their land is a small percentage of the groundwater used in Texas. As far as they are concerned, it is the only water.

It is also irresponsible and also dodges the issue to say that all of those 254 counties that do not have water districts have done so by choice and, therefore, that they have decided that they do not need any protection from Rule of Capture and other abuses of groundwater use. The fact is that politics and misinformation (and in some cases, disinformation) have prevented the formation or confirmation of districts. Politics and misinformation should not govern groundwater policy and protection in Texas.

Second, the bigger problem is that even within water districts the Rule of Capture remains a problem. Since it is a theory of liability (and not of property rights or ownership), and since many (if not most) production limitations and spacing requirements are based on theory rather than science, a neighbor is still not protected from a neighbor. Neighbor A may well be producing in accordance with the local water district’s rules, but if the rules are based on the best-guess theory, Neighbor B may suffer negative consequences — even disastrous consequences. Sure, the best-guess-theory rules are well intentioned, but in most parts of the state the data is insufficient to say that they really are based on sound science. It may be a goal, but it is not a fact.

In the Panhandle Groundwater Conservation District, the Edwards Aquifer Authority, and a handful of other districts, the district directors do have the data to adopt meaningful rules. That is definitely not the case in Far West Texas, however. Neighbors can still injure neighbors, and an unintentional injury based on well intentioned rules that, in turn, are based on faulty science is still an injury.

In Brewster County, we have adopted a production rule that really could modify the Rule of Capture, even without the data we need to craft rules that really mean something. Can we defend our production rules if we are attacked? Our annual budget is $11,700. That barely covers the entrance fee. So the answer is probably, no, we cannot defend the rules.

Groundwater conservation districts are great in theory, but until Texas develops the political will to generate the data districts need to manage groundwater, groundwater conservation districts will continue to have a real problem conserving water and protecting all Texans. The Rule of Capture is the reason that statement is true.

Some may think that I would answer the question about abandoning the Rule of Capture like this: Yes, the Rule of Capture should be abandoned. They would be wrong. I still believe in the
Rule of Capture. But I strongly believe that it can be improved, and that improvement must be our goal. What worked 100 years ago may not work as well today, much less 50 years from now. If we modify the Rule of Capture to make it fit with changed times, changed conditions, and changed demands, we can make it work today and in the future — and in conjunction with groundwater conservation districts, not in lieu of or in competition with water districts.

Why do I support the Rule of Capture? Easy answer: The Rule of Capture has been an integral part of our core beliefs in Texas for over 100 years. It is very difficult to abandon a core belief — and probably politically impossible. That being so, we need to stop wasting our time talking about abandoning the Rule of Capture and begin talking about how to save it. Because we can save it, but we can only save it by modifying it. I’m not embarrassed by the fact that Texas is the only western state still — still — following the Rule of Capture. I am embarrassed that we haven’t changed it to fit the changed times.

I have submitted some suggested language to modify Section 36.002 of the Water Code. Language that, I submit, will save the Rule of Capture. Simplistically, it would impose upon any landowner producing water from his or her land a duty to consider, using such data as is currently available, the effects on the aquifer from which he or she is pumping and on his neighbors. If we impose that duty, we will have solved the problem of the Rule of Capture, and we will have fixed the Rule of Capture without burdensome regulations and without the involvement of bureaucrats in our business and on our land. Because I also submit that failure to fix the Rule of Capture will, inevitably, result in bureaucratic regulation. If abuses continue, the State will step in. My vote is for property owners to solve their own problems. Not for Big Brother to tell us what we need to do because we insist on embracing an ugly old lover that we have outgrown. And we don’t have to; we can pretty it up, to use what (if it isn’t) should be a Texanism.

While I freely admit that I am not an expert on water law or on the Rule of Capture — in fact, I deny being an expert on anything — I do believe that we must begin the debate, whether on my proposed amendments or someone else’s. As we have been saying, some have already made up their minds: On one side of the battle line, they say, We have to do away with the Rule of Capture. On the other, we don’t need to worry about it since the Rule of Capture is now irrelevant anyway. Or, the always popular, Who cares?

All Texans should care. The United States is predominantly a Judeo-Christian nation. Texas is predominantly a Judeo-Christian state. Even though we are a diverse state and nation and enthusiastically embrace our fellow citizens who are Muslim, Hindu, Buddhist, atheists, or agnostics, all ethical people all believe, regardless of our religious beliefs or non-beliefs, in the Golden Rule, whatever it may be termed in a given religion or philosophy. Do unto others as you would have others do unto you. Why should that not apply to water also? The answer is, It should.

It’s not a complicated solution. It’s a market-based solution, a solution based on choices. The pumpor — the guy doing the pumping — decides how badly he wants the water and what risks
he’s willing to assume based on the data available to him. But he has to consider the effect on the pumpee — the guy who’s getting pumped.

On the other hand, if the best data available seems to indicate that a proposed use would not damage anyone else’s use, but if damage nevertheless occurs, no one should be liable. Strict liability has no place in water law where all we are trying to do is encourage people to behave responsibly and where the science will never be exact. What we are talking about here is reasonable people acting responsibly. That should not be too much to ask. We ask it already in most other areas of the law, and it forms the basis of civil society.

Whether or not my suggested amendments to the Water Code would actually accomplish those goals, I cannot say. Nor am I egomaniacal enough to believe that the language I have submitted is THE solution. I can readily accept a solution based on the reasonable use doctrine, the theory of prior appropriation, the Restatement of Torts, or something else. My favorite horse is correlative rights, but I am hesitant to use the word because it carries baggage. Like the word “sustainability”, “correlative rights” is a slippery term: It means different things to different people. I am quick to recognize, for example, that California has adopted one application of the theory of correlative rights, and I am quicker to say that I most certainly do not advocate following very many California examples. Correlative rights, as applied to water in Texas, should be unique to Texas. I would shoot for a target that includes the best of our oil and gas experience with correlative rights, learns from California and other states, is locally based, and is market driven.

Having mentioned oil and gas indirectly by suggesting correlative rights as a solution, and having thereby opened the door to the oil and gas experience as an analogy to water, let me quickly slam it shut again. The oil and gas model of production is based on depletion. It is OK to use oil and gas up. It just depends on how fast. That model has no place at the water table.

Texans can have correlative rights in the oil patch and correlative rights in the water table. Nothing says they have to be identical. But it is a starting point.

Some may say that my starting point is a full employment act for lawyers and consultants. We do not need that, and that is not my intent. What we do need is common sense and respect for the rights of others. We also need to recognize that just because one solution works in one part of the State, it may not work in all parts of the State. In a state as big and diverse as Texas, one size will never fit all. Although the exact language modifying and saving the Rule of Capture that is ultimately determined to be in Texas’ best interests is unclear to me, it is clear that we must start trying to craft it. That being true, it is also abundantly clear that we must not be ostriches, burying our heads in the sand of old law and old theories. We must be eagles, searching for our prey with clear eyes and single-minded dedication. Winston Churchill said, “When the eagles are silent, the parrots begin to jabber.” The parrots will be coming back to town in January. I do not intend to be silent.
Churchill also said, “Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing ever happened.” The truth is that the Rule of Capture has served us adequately, if not well, for over 100 years. The corollary to that truth, also true, is that the Rule of Capture can continue to serve us well in the future. But only if the eagles have the courage and the vision to make it fit the 21st Century.
PROPOSED AMENDMENTS TO §36.002

Proposed Amendment #1:

§ 36.002. Ownership of Groundwater

(a) The ownership and rights of the owners of the land and their lessees and assigns in 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 or by subsection (b) of this section.

(b) The owner of groundwater, as provided in subsection (a) of this section, may use groundwater for any beneficial use or purpose, as those terms are defined in Section 11.002 of this Code and in Section 36.001 of this chapter, subject only to (1) the rules of a district as provided by subsection (a) of this section or (2) the ownership and rights of other owners of the land and their lessees and assigns in groundwater, provided that the other owner or owners:

i. have a well or wells that are located within five (5) miles of a well from which water is being used or is proposed to be used for a beneficial use or purpose; and

ii. object to the beneficial use or purpose; and

iii. can provide scientific hydrological evidence that the beneficial use or purpose is causing or will cause the drawdown of the water table or the reduction of artesian pressure, subsidence, interference between wells, degradation of water quality, or waste.

(c) It shall be a defense to any claim of liability brought by other owners of groundwater under subsection (b)(2) of this section that the owner of groundwater complained of (or the lessees and assigns of the owner) obtained and examined all scientific hydrological evidence reasonably available at the time the beneficial use or purpose began and reasonably concluded that the beneficial use or purpose would not cause the drawdown of the water table or the reduction of artesian pressure, subsidence, interference between wells, degradation of water quality, or waste.

Proposed Amendment #2:

§ 36.002. Ownership of Groundwater

(a) The ownership and rights of the owners of the land and their lessees and assigns in 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 or by subsection (b) of this section.

(b) The owner of groundwater, as provided in subsection (a) of this section, may use groundwater for any beneficial use or purpose, as those terms are defined in Section 11.002 of this Code and in Section 36.001 of this chapter, subject only to (1) the rules of a district as provided by subsection (a) of this section or (2) the correlative rights of other owners of groundwater.

c) It shall be a defense to any claim of liability brought by other owners of groundwater under subsection (b)(2) of this section that the owner of groundwater complained of (or the lessees and assigns of the owner) obtained and examined all scientific hydrological evidence
reasonably available at the time the beneficial use or purpose began and reasonably concluded
that the beneficial use or purpose would not cause the drawdown of the water table or the
reduction of artesian pressure, subsidence, interference between wells, degradation of water
quality, or waste.

(d) As used in this section, the term “correlative rights” means the right of an owner of
groundwater to a similar quantity and quality of groundwater as other owners of groundwater
owning land over the same aquifer or reservoir.

Proposed Amendment #3:

§ 36.002. Ownership of Groundwater

(a) The ownership and rights of the owners of the land and their lessees and assigns in
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 or by the correlative rights of other
landowners and their lessees and assigns.

(b) As used in this section, the term “correlative rights” means the right of an owner of
groundwater to a similar quantity and quality of groundwater as other owners of groundwater
owning land over the same aquifer or reservoir.

Proposed Amendment #4:

§ 36.002. Ownership of Groundwater

(a) The ownership and rights of the owners of the land and their lessees and assigns in
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 or by subsection (b) of this section.

(b) All uses of groundwater shall be in a reasonable amount for any beneficial use or
purpose, as those terms are defined in Section 11.002 of this Code and in Section 36.001 of
this chapter, and shall be subject to the rights of other owners of land and their lessees and
assigns in groundwater.

Which of the 4 do I like best? Number 1, because I think it will lead to less litigation and
uncertainty. It is pretty explicit as to why, when, and where one landowner can object to another
landowner’s use of groundwater. With more certainty, it is less likely to be held to be
unconstitutional. Plus, with more certainty, it gives better guidance to a landowner regarding his
proposed use. Finally, it gives standards that an opponent of a beneficial use or purpose has to
meet. If he can’t meet the scientific standard, he’d better just swallow his objection. It should
eliminate sore-heads and frivolous and chronic complainers.

There may be better standards, but this is a start.

Nos. 2 and 3 introduce the term “correlative rights” into Texas water law. It is a good term and
sound doctrine. It is pretty well defined in oil and gas law but has never been applied to water
law in Texas, although it has elsewhere. I have advocated its adoption in the article you read and in various speeches. On the other hand, it’s got a down side. Even if the Legislature defined the term in a succeeding section, it would almost certainly be litigated, repeatedly: “What does the term “correlative rights” really mean?,” is what litigant after litigant would ask. You could limit the number of lawsuits by providing that an unsuccessful plaintiff owes the attorneys’ fees and expert witness costs of the prevailing side, but that’s a backdoor limitation. In other words, at the end of the game, you may lose, but if you believe truth and justice is on your side, that will not prevent you from filing (and the other guy from having to defend his use).

“Correlative Rights” is really just a fancy way of saying the Golden Rule. But it’s mighty hard to legislate morality.

Number 3 is probably preferable to Number 2. They say the exact same thing, but No. 3 is shorter. The lawyer in me likes No. 2 because it specifically tracks the relevant statutes, but it doesn’t add anything that No. 3 implies.

Number 4 punts. It says that we’ve all got rights, but it doesn’t define them. It would leave it to the courts, almost always a bad idea. The upside is that it does clearly recognize “my” right to “my” water. In other words, under current law you can negate all of “my” rights to “my” water by capturing “your” water first. This means that you have to consider my rights, too, when you think about using the water under your land.
Tom Beard, Leonicita Cattle Company

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Beard has been Chairman of the Federal Reserve Bank of Dallas, El Paso Branch, President of Texas and Southwestern Cattle Raisers Association, and Chairman of the Executive Committee of the Cattlemen’s Beef Promotion and Research Board. He has served as a director and member of the Executive Committees of various national, state, and local organizations.

A graduate of Yale University (BA) and the University of Texas at Austin (JD), Beard is also an attorney.