ILLINOIS GROUNDWATER LAW: THE RULE OF REASONABLE USE

A Report to the

Illinois Groundwater Association

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Joliet, Illinois

Illinois Department of Transportation
Division of Water Resources

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THE RULE OF REASONABLE USE

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Contents

Chapter 1

INTRODUCTION

For decades legal scholars, water resources professionals and well owners have expressed concern that the issue of groundwater rights in the State of Illinois had remained unsettled. This problem existed mainly because Illinois courts had not, in any significant case, reached a determination concerning the question of groundwater rights.

One early and significant case, *Edwards* v. *Haeger*,[1] did discuss the groundwater rights issue and went on to state the rule of absolute ownership in its decision even though the ownership of property - not the issue of groundwater rights - was the central and deciding issue in this case. Even though the reference in *Edwards* to the absolute ownership doctrine was considered as mere dictum by numerous legal scholars,[2 3] the doctrine of absolute ownership in *Edwards* has been cited favorably in numerous court decisions.

The doctrine of absolute ownership, therefore, became generally accepted as the rule of groundwater law in the State of Illinois. In fact, the 1967 Illinois State Water Plan[4] states "Although many areas of the law pertaining to percolating groundwater have been left unsettled, the courts have subscribed to the rule which states that the owner of land owns all the percolating water underlying his land" i.e., the doctrine of absolute ownership.

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1. 180 Ill. 99, 54 N.E. 176 (1899)

2. Mann, Fred L., Harold H. Ellis, and N.G.P. Krausz, *Water Use Law in Illinois* (University of Illinois Agricultural Experiment Station Bulletin 703, in cooperation with Economic Research Service, U.S. Department of Agriculture, 1964), pp. 130-131.

3. *Water Resources Management in Illinois-A Program Review* (Illinois Economic and Fiscal Commission, 1974), pp. 94-95.

4. *Water for Illinois A Plan for Action* (Illinois Technical Advisory Committee on Water Resources, 1967), p. 399.

The uncertainty and confusion regarding Illinois groundwater law was settled with the passage by the Illinois General Assembly of the *Water Use Act of 1983*, Public Act 83-700. This legislation which directs Soil and Water Conservation Districts to conduct impact evaluations of potentially large groundwater withdrawals, states in a separate and distinct section that "The rule of "reasonable use" shall apply to groundwater withdrawals in the State."

The various common law rules or doctrines of groundwater rights will be presented followed by a review of Illinois case law covering groundwater. The *Water Use Act of 1983* and its direct relation to the doctrine of riparian rights and rules of reasonable use as stated by the courts in Illinois for surface water is described in detail. This is followed by a discussion of general guidelines for groundwater management in Illinois which should be followed as a result of the passage of the *Water Use Act of 1983.*

Chapter 2

GROUNDWATER LAW DOCTRINES

Five basic legal doctrines have emerged in American case law and have been applied to resolve conflicts among competing users of groundwater. These doctrines are: 1) the rule of absolute ownership; 2) the rule of reasonable use; 3) the correlative rights rule; 4) prior appropriation; and 5) the Restatement of Torts. An understanding of these doctrines, their differences and their subtleties is important to an appreciation of how the *Water Use Act of 1983* has resolved, at least initially, confusion over which legal rules apply in Illinois.

2.1 ABSOLUTE OWNERSHIP DOCTRINE

This doctrine, also known as the English common-law doctrine, was first stated in the English case of *Acton v. Blundell.*[5] This doctrine is based on the concept that each landowner has complete ownership of the groundwater under his land just as he does the soil and minerals. A landowner, therefore, has an unlimited right to use the groundwater and to interfere with his neighbor's supply of groundwater through normal land use activities subject only to general prohibitions against waste, malicious interference, or negligence. It has been stated[6] that even though this doctrine refers to absolute ownership, it does not create an enforceable water right; since no legal action can be taken to prevent injury produced by the activities of others. Thus, the doctrine constitutes a simple rule of capture.

The doctrine of absolute ownership was developed at a time when groundwater movement was considered unpredictable if not totally incomprehensible. Therefore, it follows that a landowner who is legally entitled to everything beneath his property, should not be held legally responsible to others for the adverse effects of groundwater pumpage which could not be anticipated in advance. This doctrine

5. 12 M. & W. 324, 67 Rev. Rep. 361 (Ex. 1843).

6. William E. Cox, *Water Law Primer*, Journal of the Water Resources Planning and Management Division, ASCE, Vol. 108 No. WR 1, March 1982, p. 115.

was cited in the earliest cases decided in most of the eastern states. The Illinois case of *Edwards* v. *Haeger*[7] in 1899 was the first to cite the doctrine of absolute ownership and this case (described in more detail later) became the legal foundation on which most subsequent groundwater cases were argued in Illinois.

2.2 REASONABLE USE DOCTRINE

Under the reasonable use doctrine of some states, a landowner is viewed as having the right to make any reasonable use of groundwater as long as it relates to some beneficial activity on the overlying land even though significant interference might result to the groundwater supplies of adjacent landowners.

As applied in practice, there is no distinction between the rights of a landowner under the absolute ownership doctrine and the groundwater version of the reasonable use doctrine, except for the prohibition of waste.[8] Past case law generally has interpreted "reasonable use" under this doctrine to cover any traditional water use and has not set restrictions or legal accountability on the water user which negatively impacts neighboring landowners groundwater supplies. It is important to note that there is no similarity between the "reasonable use" doctrine in the common law of groundwater and "reasonable use - riparian rights" doctrine of surface water law. Reasonableness under the riparian doctrine is a relative concept under which surface water rights are limited in extent by the impact of water use on other riparians. This concept only applies to groundwater under the reasonable use doctrine when water is transported for use away from the overlying land.

2.3 CORRELATIVE RIGHTS DOCTRINE

The correlative rights doctrine provides that each landowner over an aquifer has an equal and correlative right to the beneficial use of groundwater on his land and that, in time of shortage, the common water supply may be apportioned among landowners on the basis of their reasonable needs. Like the rule of reasonable use, this doctrine gives preference to local users over transporters of the water.

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7. 180 Ill. 99, 54 N.E. 176 (1899).

8. Lukas, T.N. "When the Well Runs Dry," Boston College Environmental Affairs Law Review 10(2): 445-502 (1982), p. 484 and William Goldfarb, *Water Law* (Butterworth Publishers, 1984), p. 25. Note that Robert Emmet Clark, *Waters and Water Rights* Vol. 1 (Indianapolis, Indiana: Allan Smith Co., 1967) p. 73 describes the "American rule of reasonable use" as similar to the "correlative rights" doctrine.

The correlative rights doctrine departs sharply from the absolute ownership doctrine and reasonable use doctrine in that it allows for judicial allocation of finite supplies and provides for flexibility by allowing courts to consider the relative needs of landowners in order to determine a reasonable allocation. Correlative rights are, therefore, not absolute but are rights to divert water subject to the reasonable needs of other users and the availability of supply.

The correlative rights doctrine is in many respects similar to the surface water riparian doctrine of reasonable use in that both doctrines require a balancing of water use needs. Under both doctrines the owners of land have a usufructuary right to use water in the common resource be it aquifer or stream. Both doctrines, therefore, do not vest any ownership rights in the water.

2.4 PRIOR APPROPRIATION DOCTRINE

The prior appropriation doctrine for groundwater exists only in the western states and is based on the principle that "first in time is first in right." The right of use in times of shortage of a senior appropriator is superior to that of a junior appropriator. Water uses are curtailed, therefore, in reverse order of their priority. Under this doctrine, the ownership of land is not a consideration in assigning a right but rather the actual application of water to a beneficial use in relation to the timing of other beneficial uses.

2.5 RESTATEMENT OF TORTS

"Restatements" of legal fields are formulations by legal scholars of what the law should be and are often used where laws and legal issues are in a process or need of change. The current authors of the *Restatement (second) of Torts*[9] define rules for the allocation of groundwater which directly address the problems of well interference and water shortages. Section 858 of the Restatement proposes a rule of reasonableness which is basically derived from the correlative rights doctrine for groundwater and the doctrine of riparian rights for surface water.[10]

9. *Restatement (second) of Torts*, Section 858.

10. Lukas, T.N. *When the Well Runs Dry*, Boston College Environmental Affairs Law Review 10(2): 445-502 (1982), p. 493.

Section 858 of the Restatement is as follows:

> Liability for the use of Groundwater
>
> 1) Appropriator of land or his grantee who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless
>
> a) the withdrawal of groundwater unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,
>
> b) the withdrawal of groundwater exceeds the proprietor's reasonable share of the annual supply or total store of groundwater, or
>
> c) the withdrawal of the groundwater has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.
>
> 2) The determination of liability under clauses (a), (b) and (c) of Subsection (1) is governed by the principles stated in SS. .850 to 857.

Under these rules a landowner's right to withdraw groundwater *is* only limited when the use unreasonably interferes with a neighbor's use. In this regard, the Restatement rules follow the doctrine of correlative rights and its standard of comparative reasonableness. Three basic kinds of unreasonable interference with a landowner's right to use groundwater which are prohibited are well interference, monopolization, and diversion from surface water.

In the situation of well interference, the test of liability is whether pumping has caused an unreasonable lowering of the water table or unreasonable reduction in artesian pressure. The Restatement does recognize that any use of groundwater will have some effect on an aquifer and that a reasonable drawdown must be allowed as a right. An unreasonable effect is believed to occur when a new user withdraws a ' disproportionately greater amount than others, causing wells to fail. A disproportionately large withdrawal may, therefore, be found unreasonable.

When well interference occurs and there is not an unreasonably large withdrawal, the courts, according to the Restatement, should then use as a test an evaluation of factors set for accessing the reasonableness of a riparian use of a surface watercourse. These factors are:

a) the purpose of the use,
b) the suitability of the use to the watercourse or lake (or aquifer),
c) the economic value of the use,
d) the social value of the use,
e) the extent and amount of the harm it causes,
f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other,
g) the practicality of adjusting the quantity of water used by each proprietor,
h) the protection of existing values of water uses, land, investments and enterprises, and
i) the justice of requiring the user causing harm to bear the loss.

Chapter 3

ILLINOIS COMMON LAW ON GROUNDWATER

A review of 3 Illinois cases starting with *Edwards v. Haeger*[11] decided in 1899 followed by *Behrens* v. *Schaninghausen*[12] decided in 1959 and *Lee* v. *City of Pontiac*[13] decided in 1981 will show the difficulty the higher courts in Illinois have had in settling on a consistent common law rule on groundwater usage and conflict resolution.

3.1 EDWARDS v. HAEGER

This case involved Edwards, a dairy fanner, and Haeger, a mill operator, who operated on adjacent parcels of land in Kane County. The deed which conveyed the mill to Haeger allowed him to maintain a mill race which ran through Edwards farm and also to obtain water from adjacent wetlands on Edwards farm by the cutting of ditches to the mill race.

Edwards, in 1886, in order to obtain water for cattle in his barn, constructed a well on his "hard dry" land on one side of the mill and attempted to conduct water to his barn with an underground pipe under the mill race. Haeger objected to these actions and contended that the ground water from Edwards well was actually from the wetland surface water source that he was entitled to use by grant and indeed needed for operation of his mill.

When Haeger stopped the work on Edwards pipeline, actually destroying part of it on Edwards land, Edwards obtained an injunction which was later dissolved by the circuit court of Kane County. Edwards then appealed to the Illinois Supreme Court arguing that the extent of Haeger's grant was not as large as contended and that he

11. 180 Ill. 99, 54 N.E. 176 (1899)

12. 22 Ill. App. 2d. 326 (1959)

13. 99 Ill. App. 3d. 982 (1981)

had the right to use the groundwater under his land even though there might be an injury to his neighbor.

Justice Boggs in delivering the opinion of the court found basically that Haeger's grant to use the wetland did not include exclusive rights to the groundwater and that his ability to restrain Edwards' trespass was not founded on sound legal grounds. Even though this case was decided on findings not related to groundwater rights, Justice Bogg's opinion discussed in detail the issue of groundwater rights.

The opinion of the court stated:

> "Water which is the result of natural and ordinary percolation through the soil is part of the land itself and belongs absolutely to the owner of the land, and, in the absence of any grant, he may intercept or impede such underground percolations, though the result be to interfere with the source of supply of springs or wells on adjoining premises. Upon this proposition there is, so far as we are advised, no dissension in the decisions of courts or in the writings of the authors of text books. Nor does appellee contend any different rule prevails, in the absence of a grant creating a right to percolating water in another than the owner of the soil."

Legal scholars have noted that the above statement which covers the general rule of absolute ownership of percolating water was not necessary to the decision in the case, particularly in view of the last sentence of the above question. It might, therefore, be regarded as dictum by a later court.[14]

3.2 BEHRENS v. SCHARRINGHAUSEN

The plaintiffs (Behrens)[15] owned and operated a farm in Cook County and obtained their water supply from a number of wells on their property. The defendants (Scharringhausens) operated a sand and gravel pit adjacent to Behren's farm and kept the pit dewatered to aid in its operation. The dewatering process lowered the water table in Behren's wells requiring them to sink deeper wells and install larger pumps.

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14. See Supra note 2.

15. See Supra note 12.

The Behrens eventually sued in court to restrain the gravel pit dewatering and, upon losing this case, an appeal was filed in the first district appellate court. The court basically found that the Behrens were not irreparably injured since they had been able to maintain an adequate supply of water by the installation of deeper wells and larger pumps.

After reaching this conclusion, the court, in its opinion, went on to discuss, in length, common law doctrines concerning groundwater use. The court said:

> "… that the facts in this case, as presented by the evidence, call for the same result no matter which doctrine is applied - the "English rule" or the American rule of "reasonable use."

The court went on further to say:

> "The Illinois rule on percolating water seems to rest on *Edwards* v. *Haeger,* 180 Ill. 99 (1899). We question defendants' contention that this case places Illinois in the group of states adhering to the English common law concerning rights in percolating waters. In rendering its opinion the Supreme Court did outline the English rule but did not mention *Acton* v. *Blundell,* although cited by counsel. This omission may be explained by the language of the court on page 108:
>
> "The question of the effect of the motive prompting the interference with the source of supply of water by collecting percolating water, which has been the subject of conflicting decisions in the courts of different states, does not arise in this investigation, as it clearly appears from the allegations of the bill and appellant had lawful right to dig the new well and conduct the water by pipes in his barn and other buildings, it appearing from the allegations of the bill the work of laying the pipe from the well to the farm was being prosecuted in such a manner as not to interfere with the operation of the mill ditch."
>
> "This statement may carry the implication that, in a proper case, our Illinois Supreme Court might announce a doctrine of reasonable use in relation to the needs of adjoining owners."

3.3 LEE v. CITY OF PONTIAC

The plaintiff in this case (Lee)[16] owned a trucking business on the edge of the City of Pontiac. In 1976 the defendant (City of Pontiac et.al.) authorized the widening and deepening of an existing drainage ditch east of Lee's property which resulted in the drying up of his well. Lee brought his complaint to the circuit court of Livingston County which entered summary judgment in favor of the City of Pontiac.

As in case of *Behrens,* the appellate court also found it necessary to discuss fully the existing common law rules in the United States concerning groundwater. What the court presents in its opinion regarding Illinois groundwater law is indeed interesting and is as follows:

> "Plaintiff poses two questions to us: Which rule does Illinois follow? Which rule ought Illinois follow?
>
> "There are two reported Illinois decisions on the subject of percolating water; one by the supreme court in *Edwards* v. *Haeger* (1899), 180 Ill. 99, 54 N.E. 176, and one by the appellate court in *Behrens* v. *Scharringhausen* (1959), 22 Ill. App. 2d 326, 161 N.E. 2d 44. In *Edwards,* the supreme court said:
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> "Water which is result of natural and ordinary percolation through the soil is part of the land itself and belongs absolutely to the owner of the land, and, in the absence of any grant, he may intercept or impede such underground percolations, though the result be to interfere with the source of supply of springs or wells on adjoining premises." (180 Ill. 99, 106, 54 N.E. 176,177.)
>
> "Which the court did not expressly state that it was following the English rule, most authorities consider the foregoing statement to place Illinois in that category, 78 Am. Jur. 2d Waters Sec. 157 (1975).
>
> "The *Behrens* court questioned whether Illinois came under the English rule and in doing so quoted further language from *Edwards:*
>
> "The question of the effect of the motive prompting the interference with the source of the supply of water by collecting percolating water,

16. see 99 Ill. App. 3d. 982 (1981)

which has been the subject of conflicting decisions in the courts of different States, does not arise in this investigation,..." (180 Ill. 99, 108, 54 N.E. 176, 178.)

"*Behrens* further indicated the existence of a growing concern about future water supply and expressed the hope that the supreme court might announce a new doctrine.

"In the instant case, plaintiff follows the *Behrens* lead and asks us to overrule *Edwards* and take Illinois into the American rule column. He further argues that *Edwards* lends only tenuous support to the English rule, which he deems antiquated. It is obviously beyond our constitutional power to ignore or overrule a decision of the supreme court, and we do not agree that *Edwards* lends such slight aid to the English rule. Even if it were within our power to act as plaintiff recommends, we have serious reservations concerning the practicality of the American rule.

"In our judgment, *Edwards* stands forthrightly upon the English rule, and the further language raising the question of motive was only a limited inquiry into what appears to be a limitation on that rule, namely, that if the landowner in taking percolating waters is motivated by malice or ill will, neither the English rule nor the American rule will apply. 93 CJ.S. Waters Sec. 94 (1956).

"The American rule has been divided into two by the decisions of other courts. Some have adopted the reasonable use rule and others the correlative rights rule. Both appear to be aspects of the same underlying doctrine and both present difficult problems.

"The reasonable use rule limits the landowner to an amount of percolating water necessary for some useful purpose on his land. (93 CJ.S. Waters Section 93c(3) (1956).) Such a rule raises a host of imponderables, especially since the use is limited to the land itself. Under it, it would be doubtful if a landowner could drain a sink hole or fen since the water would not be used on the premises. (Compare *Behrens.)* In the instant case, presumably the action by the City is taken to benefit all the inhabitants of Pontiac. How is this to be weighed reasonably against the single well on plaintiff's premises? Moreover, the record here discloses that the water from the plaintiff's

well was used for purposes incidental to a trucking business which was largely conducted off the premises. How does this square with the reasonable use requirement that the water be used on and for the premises? It appears to us that the reasonable use rule does nothing more than add a wild card to the English rule.

"The correlative rights rule is even more difficult of application. The Missouri Court of Appeals, while finally adopting the reasonable use rule, said concerning the correlative rights rule:

"California remains the only important correlative rights state; Utah has abandoned it, and only Nebraska also applies it to some extent. The administration of such a system of rights has proved extremely difficult in times of water shortage and has tendered towards an "equalitarian rigidity" which does not take into account the relative value of the competing uses." *Higday v. Nickolaus* (Mo. App. 1971), 469 S.W. 2d 859, 867.

"In summary, we find nothing that Illinois has, or should, deviate from the English rule laid down in Edwards. For this reason, the order of dismissal by the circuit court of Livingston County is affirmed."

Chapter 4

WATER USE ACT OF 1983

Over 84 years of confusion and uncertainty concerning the appropriate doctrine of Illinois groundwater law ended on September 23, 1983 when the Governor signed the *Water Use Act of 1983.*[17] This legislation states specifically in Section 6 that "The rule of "reasonable use" shall apply to groundwater withdrawals in the State." With this statutory language, the *Water Use Act of 1983 is,* in effect, stating that the absolute ownership doctrine (i.e. English Rule) first stated in *Edwards* v. *Haeger*[18] is no longer the groundwater law in Illinois. The *Water Use Act of 1983* states further in Section 3 that the purpose of this act is "... to establish a rule for mitigating water shortage conflicts by:

> (b) Establishing a "reasonable use" rule for groundwater withdrawals."

This act defines the term "reasonable use" in Section 4f as follows:

> "Reasonable use" means the use of water to meet natural wants and a fair share for artificial wants. It does not include water used wastefully or maliciously."

The key words of this definition are "natural wants" and "artificial wants" which are not defined further in the definition section or used in any other section of the Act. These terms or words are also not defined or used in any of the leading common law groundwater cases in Illinois or other states.

The terms "natural wants" and "artificial wants" were clearly defined in Illinois common law in the 1842 Supreme Court case of *Evans* v. *Merriweather.*[19] This is considered to be a landmark case in which the Illinois Supreme Court first

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17. Ill. Rev. Stat. ch. 5, par. 1601, also see Appendix A

18. 180 Ill. 99, 54 N.E. 176 (1899)

19. Ibid.

subscribed to the doctrine of riparian rights (or riparian doctrine of reasonable use) for surface water courses.

The use of specific riparian doctrine terminology in the *Water Use Act of 1983* results in a statutorily based unification of groundwater and surface water law in Illinois by effectively translating the surface water riparian doctrine of reasonable use to groundwater uses and conflicts.[20,21]

20. This conclusion was affirmed through a personal conversation with Jon Scholl who was largely responsible for drafting the legislation.

21. *Bridgman* v. *Sanitary District of Decatur*, 1987 (164 Ill. App. 3d 287). This conclusion was upheld by the Illinois Appellate Court in this case which stated "By using the terms "natural wants" and "artificial wants" in the definition of reasonable use in the Act (Ill. Rev. Stat. 1985, ch. 5, par. 1604(f)), the legislature has adopted the same standards for groundwater withdrawals as that which applies to surface water withdrawals pursuant to *Merriweather."*

Chapter 5

THE "RULE OF REASONABLE USE" IN ILLINOIS COMMON LAW

5.1 EVANS v. MERRIWEATHER

An understanding of the "rule of reasonable use" in Illinois must be centered on a full review of the opinion of the Illinois Supreme Court in the case, *Evans v. Merriweather (1842).*

In this case, both parties operated steam mills and obtained the water for operating these mills from the same stream. Following a drought in 1837, employees working for Evans diverted all the flow of the stream to Evan's mill drying up the stream at Merriweather's mill.

The question before the court was "to what extent riparian proprietors, upon a stream not navigable, can use the water of such stream?"

The court first addressed the issue of riparian ownership by stating "The property in the water, therefore, by virtue of the riparian ownership, is in its nature usufructuary, and consists, in general, not so much of the fluid itself, as of the advantage of its impetus."

The court followed by addressing the issue of reduction in natural flow by referencing the federal court in the case of *Tyler* v. *Wilkinson*[22] (1827) in which Justice Storey stated "I do not mean to be understood as holding the doctrine that there can be no diminution whatever, and no obstruction or impediment whatever by a riparian proprietor in the use of water as it flows; for that would be to deny any valuable use of it. There may be, and there must be, of that which is common to all, a reasonable use."[23] Justice Storey further states that "The diminution, retardation,

22. 4 Mason, 400

23. emphasis by author

or acceleration, not positively and sensibly injurious, by diminishing the value of the common right is an applied element in the right of using the stream at all."

The court went on to expand on the meaning of "reasonable use" by defining natural and artificial wants. The court stated:

> "Each riparian proprietor is bound to make such use of running water as to do as little injury to those below him as is consistent with a valuable benefit to himself. The use must be a reasonable one. Now the question fairly arises, is that a reasonable use of r u n n i n g water by the proprietor, by which the fluid is entirely consumed? To answer this question satisfactorily, it is proper to consider the wants of man in regard to the element of water. These wants are either natural or artificial.[24]
>
> "Natural are such as are absolutely necessary to be supplied, in order to his existence.
>
> "Artificial, such only as, by supplying them, his comfort and propriety are increased.
>
> "To quench thirst, and for household purposes, water is absolutely indispensable. In civilized life, water for cattle is also necessary. These wants must be supplied, or both man and beast will perish.
>
> "The supply of man's artificial wants is not essential to his existence; it is not indispensable; he could live if water was not employed in irrigating lands, or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtlessly is absolutely indispensable to the cultivation of the soil, and in them, water for irrigation would be a natural want. Here it might increase the products of the soil, but it is by no means essential, and cannot, therefore, be considered a natural want of man. So of manufactures, they promote the prosperity and comfort of mankind, but cannot be considered absolutely necessary to his existence; nor need the machinery which he employs be set in motion by steam."

The court in discussing how water should be allocated went on to say that:

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24. emphasis by author

> "... an individual... may consume all the water for his domestic purposes,[25] including water for his stock. If he desires to use it for irrigation or manufacturers, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor."

The court stated the following rule:

> "Each proprietor in his turn may, if necessary, consume all the water for these purposes____Where all have a right to participate in a common benefit (artificial wants), and none can have an exclusive enjoyment, no rule, from the very nature of the case, can be laid down, as to how much each may use without infringing upon the right of others. In such cases, the question must be left to the judgment of the jury, whether the party complained of has used, under all circumstances, more than his just proportion."[26]

In the publication *Water-Use Law in Illinois*[27] the authors (Mann, Ellis, Krausz) discussed this case extensively. In summarizing the courts definition of natural uses, the authors found that the court specifically named the following uses as natural uses: 1) quenching thirst, 2) for household purposes, 3) for cattle, and 4) (more generally) for domestic purposes. It specifically excluded the following: 1) water for irrigation and 2) water used for propelling machinery. In discussing what purposes are household, and what cattle may be watered, the authors felt domestic use was limited to uses of persons living on proprietors land (not to include hotel guests) such as water for drinking, cooking, washing, bathing, sanitation purposes and possibly fire protection. They questioned whether the court, then or today, would consider uses such as lawn watering and air conditioning as necessary to existence.

These authors further stated "At the time when the court decided the *Evans* case, most people were farmers who kept a small number of livestock for home consumption, with perhaps a few for sale. There were few large commercial herds of cattle in Illinois at that time. Thus, it seems questionable whether the court meant to include large commercial herds in its statements. It would seem that the keeping of a large commercial herd of cattle is as much for the purpose of increasing one's prosperity as is the using of machinery, the only difference being

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25. emphasis by author

26. emphasis by author

27. See Supra at note 2

that there is no substitute for water for cattle. While there is a substitute for water as a power source for machinery."

In the discussion of artificial uses Mann, Ellis, and Krausz reiterated that the court specifically included as artificial wants water used for irrigation and manufacturing and that although the court refused to rule on what was a reasonable use of water between artificial users, the court did use the terms "just proportion" and stated that the diversion of an entire stream... as a matter of law... is an unreasonable use.

According to Mann, et al.[28] the propositions of law of the *Evans v. Merriweather* case are as follows:

"1. The use of the water of a natural watercourse is limited to a reasonable use.
2. Any natural use by a riparian proprietor is a reasonable use, as a matter of law.
3. Any artificial use made where all natural uses have not first been satisfied is an unreasonable use, as a matter of law.
4. As between different artificial uses, the test of reasonableness is whether or not, under all circumstances, each user is using his just proportion of the water available for artificial uses.
5. Where it is not clearly evident that a riparian proprietor is using more than his just proportion of the water available for artificial uses, under all the circumstances it is for the jury to determine if his use is reasonable and, if it determines his use to be unreasonable to determine the extent which the complaining riparian proprietors are damaged as a result of that unreasonable use.
6. Where it is clearly evident that a riparian proprietor is using more than his just proportion of the water available for artificial uses, under all the circumstances, such use perhaps is an unreasonable us as a matter of law, and it is for a jury to determine the extent to which other riparian proprietors are damaged as a result of that unreasonable use. The court held that at least the diversion of the entire flow of a stream was clearly unreasonable."

28. See Supra note 2, p. 30

5.2 BLISS v. KENNEDY

In 1867 the Illinois Supreme Court in the case *of Bliss v. Kennedy*[29] was provided its first opportunity to address the issue of consumptive uses based on the court's ruling in *Evans v. Merriweather.* In this case the contention was between two woolen mills located on a small stream. Both mills withdrew and consumed the water from the stream which became inadequate during dry seasons.

The court in first addressing the issue of priority of use stated that:

> "Now, it has been always held, that priority of use gives no exclusive right, and it is very difficult to provide any rule that shall exactly define the boundaries of rights claimed by upper and lower proprietors on the same water course."

In addressing the issue of consumptive uses the court lain down a rule that is in line with the decision of *Evans* v. *Merriweather* which used the terminology of "just proportion." The court formulated the following rule to be applied where water is being consumed.

> "A reasonable rule, and one which we desire to lay down, would seem to be this:
>
> That so far as the water is destroyed by being converted into steam, neither of these factories is entitled to its exclusive use that it is to be divided between them as nearly as may be according to their respective requirements, that, if each factory requires the same quantity of water, it should be equally divided, but, while the water is incapable of being thus divided with mathematical exactness, if the jury should find that the upper factory has used more than its reasonable share, or has diverted the water after using it from its natural channel, or so corrupted it as to cause a material injury to the factory, it would be ground for damages, and ultimately for an injunction."

In their discussion of this case Mann, Ellis, and Krausz felt the court stated a clear and definite proposition of law with respect to relative rights of use and that the jury should be allowed to hear evidence concerning the relative needs of the parties and the amount of water available.

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29. 43 Ill. 67 (1867)

Chapter 6

GUIDELINES AND PRINCIPLES FOR THE USE AND MANAGEMENT OF GROUNDWATER IN ILLINOIS UNDER THE "RULE OF REASONABLE USE"

The *Water Use Act of 1983* has brought Illinois under a unified doctrine of common law which covers the development and use of both surface water and groundwater resources. This doctrine is based on the riparian doctrine of reasonable use which is centered on the opinion of the Illinois Supreme Court in *Evans v. Merriweather.*

The following guidelines and principles are presented as a guide for groundwater management in Illinois. They are based on the review and conclusions resulting from the preceding review of pertinent court cases and common law doctrines.

1) **The "absolute ownership doctrine" and principles cited in *Edwards v. Haeger* no longer apply in Illinois.**

   This statement is more of a conclusion than a principle. It is presented here because some may believe the citations in numerous legal guides and references are current, not realizing the rule of reasonable use has been declared in the *Water Use Act of 1983.*

2) **The "American Rule of Reasonable Use" doctrine does not apply to groundwater withdrawals in Illinois.**

   The "American Rule of Reasonable Use" doctrine for groundwater is very different than the surface water "riparian doctrine of reasonable use" described in *Evans v. Merriweather.* (See discussions of both on pages 4 and 16) The reference to the rule of reasonable use in the *Water Use Act of 1983* and the pertinent definition of reasonable use in that act are clearly intended to apply the surface water doctrine of *Evans v. Merriweather.*

3) The groundwater rights of landowners are usufructuary in nature.

Evans v. Merriweather clearly states that "The property in the water, therefore, by virtue of the riparian ownership, is in its nature usufructuary and consists, in general, not so much of the fluid itself, as of the advantage of its impetus." The terms "riparian landowner" and "overlying landowner" should be considered interchangeable in Illinois water law doctrine.

4) Seniority in length of use does not increase the right of use.

In *Bliss v. Kennedy* the plaintiffs argued that their right to use the water in the stream was superior due to the fact they were the first to construct a mill on the stream. The court did not support this argument and stated: .. ."it has been always held, that the priority of use gives no exclusive right."[30]

5) Wasteful or malicious uses are unreasonable.

Section 4f of the *Water Use Act of 1983* which defines the term "reasonable use" states: "It does not include water used wastefully or maliciously."

6) The lowering of the water table or reduction in artesian pressure by a ground water user which reduces or eliminates the use of a neighbors well is not necessarily unreasonable.

With very few exceptions, litigation between users of ground water has involved not an allocation of the supply to one party over the other or a diversion of a common supply between them but rather a complaint that a large withdrawal from a new well has lowered the water table or reduced the artesian pressure so that water no longer reaches or flows from an existing well or spring.[31] There is usually water enough for all users and the problem is one of who must bear the cost of deepening the prior well, drilling a new deep well, installing a new pump, paying increased pumping costs or obtaining water from an alternative source.

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30. *Evans v. Merriweather,* 4 Ill. (3 Scam.) 492. p. 494 states "Mere priority of appropriation of running water,..., confers no exclusive right."

31. *Restatement (second) of Torts,* Section 858. p. 261.

The supreme court has stated in *Evans v. Merriweather* that "There may be diminution in quantity,...., indispensable for the general and valuable use of the water perfectly consistent with the use of the common right. The diminution,..., not positively and sensibly injurious, by diminishing the value of the common right, is an applied element in the right of using the stream at all."

The supreme court also stated in *Behrens v. Scharringhausen*[32] in referring to the defendants lowering of the groundwater table:"... that irreparable injury to the plaintiffs is not established by the weight of the evidence, and that plaintiffs, to the extent needed by them, have been able to insure themselves of adequate well water, by extending the length of the pipes in their wells and by installing larger pumps."

7) **The priority use in times of shortage are natural wants (i.e. domestic uses). Any remaining groundwater may be used for artificial wants according to their "just proportion."**

This rule was clearly presented as a proposition of law in *Evans v. Meniweather.*[33] In *Bliss* v. *Kennedy*[34] the court in speaking of consumptive uses said that water must be divided proportionally according to the respective requirements of the parties (i.e. just proportion).

8) **The right to transport water for use off overlying land does not** exist **without statutory authority.**

Illinois courts have, in general, restricted the use of water to riparian land. The right of use is, therefore, incidental to the ownership of the riparian land and limited to the riparian proprietor. In the case of *Batavia Manufacturing Company* v. *Newton Wagon Company.*[35] The supreme court stated that a contract conveying to another a riparian proprietor's rights in water for power purposes "could not be a sale of the water of the river, or of its momentum (which they could only own

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32. See Supra note 11. Also discussion p. [9].

33. See Supra note 16. Also discussion p. [16]

34. See Supra note 24. Also discussion p. [20]

35. *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230 (1878)

the right to use on their own soil) it could amount to an estoppel of their right to use the momentum of so much water." It appears clear from this case that a riparian land owner has a clear right to the use of water on his land but does not have the right to sell or transport water.

Under Illinois law the right to transport and sell water *is* granted only under statutory authority. Such authority[36] is granted in Illinois to numerous water utilities such as municipalities, Conservancy Districts and Water Authorities. These water utilities also have the power of condemnation over local groundwater users who are impacted unreasonably.

36. Ill. Rev. Stat., Chap. 24, Par. 11-125-1 and 2. For counties see Par. 34-3107, and 34-3110. For River Conservancy Districts see Ill. Rev. Stat., Chap. 42, Par. 393. For Water Authorities see Ill. Rev. Stat., Chap. 111 2/3. Par. 228, Sec 6.

APPENDIX

WATER USE ACT OF 1983

(Ill. Rev. Stat 1983, Ch. 5, par. 1601-1607)

WATER USE ACT OF 1983

(Illinois Revised Statutes, ch. 5, par. 1601 et seq.)

AN ACT to create the "Water Use Act of 1983". P.A. 83-700, approved Sept. 23, 1983, eff. Jan. 1, 1984.

1601. Short title

§1. This Act shall be known and may be cited as the "Water Use Act of 1983".

1602. Declaration of Policy

§2. Declaration of Policy. The General Assembly declares it to be in the public interest to better manage and conserve water, to establish a mechanism for restricting withdrawals of groundwater in emergencies, and to provide for public notice of planned substantial withdrawals of water after the effective date of this Act from new points of withdrawal before water is withdrawn.

Amended by P.A. 85-483, eff. Sept. 17, 1987.

1603. Purpose

§3. Purpose. The general purpose and intent of this Act is to establish a means of reviewing potential water conflicts before damage to any person is incurred and to establish a rule for mitigating water shortage conflicts by:

(a) Providing authority for County Soil and Water Conservation Districts to receive notice of incoming substantial users of water.

(b) Authorizing Soil and Water Conservation Districts to recommend restrictions on withdrawals of groundwater in emergencies.

(c) Establishing a "reasonable use" rule for groundwater withdrawals.

The requirements of Section 5 and 5.1 of this Act shall not apply to the region governed by the provisions of "An Act in relation to the regulation and maintenance of the levels in Lake Michigan and to the Diversion and apportionment of water from the Lake Michigan watershed", approved June 18, 1929, as amended.

Amended by P.A. 85-1330, eff. Aug. 31, 1988.

1604. Definitions

§4. Definitions. As used in this Act, unless the context otherwise requires:

(a) "Department" means the Illinois Department of Agriculture.

(b) "District" or "Soil and Water Conservation District" means a public body, corporate and political, organized under the "Soil and Water Conservation Districts Act".

(c) "Groundwater" means underground water which occurs within the saturated zone and geologic materials where the fluid pressure in the pore space is equal to or greater than atmospheric pressure.

(d) "Land occupier" or "occupier of land" includes any individual, firm or corporation, other than the owner, who is in legal possession of any land in the State of Illinois whether as a lessee, renter, tenant or otherwise.

(e) "Person" means any owner of land or the owners' designated agent including any individual, partnership, firm, association, joint venture, corporation, trust, estate, commission, board, public or private institution, unit of local government, school district, political subdivision of this state, state agency, any interstate body or any other legal entity.

(f) "Point of withdrawal" means that point at which underground water is diverted by a person from its natural state.

(g) "Reasonable use" means the use of water to meet natural wants and a fair share for artificial wants. It does not include water used wastefully or maliciously.

(h) "State" means the State of Illinois.

Amended by P.A. 85-1330, eff. Aug. 31, 1988.

1605. Water Conflict Resolution

§5. Water Conflict Resolution. In the event that a land occupier or person proposes to develop a new point of withdrawal, and withdrawals from the new point can reasonably be expected to occur in excess of 100,000 gallons on any day, the land occupier or person shall notify the District before construction of the well begins. The District shall in turn notify other local units of government with water systems who may be impacted by the proposed withdrawal. The District shall then review with the assistance of the Illinois State Water Survey and the State Geological Survey the proposed point of withdrawal's effect upon other users of the water. The review shall be completed within 30 days of receipt of the notice. The findings of such reviews shall be made public.

Amended by P.A. 85-1330, eff. Aug. 31, 1988.

1605.1. Groundwater Emergency Restrictions

§5.1. Groundwater Emergency Restrictions. (a) Each District within any county in Illinois through which the Iroquois River flows, and each District within any county In Illinois with a population in excess of 100,000 through which the Mackinaw River flows, is authorized to recommend to the Department of Agriculture restrictions on groundwater withdrawal as provided by this Section.

A land occupier or person who possesses land which contains a point of withdrawal that is capable of producing more than 100,000 gallons of water on any day shall register that point of withdrawal with the District and shall furnish such reasonable data in such form as may be required by the District.

(b) The District, with the assistance and approval of the Department of Agriculture, shall issue recommended guidelines for the construction of points of withdrawal and the type and setting of pumps for use in those points of withdrawal. Copies of the guidelines shall be made available from the District upon request.

(c) Within 2 working days after receiving a written complaint from a land occupier or a person whose point of withdrawal has failed to furnish its normal supply of water, the District shall schedule an on-site investigation. If the investigation discloses (1) that the point of withdrawal fails to furnish its normal supply of water, (2) that the failure is caused by a substantial lowering of the level of groundwater In the area, and (3) that the point of withdrawal and its equipment conform to the recommended guidelines of the District issued under subsection (b), the District may recommend to the

Department of Agriculture that the Department restrict the quantity of water that a person may extract from any point of withdrawal within the District's boundaries which is capable of producing more than 100,000 gallons on any day. The restriction shall be expressed in gallons of water, may apply to one or more points of withdrawal within the District, and may be broadened or narrowed as appropriate. The restrictions shall be lifted as soon as justified by changed conditions.

(d) When a District determines that restriction of the withdrawal of water at a particular point within the District is necessary to preserve an adequate water supply for all residents in the District, the District may recommend to the Department of Agriculture that the Department restrict the quantity of water that may be extracted from any point of withdrawal within the District which is capable of producing more than 100,000 gallons of water on any day. The Department shall review the District's recommendation and if it agrees with such recommendation shall restrict the withdrawal of water within the District in accordance with subsection (c) and shall notify each land occupier or person who possesses land which contains a registered point of withdrawal affected by the restriction.

If the Department disagrees with the District's recommendation, it shall notify the District, the land occupier or the person who possesses land which contains a registered point of withdrawal affected by the recommendation and the complainant, giving the reason for the failure to affirm the recommendation. The Department may propose an alternate recommendation.

If the District, the respondent or the complainant disagrees with the decision of the Department, such person may request an administrative hearing to be conducted by the Department in accordance with the Administrative Procedure Act to show cause concerning its decision.

Final decisions of the Department pursuant to this Section may be appealed in accordance with the Administrative Review Law.

(e) The Department is authorized to promulgate rules and regulations, including emergency rules, for the implementation of this Amendatory Act of 1987. The Department may set the general policy for the Districts to follow in the administration of this Act.

Amended by P.A. 85-1330, eff. Aug. 31, 1988.

1605.2. Investigation and review - Entry upon land

§5.2. Investigation and review - Entry upon land. Persons investigating a complaint or conducting a review on behalf of the Department or District of the impact of a proposed or existing well that is required to be registered may enter upon private property for the purpose of conducting an investigation and may review any records pertaining to pumping data.

Added by P.A. 85-1330, eff. Aug. 31, 1988.

1606. Reasonable Use

§6. Reasonable Use. The rule of "reasonable use" shall apply to groundwater withdrawals in the State.

1607. Penalties

§7. Penalties. Any person who fails to register a point of withdrawal pursuant to subsection (a) of Section 5.1, or who fails to notify the District

of a proposed new point of withdrawal pursuant to Section 5, or who fails to restrict withdrawals of water pursuant to subsection (b) of Section 5.1 shall be guilty of a petty offense. Any person who is convicted of a second or subsequent offense shall be guilty of a Class C misdemeanor.

Amended by P.A. 85-483, eff. Sept. 17, 1987.