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Overview

In a landmark case, the Texas Supreme Court has held that land ownership includes an interest in groundwater in place.¹ In addition, the court held that limiting a private owner's water usage for a public purpose constitutes a taking requiring the payment of just compensation under the Texas Constitution.² The Court's opinion could have far-reaching implications as Texas and other states continue to grapple with limited water resources and competing claims and needs for its use. This case establishes that Courts are recognizing that water use has significant value and that there will be costs to everyone to ensure limited water resources are put to the most productive uses.

Texas Water Law

In Texas, groundwater generally belongs to the landowner and is governed by the rule of capture. That means that a landowner has the right to capture water that is beneath their property. It's not an ownership right, but a pumpage and capture right.³ In addition, it doesn't matter what impact such pumping has on neighboring wells. Also, under state law, all sources of groundwater are presumed to not be contained in subterranean rivers. That means that a landowner is presumed to own underground water until the source of the water supply is conclusively shown to be a subterranean river.⁴ So, in effect, a landowner can pump as much water as desired from an underground source and an adjoining landowner cannot stop the pumping. The Texas courts do not use the "reasonable use" rule with respect to

groundwater.⁵

The Edwards Aquifer Authority Act. In 1993, the Texas legislature passed the Edwards Aquifer Authority Act (Act) which created the Edwards Aquifer Authority (Authority) with the purpose of protecting the aquifer. The Act prohibits withdrawals from the aquifer without a permit issued by the Authority, and gives priority to users who withdrew underground water for beneficial use before 1993. Water cannot be drawn from the aquifer by wells drilled after 1993. The permit issued specifies the maximum rate and total volume of water than can be withdrawn by the user in a calendar year. The Act also limits the total amount of all permitted withdrawals per calendar year. The effect of the Act was to freeze any particular landowner's water use (and hence, water right) in place.⁶ Importantly, the Act based the issuance of a permit on prior use – a landowner's historical use of water from groundwater sources before the Act's effective date. So, if a prior owner had used a lot of water, then that historical use would allow the present owner to get a permit authorizing that same water usage. But, the contrary was also true. If a prior owner had not used much water, then the current owner was limited to that amount.

*Edwards Aquifer Authority v. Day*⁷

Facts of the case. This case started when two landowners purchased 381.40 acres that overlaid the Edwards Aquifer in 1994 and was completely within the aquifer's boundary. The aquifer is the primary source of water for south

central Texas and “is vital to residents.” The owners intended to grow oats and peanuts and graze cattle on the land. A well had been drilled on the property in the 1950s and was used for irrigation during the 1970s, but had fallen into disrepair under prior ownership. The well casing had collapsed and the pump had been removed. But, the well continued to flow under artesian pressure, and some water had previously been used for irrigation. However, most of the water flowed into a 50-acre lake on the property. The lake was used primarily for recreational purposes.

As required under the Act, the landowners applied for a permit for authorization to pump 700 acre-feet of water annually for irrigation. They based their request on the historical use of their predecessors who irrigated approximately 300 acres of grass from the well during the drought years of 1983 and 1984. Preliminarily, their request was found to be sufficient to substantiate the request. The landowners were invited to provide additional information, but they did not respond. A few years later, without having received a decision on their permit application, the landowners amended their request to move the withdrawal from the existing well to a replacement well. The landowners drilled the well at a cost of \$95,000. Almost a year later, the landowners received notice that they were denied the permit to withdraw water from their well because the property’s historical withdrawals had not been placed to beneficial use

The landowners appealed the Authority’s decision to the State Office of Administrative Hearings. They presented deposition testimony that the previous owners had irrigated about 150 acres with water from the lake and that about seven acres had been irrigated with water pulled directly from the well. There was no other evidence of a beneficial use. The administrative law judge (ALJ) determined the water used from the lake was state surface water.

Note: State water is “water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and

lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.”⁸ State water could not support an application for groundwater.

The ALJ also determined the use of the lake for recreational purposes was not a beneficial use as defined by the Act and the maximum historical beneficial use of groundwater shown was for the irrigation of seven acres of grass. Thus, the landowners were not qualified for a permit authorizing 700 acre-feet of water usage. Instead, the ALJ awarded the landowners a permit for 14 acre-feet of water usage rights. The Authority agreed with the decision.

Case moves to the court system. The landowners appealed and also sued the Authority for taking their property without just compensation under the Texas Constitution. The State was brought into the case due to the constitutional claims. At its most basic, the landowners’ argument hinged on whether state law recognized a property right in groundwater in place. The trial court didn’t address the issue, holding instead that the water from the well-fed lake was groundwater and should have been used in calculating the landowners permitted use. The court also dismissed the constitutional claims. Both parties appealed.

The Court of Appeals affirmed the ALJ’s decision to issue a permit for 14 acre-feet of water. But, the appellate court held that landowners do have some ownership interest in the groundwater beneath their property and determined that the constitutional takings claim should not have been dismissed. The parties appealed again.

On further review, the Texas Supreme Court agreed that the Authority did not err in limiting the landowners’ permit to 14 acre-feet. The Court agreed that using the lake to irrigate 150 acres for two years could not be a basis for beneficial use because the lake water was not

groundwater, but was state water.⁹ The Court explained that groundwater could lose its character and become state water when it flowed into the lake. Because the lake was used only during the two year period for irrigation, its purpose was for recreation and was never used to store or transport groundwater for use by the landowners, which could provide an exception to whether it became state water or remained characterized as groundwater.

Most importantly, however, the Texas Supreme Court held that landowners have a constitutionally protected property interest in the groundwater beneath their property. The question regarding whether groundwater could be “owned in place” had not yet been decided in Texas. But, that same question, when applied to oil and gas had previously been decided in the affirmative.¹⁰ The Court opined that groundwater should not be treated differently than oil and gas beneath the surface of land. As noted above, under the rule of capture, the law recognizes that groundwater (like oil and gas) can be fleeting, so it is not until the water is actually within the person’s control that any rights attach. The Court determined there was no contradiction between the prohibition on an action for drainage against another rightfully pumping the water under the rule of capture and property ownership of groundwater still in place.¹¹ The Court found persuasive that the prevailing rule among other states is that oil and gas ownership beneath the land is an exclusive property right unto itself. The Court decided there was no logical reason to treat groundwater differently. Indeed, the Court recognized that, in many respects, water is just as important to modern life as is oil by stating, “Although today the price of crude oil is hundreds of times more valuable than the price of municipal water, the price of bottled water is roughly equivalent to, or in some cases, greater than the price of oil. To differentiate between groundwater and oil and gas in terms of importance to modern life would be difficult.”

The Court went on to note that both groundwater and oil and gas are resources that must be conserved under the Texas Constitution and are

regulated with that notion in mind. While the groundwater and oil and gas are subject to both capture and regulation, the fundamental rule of absolute ownership, according to the Court, remained unaffected. The Court reasoned that a property right exists because a landowner has a right to exclude others from accessing the groundwater beneath his property if the source of that water does not also flow beneath a neighbor’s property. This right is similar to oil and gas rights. Similarly, property owners have no right to prevent the ordinary drainage of the groundwater by their neighbor. The correlative right to groundwater and oil and gas between various landowners, instead, is determined through state regulation to ensure each landowner can produce his fair share of the resources beneath his land.

To bolster its decision, the Court pointed out that the Texas Legislature had recently amended the Texas Water Code to state that “a landowner owns the groundwater below the surface of the landowner’s land as real property.”¹² This statement established that Texas recognizes ownership in place for water in both statutory and common law. Because there is an established property right, the government is not able to deprive landowners of this right without providing adequate compensation for the loss.

The “takings” issue. The Court summarily dismissed that State’s argument that ownership rights in groundwater are “too inchoate” to be protected by the Takings Clause of the Texas Constitution. The Court held that groundwater rights are property rights subject to constitutional protections regardless of whether difficulties lie in determining adequate compensation for any taking. After determining that a constitutional taking could occur, the Court reviewed whether the landowners in this case had a viable takings claim.

There are three analytical categories in constitutional taking cases, with two of them being per se takings. A per se taking occurs when there is either a permanent physical invasion of property regardless of degree, or when regulations completely deprive the

property owner of all economically beneficial use of the property. The non per-se type of taking utilizes a fact-based reasonableness test that examines the economic impact of the regulation on the claimant, whether the regulation at issue interferes with investment-backed expectations, and the character of the governmental action.

In this case, the Court determined the analysis would require review of the fact-based test for reasonableness. While the Court found that a taking could occur based on the landowners' property interest in the groundwater beneath the property, the Court found that the record failed to provide sufficient information regarding the specific economic impact on the landowners. Likewise, the Court found there was too little information to determine the landowners' expectations when purchasing the property, so there was no way to make a finding of whether a taking did occur in this situation. The Court stated, however, that even if a compelling reason justified more restrictive permitting of groundwater under the Act than the Texas Water statute generally, the landowners could not be deprived of all beneficial use of the groundwater below their property merely because they did not use it during a historical period. This would appear to favor the landowners' takings claim.

The Court remanded the case to the trial court to determine whether the denial of a permit in the amount of water requested by the landowners constituted a taking after full development of the record.¹³ The Court dismissed the landowners remaining constitutional claims, because they were without merit.

Conclusion

Genuine concerns were raised regarding the influx of taking claims that would arise as the Authority sought to divvy out limited water use when demand far exceeded the maximum allowed under the law. In this situation, the Authority received 1,100 permit requests for 834,244 acre-feet per year. The Authority had a 450,000 acre-feet per year cap. Approximately 58 percent of the applications were for

irrigation; 20 percent were for industrial uses; and 15 percent for municipal use. The two-dozen parties filing amicus briefs in support of one side or another included city governments, cattle associations, the Texas Farm Bureau, environmental groups, and landowners. The Texas Supreme Court noted that water regulation could differ from the regulation of oil and gas. Indeed, the Court noted that the state could issue water permits based on future use and value to the public in general rather than simply on surface area (as is the case with oil and gas). But, a close reading of the Court's opinion seems to compel the conclusion that the Authority's system of water rights tied to historical use alone may not pass constitutional muster. The Court noted that any system that rewarded historically heavy water use could be inconsistent with the economically efficient development of land. That would seem to indicate that the Court was focused on current use much more than a system utilizing rigid, historical use of water in terms of a system that would protect property rights in water. The Court could find no reason why the Act should be more restrictive of water use than the Texas Water Code allowed, and neither the State nor the Authority provided an answer. On that note, the Court seemed to be telegraphing a message to the Texas legislature regarding the need to reign in water and conservations districts operating under statutes separate from the Texas Water Code.

Until some economically efficient system for deciding the value of groundwater rights along with an equitable manner to dispense water for its most beneficial use is developed, this issue will undoubtedly continue to be addressed through the court system. But, the Court did note that Texas groundwater regulation did not need to result in takings liability. Indeed, the court stated that, "The legislature can discharge its responsibility under the [Texas Constitution's] Conservation Amendment without triggering the Takings Clause." That's a clear recognition by the Court that property rights in water can be protected, economic efficiency can be bolstered, and some regulation

in the public's interest can be accomplished without a taking being effected.

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¹ *Edwards Aquifer Authority v. Day*, No. 08-0964, 2012 WL 592729 (Tex. Feb. 24, 2012).

² Article I, Section 17(a).

³ The Texas Supreme Court adopted the rule of capture in *Houston & T.C. Railway Company v. East*, 81 S.W. 279 (Tex. 1904).

⁴ The status of Texas law with respect to subterranean rivers is not settled. Section 52.001 of the Texas Water Code excludes both stream underflow and subterranean rivers from the definition of underground water.

⁵ As noted in footnote 2 *infra.*, and accompanying text, the Texas courts generally follow the rule of absolute ownership (a.k.a., "rule of capture"). In *Sipriano v. Great Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999), the court again affirmed the use of the doctrine.

⁶ Under the Act, some trivial amounts of water usage are exempt from the permit requirement.

⁷ *Edwards Aquifer Authority v. Day*, No. 08-0964, 2012 WL 592729 (Tex. Feb. 24, 2012).

⁸ Texas Water Code § 11.021(a).

⁹ Under Texas law, surface water belongs to the state and can be used by a landowner only with the state's permission.

¹⁰ Indeed, the Texas Court of Appeals has, citing its opinion in *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999), applied the rule of capture to any migratory subsurface minerals that a landowner can produce absent malice or willful waste. See *Petro Pro, Ltd., et al v. Abbott Laboratories*, 279 S.W.3d 743 (Tex. Ct. App. 2007). See also *Texas Co. v. Daughtery*, 176 S.W. 717 (Tex. 1915) where the Court found a property interest in oil and gas beneath the land, and *Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290 (Tex. 1923) where the Court held that for oil and gas, the rule of capture does not preclude ownership of the minerals in place.

¹¹ In other words, the court determined that a landowner had a property interest in the groundwater even though the effect of a neighbor's drilling

activity would lessen the groundwater reserves under the land of both owners. That was insufficient to make the property right illusory.

¹² Texas Water Code, §36.002.

¹³ The Court did not have to determine whether a taking had occurred because of the procedural aspect of the case which below was a grant of summary judgment for the Authority.