



HCA Issue: Edwards Aquifer Authority v. Day

What the Supreme Court Did (and Did Not) Say about Groundwater in Texas

Photo by: Chase Fountain



HCA is a passionate community caring for the unique features, spring-fed streams, heritage ranch lands, spectacular beauty and vibrant culture of the Texas Hill Country for the benefit of future generations.

In Texas, groundwater in place is owned by the overlying landowner, but it is subject to reasonable regulation by the state (for example, through groundwater districts). Regulation of groundwater can result in a compensable taking. Another case, Bragg v. Edwards Aquifer Authority, is likely to shed some additional light on questions left unanswered in Day about when regulation of groundwater results in a compensable taking.

What the Court Did Say:

- The Court did hold that groundwater is owned in place by the overlying landowner. “In our state the landowner is regarded as having absolute title... to the oil and gas in place beneath his land. . . Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value... We now hold that this correctly states the common law regarding the ownership of groundwater in place.”
- The Court did hold that, despite this private ownership of groundwater, the state, through groundwater districts like the EAA and others, has the power to regulate groundwater use. “The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations.” The Court also extensively discussed the legislatively-conferred groundwater district powers

emanating from the Conservation Amendment of the Texas Constitution, Article XVI, Section 59, and implemented through Water Code Chapter 36.

- The Court did state that state regulation to limit groundwater use based solely on historical use such as that applied in the Edwards Aquifer can cause a taking of private property. (i.e. Districts cannot limit groundwater pumping permits to only those who can demonstrate prior beneficial use during some specific time period). “...a landowner cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during an historical period and supply is limited.”



hill country alliance

What is HCA?

The Hill Country Alliance is a nonprofit organization whose purpose is to raise public awareness and build community support around the need to preserve the natural resources and heritage of the Central Texas Hill Country. We create resources, conversations and forums for landowners, neighbors, elected officials and all concerned citizens.



Interested in staying connected to this and other land, water and scenic beauty issues in the Hill Country? Please visit www.hillcountryalliance.org and click "subscribe" to receive our weekly newsletter with news, events and updates.

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What the Court Did Not Say:

- The Court did not say that groundwater districts have no power to regulate groundwater use and production. Rather, the court identified the question as whether the exercise of those powers results in a compensable taking. "Today we have decided that landowners do have a constitutionally compensable interest in groundwater, and we come at last to the issue not presented [in a previous case]: whether the EAAA's regulatory scheme has resulted in a taking of that interest." ... "...groundwater regulation need not result in a takings liability. The Legislature's general approach to such regulation has been to require that all relevant factors be taken into account. The Legislature can discharge its responsibility under the Conservation Amendment without triggering the Takings Clause."
- The Court did not find that the EAA regulation of Day was a compensable taking. Instead, the court agreed that summary judgment against Day's takings claims was improper and required remand of the case to the district court for further evidentiary proceedings. "A full development of the record may demonstrate that EAAA regulation is too restrictive of Day's groundwater rights and without justification in the overall regulatory scheme." A settlement was reached in the Day case before the record could be fully developed in a trial court.
- The Court did not provide clear standards for how to determine how much groundwater a particular landowner may own. This is one of the major unanswered questions post-Day and its resolution may be different in different aquifers.
- The Court did not provide detailed guidance on how to determine when a regulation is a "taking" because of "interference with reasonable investment backed expectations." For example, in assessing whether a groundwater district regulation constitutes a taking, the Day opinion did not indicate whether the analysis of the damages should be based on the change in value of the groundwater alone or on the change in value of the entire property (land plus groundwater).

Groundwater and Surface Water Connection: Texas water law regulates surface water and groundwater separately, and by different sets of rules. However, Geology 101 tells us that groundwater and surface water are explicitly interconnected. Groundwater emerges as springs, springs feed creeks and streams that seep into our aquifer, reverts in most cases from one form to the other many times on its journey between its beginning as rain and its destination at the sea. It's time for policies that reflect the reality of the entire hydrologic cycle and treat all of Texas' water resources as parts of a whole system.

