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Texas Groundwater Issues:

Ownership Rights and Regulation

2010

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Acknowledgements

These documents were prepared by Texas and Southwestern Cattle Raisers Association, Texas Wildlife Association and Texas Farm Bureau.

Many associations and organizations have joined this effort to protect property owners' private property rights in groundwater. These documents reflect a joint effort, shared philosophy and commitment to groundwater ownership in place and local regulation as described herein. This is not a new association or organization and the initiative respects the autonomy of the individual supporting associations or organizations.

Please contact one of the individuals below or one of the participating associations or organizations below for more information and how to participate in this effort.

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Introduction

According to estimates by the Texas Water Development Board (TWDB), by 2060 Texas' population will more than double, and its water demand will increase by 27%. Because groundwater from Texas' aquifers supplies over half the state's water, it is imperative that groundwater resources be managed to provide for current and future use.

In 1997, the Texas Legislature made significant changes to water planning and groundwater conservation district management. The new Regional Water Planning process highlighted the future water needs as well as where the water would be procured to meet those needs. This process stressed the need for many areas without groundwater regulation to create groundwater conservation districts to protect this finite natural resource.

In 1999, only 45 groundwater conservation districts existed. These districts were primarily located West of the IH-35 corridor. Today, 96 groundwater conservation districts exist covering 144 counties. Of the 10 million acre-feet currently produced in Texas, 9 million acre-feet of this production is within a groundwater conservation district. Therefore, over 90% of the groundwater produced today could be impacted by the regulation of groundwater conservation districts, Edwards Aquifer Authority, or the Harris/Galveston Subsidence Districts.

Groundwater is and always has been an integral part of the land, and secure, protectable rights assure conservation and stewardship of groundwater [see white paper titled "Groundwater Ownership and Regulation in Texas"]. Texas and Southwestern Cattle Raisers Association, Texas Wildlife Association, and Texas Farm Bureau have joined forces to initiate a growing number of associations and organizations protecting property owners' private property rights in groundwater, while supporting reasonable, science-based regulation for the long-term sustainability of groundwater resources. To advocate these ideals, the supporting associations and organizations are establishing an educational program to assist members, property owners, legislators, and policy makers in understanding current groundwater ownership and regulatory issues in Texas.

Joint Position Statement on Groundwater Ownership

Groundwater is an integral part of the land and is owned by private landowners. The Texas Constitution and more than 100 years of case law support this position. Secure, protectable property rights best assure conservation and stewardship of all resources, including groundwater.

As the demand for groundwater in Texas increases, it is important that groundwater continues to be recognized and reaffirmed as vested, real property of private landowners. Private landowners and their productive open land are keys to an effectively functioning water cycle. Their active and informed stewardship of land and water resources benefits all Texans.

Like other private property in Texas, groundwater is subject to reasonable regulation. This ensures that private landowners are treated fairly (afforded due process), property rights are respected, and that all private landowners maintain the ability to use groundwater for any beneficial use.

Just as it makes sense for school districts to be governed by local citizens, it makes sense for groundwater to be governed by local citizens, which is why we support local groundwater conservation districts. It is better and more effective for private landowners to work with their neighbors, rather than a distant state agency.

However, for groundwater conservation districts to function as they were intended, recognition and reaffirmation of groundwater ownership is needed so groundwater conservation districts are consistent in this interpretation across the state. All groundwater conservation districts must recognize that groundwater is the property of private landowners and use sound scientific principles to develop reasonable regulations that ultimately will ensure the beneficial use of groundwater.

We support protecting and reaffirming that groundwater is the vested, real property of private landowners for the following reasons:

1. **State law is clear that groundwater is the vested, real property of private landowners, but some continue to challenge the law.** Private landowners must defend and reaffirm their ownership of this property and all constitutionally mandated private property rights in the regulatory, legal, and legislative arenas to protect the resource for the benefit of all.
2. **Private landowner ownership of groundwater encourages good stewardship and promotes accountability.** The way private landowners, acting as land stewards, manage their property directly influences quantity and quality of groundwater available to all Texans. Vested ownership with local control also equitably balances conservation and use.
3. **Private landowner ownership of groundwater provides more certainty and balance in water planning.** With groundwater ownership reaffirmed, water planners can concentrate on how best to use groundwater to meet the state's critical needs

instead of arguing about who owns it. This helps balance rural water-producing areas and urban water-consuming areas, without jeopardizing potential growth in any area of the state. Recognition of all landowners' rights ensures that the value of available groundwater resources is shared by all property owners, not just a select few.

Legal Review and Facts

A. Groundwater Ownership in Texas

1. Absolute Ownership Doctrine

Groundwater ownership in Texas begins with the *absolute ownership doctrine*, which establishes a property owner's vested right in groundwater in place below his land—a vested “real property” right that provides ownership in place. The Texas Supreme Court adopted the absolute ownership doctrine in the *Houston & Tex. Cent. Ry. Co. v. East* case of 1904:

An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. *So the owner of land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.*

Texas courts have consistently applied this doctrine to groundwater ever since.

A corollary or subset of the absolute ownership doctrine is the *rule of capture*, which defines a property owner's “liability protection” for producing groundwater pursuant to his vested real property right. The rule of capture allows a property owner to produce groundwater for any beneficial purpose without liability to his neighbors. *The rule explains the manner in which a landowner may exercise his property rights in groundwater, not whether the property rights exist.*

2. Right to Groundwater in Possession

In addition to the real property right associated with absolute ownership, property owners have a vested right to groundwater that is legally produced and reduced to their possession. Once water is withdrawn from its underground source, it becomes “personal property” subject to sale, commerce, and taxation. This vested personal property right is different from the vested real property right associated with the absolute ownership of groundwater in place.

3. Arguments about the Ownership Right

Some argue there is no vested right in groundwater in place because, under the rule of capture, landowners have no protection from drainage by neighboring wells. They argue property owners only have a right to groundwater that does not vest until it is produced and reduced to possession. This argument is flawed.

First, there have always been limitations on the rule of capture. In *East* the Court acknowledged the rule of capture could be modified by “express contract and positive authorized legislation.” Since *East* the Court has identified additional exceptions that provide protection to adversely affected landowners, such as willful waste and negligently caused subsidence.

Second, the rule of capture has never been interpreted to divest a property owner of ownership in place. Rather, throughout its history—both its oil and gas and its groundwater history—the absolute ownership doctrine and its corollary, the rule of capture, have been premised on ownership in place, which vests with ownership of the surface estate.

Third, while the Texas Supreme Court has sometimes criticized the rule of capture, it has never considered or recognized an alternative theory that would undermine the principle of absolute ownership in place. For instance, in the 1999 *Sipriano* case, the Court declined to repeal the rule of capture in favor of the American (reasonable use) rule. *Both of these liability rules are based on the principal of ownership in place. Thus, even if the Court had made a shift from the rule of capture to the American rule, it would not have changed the underlying ownership interest such rules seek to protect.* This is confirmed by the Court’s cautionary statement that “any modification of the common law [rule of capture] would have to be guided and constrained by constitutional and statutory considerations.”

B. Groundwater Regulation under the Texas Water Code

The rule of capture has always been subject to “positive authorized legislation.” Such legislation is codified in chapter 36 of the Texas Water Code, which establishes groundwater conservation districts (GCDs) as the state’s preferred method of groundwater regulation. Today there are 96 confirmed GCDs in operation.

GCDs did not begin to proliferate until the mid-1990s, when the Legislature created the regional water planning groups. Recognizing the need to balance GCD powers with the state’s regional water planning efforts, the Legislature made another significant overhaul of the Water Code as part of S.B. 2 in 2001. S.B. 2 established groundwater management areas (GMAs) based on the boundaries of major aquifers, and eliminated GCDs’ ability to prohibit transfers outside district boundaries. S.B. 2 authorized GCDs to set more restrictive limitations on future groundwater use if the restrictions applied fairly to all new and increased uses. S.B. 2 also authorized GCDs to provide greater protection to historic and existing uses of groundwater.

In 2005 the Legislature drastically changed the landscape of groundwater management in Texas with the passage of H.B. 1763. H.B. 1763 created new groundwater planning process that requires GCDs in each GMA to develop a joint management plan that establishes, in a quantitative manner, the “desired future condition” (DFC) of groundwater resources in the GMA. For example, a DFC could be that water levels do not decline more than 100 feet in 50 years, or spring flow is not allowed to fall below 10 cubic feet per second during a drought of record. Using the DFC, TWDB must run groundwater availability models that will determine the “managed available groundwater” (MAG) for each district. GCDs must ensure that their management plans contain goals and objectives consistent with achieving the DFC. Regional water planning groups must use the MAG in their planning efforts. Thus, a district’s DFC impacts not only individual property owners in the district, but also the entire planning region.

The joint planning process may allow GCDs to establish restrictive DFCs, set a cap on overall production, and deny permits once the cap is reached. For instance, some interpret Section 36.1132 of the Water Code as establishing a prohibition (or cap) against issuing permits in excess of the total MAG established by the DFC. Once a cap is computed, GCDs may try to create a special, priority

permit system. GCDs will first allocate MAG to exempt users and historic and existing users, and then divide the remaining MAG among all other users, many of whom may have been historically conserving groundwater. If no “available” groundwater remains after allocation to exempt users and historic and existing users, GCDs could deny all other property owners the opportunity to produce groundwater other than for household or small livestock uses. Many GCDs are also considering reducing existing users’ current production.

GCDs must complete the DFC process by September 1, 2010. Conservative decisions will hasten litigation if property owners are denied permits when no more MAG can be permitted. Those who have historically conserved the resource (by producing less or not producing at all) could be left with few or no rights at all. This places GCDs in the position of adjudicating water rights—deciding which property owners will and will not get groundwater. To make matters worse, the process for challenging the reasonableness of DFCs is stacked against the property owner. Even if TWDB determines a district’s DFC is unreasonable, nothing requires the GCD to change its decision.

C. The Takings Clause Limits Regulation of Groundwater Rights

Because property owners have a vested real property right in groundwater in place, the state may not unreasonably limit a property owner’s groundwater rights without compensation. Given this constitutional limitation, the Legislature has expressly recognized and preserved landowners’ ownership interests in groundwater in section 36.002 of the Water Code:

*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.*

Therefore, while groundwater regulation may limit the exercise of groundwater rights, the statutory and common law still confirm the principle of ownership in place. Any groundwater regulation must reasonably balance future needs with property owners’ private property rights.

The clash between regulation (e.g., the DFC process) and property owners’ ownership rights is coming to a head at a time when the Texas Supreme Court has once again been asked to consider the nature of a landowner’s ownership interest in groundwater. *Edwards Aquifer Authority v. Day*, 274 S.W.3d. 742 (Tex. App.—San Antonio 2008, pet. pending). The Attorney General and the Edwards Aquifer Authority have argued that property owners’ groundwater rights in place are not vested, and thus regulation by GCDs can never constitute a taking. If groundwater rights are not protected constitutionally, there is no recourse for a property owner when that property right is taken or restricted. The threat to property owners statewide is apparent: unreasonable and restrictive decisions by local GCDs can profoundly limit landowners’ private property rights. Limiting these rights could deprive all Texas citizens of the economic benefits of the resource.

D. Unreasonable Groundwater Regulation Will Hamper Economic Development

If Texas cannot meet its water needs, Texas’ economy will suffer. According to TWDB, “without water, farmers cannot irrigate, refineries cannot produce gasoline, and paper mills cannot

make paper.” If future water needs are not met it could cost businesses and workers in the state approximately \$9.1 billion per year by 2010 and \$98.4 billion per year by 2060. State government could lose \$466 million in tax revenue in 2010 and up to \$5.4 billion by 2060 due to decreased business activity as a direct result of insufficient supply.

In a 2009 report, *Liquid Assets: The State of Texas’ Water Resources*, Comptroller Combs cautioned that policy makers and GCDs must consider the impact their actions could have on a property owner’s private property rights in groundwater, including the potential economic impact. As she poignantly stated: “[R]ecent court rulings have affirmed the state’s long-held position on ownership of private property, as codified in . . . the Private Real Property Rights Act, Groundwater is the property of the owner of the land overlying the aquifer, and efforts to interfere with this right could result in both uncertainty of ownership and enormous economic consequences for our state.”

E. Recognizing Property Rights with Science-Based Regulation Is the Best Approach

The best way to manage and prepare for the state’s future water needs is reasonable, science-based regulation that continues to recognize vested real property rights in groundwater. Ownership of groundwater in place provides for the continued development of a groundwater market that can meet the state’s critical needs within regulatory limits. First, private ownership of groundwater provides certainty, consistency, and balance in water planning. With a consistent, protectable property right, efficiency and economy can flourish. Second, ownership in place encourages good stewardship and promotes accountability. Ownership in a market based system will encourage and incentivize property owners to closely analyze the quantity and quality of their groundwater. A landowner is better positioned to ensure a clean and ample supply on his property than is a distant state agency. Finally, ownership in place is critical to preventing development of an artificial groundwater market. True market demand will establish the pace and price of groundwater development, which will depend on factors such as the distance to and reliability and sustainability of supply. It will promote a balance between rural water-producing areas and urban water-consuming areas, without jeopardizing potential growth in any area of the state. A groundwater market, based on vested private ownership and sound science, allows economic development to occur but at the same time allows property owners to continue their existing use should they so choose. The alternative is loss of rights without remedy, and the state deciding who can use water and for what purpose.

Frequently Asked Questions

1. Why was this effort initiated?

Property owners' ownership of groundwater is under attack in the courts and in some groundwater conservation districts (GCDs). The supporting associations and organizations believe private ownership, coupled with reasonable, science-based regulation, is the best way to manage Texas' groundwater resources and assure stewardship and conservation. A balance can be struck between property rights and reasonable regulation while assuring protection for public and private investments and water needs in every part of the state.

The Attorney General has urged the Texas Supreme Court to not recognize ownership of groundwater in place. Some groundwater conservation districts (GCDs) are adopting rules and pumping limits that will deprive property owners of the right to produce groundwater in the future. Given these trends, the supporting associations and organizations believe its effort is necessary to ensure that groundwater continues to be recognized as a vested private property right. Private ownership fosters conservation and ensures the future beneficial use of groundwater. Reasonable regulation ensures that all property owners are treated fairly and that property rights are respected. Private ownership coupled with reasonable regulation is the best method to protect property rights and manage groundwater resources for the benefit of all Texans. Vested ownership incentivizes property owners to maintain and manage critical open space lands that contribute to and form the geological sponges that are physically integral to the land and a connected component of groundwater resources.

For instance, if groundwater rights are not vested until reduced to possession, then the only way to protect them is to produce the groundwater before it is too late. This is contrary to protecting and conserving the resource, and is bad public policy. With vested ownership of groundwater in place there can be an appropriate balance. Recognition of all property owners' rights ensures that the value of available groundwater resources is shared by all property owners, not just a select few. Reasonable regulation should recognize ownership interests and existing use, while allowing water planners to manage the resource for long-term sustainability and assure long-term public benefits. This type of balance is critical for economic development in the state.

2. How does the public benefit from reaffirming that groundwater rights are vested?

It supports conservation of Texas' groundwater resources, recognizes the private property rights of Texans, fosters reasonable and fair regulation that encourages consistent treatment, promotes accountability for management and conservation, and allows a regulated groundwater market to develop as society demands it, and in a manner that includes all property owners.

The supporting associations and organizations support the preservation of property owners' vested property rights in groundwater as critically important to the management and conservation of groundwater resources in Texas. Private ownership of groundwater encourages and incentivizes good stewardship and promotes accountability. As the demand for groundwater in Texas increases, private ownership in a market based system will encourage close analysis of the quantity and quality of a

property owner's groundwater. This system already exists today in many areas of the state. A property owner in coordination with the local GCD is better positioned to ensure the quality and supply of groundwater on his property than is a distant state agency.

Private ownership of groundwater provides certainty, consistency, and balance in water planning, allowing planners to concentrate on how best to use groundwater to meet Texas's critical needs. It affords the ability to achieve a balance between rural water-producing areas and urban water-consuming areas, without jeopardizing potential growth in any area of the state. Ultimately, private ownership of groundwater supports free enterprise, allowing the continued, reasonable development of a regulated market for groundwater that includes all property owners. The regulation of this market is governed by limits established by the Legislature. If groundwater rights are not vested, they can be unreasonably limited or eliminated, leaving the property owner with no right to produce groundwater from his property and no remedy for its loss. This could potentially affect land values, lending institutions, financing of long-term existing and planned public and private water projects, and the Texas economy.

Ownership of real property fosters conservation because it is an integral part of the land and is tied to management activities affecting land conservation and stewardship. The suggestion by some that you don't own groundwater until you produce it is a serious disincentive to conservation, and a policy that encourages unnecessary production.

3. As a property owner, why should I care or get involved?

The other option is to let the government take your property without a fight. The Texas Alliance of Groundwater Districts, the Edwards Aquifer Authority, and even the Attorney General, are arguing in court that property owners do not have a constitutionally protected property right in groundwater.

Groundwater is an integral part of the land. Texas law has repeatedly affirmed the private ownership of groundwater for over 100 years, although the courts have not addressed the extent of its constitutional protection. However, as Texas' population grows and water becomes scarcer, landowners' groundwater rights are increasingly under attack. The supporting associations and organizations support the constitutional position that the law has always established groundwater ownership as a vested property right. On the other hand, the State and some GCDs are attempting to redefine groundwater rights as unvested property rights. For example, the Texas Alliance of Groundwater Districts, the Edwards Aquifer Authority, the Attorney General, and others filed briefs with the Texas Supreme Court arguing that the property owner does not own groundwater in place. Such a characterization is critically important to a property owner's ability to exercise groundwater rights. It would mean your groundwater rights could be taken (curtailed or halted) without any recourse or compensation. A groundwater system that unreasonably and unfairly restricts use of your property affects the value of that property, and your ability to conserve, produce, use, or sell that property. Even property owners' exempt use and historic use of groundwater would be at risk. Moreover, those who have historically conserved the resource (by producing less or not producing at all) could be left with few or no rights at all. Ultimately, an ownership right that is not vested is less valuable and much harder to protect.

4. What is the current law regarding groundwater ownership?

A property owner is the absolute owner of the groundwater in place beneath his property, subject to reasonable regulation.

Private ownership of groundwater derives from the common law, beginning with the Texas Supreme Court's adoption of the *absolute ownership* doctrine in a case called *Houston & Texas Central Railway Co. v. East*:

An owner of soil may divert percolating water, consume or cut it off, with impugny. It is the same as land, and cannot be distinguished in law from land. So the owner of land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.

98 Tex. 146, 150, 81 S.W. 279, 281 (1904). The Texas Supreme Court has reaffirmed this principle numerous times since 1904. From a statutory perspective, the Texas Legislature has also recognized a property owner's ownership interest in groundwater in Chapter 36 of the Texas Water Code. Section 36.002 says, "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." As private property, groundwater rights are also protected by the constitutional mandates that private property cannot be taken without compensation and due process of law.

5. How can you own groundwater if you can't quantify how much is below your property, or if it moves from one parcel to the next?

Property owners have a *real property right* in the groundwater in place below their land, but they do not own a particular molecule of groundwater when it is below their land. Property owners have the right to produce groundwater from their land, subject to reasonable governmental regulation and other existing common law restrictions such as for beneficial use and prevention of waste. Once groundwater is produced and reduced to possession by the property owner, the groundwater becomes *personal property*, subject to sale and commerce like a cow or tractor. Groundwater is similar to oil and gas in this respect: it usually is not stationary and some property owners have more of it below their land than others. But this does not mean landowners don't have a real property right in oil and gas in place below their land.

6. How can you own groundwater if you can't protect it from your neighbor or others?

The rule of capture is simply the rule of liability associated with the exercise of groundwater rights under the absolute ownership doctrine. The rule of capture addresses how the property right may be exercised, not whether it exists.

Property rights opponents argue that an essential element of ownership is the right to exclude others, and that groundwater cannot be owned in place because the rule of capture precludes the

surface owner from preventing drainage of his property by others. This argument is belied by nearly 100 years of oil and gas law recognizing the concept of ownership in place alongside the rule of capture. The Texas Supreme Court has consistently recognized both the rule of capture and ownership in place for groundwater. Moreover, you do have some protection from your neighbors under the rule of capture, such as for wasteful use and negligent subsidence. The rule of capture is also subject to reasonable regulation. Absolute ownership in place and the rule of capture are not contradictory legal principles, and recognition of ownership in place will not negate the ability of the state to regulate groundwater.

7. Do you support mandating a correlative rights approach to groundwater management?

No. The ownership of groundwater in place can be recognized without mandating every district use a correlative rights system to allocate groundwater. However, the supporting associations and organizations support every property owner's right to be given the opportunity to produce a reasonable amount of groundwater. It is the responsibility of each GCD to determine what management and regulatory practice best suits their local situation.

8. Are you proposing to cut off existing users, and asking GCDs to cancel and re-issue new permits?

No. There should be no need to cancel or re-issue permits unless those permits were issued under a system that illegally curtailed or prohibited use by others. However, existing users may have their pumping reduced in the future so that other property owners can exercise their rights to the groundwater.

A vested right to the groundwater in place strengthens existing permitted rights. Without vested ownership in place, the only right to groundwater an existing user has is those granted by the GCD's rules. Therefore, the rights are wholly vested in rules of the district, and can be taken away with a change in the district's rules. Also, such rights do not necessarily transfer with the property because the district's rules may require a new property owner to reapply for a permit. To the contrary, with ownership in place, the right to produce groundwater remains with the land or property owner and cannot be taken away by a change in GCD rules.

However, existing and historic users must recognize that most of them made investments through groundwater under rule of capture where all property owners had an equal right to capture groundwater and there was no protection of the investment. If a GCD's rules now provide protection for existing use, it is a new protection that did not exist when the investment was made.

After sound science identifies the extent of groundwater resources in a district, and only if all permit holders will "benefit" from reductions, would district-wide reductions make sense. Even then, an existing user could make up for a loss on investment through conservation measures or the market, by selling or purchasing water rights.

Even when groundwater resources are severely restricted, market pressures will dictate who desires to continue an existing use, begin a new use, or sell to someone else for another use. No

property owner would be denied groundwater; the landowner may simply have to purchase additional rights if the district has to reduce production by existing users.

9. Are you suggesting that GCDs cannot say “no.” Won’t reaffirming private ownership deplete aquifers because GCDs cannot say “no” to permit applicants?

Yes. The supporting associations and organizations believe ALL property owners have a vested right to capture groundwater on their property. However, we are not suggesting that GCDs cannot regulate groundwater production.

GCDs have a statutory responsibility to protect groundwater resources. This would be impossible if the district could not limit a property owner’s right to capture groundwater. However, the GCDs should not say “no” to a property owner with a valid, beneficial use. The GCDs should treat all property owners fairly. If there is a situation where a permit should be denied or severely limited, the GCDs must evaluate whether that decision would constitute a regulatory taking. There could be situations where denying a permit may not be considered a taking by the courts. It will depend on each individual situation.

10. State law seems clear, so why reaffirm the obvious? What is happening at GCDs or in the courts that you don’t like?

With the desired future condition process well underway and likely to result in caps on production, and the Texas Supreme Court addressing whether groundwater rights in place are constitutionally protected, a perfect drought could be brewing for Texas property owners.

Local GCDs, at the direction of the Legislature, are required to adopt “desired future conditions” (DFCs) for the groundwater resources in each Groundwater Management Area. These DFCs will be used to calculate “managed available groundwater,” which will be used by districts to limit the amount of groundwater that can be pumped in each district. In most instances, this will result in a cap or limit on production. GCDs must set production limits to achieve the desired future conditions of the Groundwater Management Area that will affect water rights allocations among users. Some GCDs believe they can say “no” to new permits to pump groundwater because they believe there is no vested property right in groundwater until it is produced, and thus no regulatory taking for denying a property owner the right to produce. Under this same logic, some GCDs will adopt rules restricting even historic uses. The supporting associations and organizations seek to ensure that GCDs allocate rights to produce groundwater that will respect private property rights.

In the courts, the Texas Supreme Court is currently considering the appeal of a major groundwater rights case: *Edwards Aquifer Authority v. Day*, 274 S.W.3d. 742 (Tex. App.—San Antonio 2008, pet. pending). This case squarely presents whether governmental regulation of groundwater can amount to a taking of vested private property requiring compensation. This is an important case because, while the Texas Supreme Court has repeatedly reaffirmed the absolute ownership doctrine of groundwater, it has not done so without criticizing the rule of capture aspect of the doctrine and suggesting that another system may be needed in the future.

In the *Day* case, the Edwards Aquifer Authority, the Texas Alliance of Groundwater Districts, and the Attorney General have argued the absolute ownership doctrine does not vest any ownership interest in groundwater until that groundwater is actually produced and reduced to possession. Under this theory, GCDs and the legislature could unreasonably regulate groundwater—in fact, completely halt its production—without any liability for depriving a property owner of that property right. If adopted, this position would completely undermine the private property rights of Texas property owners.

11. Didn't recent court cases, like *City of Del Rio* and *Guitar*, resolve this issue?

Previous court cases have not answered whether regulation of groundwater production can constitute a taking of private property as applied to a particular property owner's situation, which issue is squarely before the Texas Supreme Court in the *Edwards Aquifer Authority v. Day* case.

Prior to *Day*, the Texas Supreme Court was most recently presented with the takings issue in a 1996 case called *Barshop v. Medina County Groundwater Conservation District*, but avoided providing a complete answer. In more recent cases, such as *City of Del Rio* and *Guitar*, the issue has not been squarely presented.

In *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, the San Antonio Court of Appeals did address the issue of groundwater ownership. While the court reaffirmed the absolute ownership theory, and recognized the ownership interest in groundwater, the court was not presented with the question of how far governmental regulation can go before a regulatory taking of groundwater rights occurs. And, since the Texas Supreme Court did not agree to hear the case, the decision of the appeals court does not have statewide effect.

In *Guitar Holding Co. v. Hudspeth County Underground Water Conserv. Dist. No. 1*, 263 S.W.3d 910 (Tex. 2008), the Texas Supreme Court voided the rules of a groundwater conservation district that granted certain historic irrigation users the perpetual (and exclusive) right to transfer and sell their groundwater outside the district for an entirely new use, while all other new users were effectively barred from producing groundwater. While *Guitar* does establish some limits on a groundwater district's authority, the case did not address whether the district's rules constituted a taking of private property.

12. Why is legislation necessary?

The Texas Water Code does not clearly state that the rights of property owners to groundwater is a vested right to groundwater in place.

Section 36.002 of the Water Code recognizes property owners' private property rights in groundwater, but qualifies that those rights may be "limited or altered by rules promulgated by a district." The supporting associations and organizations believe the context of this limitation relates to enacting reasonable and fair regulation, not undermining constitutional property rights protections that guarantee ownership. Thus, while the Supreme Court could provide some baseline protection to property owners, Chapter 36 of the Water Code must be amended to ensure that GCDs must recognize landowner property rights when adopting rules and issuing

permits. If the law is not clear, it will provide an opportunity for some districts to attempt to deny property owners their rights to groundwater.

13. Does reaffirming vested ownership of groundwater in place change any existing major groundwater issues facing the legislature and GCDs?

It does not change the issues, although it may change how the issues are resolved. The legislature and GCDs are still facing a growing population and a limited resource. They still must find a reasonable way to manage the resource for the future.

Regardless of how the ownership interest is defined, the legislature and GCDs still must find a reasonable way to protect and conserve our state's groundwater resources. There are major issues facing groundwater policy makers in this effort. For instance, in the context of planning for long-term management, policy makers must address how to share the resource among owners and users of groundwater. Should it be according to the rule of capture, equitable distribution, pro-rata sharing, reasonable and prudent use, or some combination of these? They must deal with existing uses, and the balance between agricultural irrigation use versus urban and commercial use. They must deal with existing wells, new wells, and well spacing. They must deal with emerging community uses and economic development, which can be significantly hampered by improper groundwater regulation. They must deal with the sale and transfer of water rights outside of a groundwater district or an aquifer. They must deal with existing contracts governing groundwater production, and potential property fragmentation if groundwater were to be no longer privately owned. Policy makers must deal with all these issues in the framework of sound science, which is only now being developed. For instance, they must understand how much groundwater is available in an aquifer, what are the recharge rates, and how much can be produced.

Many of these issues will continue to exist and need to be addressed even if vested ownership is reaffirmed. However, vested ownership in groundwater ensures that any regulation seeking to achieve these policy goals must be reasonable. It ensures that existing and historic uses will be protected. It also solidifies the already existing and extensive private contract market for groundwater, which is subject to reasonable regulation and beneficial use, as has always been the case. Reaffirmation of vested ownership in groundwater is the only way to create a true water market that appropriately balances the varying interests across the state. If vested ownership no longer exists, certain options will be removed from the table, and any market would be artificial and subject to political maneuvering.

14. Are the supporting associations and organizations- opposed to GCDs?

Not at all. A GCD that recognizes in its rules the ownership interests of property owners, acts within its authority, and uses sound science to guide its rulemaking, provides for effective regulation of groundwater resources.

Local GCDs are the best method for regulating and conserving a local resource. These districts, in consultation with their local constituents, are in a far better position to regulate their local resource than is a distant state agency. But districts must act within constitutional limits and their legislative authority. They must also act pursuant to sound scientific principles regarding groundwater availability and establishing desired future conditions.

15. What will happen to the value of my land if vested ownership of groundwater in place is reaffirmed?

Vested ownership in place will protect existing values and may even enhance the values of some properties.

Subject to proper regulation and certainty in groundwater production, property values could improve. On the other hand, an overly restrictive regulatory system and uncertainty in groundwater production would adversely affect property values. From a lending perspective, property subject to reasonable regulation and certainty of use is more favorable than property subject to problem regulation and uncertainty of use. Recognition of all property owners' rights ensures that the value of available groundwater resources is shared by all property owners in a community, not just a select few.

For existing users with existing permits, recognizing the rights of all property owners will not affect the current ability to capture groundwater under an existing permit. Moreover, GCDs have the ability to provide greater protection to historic and existing uses.

16. If I have vested ownership of groundwater in place, can it be valued and taxed?

Groundwater in place cannot be taxed under current law.

Groundwater is an integral part of the surface estate, just like limestone, sand, and gravel. The supporting associations and organizations maintain that property owners have a right, and have always had a right, to the groundwater on their property, just like they have a right to mine or quarry limestone, sand, or gravel. These "substances" cannot be taxed unless they are being extracted and sold. Otherwise, they are all taxed "in place" as part of the market value of the land. If the law clarifies that property owners have a vested right in groundwater in place as part of the surface estate, just like all the other substances of the surface estate, that does not change how the substances of the surface estate are taxed.

The Texas Supreme Court addressed these same issues with respect to limestone in *Gifford-Hill, Co. v. Wise County Appraisal District* in 1992. In that opinion the Court clarified that property can only be taxed if the Texas Property Tax Code authorizes it to be taxed. The Texas Tax Code does not authorize the taxation of groundwater. Therefore, if the Texas Supreme Court or the Legislature establishes that groundwater is the vested property of the property owner, it still cannot be taxed unless legislation is passed amending the Tax Code to authorize such a tax.

17. If a property owner sells his groundwater rights, how will that affect use of the land in the future? Can future owners of that land still get access under the domestic and livestock exemptions even though someone may have already sold all the groundwater rights?

A property owner is generally free to contract as he desires. Thus, future groundwater use depends on the conveyance documents used to accomplish the sale or transfer.

If a property owner wants to reserve all water rights or just a portion, he may do so. If a property owner wants to sell all water rights, but reserve access to groundwater for exempt uses, he may do so. Property owners should always consider whether and how to sever and reserve or sell water rights, and evaluate the terms of the conveyance documents carefully, and we always recommend advice of a competent, independent attorney before finally signing any documents. Of course, any production will have to be in compliance with the GCD's rules, no matter who owns the water rights.

We believe a reservation for exempt uses is good policy and should be required in all conveyances severing groundwater rights from the surface estate.

18. How does vested ownership affect groundwater marketing? Doesn't it encourage or fast-track such a market?

A groundwater market already exists in many areas of the state. It is relied upon by property owners and cities statewide. Vested property rights in groundwater in place do not by themselves create or fast track a groundwater market. The groundwater property right only directs how that market will develop subject to regulation by GCD rules and sound science. Recognition of all property owners' rights ensures that the value of available groundwater resources is shared by the community, not just a select few.

Vested ownership in groundwater in place is critical to recognizing existing transactions and the development of future groundwater production, rather than an artificial market created by regulatory controls that harm land stewardship and conservation. Vested rights in groundwater in place only ensure that a true water market can exist, not whether or how quickly it will develop. Society and the economy will establish the pace and price for groundwater markets, which will depend on factors such as the distance to and reliability and sustainability of groundwater supply. Given these factors, markets for transfer of water are most likely to develop first, and perhaps only, in locations with abundant groundwater supplies near high demand, such as a major city.

Vested ownership does not prevent water marketing, as some contend. Oil and gas is a good example of how this would work.

19. Isn't a groundwater market bad? For instance, won't water go to the highest bidder?

A market already exists, and nothing done on the groundwater ownership front will change that. For example, in the Texas panhandle groundwater rights have been bought and sold with no detriment to the existing communities and their economies.

If a market develops in your area, you can choose whether to participate, and the local community through the GCD can determine if the groundwater, based on sound science, can be used for new uses. You may choose to conserve your groundwater, or continue its existing use. Or there may be an economic advantage for you to sell your groundwater rights. In all instances, you have the

choice, and your existing groundwater use will be protected as a vested property right. A groundwater market, based on vested ownership rights in place and reasonable, science-based regulation, allows economic development to occur but at the same time allows property owners to continue their existing use should they so chose. Of course, there will be an economic incentive for the most cost effective use of the groundwater. Without a market, there are fewer choices, and there is little economic value to your groundwater resource outside of its use on your property.

20. How does groundwater impact the Texas economy?

Groundwater plays a critical role in the functioning of the state economy. In her letter brief to the Supreme Court of Texas, the Texas Comptroller of Public Accounts indicated the following: “Groundwater and the rights of landowners associated therewith play a fundamental role in the strength of the Texas economy. To cite but one example, agriculture, Texas' second largest resource-based industry, has an economic impact on the Texas economy of approximately \$100 billion.' The vast majority of our state's total land area, almost 80 percent, involves some type of agricultural production.' Critical to the continued strength of agriculture in our economy is groundwater and it is the source of 73 percent of the water used in Texas' irrigated agriculture industry.

In addition, communities across the state have invested a great deal of time and money in acquiring groundwater rights from landowners to support the water supply needs of their vibrant and growing economies. The continued sustainability and development of these water projects are important to our state's economic success. Texas has a substantial interest in protecting its economy by ensuring continued acknowledgment of established groundwater rights.”

21. Will there be a plague of takings liability? Will it bankrupt my GCD?

No. A regulatory takings case is difficult to make against a GCD or any other governmental entity.

While some make this argument, the truth is a takings case is difficult to make. A property owner must meet a very high bar to establish a takings claim. Only if regulation is truly unreasonable, or if a property owner's rights are significantly restricted, or the property owner has made significant investment based upon future groundwater production, could a takings claim be successful. For instance, since the Edwards Aquifer Authority legislation was confirmed in 1996, the Edwards Aquifer Authority itself has only identified three takings cases resulting from the sweeping limitations imposed by the Edwards Aquifer Authority Act. Lawyers will not be interested in such cases unless the facts are sufficient to meet the high bar. Moreover, property owners will be deterred from bringing frivolous or weak lawsuits because GCDs have the ability under Chapter 36 to recover their attorneys' fees from the property owner, if the district prevails in the suit. This forces attorneys and property owners to seriously evaluate their case.

22. If a taking is shown, who will pay?

The regulatory entity will pay. If the entity does not have adequate monetary resources, it may have to increase fees or taxes to compensate the property owner whose groundwater rights were illegally taken to the benefit of permitted users in the district.

Some argue that the compensation paid to these property owners may be at a significant cost to the local people or the state. While this may indeed be an unfortunate result of taking the rights of a property owners in some cases, it does not justify damaging a property owner without compensation. All property owners have a constitutional right to be compensated when government takes, damages or, destroys their property or property rights.

23. What will the supporting associations and organizations do next?

The supporting associations and organizations have planned an educational and legislative program, to ensure that our members, our fellow Texas property owners, and our legislators are properly informed about this significant issue, and will continue to advocate for this issue.

24. How can I get involved? How can I stay updated on your activities?

Attend GCD and GMA meetings; write to your state representative and state senator; stay apprised of our updates and legislative efforts.

References

Websites of Interest

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