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Healthy Groundwater Policy Conversations

“Groundwater for Texans,” a Texas Water Symposium will air June 1st and 3rd on Texas Public Radio and are also available online.

The *Texas Tribune*’s Evan Smith moderated the final installment of the Texas Water Symposium at Trinity University in San Antonio on the evening of May 17. The Water Symposium is a partnership between Texas Tech University, Schreiner University, Texas Public Radio and The Hill Country Alliance (HCA).

A panel of prominent water attorneys, including Russell Johnson, Greg Ellis and Tom Mason engaged in respectful civic discourse for 90 minutes on the merits and implications of the recent Texas Supreme Court’s groundwater decision, Edwards Aquifer Authority (EAA) vs. Day. This highly anticipated judgment by the Court, handed down February 24, 2012, confirms that all landowners have a real property interest in the groundwater “in place” under their land, analogous to Texas landowners’ property interest in oil and gas. The decision re-enforces the long-held notion of the supremacy of private water rights in Texas in that landowners do have a constitutionally compensable interest in groundwater. Specifically, the government may not **take** private property (in this instance, water) without fairly compensating the property owner.

The panelists held somewhat differing opinions about the spirit of the ruling and on the policy implications. Mr. Johnson insists that the ruling is *not* legally groundbreaking and has 109 years of precedent in Texas common law. He insists that the Texas Supreme Court has repeatedly found for the preservation of landowners’ ability to pump groundwater from Texas’ aquifers at will, provided the use is beneficial and without malice.

Gregory M. Ellis proposed that the Supreme Court has strayed from the legislature’s intent to protect groundwater from unregulated pumping. He further stated that twenty years of legislative effort to bring order and moderation to groundwater production and to the Edwards Aquifer in particular has been cast into grave uncertainty.

Tom Mason added to the conversation by speaking to the broader issues that are revealed when considering, and appreciating, the relationship between ground and surface water in the water cycle system.

Indeed, all of the panelists concurred that the Court's decision would have a major impact on local groundwater districts' ability to regulate the amount of water withdrawn from any given aquifer. Restrictions of production by current and future property owners were not ruled out by the courts explicitly, and no judicial guidance was offered.

The major questions that this judgment imposes are manifold:

- To what extent has this affected groundwater districts' regulatory authority?
- Are future landowners to be compensated for potential loss due to takings?
- Would restrictions in time of drought, or as a fulfillment of a Desired Future Condition, constitute a taking?
- How can the law of the land be reconciled with the public policy of a finite resource such as water?
- How can this ruling promote the best policy for Texas?
- How will the Federal Government defend the Endangered Species Act if unfettered production jeopardizes listed fish and wildlife?

The answers to these important questions cannot be answered by a panel of legal experts no matter how well intentioned they may be. The serious questions of individual rights versus the common good are important to us all, and the health and productivity of our aquifers hang in the balance.

"In full view was the dilemma that presents itself when considering groundwater ownership-protection of a property right or who has the right to protect it. A third perspective, management of the resource introduced the reality that how successful we will be as we move forward depends on the plans and rules of our Groundwater Conservation Districts," observed Milan J. Michalec, HCA Board Member and Director of the Cow Creek Groundwater Conservation District in Kendall County. "In any case, these are issues that may be successfully resolved if we are respectful of the limits of the water cycle and that of the land on which it falls."

The program will air Friday, June 1st at 7pm on KTXI 90.1 FM Kerrville/Fredericksburg and Sunday, June 3rd at 8pm on KSTX 89.1 FM San Antonio. The program will also be added to the Newsmaker Hour section of the Texas Public Radio website, where it will be available for listening online.

The Hill Country Alliance is a nonprofit organization whose purpose is to raise public awareness and build community support for preserving the natural resources and heritage of the Central Texas Hill Country. Learn more at www.hillcountryalliance.org.

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