

***1011 WATER DOES MIX WITH OIL: TEXANS' NEW ABILITY TO OWN GROUNDWATER**

INTRODUCTION

In early July 2012, the U.S. Department of Agriculture declared over 1000 counties in twenty-six states as natural-disaster areas.¹ The widespread emergency shared one thing in common: an alarming lack of water.² Water is a fundamental resource of our society. Without water, residents in a locale cannot grow food, support industry, or even inhabit an area. In times of drought or in geographic regions where there is hardly any rain at all, people often turn to groundwater.³ Wells are easy to install,⁴ and at first glance appear to offer unlimited amounts of water to a land thirsting for more.⁵

There is a great deal of variation in the ways that states allocate rights to groundwater.⁶ Over time, common law developed five methods for allocating groundwater rights.⁷ The first three methods--reasonable-use rule, appropriative rights, and regulated riparianism--mirror methods for managing surface water.⁸ In tandem with the fourth, correlative rights, these methods are designed around some method of sharing or using the water appropriately.⁹ The fifth and rarest method is right of capture.¹⁰ Under the right of capture, there is no limit to the amount of groundwater a landowner may withdraw, regardless of the effect on others, so long as the withdrawal is not unreasonable or malicious.¹¹ As one of the few states that still employ this method, Texas has held onto the rule of capture since the Texas Supreme Court's 1904 decision in *Houston & Texas Central Railway v. East* that a company could pump as much water as it liked, even if it dried up a neighbor's well.¹²

I. BACKGROUND

Even after all of these years, Texas groundwater law is one of the most complex and highly developed areas of law.¹³ When a landowner can withdraw large quantities of water even in times of drought, the situation inevitably begs the question: what limits can the government or the courts place on this withdrawal? The aquifers in the state have been decreasing over the years, and there is real concern about the ability to have water in the future.¹⁴ Many local water authorities took the initiative to limit water usage through administrative controls in an attempt to preserve aquifer levels for future consumption.¹⁵ The direct impact of these controls is less water for agriculture, which can be a hard hit for the area known as "America's breadbasket."¹⁶ The tension led to the recent Texas Supreme Court ruling in *Edwards Aquifer Authority v. Day*.¹⁷

In *Edwards Aquifer Authority*, the court took a major step beyond *East*. The court held that a landowner owns the groundwater in place,¹⁸ and thus a governmental limitation of that ownership may be a constitutional takings violation requiring compensation if the regulation substantially impacts the property's value.¹⁹ Thus, a landowner owns "separately, distinctly, and exclusively" the water beneath his land and is afforded the usual remedies to protect against trespassers.²⁰ A central element in the court's reasoning was the conclusion that groundwater rights are akin to oil and gas rights.²¹ In 1915,

the court held that oil and gas rights were owned in place,²² and now the court sees no difference between those rights and groundwater rights.

***1013 II. CRITIQUE**

The court's reasoning equates to a significant policy shift on an already-overburdened system. In Texas, landowners can already pump as much water from the drying aquifers as they please under the right of capture.²³ If ownership of the groundwater beneath the land protects the landowner from government intervention without just compensation, we must ask, who will protect the groundwater from the landowner?

This Comment will examine and critique the three arguments the court considered in determining whether groundwater ownership rights should be the same as oil and gas: the right to exclude, the applicability of correlative rights, and the fundamental differences between water and oil.²⁴ Each of these grounds were proposed by the Edwards Aquifer Authority ("Authority") as reasons to not recognize ownership in place for groundwater, and the court rejected each one.²⁵

A. RIGHT TO EXCLUDE

The Authority, in its quest to regulate water usage, contended that water could not be owned in place because there is no right to exclude--the right of exclusion being a central tenet to the ownership of property.²⁶ The resource exists in subterranean reservoirs where the flow of water molecules makes it impossible exclude others from the use of the resource.²⁷ The court swiftly rejected this contention, as it was the same argument made about oil and gas in 1915.²⁸ It further noted that under oil and gas law, a landowner has the right to prevent slanted drilling into an oil or gas formation under their land, which is a form of exclusion, and the same would be true with groundwater.²⁹ Here, the court's reasoning is sound. Simply because the resource can move or change in size should not invalidate claims of ownership and the right to exclude. To hold otherwise would risk putting oil and gas rights, settled since 1915, into a state of confusion.

B. CORRELATIVE RIGHTS

A central tenet of Texas oil and gas law is the recognition of correlative rights between landowners.³⁰ The correlative rights doctrine promotes sharing a resource and provides a cause of action that aims to prevent negligent waste and destruction of the natural resource.³¹ The Authority argued that the law recognizes correlative rights in oil and gas and *1014 not in groundwater rights; thus, groundwater must be treated differently.³² The Authority pointed to *East* for support, which declared that "the law recognizes no correlative rights in respect to underground waters percolating ... through the earth."³³

The court reached an appropriate solution to this apparent conflict. Correlative rights are a creation of regulation, not common law, and when *East* was decided, there was no groundwater regulation yet in place (now, 100 years later, groundwater is the subject of extensive regulation).³⁴ The court also added that *East* should not be read so narrowly and does not exclude an action for malice, wanton conduct, or waste.³⁵ While this reasoning seems to conflict with the rule of capture, which appears to allow unfettered access to water, the court is saved by precedent. In 1999, the court ruled that the rule of capture does not preclude an action for waste.³⁶ This reasoning allowed the court to overcome the definitional challenges between correlative rights and the rule of capture. The correlative rights associated with oil and gas are simply incorporated to a different degree with groundwater by establishing the rights through precedent.³⁷ Accordingly, the court's reasoning is thorough and the Authority's argument should not have been sustained.

C. FUNDAMENTAL DIFFERENCES

Lastly, the Authority argued that "groundwater is so fundamentally different from oil and gas in nature, use, and value that ownership rights in oil and gas should have no bearing in determining those in groundwater."³⁸ Groundwater is a renewable resource replenished in aquifers and has typically been valued at much less than oil and gas; in comparison, oil and gas are essentially nonrenewable with a much higher market value.³⁹ The court recognized that water is essential for life, but also believed that fuel for power is equally essential.⁴⁰ In almost an underhanded jab, it noted that, in some cases, the cost of a bottle of water exceeds the price of oil.⁴¹

This is where the court's reasoning becomes unsound. The court simply concluded that water and oil are equally essential for life, while also stating that "[g]roundwater regulation must take into account not only historical usage but future needs, including the relative importance of various uses, as well as concerns unrelated to use, such as environmental impacts and subsidence."⁴² Yet the court ignored its own reasoning as well as the facts: water is renewable and can flow through thousands of parcels of land. More importantly, humans, armadillos, prickly pear, and all other life on this earth cannot function *1015 without water. They can do so without oil and gas. Groundwater's nature, use, and value make it fundamentally different from oil and gas. The court even summarized these differences in its opinion: water percolates through the earth, oil and gas resides in a reservoir; each has different uses, different extraction methods, and different values in the marketplace.⁴³ The court too quickly dismissed the differences in nature, use, and value between groundwater and oil and gas. It is these differences that cloud the relationship between the two resources, and undermine the court's conclusion that ownership in place is translatable.

If the court had recognized these fundamental differences, it could have empowered the Authority to regulate its precious water supply with a forward-thinking vision. Unfortunately, the ruling cements a rare groundwater doctrine with even more dramatic ownership scheme. In a state that lacks vast water resources, ignoring these differences are bound to cause problems in the future. There is at least one similarity between the two natural resources: both wells can run dry.

CONCLUSION

The state of Texas has dramatically changed the law of groundwater under this judicial opinion. The supreme court reached its decision by comparing oil and gas law to groundwater law, thereby extending ownership in place to groundwater. In rejecting the three counter-rationales presented by the local water authority, the court solidified this change. However, the easy dismissal of the fundamental differences in nature, use, and value between groundwater and oil and gas place this opinion on fluid ground. Nevertheless, due to the complexity of groundwater laws and the limited modern reliance on the rule of capture, this reasoning is unlikely to venture beyond the Lone Star State.

Footnotes

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¹ Alan Bjerga, *Disaster Declared in 26 U.S. States as Drought Sears Midwest*, BUSINESSWEEK (July 11, 2012), <http://www.businessweek.com/news/2012-07-11/usda-declares-disaster-in-26-states-as-drought-sears-midwest>.

² *Id.*

³ NEB. DEP'T OF ENVTL. QUALITY, DROUGHT: LONG TERM EFFECTS ON WATER SUPPLIES 2 (2003).

⁴ *See, e.g.*, U.S. GEOLOGICAL SURVEY, *Groundwater: Wells*, [http:// ga.water.usgs.gov/edu/earthgwwells.html](http://ga.water.usgs.gov/edu/earthgwwells.html) (last visited Oct. 16, 2012).

⁵ NEB. DEP'T OF ENVTL. QUALITY, *supra* note 3, at 2.

⁶ 19 WATERS AND WATER RIGHTS § 19.01 (Amy L. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2011).

⁷ *Id.*

⁸ *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 Houston & Tex. Cent. Ry. Co. v. East, 81 S.W. 279 (Tex. 1904).

13 *See*, Dylan O. Drummond et al., *The Rule of Capture in Texas-- Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 42 (2004).

14 Kate Galbraith, *Push Comes to Shove Over Water Restrictions*, N.Y. TIMES, Mar. 17, 2012, at A25.

15 *Id.*

16 *Id.*

17 Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012).

18 *Id.* at 832. As the court summarized the rule of ownership in place, “[e]ach 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.” *Id.*

19 *Id.* at 833.

20 *Id.* at 832.

21 *Id.*

22 Tex. Co. v. Daugherty, 176 S.W. 717 (Tex. 1915).

23 Kelly, *supra*, note 11 at 19.01.

24 *Edwards Aquifer Auth.*, 369 S.W.3d at 830-31.

25 *Id.*

26 *Id.* at 830.

27 *Id.*

28 *Id.* (citing *Texas Co. v. Daugherty*, 107 Tex. 227 (1915)).

29 *Id.*

30 *See* Francis M. Dougherty et al., *Correlative Rights of Adjoining Owners*, 55 TEX. JUR. 3D *Oil and Gas* § 17 (2012).

31 *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 563 (1948).

32 *Edwards Aquifer Auth.*, 369 S.W.3d at 830.

33 *Houston & Tex. Cent. Ry. Co.*, 81 S.W. at 280.

34 *Edwards Aquifer Auth.*, 369 S.W.3d at 830.

35 *Id.*

36 *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999).

37 *Edwards Aquifer Auth.*, 369 S.W.3d at 831.

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 831-32.