

May 18, 2015

Property Rights and Groundwater Regulation

2015 Groundwater Summit



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Groundwater Ownership and Rights

Texas Supreme Court Recognizes a Landowners Ownership of Groundwater

EAA v Day McDaniel (2012)

...Again, the issue is not whether there are important differences between groundwater and hydrocarbons; There certainly are. But we see no basis in these differences to conclude that the common law allows ownership of oil and gas in place but not groundwater.

... As with oil and gas, one purpose of groundwater regulation is to afford each owner of water in a common, subsurface reservoir a fair share.

Right to a “Fair Share”

Elliff v Texon (1948)

*“This reasonable opportunity to produce his fair share of the oil and gas is the **landowner’s common law right** under our theory of absolute ownership of the minerals in place.”*

Right to a "Fair Share"

Marrs v Railroad Commission (1944)

*"...any denial of such fair chance amounts to **confiscation**."*

*"It is the **taking** of one man's **property** and the giving it to another."*

Right to a “Fair Share”

Halbouty v Railroad Commission (1962)
(Port Acres Case)

*“As said in **Normanna** the proration formula adopted here of 1/3-2/3 does not come close to compelling ratable production nor afford to each producer in the field an opportunity to produce his fair share of gas from the reservoir.”*

Right to a “Fair Share”

Halbouty v Railroad Commission (1962)
(Port Acres Case)

*“It is to be reemphasized that their permits were granted for the purpose of avoiding confiscation of the minerals underlying **THEIR** land and not for the purpose of enabling them to **DRAIN** the minerals underlying ADJOINING LANDS to pay the cost of their operations plus profits.”*

Right to a “Fair Share”

- What does it mean?
 - 1) EVERY landowner has a right to be allocated their “fair share” of the DFC;
 - 2) A GCD must protect a landowner’s fair share from drainage; and
 - 3) Large groundwater users may have to buy/lease groundwater rights of adjacent land impacted by drainage.

Groundwater Bills

HB 30 by Larson: Proposed Committee Substitute

Texas Water Development Board designates “production zones”

- No consideration of drainage area in zone designation
- No due process to challenge TWDB’s designation

Allocation of production in the zone by local GCD

- No Recognition of Landowners’ Right to a Fair Share
- Permit Process- No Recognition of Leasing or Buying Rights to Produce the Groundwater
- Landowners’ only recourse would be the courthouse

H.B. 2647 by Ashby: As Filed

GCDs may not curtail or reduce production of power generators or mine associated with power generation

- Necessary to Protect the Public Health & Safety?
- Discrimination for a Public Purpose?
- Is it a Taking of other Groundwater Users' Right to a Fair Share?
- Can you prioritize the use of groundwater? Consistent with Fair Share?

H.B. 3356 by Lucio: As Filed

Determine how much a “Retail Public Utility” can produce based on SERVICE AREA OR NEEDS, NOT ACREAGE OR TRACT-SIZE of the well site the utility actually OWNS

- Current law allows a GCD to consider service area or needs, BUT this statute was adopted **BEFORE EAA v DAY**
- Utilities’ response to Day because they can’t AFFORD TO BUY OR LEASE GROUNDWATER RIGHTS!
- Problems?
 - Utility doesn’t own groundwater because it’s in their service area
 - Allows a well on a small tract to drain the fair share from under neighboring tracts without compensation
 - Discriminates between utilities and other groundwater users

GCD Attorneys testified “fair share” IS NOT a property right!

H.B. 3116 by Cyrier & H.B. 4123 by Nevarez

- “Local Bills”- Lost Pines GCD & Val Verde GCD
- Both bills attempt to give “historical use” a superior right
- Justification? Investment-backed Expectations?!
- How do you take a landowner’s fair share to prevent a taking of “investment-backed expectations?”
 - Commit a taking to prevent a taking?!
 - Marris v RCT situation? “taking of one man’s property and the giving it to another”?!

Example of trying to continue regulating groundwater like it is a usufructory right instead of a real property right.

H.B. 200 by Keffer: As Engrossed

- Recognizes that regulations must protect private property rights
- Addresses “loser pays” in Section 36.066
 - Makes award of attorney fees permissive
 - Allows segregating of attorney fees based upon issues where district prevails
- Repeals ineffective TWDB appeal of DFC
- Creates a clear path to appeal a local GCDs adoption of DFC
 - SOAH hearing at GCD level
 - Judicial appeal of GCD decision under substantial evidence
 - DFCs are first step in regulation of groundwater
 - Landowners must have a clear opportunity to challenge it
 - Next DFCs are due 2016!

H.B. 4112 by Burns: Common Law Rights

- S.B. 332 by Fraser (2011)
 - Amended Sec. 36.002 of Water Code
 - Recognized Ownership in Place
 - Recognized Right to Capture
- EAA v Day (2012)
 - Recognized Ownership in Place and Right to Capture
 - ALSO RECOGNIZED RIGHT TO A FAIR SHARE
- Section 36.002 is not consistent with the common law
- References to Section 36.002 as “the description” of ownership and rights
 - Statute needs to be consistent with common law
 - H.B. 4112 adds reference to “any other right recognized by common law”
 - Legally, it’s not needed. But, perception is reality.

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The Future?

What have we learned this session?

- Denial regarding what “fair share” means
 - GCDs with rules inconsistent with real property rights
 - Groundwater users who will have a financial burden
- No Political Will to provide statutory guidance
 - Rules and Permits consistent with Fair Share
 - More, Not Less Discrimination
 - Less, Not More Regulatory Certainty

FUTURE? Litigation to get the same answers we already have from 70 years of oil and gas law.

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