

May 18, 2015

# Property Rights and Groundwater Regulation

2015 Groundwater Summit



# 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?!
  - Marrs 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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