



## Oil & Gas News Alert

### Texas Supreme Court to Determine Whether the Accommodation Doctrine Applies To Severed Groundwater Estate

By Morgan Johnson, Chris Halgren, and Austin Brister  
September, 2015

The Texas Supreme Court recently granted Coyote Lake Ranch's petition to review an opinion by the Amarillo Court of Appeals in *Lubbock v. Coyote Lake Ranch*, holding that the "Accommodation Doctrine," does not apply to the relationship between a surface owner and the owner of a severed groundwater estate. In the context of a severed mineral estate, the Accommodation Doctrine requires that the owner of a severed mineral estate accommodate pre-existing surface uses in certain circumstances.

By granting Coyote Lake Ranch's petition to review, the Texas Supreme Court will have the opportunity to address whether this doctrine also applies to a severed groundwater estate. The decision in this case could potentially answer an important question regarding conflicts between groundwater production activities and existing surface uses. With the oil and gas industry dealing with sub-\$50 oil prices, and the public's increasing awareness of the importance of water, the Supreme Court's holding in this case will have significant implications to the development of groundwater in Texas. As Texas A&M University School of Law professor Gabriel Eckstein told Law 360, this case "has big implications, some of which we can't even imagine yet."

### The Deed and Dispute

In 1953, a predecessor of Coyote Lake Ranch ("CLR") conveyed the groundwater estate in a portion of its ranch to the City of Lubbock ("City"). The deed reserved the surface estate owner enough water "to carry on usual and normal domestic and ranching operations and undertakings upon said land," and granted the City the "full and exclusive rights of ingress and egress over the lands so that the [City] may at any time and location drill water wells and test wells on said lands for the purpose of investigating, exploring, producing, and getting access to percolating and underground water."

The deed also conveyed a perpetual easement to "string, lay, construct, and maintain" water, fuel, power, and communication lines, and granted the right to build houses for employees, booster stations, roads, and reservoirs, as well as "the rights to use all that part of said lands necessary or incidental to the taking of percolating and underground water and the production, treating and transmission of water therefrom and delivery of said water to the water system of the City of Lubbock only."

In 2012 and 2013, the City drilled and developed seven wells on CLR's ranch land near the north border. This case arose when the City announced a plan to construct and develop 80 municipal water wells on the CLR ranch land in a drilling arrangement that CLR claims will interfere with its use of the ranch. CLR filed suit seeking to stop the expanded drilling, alleging that the City's activities on its property were unlawful and did not accommodate CLR's pre-existing use of the surface. CLR further alleged that the proposed production activity would drastically disrupt CLR's existing ranching and cattle-raising operations.

CLR filed an application for a temporary injunction, asking the trial court to enjoin the City from performing additional activities on CLR's property until after a trial on the merits. The trial court granted CLR's application.



#### Austin Office

600 Congress Ave.,  
Ste. 2100  
Austin, TX 78701  
512 495-6000 o  
512 495-6093 f

#### Houston Office

711 Louisiana St.,  
Ste. 1600  
Houston, TX 77002  
713 615-8500 o  
713 615-8585 f

[mcginnislaw.com](http://mcginnislaw.com)

## Water Rights Background

While Texas law treats oil and gas and groundwater differently in many aspects, courts have applied several oil and gas doctrines to the production and ownership of groundwater. For example, both commodities are subject to the rule of capture, and both are considered “fugitive” or capable of traveling. However, the regulation of each commodity is drastically different and due to limited case law on the subject of groundwater, parties typically rely heavily on contractual agreements rather than common law overlays to determine their rights and obligations. For example, the dominant estate theory, which generally provides the owner of severed mineral estate dominion over the surface estate as necessary to access the minerals, has not been addressed by Texas courts as it relates to severed water rights. As a result, parties involved in the severance of water rights often rely heavily on contractual planning for their access and related issues. Parties often seek to ensure that the document severing the groundwater from the surface estate provides the groundwater estate owner the right to access, produce, and subsequently transport the produced groundwater.

In *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012), the Texas Supreme Court discussed the similarities to some extent, holding that the ownership of groundwater is similar to the ownership of minerals, in that they are both owned “in place.” Under the ownership in place theory, the owner of oil and gas or groundwater is regarded as having absolute title in severalty to the oil and gas or groundwater beneath his land, subject only to the qualification that it must be considered in connection with the law of capture and police regulations. Left unanswered in *Day* is the extent to which other oil and gas doctrines are applicable to groundwater owners under the same rule of law, if at all.

## The Arguments and Appeal

On appeal, the appellate court reviewed the trial court’s order granting a temporary injunction prohibiting the City from taking certain activities relating to further development of its water plan on land which was owned and used by CLR. In performing its review, the appellate court concluded that the Accommodation Doctrine was the sole underlying basis for the trial court’s order granting the temporary injunction. Accordingly, the appellate court limited its review to the issue of whether the Accommodation Doctrine could apply to a dispute between a surface owner and the owner of a severed groundwater estate.

CLR argued that *Edwards Aquifer Auth. v. Day* established that issues related to groundwater ownership should generally be analogized to issues related to mineral ownership. However, the Amarillo Court of Appeals noted that neither *Day* nor any other case it reviewed expressly provided that the Accommodation Doctrine should apply to the relationship between the owner of the surface estate and the owner of the groundwater estate. As a result, the Amarillo Court of Appeals declined to read *Day* in a manner that would support extending the Accommodation Doctrine as requested by CLR.

The Amarillo court reviewed existing case law, and found that it does not support extending the doctrine to cover a severed water estate. Further, the Amarillo court stated that, if the doctrine should be extended, the decision to do so should come from either the Texas Supreme Court or the Legislature because of the impacts such a change could have on existing water law.

On January 30, 2015, the Supreme Court of Texas requested briefs on the merits. Earlier this month, in September of 2015, the Court granted review.



### Austin Office

600 Congress Ave.,  
Ste. 2100  
Austin, TX 78701  
512 495-6000 o  
512 495-6093 f

### Houston Office

711 Louisiana St.,  
Ste. 1600  
Houston, TX 77002  
713 615-8500 o  
713 615-8585 f

[mcginnislaw.com](http://mcginnislaw.com)