

**THE OWNERSHIP OF GROUNDWATER IN TEXAS**  
**The Implications of *Day v. Edwards Aquifer Authority***  
**For Meeting the Needs of Texas and Oklahoma**

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Fighting over water is a tradition in the Western states, as reflected in the famous quotation often attributed to Mark Twain: “Whiskey is for drinking; water is for fighting over.” Today, new battles over groundwater are breaking out across the western states. Recently, the Texas Supreme Court finally put an end to the battle over who owns groundwater in place in Texas. This article explores the implications of that decision both in terms of meeting the water needs of Texas and in terms of potential water supply arrangements in Oklahoma.

***The Ownership of Groundwater: A Very Strange Battle***

On August 5, 2008, the Texas Senate Committee on Natural Resources held a hearing in Amarillo concerning, among other topics, the issue of regulation of groundwater. During the course of that hearing, Senator Robert Duncan of Lubbock made the following observations:

“...nobody owns the groundwater under - in place. You have the right to drill and you have the right to capture, but you have no right...

“And I might add to that - that the trend would seem to me to be - that property right is - to the ownership is pretty illusory...Illusory - in other words, I don’t think there is property right. I don’t think you own the water in place.”

What could lead a West Texas State Senator to opine that groundwater is not owned in place? At the time, a landowner challenge to denial of a permit to produce groundwater was winding its way through the Texas court system.<sup>1</sup> The San Antonio court of appeals had handed a victory to two owners of land who sought a permit to produce irrigation water from a tract that lacked requisite historic use data. The San Antonio court held that the landowners had a vested property right in groundwater in

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<sup>1</sup> *Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex. App.—San Antonio 2008, aff’d *Edwards Aquifer Authority v. Day*, Tex. 2012).

place, and that the property right was entitled to constitutional protection.<sup>2</sup> The subsequent appeal to the Texas Supreme Court saw a plethora of amicus briefs on both sides of the issue.<sup>3</sup> Although oral argument was held on February 17, 2010, the Texas high court waited until February 24, 2012 to hand down its definitive 49 page opinion. In the interim, the Texas Legislature stepped into the fray, passing an amendment to the Texas Water Code that plainly stated that the owner of land owned the groundwater beneath the surface as real property.<sup>4</sup>

The judicial and legislative attention paid to this ownership issue reflected a battle for regulatory control of water in Texas. There, groundwater regulation is delegated to individual groundwater districts under Chapter 36 of the Water Code.<sup>5</sup> The question at hand was (and is) the extent to which these districts are constrained by legal considerations as they undertake the task of regulation. The answer to this question necessarily depended on the nature of the property rights affected by the district's regulation of groundwater. Are rights in and to groundwater while in the ground "vested property rights?" If so, are those rights entitled to constitutional protection? If so, what are the implications for transporting water around and out of the state?

Water districts and their advocates denied that landowners had a vested property right in groundwater. They suggested that a private landowner has only a usufruct,<sup>6</sup> which they described as an exclusive right to capture the water under the property by producing it at the surface. Because ownership of property must vest somewhere at all times,<sup>7</sup> the implication of this suggestion was that the State actually owned the groundwater until produced. Following this reasoning, they concluded that the State, acting through its agencies such as groundwater districts, had authority to regulate groundwater without concern for private property rights of the landowner, thereby exempting the State from liability in dealing with groundwater rights. From a practical

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<sup>2</sup> *Id.*; See also *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002) (holding that a vested property right is entitled to constitutional protection).

<sup>3</sup> For a compendium of the briefs, see [www.texasgroundwaterlaw.com](http://www.texasgroundwaterlaw.com).

<sup>4</sup> Texas Water Code Sec. 36.002.

<sup>5</sup> Texas Water Code Sec. 36.0015.

<sup>6</sup> A "usufruct" is defined as "the legal right of using and enjoying the fruits or profits of something belonging to another." Merriam Webster's Collegiate Dictionary 1302 (10th ed. 1993) (emphasis added).

<sup>7</sup> See, for example, *Wolkewitz v. Wood*, 216 S.W.2d 611 (Tex Civ. App.-Texarkana 1948); *Brooker v. Brooker*, 76 S.W.2d 180 (Tex Civ. App.-Ft. Worth 1934).

standpoint, this legal reasoning would protect groundwater districts from suit if they made export of water from the districts difficult or impossible. Because most of the 96 existing groundwater districts are controlled by agricultural interests, local districts are reluctant to see “their” groundwater being transported out of the local area for any use anywhere else. Accordingly, the ownership fight was a de facto battle over the ability to provide water to meet the growing needs of large cities across the state.

**Prior Texas Case Law**

For at least a century, Texas cases consistently recognized that the owner of the land owns the water underlying his property.<sup>8</sup> A landowner's ownership of the groundwater had been recognized in Texas since at least 1904, when the Texas Supreme Court handed down its decision in *Houston & T.C. Ry Co. v. East*.<sup>9</sup> There, the Texas Supreme Court had before it a case in which East, a landowner, sued an adjoining landowner for drilling a well that dried up East's spring. East claimed damages to his property due to unavailability of water. Rejecting East's claims, the trial court held for defendant. The court of appeals reversed, apparently on the premise that the use by the railroad company was an unreasonable use. In this posture, the Texas Supreme Court was clearly presented with the question of whether it should adopt the “reasonable use” doctrine for groundwater in this State, which would hold that the owner of the surface has only a right to use that amount of water that is reasonable. Or, alternatively, should it adopt an “absolute ownership” view that would give the landowner the right to produce all the water he could regardless of reasonableness of use? After analyzing holdings from around the country dealing with the right of a landowner to make use of water under his land, the Court concluded:

An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of the land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.

*Id.* at 150 (emphasis added).

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<sup>8</sup> In its decision in *Day*, the Texas Supreme Court opined that the ownership of groundwater in place had never been expressly decided in Texas. As can be seen from the language of earlier cases, this observation is an empty effort to appease the groundwater district interests.

<sup>9</sup> 98 Tex. 146, 81 S.W. 279 (Tex. 1904).

This rule of ownership comes from the English common law, specifically the doctrine of *ad coelum*,<sup>10</sup> which says that a property owner is vested with property rights in all of the sky above his property up to the heavens and everything beneath his property to the center of the earth. (See H. Williams & C. Meyers, *Manual of Oil and Gas Terms* 19 (7th ed. 1987).) Note that the *East* decision equates underground water with the land itself, indistinguishable from soil. This characterization assumes significance when comparing rights in underground water with rights in flowing streams; the former is an absolute ownership right indistinguishable from the soil itself, while the latter is a right to reasonable use only. This distinction was fully recognized by the Texas Supreme Court in 1927 in *Texas Co. v. Burkett*,<sup>11</sup> where the Court was presented with a breach of contract action in which the plaintiff, Burkett, had contracted with Texas Company to provide water from his land for its operations. Plaintiff's land had multiple water sources, including a stream that often but not always flowed, and a well. After Texas Company failed to honor a verbal renewal of the contract, Burkett sued. Defending, Texas Company claimed that the State, not Burkett, owned the water he had contracted to sell, and the contract was thus unlawful and contrary to public policy. Thus, the ownership of riparian water and groundwater was at issue. With the ownership issue clearly joined, the Supreme Court first dealt with the water from the stream, holding:

From the testimony shown in the record, we are of the opinion that Leon River is a stream to which riparian rights attach, and the flood waters of which are subject to the appropriation laws of this state. Hoefs v. Short, 114 Tex. 501, 273 S. W. 785, 40 A. L. R. 833.

The right of Burkett as a riparian owner was one of use only, since the riparian does not own the water which flows past his land.<sup>12</sup>

Turning to the issue of whether Burkett could therefore lawfully fulfill the contract from a well, the Court noted the absence of evidence that the water from the well was in fact riparian water rather than percolating groundwater. Concluding the contract was not unlawful, the Court stated:

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<sup>10</sup> Cuius est solum, eius est usque ad caelum et ad inferos (in English, for whoever owns the soil, it is theirs up to the sky and down to the depths) is a Roman legal principle of property law that was passed down to common law and civil law systems. *Blacks Law Dictionary*

<sup>11</sup> 117 Tex. 16, 296 S.W. 273 (Tex. 1927).

<sup>12</sup> *Id.* at 276.

We are unable to say, from the evidence, whether or not the spring, or springs, from these percolating waters, was, or were, of sufficient magnitude to be of any value to riparian [sic] proprietors, or added perceptibly to the general volume of water in the bed of the stream, and we therefore assume that they were springs of such character that Burkett plainly had the right to grant access to them and the use of their waters for any purpose, either on **riparian [sic]** or nonriparian land. In other words, in so far as this record discloses, they were neither surface water nor subsurface streams with defined channels, nor riparian water in any form, and therefore were the exclusive property of Burkett, who had all the rights incident to them one might have as to any other species of property.<sup>13</sup>

Finally, the Court noted that there was no evidence that the waters obtained from the excavated well were underground streams with defined channels, and therefore subject to a rule of correlative rights. Thus, the Court concluded, “the presumption is that the sources of water supply obtained by such excavations are ordinary percolating waters, which are the exclusive property of the owner of the surface of the soil, and subject to barter and sale as any other species of property.”<sup>14</sup>

Subsequent Texas cases affirmed the ownership of groundwater as being indistinguishable from ownership of the soil itself. See *City of Corpus Christi v. City of Pleasanton*;<sup>15</sup> *Friendswood Development Company v. Smith-Southwest Industries, Inc.*;<sup>16</sup> *Moser v. United States Steel Corp.*;<sup>17</sup> and *Bartley v. Sone*.<sup>18</sup>

### **The Day Decision**

In its long awaited decision in the *Day* case, the Supreme Court’s first two sentences spread joy among landowners and shock waves among groundwater districts: “We decide in this case whether land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation guaranteed by article I, section 17(a) of the Texas Constitution. We hold that it does.”

After reciting the somewhat convoluted history of the case, the Court opined that it had never decided whether groundwater can be owned in place, then noted “...we held

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<sup>13</sup> *Id.* at 278.

<sup>14</sup> *Id.* at 29, 296 S.W. at 278.

<sup>15</sup> 276 S.W.2d 798 (Tex. 1955)

<sup>16</sup> 576 S.W.2d 21 (Tex. 1978),

<sup>17</sup> 676 S.W.2d 99 (Tex. 1984).

<sup>18</sup> 527 S.W.2d 754, 759-60 (Tex. App.—San Antonio 1974, writ ref’d n.r.e.),

long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently.” Following that line of thought, the Court held that the fugacious nature of groundwater did not preclude ownership in place, relying on its reasoning in *Texas Co. v. Daugherty*,<sup>19</sup> an oil and gas case that noted:

The possibility of the escape of the oil and gas from beneath the land before being finally brought within actual control may be recognized, as may also their incapability of absolute ownership, in the sense of positive possession, until so subjected. But nevertheless, while they are in the ground, they constitute a property interest.<sup>20</sup>

Rejecting another argument advanced by the EAA, the Court held that landowners have “correlative” rights in groundwater. Relying on its holding in *Eliff v. Texon Drilling Co.*,<sup>21</sup> the Court held that “correlative rights between the various landowners over a common reservoir of oil or gas” have been recognized through state regulation of oil and gas production that affords each landowner “the opportunity to produce his fair share of the recoverable oil and gas beneath his land.” Comparing groundwater to oil and gas, the Court noted that correlative rights in each instance were creatures of regulation and not of the common law. Importantly, the Court specifically adopted the “fair chance” doctrine that has long been the rule in oil and gas matters.

EAA posited that the ownership principles regarding oil and gas should not apply to groundwater because it is chemically and socially different from oil and gas: “you can’t drink oil.” Rejecting this argument, the Court pointed out that differentiating between the two in terms of importance to modern life would be difficult, then noted: “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.” The Court then adopted the following reasoning from *Eliff* as correctly stating the law regarding ownership of groundwater:

In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns

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<sup>19</sup> 176 S.W. 717 (Tex. 1915).

<sup>20</sup> *Id.* at 720.

<sup>21</sup> 210 S.W.2d 558 (Tex. 1949).

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.<sup>22</sup>

Finally, the Court specifically held that the nature of groundwater ownership was such that constitutional protections attached to it: “Groundwater rights are property rights subject to constitutional protection, whatever difficulties may lie in determining adequate compensation for a taking.” Outlining the nature of such constitutional protection, the Court turned to its opinion in *Sheffield Development Co. v. City of Glenn Heights*:<sup>23</sup>

“Government hardly could go on”, wrote Justice Holmes in the first regulatory takings case in the United States Supreme Court, “if to some extent values incident to property could not be diminished [by government regulation] without paying for every such change in the general law.” Yet, he continued, “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” “The general rule at least”, he concluded, is “that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”, adding, “this is a question of degree — and therefore cannot be disposed of by general propositions.” “[T]he question at bottom is upon whom the loss of the changes desired *should* fall.”<sup>24</sup>

The Court concluded that a takings analysis with respect to groundwater regulation should follow the factors set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). In that regard, the Court opined that the State is “unquestionably” empowered to regulate groundwater production because such regulation is essential to its conservation and use. One purpose of this regulation is “to afford each owner of water in a common, subsurface reservoir a fair share.” After carefully analyzing the *Penn Central* factors in connection with the EAA authorizing statute and the ownership provisions of the Texas Water Code, the Court concluded that a fact issue existed regarding whether the EAA regulations were too restrictive of Day’s groundwater rights and without justification in the overall regulatory scheme.

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<sup>22</sup> 210 S.W.2d 558, 561.

<sup>23</sup> 140 S.W.3d 660 (Tex 2004).

<sup>24</sup> Id. at 670 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413, 416 (1922)).

*The Implications of Day*

As noted above, the Court in *Day* repeatedly turned to Texas oil and gas law to provide the analog for groundwater rights. The importance of this reliance on oil and gas cases cannot be overlooked: Texas groundwater rights can now be examined in the light of a century of well-developed oil and gas law. The implications for groundwater regulation are huge. From the early part of the last century, Texas courts have been called upon to determine the limits of the lawful exercise of authority by the Texas Railroad Commission, the entity that exercises regulatory authority similar to (but not nearly as fractured as) groundwater districts. These cases are instructive regarding the nature of the correlative rights of adjoining owners of groundwater (the "fair chance doctrine") and the implications for both the State and the landowner when regulations unnecessarily abridge the rights of groundwater owners.

The fundamental constitutional issues concerned here were discussed in the oil and gas context in *Marrs v. Railroad Commission*.<sup>25</sup> There, certain mineral rights owners challenged a ruling by the Texas Railroad Commission concerning production allowances in a field long shown to be productive of oil.<sup>26</sup> In somewhat simplified terms, a group of mineral owners in the northern portion of the field had established early production from numerous wells, thereby establishing a "pressure sink" that would cause oil to migrate toward the area.<sup>27</sup> Owners in the southern portion of the field had developed wells at a slower pace, but were able to demonstrate that substantial reserves of oil existed in their area, particularly as compared to the northern area which had been subject to greater depletion over the years.<sup>28</sup> Before the regulatory action in question, the owners in this southern area had established a line of wells between the two areas that produced at maximum capacity and essentially established a "shield" protecting them from drainage from the northern area.<sup>29</sup> The Railroad Commission then established field rules which prevented this line of "shield" wells from producing their maximum capacity.<sup>30</sup> The effect of this was to permit oil from the southern area to once again migrate toward the

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<sup>25</sup> 177 S.W.2d 941, 948 (Tex. 1944).

<sup>26</sup> *Id.* at 943.

<sup>27</sup> *Id.* at 943-45.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 949.

<sup>30</sup> *Id.* at 946.

pressure sink in the north area.<sup>31</sup> The suit was predicated on the theory that production in the south area was so restricted by the Commission's proration orders that the owners there were unable to recover their oil before it drained away to more densely drilled section to the north.<sup>32</sup>

The questions presented were whether the Commission's orders were subject to judicial review, and if so, whether the actions of the Railroad Commission were arbitrary, unjust and discriminatory, and deprived plaintiffs of their just property rights. Answering those questions in the affirmative, the Texas Supreme Court stated:

Under the settled law of this State oil and gas form a part and parcel of the land wherein they tarry and belong to the owner of such land or his assigns and such owner has the right to mine such minerals subject to the conservation laws of this State. Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation.<sup>33</sup>

As to the practical implications of this "confiscation," the court continued:

As the oil is taken from the depleted Church-Fields area it is replaced by oil drained from petitioners' property. If petitioners were free to fend for themselves they could mine the oil under their land and thus prevent its escape to the adjoining area. But the orders of the Railroad Commission here complained of prevent petitioners from so doing. As a result, petitioners are being forever deprived of their property. It is the taking of one man's property and the giving it to another.<sup>34</sup>

The Supreme Court then elaborated at length concerning the legal implications of this "taking:"

Our Constitution authorizes the conservation of our natural resources. The authority to execute this constitutional provision in so far as it applies to oil and gas has been vested by the Legislature in the Railroad Commission of the State. Undoubtedly, in carrying out this constitutional purpose, the Commission must, as far as possible, act in consonance with the vested property rights of the individual. While our Constitution thus provides for the conservation of our natural resources for the benefit of the public, there are other constitutional provisions for the protection of the property rights of the individual. Article I, Section 17, of our State Constitution

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<sup>31</sup> *Id.* at 945.

<sup>32</sup> *Id.* at 946.

<sup>33</sup> *Id.* at 948 (citations omitted) (emphasis added).

<sup>34</sup> *Id.*

prohibits the taking of one's property for public use without adequate compensation therefor. Article I, Section 3, provides for equal rights for all men, and Article I, Section 19, provides that no citizen shall be deprived of his property except by the due course of the law of the land. The Fourteenth Amendment to our Federal Constitution provides that no State shall deprive any citizen of his property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. We need not here determine to what extent the State may confiscate one's property, or deprive him of the use thereof, without compensation, where this is necessary in order to conserve the natural resources of the State. See in this connection *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321; *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 83 S.W.2d 935, 87 S.W.2d 1069, 99 A.L.R. 1107, 101 A.L.R. 1393, and authorities there cited. It is sufficient to point out that the trial court here found that the drainage complained of was not necessary in order to avoid waste, and that finding is supported by the evidence. It was further found that the orders of the Railroad Commission were unreasonable, unjust, and discriminatory. This Court has many times said that the Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields, or between different owners in the same field.<sup>35</sup>

In this single passage, the Texas Supreme Court identifies a sweeping panoply of rights on which the Railroad Commission must not trample:

1. Texas Constitution, Article I, Section 17, prohibiting the taking of one's property for public use without adequate compensation;
2. Texas Constitution, Article I, Section 3, providing for equal rights for all men;
3. Texas Constitution, Article I, Section 19, providing that no citizen shall be deprived of his property except by the due course of the law; and
4. U.S. Constitution, 14<sup>th</sup> Amendment, providing that no State shall deprive any citizen of his property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Under the holding in *Day*, the same principles apply to groundwater: every owner is entitled to a fair chance to recover groundwater in or under his land, and any denial of such fair chance amounts to confiscation, or stated differently, a taking of private property that is prohibited by the United States and Texas constitutions.

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<sup>35</sup> *Id.* at 949.

In *Marrs*, the Texas Supreme Court outlined a second prong of legal considerations by which administrative agencies are bound: an agency of the state cannot promulgate rules or issue orders that are “unreasonable, unjust, and discriminatory.”<sup>36</sup> The Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields, or between different owners in the same field.<sup>37</sup> The prohibition announced by the Court could just as accurately state that groundwater conservation districts “cannot indulge in unjust, unreasonable, or arbitrary discrimination between different [aquifers], or between different owners in the same [aquifer].”

What are the limits on a groundwater conservation district under this “unreasonable regulatory discrimination” standard? Again, instruction is readily available from cases in the oil and gas arena. For example, in *Railroad Commission v. Shell Oil*,<sup>38</sup> the Texas Supreme Court had before a “Rule 37” case dealing with the authority of the Railroad Commission to grant exceptions to its well spacing rules. The Court noted:

It is a well-established principle of constitutional law that any statute or ordinance regulating the conduct of a lawful business or industry and authorizing the granting or withholding of licenses or permits as the designated officials arbitrarily choose, without setting forth any guide or standard to govern such officials in distinguishing between individuals entitled to such permits or licenses and those not so entitled, is unconstitutional and void.<sup>39</sup>

The Court explained that there must be some factual basis for classifying some applicants as subject to the general spacing provisions of the rule and other applicants as within the exception. The grant or denial of rights cannot be made on the basis of conditions that exist equally in any other part of a field. As the Court noted:

In order to be valid a discrimination between persons must have a reasonable basis in fact. There must be some factual basis for classifying some applicants as subject to the general spacing provisions of the rule

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<sup>36</sup> *Id.* at 949.

<sup>37</sup> *Id.*

<sup>38</sup> 161 S.W.2d 1022 (Tex. 1944).

<sup>39</sup> *Id.* at 1025.

and other applicants as within the exception. This reasonable basis can only be a showing of unusual conditions peculiar to the area where the well is sought to be drilled-not testimony that would be equally applicable to any other part of the field.<sup>40</sup>

Continuing to describe the conditions that might allow differential treatment of persons in the same field (aquifer), the Court opined:

Upon a showing that in a particular field, or in a particular section of a field, on account of the peculiar formation of the underground structure or other unusual circumstances, a closer spacing of the wells is essential to recover the oil, undoubtedly the Commission would have authority to grant the exception, provided that it includes all those and only those coming within the exceptional situation, and providing further that it did not unduly discriminate in any other manner against producers in other areas or fields.<sup>41</sup>

Thus, a water district may justify disparate treatment of adjoining landowners in the same aquifer only if there is some rational basis in the facts that justifies different treatment. If there is no “peculiar formation of the underground structure or other unusual circumstances” affecting adjoining owners, there can be no differentiation in treatment without violating the equal rights and equal protection clauses of the United States and Texas Constitutions.

**Export of Groundwater: Constrained or Constitutionally Protected?**

Returning to the central item of interest here, can Texas groundwater districts restrict or deny the exportation of groundwater from within the districts to other points in Texas or elsewhere? Clearly, the *Day* case and its application of principles from oil and gas law mandate that the owners of groundwater must be given a fair chance to realize the beneficial use of their property. Groundwater districts are already under a statutory mandate prohibiting them from discriminating against the export of groundwater.<sup>42</sup> However, the Texas Water Code allows groundwater districts to impose different permit terms on permits to export water outside the district.<sup>43</sup> Arguably, if the purpose for which the water will be used outside the district is a “beneficial use” under the definitions set

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<sup>40</sup> *Id.* at 1026 (emphasis added).

<sup>41</sup> *Id.* at 1027. (emphasis added)

<sup>42</sup> Texas Water Code Sec. 36.122(g).

<sup>43</sup> Texas Water Code Sec. 36.122(a).

forth in the Code,<sup>44</sup> a district should not be able to place greater restrictions on export than on in-district use. Doing so would necessarily deprive the putative exporter of a “fair chance” to produce his groundwater, resulting in a regulatory taking. Thus, *Day* strengthens the argument that districts may not discriminate against those whose use of groundwater includes exporting it out of the district for a beneficial use such as municipal water supply or fracking.

Given that a groundwater owner should be able to export water out of a groundwater district for beneficial uses elsewhere, can the owner also transport the water across a state line for beneficial uses? That answer implicates both the property rights in groundwater and the interstate commerce clause. Groundwater districts cannot prohibit export of groundwater for beneficial uses elsewhere in Texas, and nothing in the law suggests that districts can treat export to another state any differently. Further, the issue of whether Texas may prohibit export of groundwater from its boundaries to Oklahoma has already been decided. In *City of Altus, Oklahoma v. Carr*,<sup>45</sup> a federal district court in Texas ruled that a Texas statute prohibiting the removal of water from an underground in Texas for use in another state amounted to an unconstitutional burden on interstate commerce. Following what it understood Texas law on groundwater ownership to be in 1966, the court concluded that Texas landowners own an interest in groundwater and have the right to produce and appropriate that water. Further, the court recognized that once withdrawn from the ground, water becomes personal property of the landowner. The court concluded:

Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone . . . or prohibits the withdrawal of such substance where the intent is to transport such in interstate commerce, the result upon interstate commerce is the same. In both situations, the purpose and intent of the statute and the end result thereof is to prohibit the interstate transportation of an article of commerce. Clearly, then, Section 2 of this statute constitutes an unreasonable burden upon interstate commerce. Plaintiffs

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<sup>44</sup> Texas Water Code Sec. 36.001(9): “beneficial use” includes use for agricultural, gardening, domestic, stock raising, municipal, mining, manufacturing, industrial, commercial, recreational or pleasure purposes; exploring for, producing, handling or treating oil, gas, sulphur or other minerals; or any other purpose that is useful or beneficial to the user.”

<sup>45</sup> *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966).

should not be denied by the provisions of such statute the right to withdraw and move water in interstate commerce.<sup>46</sup>

***Conclusion:***

While the *Day* case represents an important milestone in private property rights, its pronouncements are neither surprising nor new. However, groundwater rights owners can take comfort in the confirmation that their rights are protected, including the right to a “fair chance” to produce water for beneficial uses. The holdings in *Day* and *City of Altus* combine to recognize that a Texas groundwater rights owner must be allowed to export that water from within a groundwater district to points outside that district, including points outside the State itself.

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<sup>46</sup> Id. at 840.