OWNERSHIP OF GROUNDWATER



Marvin W. Jones
Sprouse Shrader Smith PC
Amarillo

OWNERSHIP?

- Some say that water is not owned in place
- Landowner only has a "usufruct"—the right to withdraw water from the property
- But NO vested property right in the water in the ground

WHO OWNS GROUNDWATER IN PLACE?

- If not the landowner, who?
- No one wants to answer that question



VOICES AROUND THE STATE

- Greg Ellis, Executive Director, TAGD
- "The biggest issue the [Texas] courts will have to decide is the question of who owns the groundwater. Though this issue has been discussed in legal circles for well over a decade, it's only in the last year, really, that cases addressing this 'vested rights' issue - whether or not landowners have a vested right in the ownership of groundwater - are making their way through to the higher courts."

Greg Ellis Aug. 22, 2008

 "I think we need to find some compromise legislation that clarifies historic rights (perhaps by codifying the Guitar decision) and finds a way to ensure the water rights will be available to ranchers without guaranteeing anyone a specific result or codifying groundwater as a vested property right."

VOICES AROUND THE STATE

- Bruce Davidson, San Antonio Express
 News
- "And the stakes could not be higher. If the 'rule of capture' is applied to Texas groundwater, any landowner could claim rights to water beneath his or her property."

SENATOR DUNCAN'S VIEW

- "I don't think there is property right. I don't think you own the water in place."
- "...the ownership is pretty illusory."
- "...nobody owns the groundwater under - in place."
- August 5, 2008 Hearing of the Senate Natural Resources Committee

OWNERSHIP?

- If "NOBODY" doesn't own it, who does?
- Two choices
 - The landowner
 - The STATE
- Sen. Duncan: "...it would occur to me that in the future, there is a lot of opportunity for <u>central control</u> of that water."

DAY V. EDWARDS AQUIFER AUTHORITY





Day v. EAA: The Court of Appeals Opinion

- Edwards Aquifer v. Day (San Antonio 2008)
- Recognized the ownership of groundwater and the constitutional consequences of that ownership
- "This court recently held landowners have some ownership rights in the groundwater beneath their property. Because Applicants have some ownership rights in the groundwater, they have a vested right herein. Applicants' vested right in the groundwater beneath their property is entitled to constitutional protection."

The EAA Petition for Review

- Does the Texas common law rule of capture provide a landowner, within the boundaries of the Edwards Aquifer Authority, with a vested and constitutionally protected ownership interest in the groundwater in place beneath his or her property?
- Wrong question: confuses the rule of capture with ownership

The EAA Petition for Review

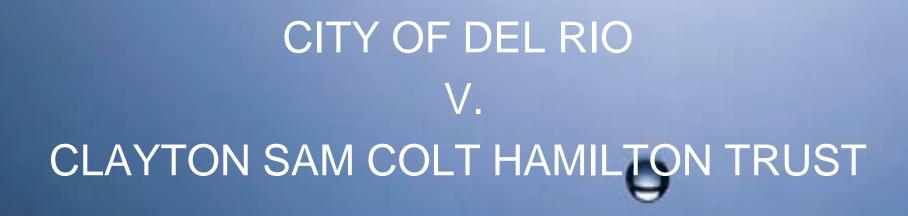
- D&M cannot have suffered a constitutionally compensable taking if the thing they claim was taken from them is not vested property entitled to constitutional protection.
- This Court should grant review and hold that Respondents do not have a vested property right in groundwater in place...

The Attorney General's Petition for Review

- If a property owner's access to groundwater can be limited by his neighbors without tort liability, it can likewise be limited by the government without takings liability.
- Confuses private property rights with the nature and limits of the power of government.

The Attorney General's Petition for Review

- "The Legislature can change <u>non-vested</u> common law property rights without incurring takings liability."
- "And the court has always recognized that the Legislature might adjust the parameters of groundwater ownership."
- "As the State has explained, the Conservation Amendment, the rule of capture, and the Legislature's authority to change common law all operate to undermine any claimed prospective property right."



Pending before the Texas Supreme Court

Del Rio's Reply Brief

- There is a huge and obvious gap between the concept of a "right" or "interest" in groundwater beneath the surface of one's property and the more far-reaching concept of actual fee simple ownership of the very corpus of that groundwater. The City urges rejection of the latter concept, not of the former one.
- [T]he water itself is not subject to off-site sale until reduced to possession (at which point it is personal property).

OWNERSHIP: NOT A NEW ISSUE

- 1845: State adopted the common law of England <u>except</u> as changed by the Legislature or the Constitution
- TRCS art. 1 (now TCPRC Sec. 5.001)
- What was the common law of England regarding the ownership of groundwater?

East Case

- Houston & TC Ry v. East (1904)
- Holds that the landowner owns water in place under that land
- Adopts the Rule of Capture



East Case (1904)

- What the Court said:
- "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,"

East Case (1904)

- Quotes Acton v. Blundell (1843)
- "...we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action."

And Before Acton?

- Marcellus (a Roman justice)
- "No action, not even an action for fraud, can be brought against a person who, while digging on his own land, diverts his neighbor's water supply."
- Sometime before 45 B.C.
- In accord: Ulpian (Praefectus Praetorio, A.D. 211 to 222)

And Before Acton?

- Roman law (and English common law) are based on the Latin maxim: "cujus est solum ejus est usque ad coelum et ad infernos"
- Meaning: "whoever owns the soil owns everything up to the sky and down to the depths"

Back to the Attorney General's Position in Day v. EAA

- Earlier opinion of the AG [Att'y Gen. JM-827 at 14. (Nov. 25, 1987)]
- The Texas Supreme Court recently reaffirmed that, under Texas law, landowners have "absolute ownership" of percolating groundwater beneath their lands. A corollary to this "absolute ownership" is the landowners' right to capture the groundwater beneath their lands. The right of landowners to groundwater beneath their land is an incident to their ownership of the land—a part of the land. Because groundwater is considered to be the property of the overlying landowner, under the common-law rule, the landowner may withdraw it regardless of the effect of the withdrawal on other wells.

RULE OF CAPTURE?

- A rule of nonliability: a landowner cannot be liable for producing what amounts to his neighbor's water
- Some: if you can take water from under my land and I cannot sue for that, then I must not own the water until I bring it to the surface
- But if I don't own the water in place, then there is no need for the rule of capture...

Texas Co. v. Burkett (1927)

- The contract: supply water from various sources
- Ownership of water in streams: the State
- Ownership of underground water in defined stream channels: the State

Texas Co. v. Burkett (1927)

- Ownership of "percolating waters:"
- "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."

City of Corpus Christi v. City of Pleasanton (1955)

 "It thus appears that under the commonlaw rule adopted in this state an owner of land could use all of the percolating water he could capture from wells on his land for whatever beneficial purposes he needed it, on or off of the land, and could likewise sell it to others for use off of the land and outside of the basin where produced, just as he could sell any other species of property."

OTHER CASES ON OWNERSHIP?

- Friendswood Development Company v. Smith-Southwest Industries, Inc. (Tex. 1978): "this ownership of groundwater comes with ownership of the surface; it is part of the soil."
- Moser v. United States Steel Corp. (Tex. 1984)
- Gifford-Hill & Co., Inc. v. Wise County Appraisal District (Tex. 1991)

Bartley v. Sone (San Antonio 1974)

 "The owner of land 'owns also all ordinary springs and waters arising thereon.' This rule relating to ownership of water flowing from springs stems from the rule that the owner of land owns the water under the surface, generally referred to by hydrologists as 'ground water.' Our statutory law recognizes this principle, although the legislature uses the term 'underground water,' rather than 'ground water.'

Bartley v. Sone (San Antonio 1974)

 "Our statutes define 'underground water' as 'water percolating below the surface of the earth and that is suitable for agricultural gardening, domestic or stock raising purposes, but does not include defined subterranean streams or the underflow of rivers.' Tex. Water Code Ann. Sec. 52.001(3) 1972. The Water Code expressly recognizes 'the ownership and rights of the owner of the land . . . in underground water 'Tex. Water Code Ann. Sec. 52.002 1972. These statutory provisions are but the embodiment of well settled rules relating to the ownership of percolating waters."



Water Code Chapter 11

- Sec. 11.021. STATE WATER
- (a) The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.
- (b) Water imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state is the property of the state.

- Texas Water Code Sec. 36.002
- OWNERSHIP OF GROUNDWATER. The ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a district.

- Texas Water Code Sec. 36.002
- The Texas Supreme Court has twice recognized that this provision "confirms private property rights in underground water."
 - City of Sherman v. Pub. Util. Comm'n (Tex. 1983)
 - Friendswood Development Company v.
 Smith-Southwest Industries, Inc. (Tex. 1978)

- Texas Water Code Sec. 36.119
- Recognizes the ownership of groundwater by specifically allowing a water rights owner to sue his neighbor for drainage if the neighbor is operating a well without a permit or otherwise in violation of district rules
- If landowner did not own the water, no need for this legislation

- Tex. Prop. Code § 21.0421(a)
- Eminent domain statutes require admission of "evidence related to the market value of groundwater rights as property apart from the land" when a political subdivision proposes to condemn the "fee title of real property," and there is evidence that the political subdivision plans to use the "rights to groundwater for a public purpose."

OTHER TEXAS LAW?

- Private Real Property Rights Preservation Act
- Defines the phrase "private real property" to mean "an interest in real property recognized by common law, including a groundwater or surface right of any kind, that is not owned by the federal government, this state, or a political subdivision of this state."

The Oil & Gas Corollary

- AG Opinion JM-827 (1987): "The law with regard to the state's regulation of oil and gas provides a helpful analogy for groundwater regulation because the common-law property rights are similar."
- Texas Co. v. Daugherty (Texas Supreme Court 1915)
- "Oil and gas in place are part of the realty and constitute a property interest, not merely a license to bring them to the surface and only then reduce them to possession."

The Oil & Gas Corollary

- Daugherty addressed the issue now raised by EAA: rule of capture means you don't have a vested property right until brought to the surface
- "The possibility of the escape of the oil and gas from beneath the land before being finally brought within actual control may be recognized, ...[b]ut nevertheless, while they are in the ground, they constitute a property interest."

CONSTITUTIONAL PROTECTION?

- Marrs v. Railroad Commission (1944)
- Texas Constitution, Article 1, Section 17, prohibits the taking of one's property for public use without adequate compensation;
- Texas Constitution, Article 1, Section 3, provides for equal rights for all men;
- Texas Constitution, Article 1, Section 19, provides that no citizen shall be deprived of his property except by the due course of the law; and
- U.S. Constitution, 14th Amendment, 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.

CONSTITUTIONAL PROTECTION?

- The conclusion:
- Groundwater districts "cannot indulge in unjust, unreasonable, or arbitrary discrimination between different [aquifers], or between different owners in the same [aquifer]." Marrs v. RRC

WHAT DIFFERENCE DOES OWNERSHIP MAKE?

- If groundwater in place is a vested property right, that right is entitled to constitutional protection
- GCDs can regulate groundwater use, but...
- Regulation cannot be unreasonable, unjust, and discriminatory
- Rules must have a rational basis if treating different owners differently
- Regulation must be equal—the burden of conservation must fall equally
- Marrs: RRC cannot have different rules for owners in the same reservoir

WHAT DIFFERENCE DOES OWNERSHIP MAKE?

- If the landowner owns the groundwater, there is a problem with historic use schemes
- Could the RRC refuse to give a mineral owner a permit to drill a well because earlier permitees were already producing all the "allowable" from a reservoir?

WHAT DIFFERENCE DOES OWNERSHIP MAKE?

- If the landowner owns the groundwater, there is a problem with arbitrary lines
- Arbitrary lines? Lines that treat people within same aquifer differently
- Could the RRC draw an arbitrary line on the surface above a reservoir and impose different rules on owners depending on which side of the line they are on?

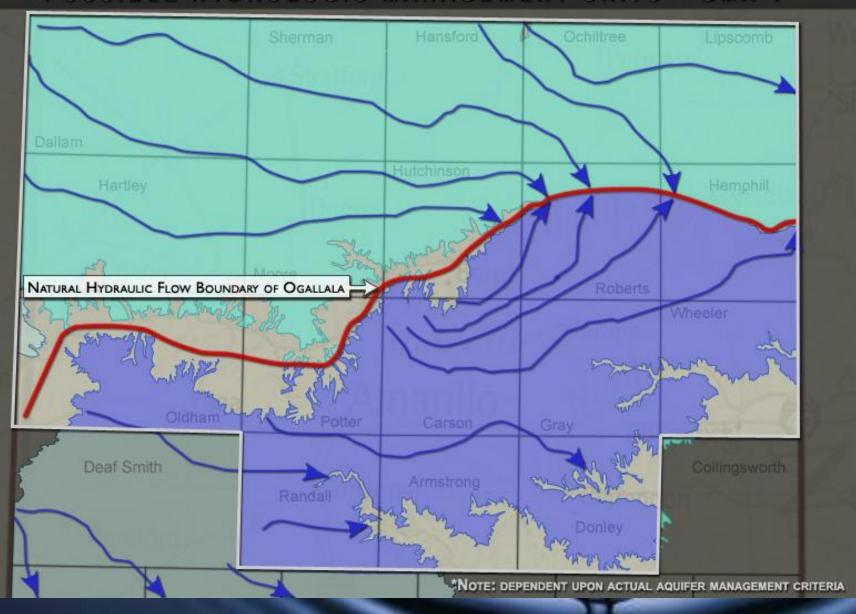
IMPLICATIONS FOR GCDs TODAY: DFCs

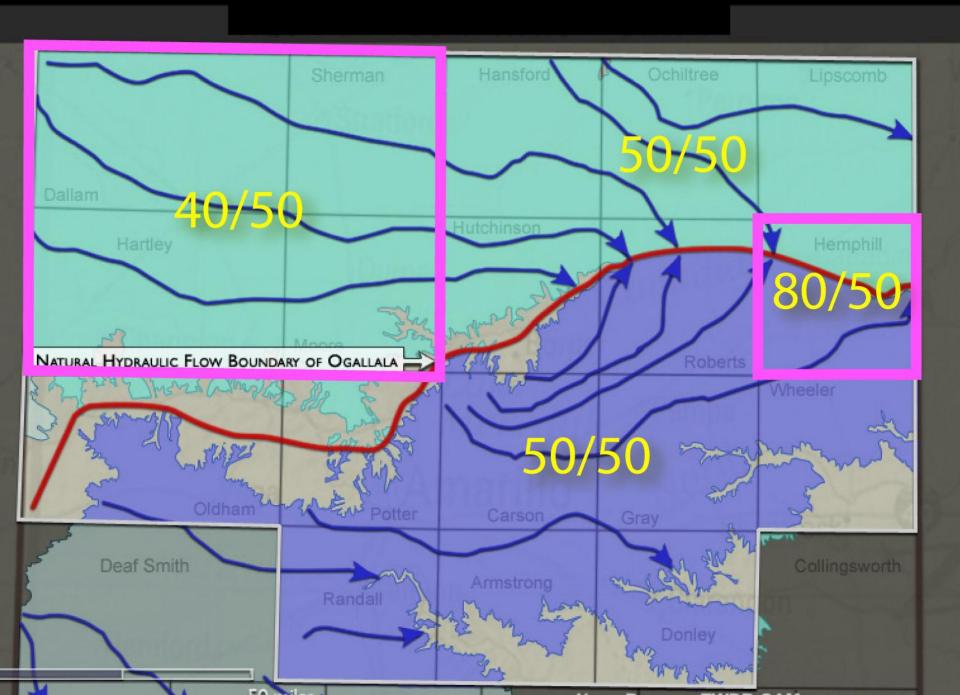
- Sec. 36.108: Joint Planning and GMAs
- Must establish Desired Future Conditions for each aquifer, subdivision of aquifer, geological strata
- OR "geographic area"
- GCDs: We can designate different DFC for each district in our GMA

PERMISSIBLE LINES TO DRAW?

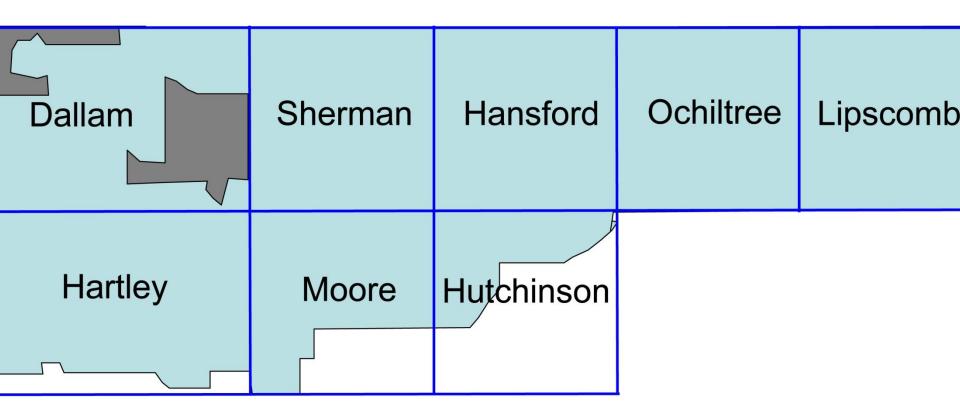
- Sec. 36.108(d)(2)
- Aquifer
- Subdivision of an aquifer
- Geological strata
- "Geographical areas"
- Political subdivisions?

POSSIBLE HYDROLOGIC MANAGEMENT UNITS - GMA 1*

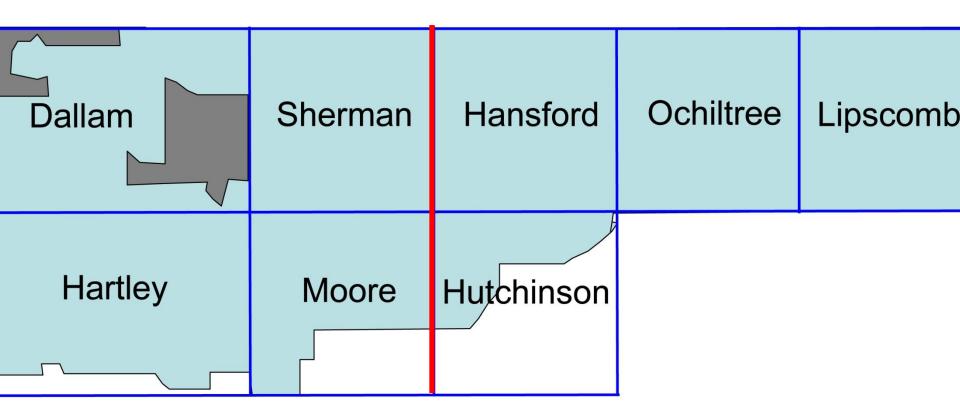


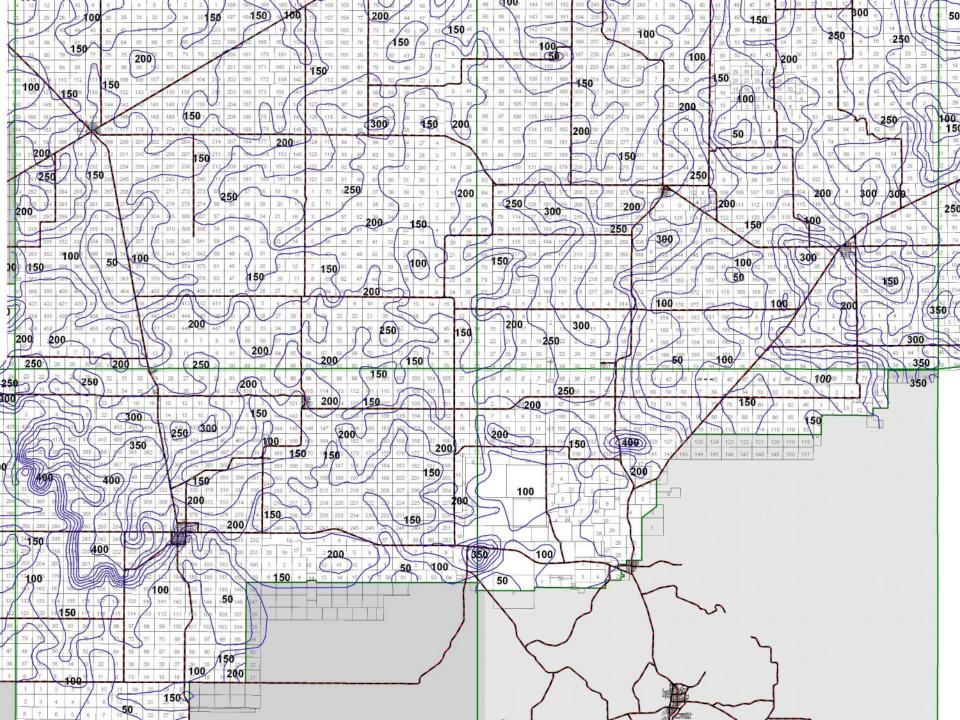


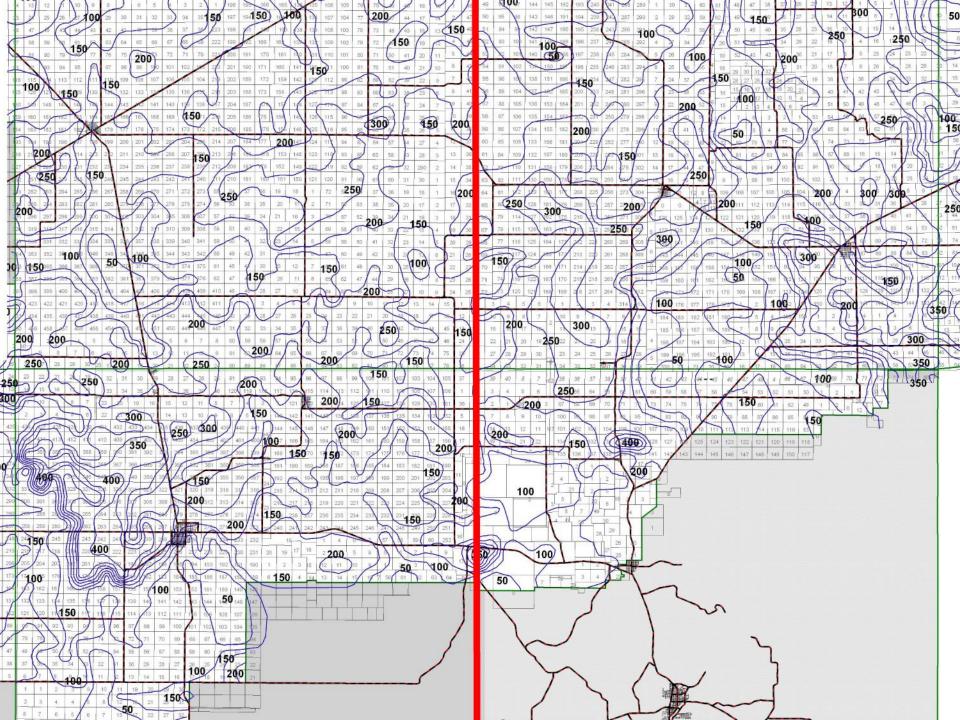
NORTH PLAINS GROUNDWATER CONSERVATION DISTRICT



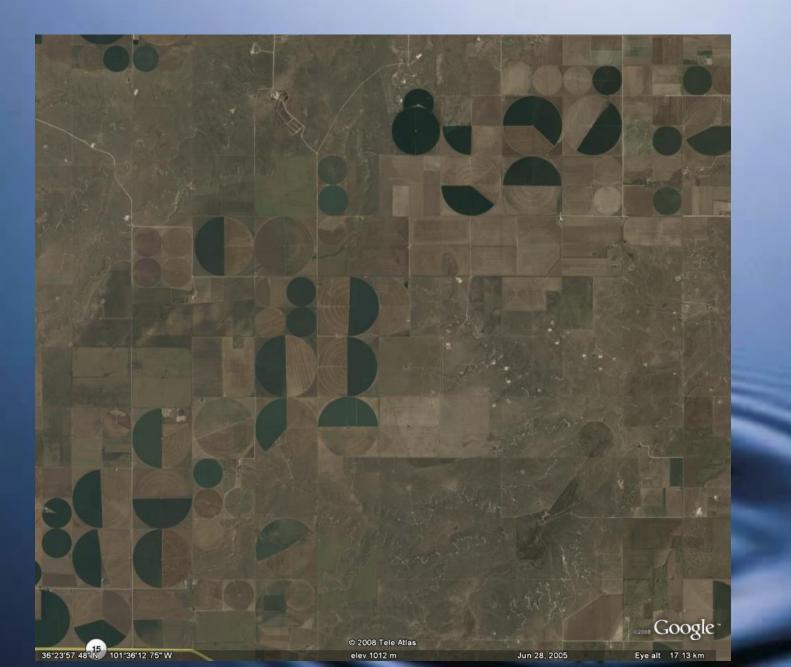
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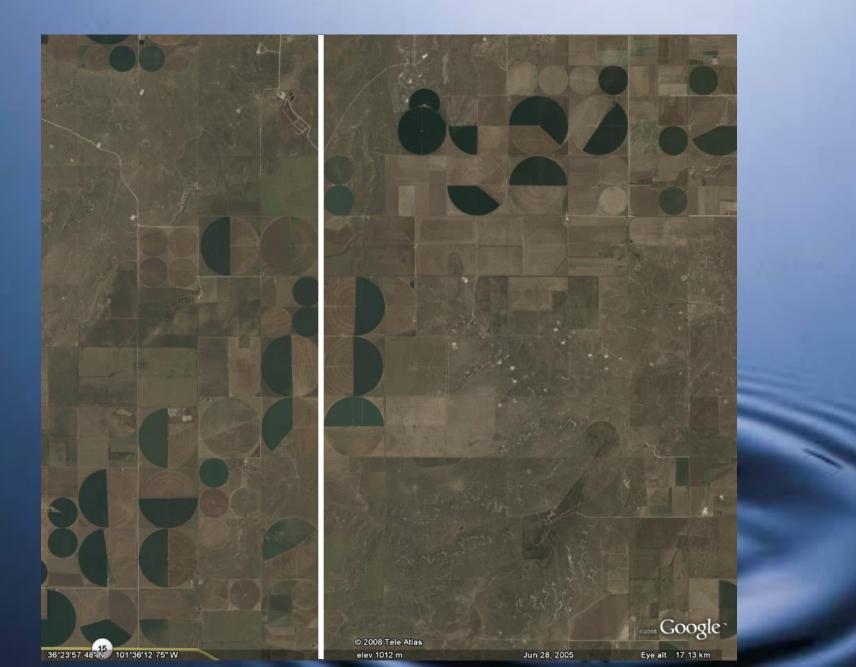




SHERMAN/HANSFORD COUNTY LINE



SHERMAN/HANSFORD COUNTY LINE



Roberts/Hemphill County Line

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Google

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POTENTIAL DISASTER?

- If GCDs designate different DFCs for different political areas, and then use different rules to achieve the DFCs, will be just like the RRC enforcing different rules in a single reservoir based on a county line on the surface—an unconstitutional exercise of regulatory power
- The system of GCDs then crashes

What Can You Do?

- Urge organizations like this one to submit amicus briefs in the Day and Del Rio cases—asking the Court to affirm that landowners in Texas own the groundwater in place under their land
- Support legislation that makes ownership of groundwater crystal clear
- Tell your local GCD to quit paying TAGD to write briefs saying landowners don't own their groundwater
- Call your State representatives and ask them to take the position that landowners own the groundwater and oil and gas below their property

Sprouse Shrader Smith PC Amarillo



