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GCD Regulation of Groundwater In the Cold Light of *Day*

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Why The DFC Process Is Failing: What Can Be Done To Fix It (December 2009)
Ownership of Groundwater: A Primer (April 2009)
The Ownership of Groundwater in Texas: A Contrived Battle for State Control of the Groundwater (2009, Baylor Law Review)

TABLE OF CONTENTS

GCD REGULATION OF GROUNDWATER IN THE COLD LIGHT OF *DAY*

Marvin W. Jones

In its briefing in the Texas Supreme Court in *Edwards Aquifer Authority v. Day*[1] Edwards Aquifer Authority ("EAA") took the position that if groundwater was determined to be owned in place by the landowners, regulation would be severely hampered due to the expense of takings claims. The Court responded by concluding: "We cannot know, of course, the extent to which the Authority's fears will yet materialize, but the burden of the Takings Clause on government is no reason to excuse its applicability."

The question explored here is the nature of takings claims as such claims might relate to groundwater regulation by groundwater conservation districts. Under what circumstances will GCD's become subject to liability for takings?

The Case Law at Issue: Edwards Aquifer Authority v. Day

In *Edwards Aquifer Authority v. Day and McDaniel*, the Texas Supreme Court had before it a landowner challenge to denial of a permit to produce groundwater. 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 "some" vested property right in groundwater in place, and that the property right was entitled to constitutional protection.[2] The subsequent appeal to the Texas Supreme Court saw a plethora of amicus briefs on both sides of the issue.[3] 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.[4]

The judicial and legislative attention paid to this ownership issue reflected a battle for regulatory control of water in Texas. 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?

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,[5] 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,[6] 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 standpoint, this legal reasoning would protect groundwater districts from suit if they restricted the availability of production permits or unreasonably reduced production limits for all users in a district. Also implicated is the right to restrict or prohibit specific uses of groundwater, particularly the right to export groundwater from a district to other points in the state. Because most of the 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.

A. 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.[7] A landowner's ownership of the groundwater had been recognized in Texas since at least 1904, when the Texas Supreme Court handed

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[1] 389 S.W.3d 814 (Tex. 2012).

[2] *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742 (Tex. App.—San Antonio 2008); *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).

[3] For a compendium of the briefs, *see* www.texasgroundwaterlaw.com.

[4] Texas Water Code § 36.002.

[5] 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).

[6] *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).

[7] 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.

down its decision in *Houston & T.C. Ry Co. v. East*.[8] 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).

This rule of ownership comes from the English common law, specifically the doctrine of *ad coelum*,[9] 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*,[10] 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.[11]

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:

> 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 reparian [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 **reparian [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

[8] 98 Tex. 146, 81 S.W. 279 (Tex. 1904).

[9] 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. *Black's Law Dictionary*.

[10] 117 Tex. 16, 296 S.W. 273 (Tex. 1927).

[11] *Id*. at 276.

> incident to them one might have as to any other species of property.[12]

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."[13]

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*;[14] *Friendswood Development Company v. Smith-Southwest Industries, Inc.*;[15] *Moser v. United States Steel Corp.*;[16] and *Bartley v. Sone*.[17]

B. 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 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*,[18] 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.[19]

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.*,[20] 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 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.[21]

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

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[12] *Id*. at 278.
[13] *Id*. at 29, 296 S.W. at 278.
[14] 276 S.W.2d 798 (Tex. 1955).
[15] 576 S.W.2d 21 (Tex. 1978).
[16] 676 S.W.2d 99 (Tex. 1984).
[17] 527 S.W.2d 754, 759-60 (Tex. App.—San Antonio 1974, writ ref'd n.r.e.).
[18] 176 S.W. 717 (Tex. 1915).
[19] *Id*. at 720.
[20] 210 S.W.2d 558 (Tex. 1949).
[21] 210 S.W.2d 558, 561.

opinion in *Sheffield Development Co. v. City of Glenn Heights*:[22]

> "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."[23]

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 it 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.

C. Takings Claims Defined

As noted above, the Texas Supreme Court held in *Day* that landowner's have a vested, constitutionally protected right in groundwater in place: "Today we have decided that landowners do have a constitutionally compensable interest in groundwater, and we come at last to the issue not presented in *Barshop*: whether the EAAA's regulatory scheme has resulted in a taking of that interest." The Court then delineated two types of takings: a complete taking, characterized by actual physical invasion of property or regulations that deprive an owner of all economic benefit of property, or a regulatory taking governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, [438 U.S. 104] (1978).

In *Lingle v. Chevron U.S.A., Inc.*,[24] the U.S. Supreme Court explained the types of takings that *ipso facto* require compensation:

> We have . . . described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.
> …
> The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. *See Agins*, 447 U. S., at 260; *see also Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 834 (1987); *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 495 (1987); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 1016*1016 U. S. 264, 295-296 (1981).[6] As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Agins, supra*, at 260 (citations omitted) (emphasis added).
> *Id.* at xx.

The Texas Supreme Court's reference to the *Penn Central* factors addresses the more problematic issue: if a regulation does not result in a physical invasion of property and does not deny the owner of all economically beneficial or productive use, is there nevertheless a regulatory line that cannot be crossed without compensating the owner? *Penn Central* sets out a three-prong balancing test to govern certain types of takings claims. Under that test, courts consider: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed

[22] 140 S.W.3d 660 (Tex 2004).
[23] *Id*. at 670 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413, 416 (1922)).
[24] 544 U.S. 528 (2005).

expectations; and (3) the character of the governmental action. Under both the Texas and Federal Constitutions, the reasonable, investment-backed expectations prong is a critical component of the *Penn Central* test. *See, e.g., City of San Antonio v. El Dorado Amusement Co.*;[25] *Ruckelshaus v. Monsanto Co.*[26] It is frequently the most important part of the analysis. *Mayhew v. Town of Sunnyvale*,[27] ("The reasonable investment-backed expectation of the claimant is critical."); *City of Dallas v. VRC LLC,*[28] ("[T]he investment-backed expectations of the property owner" are "critical in evaluating the reasonableness of the government's interference").

An owner's historic use of property will often be a primary consideration when determining reasonable investment-backed expectations. *Hallco Tex., Inc. v. McMullen Cnty.*[29] ("Historical uses of the property are critically important when determining the reasonable investment-backed expectations of the landowner.)" On the other hand, it is more difficult to establish a reasonable investment-backed expectation for an entirely new use of property. *Park v. City of San Antonio*;[30] *Hallco Texas, Inc. v. McMullen County*.[31] Arguably, an owner who develops a specific property for a use consistent with the historic use of surrounding property should be held to have a reasonable investment-backed expectation requiring compensation. *See, e.g., Palazzolo v. Rhode Island*.[32]

D. Marrs v. RRC: An Oil and Gas Analog for Physical Takings

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*.[33] 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.[34] 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.[35] 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.[36] 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.[37] The Railroad Commission then established field rules which prevented this line of "shield" wells from producing their maximum capacity.[38] The effect of this was to permit oil from the southern area to once again migrate toward the pressure sink in the north area.[39] 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.[40]

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

[25] 195 S.W.3d 238, 243, 246-47 (Tex. App. 2006).
[26] 467 U.S. 986, 1005-1007 (1984).
[27] 964 S.W.2d 922, 937 (Tex. 1998).
[28] 260 S.W.3d 60, 65 (Tex. App. 2008).
[29] 94 S.W.3d 735, 738 (Tex. App. 2002), *aff'd*, 221 S.W. 50 (Tex. 2006).
[30] 230 S.W.3d 860 (Tex. App. 2007).
[31] 94 S.W.3d 735 (Tex. Ct. App. 2002).
[32] 533 U.S. 606 (2001).
[33] 77 S.W.2d 941, 948 (Tex. 1944).
[34] *Id*. at 943.
[35] *Id*. at 943-45.
[36] *Id*.
[37] *Id*. at 949.
[38] *Id*. at 946.
[39] *Id*. at 945.
[40] *Id*. at 946.

> 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.[41]

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.[42]

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 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.[43]

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.

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."[44] The Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields, or between different owners in the same field.[45] 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*,[46] 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:

[41] *Id*. at 948 (citations omitted) (emphasis added).
[42] *Id*.
[43] *Id*. at 949.
[44] *Id*. at 949.
[45] *Id*.
[46] 161 S.W.2d 1022 (Tex. 1944).

> 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.[47]

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 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.[48]

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.[49]

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.

Two Possible Scenarios

Although there can be many possible variations of regulations that result in a taking, two are presented here, one involving a *Marrs*-style taking and the second involving a more subtle regulatory taking.

Scenario 1: Assume for the first scenario that two or more groundwater conservation districts exist above a single aquifer.[50] Assume that each GCD has adopted a separate desired future condition for the aquifer within its boundary,[51] and that each GCD will follow the statutory admonition that its rules must be modified to actually achieve the chosen desired future condition. For purposes of this illustration, assume that a groundwater conservation district ("District A") has adopted a DFC requiring that 80% of the 2010 level of saturated thickness will exist at the end of 50 years, while the adjacent districts have adopted a DFC of 50%. If District A then sets a production limit of 0.5 acre feet per acre per year in order to achieve the DFC, but the adjacent districts set a production limit of 1.5 acre feet per year, those persons whose property is at the boundary between the districts will ultimately be affected in the same way the oil producers were affected in *Marrs.* While the GCD itself is not directly taking groundwater from the boundary owners, its regulations will result in groundwater flowing from the boundary owners to their more fortunate neighbors in the adjoining districts. Obviously, expert testimony will be required to determine the extent to which drainage is damaging the property at issue, but similar expert testimony is routinely used to establish damages in oil and gas drainage cases.

A second type of damage caused in this first scenario is the diminution of market value of the groundwater rights across the entirety of District A. Where the production limits of the surrounding districts are more generous, the market value will be greater. Conversely, a district that shares a common aquifer but unreasonably restricts production as compared to its neighbors is artificially repressing the market value of groundwater rights, a taking for which compensation should be allowed.

[47] *Id*. at 1025.
[48] *Id*. at 1026 (emphasis added).
[49] *Id*. at 1027 (emphasis added).

[50] Given that 98 GCDs exist over 16 major aquifers, this assumption is the rule rather than the exception.
[51] Also an assumption that reflects reality, given that virtually all GCDs adopted disparate DCFs for areas over a common aquifer.

Scenario 2: Assume that a GCD has historically relied only on spacing and offset rules to regulate production, with no specific production limitations in place. Assume that the property owners in that district have historically purchased land at a given value on the assumption that they can use an amount of water necessary to raise corn, and that their lenders have loaned money to purchase the land, drill irrigation wells and buy sprinkler systems based on the economics of raising corn. Then assume that the district decides to impose production limits that reduce the previously unlimited production to 1.0 acre feet per acre per year over a four year span. Those owners raising corn have historically used as much as 3.0 acre feet per acre; they cannot raise corn with only 1.0 acre feet per acre. The crops that can be raised on 1.0 acre feet per acre will not generate the income required to discharge the various loan obligations. Under this scenario, the "taking" is not a physical taking, nor has the district's regulation completely deprived the owners of all economically beneficial use of the property. However, the landowners had reasonable investment-backed expectations that have been frustrated by the regulations. Under those circumstances, a taking has occurred that requires compensation.

Conclusion

While the *Day* case represents an important milestone in private property rights, its pronouncements are neither surprising nor new. 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. As groundwater conservation districts gear up to pass rules required to achieve their various disparate desired future conditions, owners will undoubtedly want to explore whether these regulations effect a taking.

Table of Authorities

Cases