

February 28, 2012

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In a Landmark Decision, the Texas Supreme Court Recognizes Vested Property Interest in Groundwater "In Place"

By Leonard H. Dougal, Ed Small, and Cassandra Quinn

On February 24, 2012, the Texas Supreme Court issued its long-awaited decision in *Edwards Aquifer Authority v. Day*, one of the most significant water law cases in years. In a unanimous decision, the Court ruled that, under both the common law and the recently enacted Senate Bill 332, a landowner owns the groundwater under his land "in place" as a property right that cannot be taken for public use without adequate compensation guaranteed by the Takings Clause of the Texas Constitution. The decision is likely to have wide-ranging effects for landowners' rights, as well as impacts on the regulation of groundwater by the state's 96 established groundwater conservation districts.

The case involved a challenge brought by two farmers, Burrell Day and Joel McDaniel, who applied in 1996 for a permit from the Edwards Aquifer Authority (EAA) to pump 700 acre feet per year of water from 381 acres of land over the Edwards Aquifer for irrigation purposes. The EAA ultimately granted a permit, but for only 14 acre feet of water per year based upon the landowners' documented historic beneficial use of the groundwater. The landowners filed a lawsuit contending that an unconstitutional "taking" of their groundwater rights had occurred. The EAA took the position that a landowner's property interest in groundwater does not vest until after the water is brought to the surface and, thus, the landowners' takings claim must fail because they did not have a constitutionally protected interest in the groundwater in place.

The trial court agreed with the EAA's position and denied the landowners' takings claim; however, that decision was reversed on appeal. The appellate court held that "landowners have some ownership rights in the groundwater beneath their property" and "[b]ecause Applicants have some ownership rights in the groundwater, they have a vested right therein." The appellate court ordered the case to be remanded for further consideration of the takings claim, but the case was subsequently appealed to the Texas Supreme Court.

The Supreme Court concluded that there is a vested property interest in groundwater in place. Texas law has long recognized that oil and gas are owned in place, and the Court found no reasonable basis for treating groundwater differently. In applying this conclusion to the facts in *Day*, the Court upheld the EAA's issuance of a permit for only 14 acre feet per year of water, but remanded the case to determine whether the EAA's permitting process resulted in a taking of the landowners' groundwater rights for which adequate compensation is constitutionally guaranteed.

While the *Day* case specifically involved the Edwards Aquifer, it has important statewide implications for the regulation of groundwater. The decision will certainly have a significant effect on the permitting of wells and regulation of groundwater by local groundwater conservation districts, which have typically considered an applicant's historic beneficial use of water as an important factor in granting production permits. The new challenge for conservation districts will be to fairly allocate production, so that each landowner has an opportunity to capture a fair share of the groundwater, which may result in a larger reliance on well spacing and acreage considerations, rather than merely historic use. Additionally, given aquifer production caps, resulting either under the endangered species act (as in the Edwards Aquifer) or the Desired Future Conditions (DFC) process, districts will be faced with a new challenge of how to allocate the limited production from each aquifer. This may result in efforts to reallocate water from those who already hold production permits, which will create uncertainty in the value of existing permits.

Clearly, if a district seeks to impose unreasonable or arbitrary restrictions on groundwater production, under *Day* the landowner now has a potential remedy. In fact, a significant concern of groundwater conservation districts is that the Court's ruling will lead to more litigation as landowners whose groundwater rights are restricted seek compensation for a taking. The EAA argued that takings litigation may disrupt the robust market that has developed in its permits and that buyers will be wary of paying for permits that may later be reduced. The Court responded by stating that "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." Stay tuned, sorting out the true impact of this decision will take some time.

The Supreme Court's opinion in *Edwards Aquifer Authority v. Day* is [available here](#).

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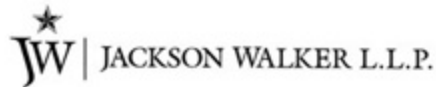
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