



A Victory for Property Rights

Texas Court Decision Affirms Right to Water

By Bruce Wright

(May 7, 2012)

On February 24, 2012, the Texas Supreme Court issued a landmark ruling that reaffirms the traditional right of farmers and ranchers to use the water lying beneath their land.

The court's opinion in the case called *Edwards Aquifer Authority and the State of Texas v. Burrell Day and Joel McDaniel* provides a capstone for decades of efforts by the Texas Legislature to defend and protect private real property rights.

A Basic Right

Landowners' rights are a long-standing concern in Texas. Government interventions that interfere with or prevent landowners from making use of their property are called "takings," and the basic principle that government should pay for

Read the [court's opinion on Edwards Aquifer Authority and the State of Texas v. Burrell Day and Joel McDaniel \(PDF, 126K\)](#)

such actions is enshrined in our basic law. Article I of the Texas Constitution stipulates that “No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made.”

This principle, however, is often eroded by government regulation of land use.

Significant legislative attempts to shore up the basic right to the free use of private land began with 1995’s Senate Bill 14, the Texas Private Real Property Rights Preservation Act, which directs governmental entities to expressly consider whether takings of private real property may result from their actions.

Texas law has long held that, as with oil and gas deposits, groundwater is subject to the traditional common-law concept of “rule of capture.” This means that landowners can, if acting without malice or willful waste, take as much groundwater as they can capture under their land without any liability to their neighbors. A 2011 bill, SB 332, reaffirmed that property owners have an ownership interest in the groundwater below their property.

SB 332, heavily supported by farming, ranching and landowner groups throughout the state, could affect the way in which some Texas groundwater is regulated.

Historic Usage

The Edwards Aquifer Authority (EAA), created by the 1993 Texas Legislature, manages the conservation and use of groundwater across an eight-county region in southern Texas. The legislation creating the EAA required the authority to award water usage permits on the specific basis of “historic use” — the “amount of beneficial use” a property’s groundwater has been put to in the past.

In effect, the EAA’s regulations could prevent landowners from using a given amount of groundwater simply because they hadn’t done so before.

This was an important issue in *Edwards Aquifer Authority v. Day*.

The events behind the case began in 1994, when Bexar County ranchers R. Burrell Day and Joel McDaniel bought a 381-acre property within the EAA’s jurisdiction to grow oats and peanuts and run cattle. The property had an abandoned well, drilled in 1956 and lacking a pump. The well still flowed under artesian pressure, however, and previous owners had used this well water to irrigate about seven acres in 1983 and 1984.

Day and McDaniel planned to drill a replacement well and sought a permit to do so from the EAA. EAA's permits, however, were based on the "beneficial use" of groundwater in the period of June 1, 1972 through May 31, 1993. The EAA ultimately ruled that the historic beneficial use of the property's groundwater was limited to the seven acres briefly irrigated in the 1980s, and refused to permit any more extensive use of the land's groundwater.

In the long legal challenge that followed, Day and McDaniel contended that the EAA's denial of the permit constituted a taking that merited compensation. Without indicating specifically whether a compensable taking had occurred, the Texas Supreme Court concluded that "a landowner cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during an historical period."

"Better Than We Could Have Hoped For"

Groups that support landowner rights were delighted by the court's opinion.

"I'll be honest with you, I think the decision was better than we could have hoped for," says Jim Sartwelle, an Austin County rancher who also serves as director of public policy for the Texas Farm Bureau. "The fact that the court referenced SB 332 was gratifying for all of us, given the hard work that all our groups and elected officials did in getting 332 through.

"The final authority in the state of Texas has asserted the landowner's right to drill a well," Sartwelle says. "The decision, just like SB 332, doesn't undo one iota of the ability of locally controlled groundwater management districts to do their jobs — they maintain the ability to do that."

But now they'll have to reimburse the owners if their constitutional rights are disturbed.

"It's just huge," Sartwelle says. "People would ask us, 'What does 332 mean?' and all the smart people told us we wouldn't know until it's litigated. I think we have a pretty good idea now. We're very pleased with the Supreme Court's decision."

Susan Durham, executive director of the South Texans' Property Rights Association, concurs.

"Our association was part of a state property rights coalition that supported passage of S.B. 332, and we're happy to see that the Supreme Court has confirmed those principles," she says. "We see access to groundwater as an inherent property right and integral part of property ownership and property value."



"I think the decision was better than we could have hoped for."

— Jim Sartwelle,
Texas Farm Bureau



"We see access to groundwater as an inherent property right and integral

She also points out that the decision may encourage water conservation.

“Recognition of this right will allow property owners to preserve groundwater in the ground, instead of forcing them to pump water just to establish ‘historical use,’ to protect their right to use groundwater in the future.”

In 2009, Comptroller Susan Combs filed an amicus brief supporting the plaintiffs in the case. “We have to manage our precious water resources wisely and well,” she says, in response to the ruling. “But if we ignore private property rights, we’ve lost a fundamental part of what makes Texas what it is. I applaud the court for keeping us on the right path.”

For more information on government regulation and Texas property rights, please visit the Comptroller’s Keeping Texas First website at KeepingTexasFirst.org.

part of property ownership and property value.”

— Susan Durham,
Executive Director
South Texans’
Property
Rights Association