TEXAS GROUNDWATER RULING
EAA v. Day
TEXAS SUPREME COURT CONFIRMS LANDOWNER’S OWNERSHIP OF GROUNDWATER IN PLACE

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INTRODUCTION

In 1904 the Texas Supreme Court adopted as part of Texas Common Law the so-called English Rule of “Absolute Ownership” of groundwater in Texas. Houston & Texas Central Railroad Co. v. East, 81 S.W. 279, 280-81 (Tex. 1904) ("East case" or "East"). On February 24, 2012 — more than a century later — the Supreme Court announced for the first time that under Texas law the ownership of the groundwater in place belonged to the owner of the property. Edwards Aquifer Authority v. Day, __ SW3d __, 2012 Tex. LEXIS 161*(Tex. Feb. 24, 2012) ("Day case" or "Day" and cited as “EAA v Day, supra, at __”).

Anticipated as a landmark decision in Texas jurisprudence, the Court’s decision was as significant for what it did not decide as what it did. The narrow scope of the Court’s decision was a function of the procedural nature of the way the case came up to the Supreme Court. Id.

Since 1904 — when the Texas Supreme Court adopted the so-called rule of “Absolute Ownership” from the English case of Acton v. Blundell, 12 Mees & W 1843, and concluded that the owner of the surface had the right to dig and to capture the water percolating from beneath his property even if doing so affected his neighbor (East, supra, 81 S.W. at 280; see City of Sherman v. PUC, 643 S.W. 2d 681, 685 (Tex. 1983)) — Texas has followed the “Rule of Capture.” From the East holding, Texas’ “Rule of Capture” has evolved. See Drummond, Sherman & McCarthy, The Rule of Capture in Texas—Still So Misunderstood After All These Years, 37 Tex. Tech L. Rev. 1, 42-57 (2005), which discusses the development of the Rule of Capture and groundwater ownership in Texas.

The Rule of Capture announced in East was a theory of “Tort Law” that allowed the Railroad to escape liability for the harm it may have produced on East’s neighboring land irrespective of whether East had owned the water when it was in the ground. EAA v. Day, supra, at *29-30. The reason, according to the Supreme Court’s Day decision, was that in East the Court concluded that “a landowner is the absolute owner of groundwater flowing at the surface from its well, even if the water originated beneath the land of another.” Id. at *30. Writing for a unanimous Court in Day, Justice Hecht noted: “The Railroad escaped liability, certainly not because East did own the water in place, but irrespective of whether he did. Id. at *29 (citing East, supra, 81 S.W. at 280-281, quoting Pixley v. Clark, 35 N.Y. 520 (1866)).

The Rule of Capture is often confused with the more fundamental property right of the ownership of the groundwater in place. The Court’s ruling in Day, according to Justice Hecht, was the first time that the Texas Supreme Court had decided the question of ownership of groundwater in place. Id. at *30-35 (distinguishing the Court’s earlier decisions in East, Pleasanton, City of Sherman, Friendswood, and Sipriano); see East, supra; City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798 (Tex. 1955); City of Sherman v. Pub. Util. Comm’n 643 S.W.2d 681 (Tex. 1983); Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21 (Tex. 1978); Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76, 79 (Tex. 1999).

FACTUAL BACKGROUND

The Day case arose from an appeal from an administrative determination by the Edwards Aquifer Authority (EAA) on an application for an “initial regular permit” (IRP) to produce groundwater from the Edwards Aquifer. Id.; see Edwards Aquifer Act (EAA Act cited as “EAA Act § __”). [The EEA Act, as amended, is not codified. The EAA website contains an unofficial user friendly compilation of the EAA Act as amended available online at: www.edwardsaquifer.org/files/EAAact.pdf.]

The focus of this article is the specific issue of the ownership of the groundwater in place. This issue was raised and adjudicated in the trial court by way of cross motions for summary judgment filed by Day and the EAA on the question of whether the landowner had a constitutionally protected interest in the groundwater in place. EAA v. Day, 274 S.W.3d 742, 750 (Tex. App. – San Antonio 2008), aff’d, __ S.W.3d __, 2012 Tex. LEXIS 161*(Tex. Feb. 24, 2012).

The EAA is a “special purpose district” created by the Texas Legislature in 1993 pursuant to the so-called “Conservation Amendment” of the Texas Constitution. (Act of May 30, 1993, 73d Leg., R.S., ch.