



# Groundwater Law Today and Tomorrow: Court Decisions and Their Impact

14<sup>th</sup> Annual  
Bell County Water Symposium  
November 18, 2014 - Belton

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## Recent Decisions

- Edwards Aquifer Authority v. Day
- Edwards Aquifer Authority v. Bragg
- City of Lubbock v. Coyote Lake Ranch
- Guitar Holding Co. v. Hudspeth County UWCD

## Edwards Aquifer Authority v. Day (Texas Supreme Court – 2012)

- Landowners applied for a permit to withdraw 700 acre-feet of water annually for irrigation. EAA denied the application.
- Landowners protested, and an ALJ concluded that landowners should be granted 14 acre-feet of water.
- Landowners appealed and also sued EAA for constitutional violations, including a taking of property without compensation.
- District Court granted summary judgment to landowners as to the appeal and granted summary judgment to EAA as to the constitutional claims.
- San Antonio Court of Appeals affirmed in part, reversed in part, and remanded. Landowners, EAA, and the State of Texas each filed petitions for review. The Supreme Court granted all three petitions.

## Edwards Aquifer Authority v. Day (Texas Supreme Court – 2012)

- Texas Supreme Court referenced Senate Bill 332 which was enacted by Texas Legislature in 2011.
- Citing *Eliff v. Texon Drilling Co.*, Supreme Court says the same common law principles for minerals apply to groundwater:
  - “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.”
  - Substitute “groundwater” for “oil and gas”
- “We now hold that this correctly states the common law regarding the ownership of groundwater in place.”
- Texas Supreme Court made it clear that a landowner owns the groundwater in place subject to the regulations of a GCD.

## Edwards Aquifer Authority v. Day (Texas Supreme Court – 2012)

- Supreme Court → “Today we have decided that landowners do have a **constitutionally compensable interest** in groundwater.”
- The question is whether the EAA’s action (denial of full permitted amount requested) constitute a “taking” of Day’s interest in groundwater.
- Apply the standard takings analysis from *Penn Central* (economic impact, investment-backed expectations, nature of the regulation).
- “While Day should certainly have understood that the Edwards Aquifer could not supply landowners’ unlimited demands for water, we cannot say that he should necessarily have expected that his access to groundwater would be severely restricted.”
- Day’s takings claim should be evaluated by lower court.

## Edwards Aquifer Authority v. Day (Texas Supreme Court – 2012)

- Texas Supreme Court referenced Conservation Amendment of Texas Constitution (Art. 16, Sect. 59) enacted in 1917 giving Texas Legislature responsibility for the regulation of natural resources, including groundwater.
- One purpose of groundwater regulation is to afford each owner of water in a common, subsurface reservoir a fair share.

## Edwards Aquifer Authority v. Bragg (Texas Ct. of Appeals - SA – 2013)

- The Braggs applied for historic use permits to allow pumping from existing wells to irrigate two pecan orchards.
- EAA denied the application for the 42-acre orchard because the Braggs could not demonstrate the historic groundwater use claimed (193.12 acre feet).
- EAA partially granted the application for the 56.6-acre orchard based on the Braggs' demonstration of historic groundwater use in the amount of 120.2 acre feet, and not the entire historic use claim of 228.85 acre feet.
- The Braggs did not appeal EAA's permit decisions, but rather filed a **takings claim** in district court seeking damages.

## Edwards Aquifer Authority v. Bragg (Texas Ct. of Appeals - SA – 2013)

- The trial court awarded \$732,493.40 for EAA's denial of 301.77 acre feet (out of the total 421.97 acre feet claimed by the Braggs)
- The San Antonio Court of Appeals took into consideration the Texas Supreme Court's guidance from *EAA v. Day/McDaniel*
- The appellate decision concluded that the EAA's decision on the Braggs' permit applications constituted a regulatory taking of their groundwater rights and the Braggs should be compensated.
- However, the appellate court disagreed with the trial court's methodology for calculating the takings damages and remanded the case with instructions for the trial court's further calculation and subsequent decision.



## Edwards Aquifer Authority v. Bragg (Texas Ct. of Appeals - SA – 2013)

- This decision is important because it is the first-ever appellate decision to address a groundwater takings award against a GCD.
- The EAA petitioned to the Texas Supreme Court in March 2014, prior to the remand back to the District Court.
- At this point, the Supreme Court has requested briefs on the merits from each side
- The Bragg's brief is due December 12<sup>th</sup>, 2014, and the EAA's is due January 7<sup>th</sup>, 2015.
- Many amicus briefs are expected to be filed as well.

## City of Lubbock v. Coyote Lake Ranch, LLC. (Texas Court of Appeals. – Amarillo, 2014)

- In 1953, the City of Lubbock acquired groundwater rights from a landowner to augment the public drinking water supplies for Lubbock and several other West Texas communities.
- The landowner later sold the rest of the property rights (i.e. surface) to Coyote Lake Ranch, LLC.
- In 2012, the City proposed a plan to produce groundwater on that property, and began conducting well testing.
- Coyote Lake filed suit in Bailey County District Court to, among other things, stop the City from taking any further action relating to Lubbock's proposed groundwater production on the property.
- Trial Court granted temporary injunction to stop the City's activities on the property.

## City of Lubbock v. Coyote Lake Ranch, LLC. (Texas Court of Appeals – Amarillo, 2014)

- On appeal Coyote Lake argued that a dominant (groundwater) and servient (surface) estates had been created, same as in the oil and gas context.
- Thus, Coyote Lake claimed, the City's rights to explore for groundwater within its property were encumbered by the oil and gas law-derived "accommodation doctrine."
- The accommodation doctrine or "alternative means" doctrine requires the owner of the dominant estate to exercise "due regard to the rights of the surface owner and the current uses of the surface" as it explores for minerals (or groundwater).

## City of Lubbock v. Coyote Lake Ranch, LLC. (Texas Court of Appeals – Amarillo, 2014)

- The Court of Appeals → no legal support for Coyote Lake's position that the accommodation doctrine dictates the relationship between a severed groundwater estate and remaining surface estate.
- Specifically, Coyote Lake provided no applicable controlling legal authority to support its argument, and the Court's own research "yielded no case in which a Texas court has applied the accommodation doctrine to the groundwater context."
- Coyote Lake's position is too broad of an expansion of the holding in *Day*. The "dynamics and the rights between the parties...are different than the rights of the parties addressed in *Day*," and the Court ultimately deferred to the Texas Supreme Court to "recognize and pronounce such an expansion" of the holding in *Day* → Temporary injunction on City's activities lifted.

## Guitar Holding Co. v. Hudspeth County UWCD (Texas Supreme Court - 2008)

- In 2001, the GCD adopted a new management plan seeking to sustain their aquifer at “an historically optimal level.”
- The new MP and Rules limited production granted under new permits based on a specific historic use period (landowner would have to prove use during the period).
- Guitar Holding Co did not use as much as other landowners during the historic period, and thus received a relatively smaller permit than others.
- Guitar brought 4 separate unsuccessful administrative appeals to the District Court challenging the validity of the District’s new rules regarding production and transfer permits.
- The El Paso Court of Appeals upheld the District Court’s rulings and Guitar appealed to the Texas Supreme Court.

## Guitar Holding Co. v. Hudspeth County UWCD (Texas Supreme Court - 2008)

- Primarily, Guitar argues the District has misapplied its limited authority to preserve existing or historic groundwater use within the district.
- Transferring groundwater out of the district is a “new use” for which a new application must be made.
- By using its rules to link transfer permits to existing permits, either validation or operating, the District has avoided applying the same limitations to all of the new transfer permit applications.

## Guitar Holding Co. v. Hudspeth County UWCD (Texas Supreme Court - 2008)

- The Texas Supreme Court held that “use” included both the **purpose** as well as the **amount** of water when looking at a GCD’s discretion to preserve historic and existing use.
- In regard to transport permits, the Court stated that the new rules essentially “grant franchises to some landowners to export water while denying that right to others,” as “transport” was never a “use” historically.
- The Texas Water Code states that all “new uses” be treated equally, and since these new rules were not “uniformly applied” to all new applications, the rules are thus invalid → Judgment of Court of Appeals was reversed.

## Groundwater Management Area (GMA) – Joint Planning Process

- Chapter 36 of the Texas Water Code governs the “Joint Planning” process by which GCDs come together on a regional level to set Desired Future Conditions for the applicable aquifers in the region.
- Regional approach to groundwater management while maintaining local control of GCDs
- Currently in the 2<sup>nd</sup> round of Joint Planning and establishing DFCs
- 1<sup>st</sup> Round of Joint Planning completed by June 1, 2010
- 2<sup>nd</sup> Round of GMA JP Process to be completed and DFCs set by May 1, 2016
- Texas Water Code contains 9 factors for consideration before adopting DFCs





## Factors to be considered by GMA when establishing DFCs for Aquifers - §36.108(d)

- Aquifer Conditions
- Water Supply Needs & Water Management Strategies
- Hydrological Conditions
- Environmental Impacts (spring flow, surface water interaction)
- Impact on Subsidence
- Socioeconomic Impacts
- Impacts to Private Property Interests
- Feasibility of Achieving the DFC
- Any Other Information Deemed Relevant to the DFC

## GMA Process

- Consider 9 factors from § 36.108(d)
- Propose DFC for adoption → 2/3s majority vote of district reps req'd
- 90 day public comment period → Begins once DFCs are sent to GCDs
- All GCDs within each GMA hold their own hearings within district boundaries
- GCDs prepare summary reports (addressing public input/comments)
- GMA meets → receive summary reports & consider changes to DFCs
- GMA drafts Explanatory Report → Submits to TWDB
- After receipt of Explanatory Report, GCDs adopt DFCs individually

## GMA 8

- Last met Nov 3<sup>rd</sup> in Cleburne to receive explanation of latest Groundwater Availability (GAM) runs
- GMA consultants propose additional runs to consider ranges of possible groundwater pumping
- Purpose of GAM runs → Find the balance between “highest practicable” level of groundwater production & “Conservation, Preservation, Protection, Recharge, Control of Waste and Subsidence”
- Will meet again in January to approve additional GAM runs
- After additional runs are complete, GMA 8 will hopefully have enough information to propose DFCs and vote on them
- Next Step → Public Comment Period, Individual GCD Hearings, Preparation of Summary Reports - To be completed in 2015

Any questions?

Thank you

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