

# GROUNDWATER LAW

A look at the ancient rule of capture and the modern Accommodation Doctrine.

BY JUSTIN HODGE AND GRAHAM TAYLOR

*J*acob's well was there, and Jesus, tired as he was from the journey, sat down by the well. It was about noon. When a Samaritan woman came to draw water, Jesus said to her, "Will you give me a drink?" (His disciples had gone into the town to buy food.)

"Sir," the woman said, "you have nothing to draw with and the well is deep. Where can you get this living water? Are you greater than our father Jacob, who gave us the well and drank from it himself, as did also his sons and his livestock?"<sup>1</sup>

The ancient rule of capture can arguably be dated back centuries to Jacob's well and, as the English rule, has been a cornerstone of Texas law since 1904.<sup>2</sup> The rule of capture simply states that owners of a surface estate have no cause of action when adjoining landowners deplete migratory resources under the property in the absence of negligence or trespass. Said another way, Texans, like the ancient Samaritans and Israelites, have the legal right to draw water from wells as did Jacob and "also his sons and his livestock."

In 1971, Texas adopted the modern Accommodation Doctrine in an attempt to balance the scales between mineral and surface estates.<sup>3</sup> It requires that owners of mineral estates reasonably accommodate the use of the surface estate.<sup>4</sup> The doctrine is violated when the surface activities of the owners of the mineral estate are not "reasonably necessary" to extract the oil or gas if the mineral owner has other reasonable means of production available that will not interfere with the surface owner's use. Simply put, if reasonable alternative drilling methods protecting the surface owner's existing use are available, the mineral owner must make reasonable accommodations.<sup>5</sup>

At first glance, these two doctrines seem somewhat contradictory. However, rule of capture jurisprudence evolved to find that oil and gas ownership was "in place," meaning that owners of mineral interests had vested property interests in the oil and gas notwithstanding the rule of capture. Therefore, while someone else can take the oil or gas, they cannot destroy it or render it valueless by not allowing someone to get to it. The rule of capture in Texas jurisprudence has always applied to groundwater, but applying the Accommodation Doctrine to groundwater is a recent development. Oil and gas is historically recognized as being "owned in place" whereas groundwater is not. While that may seem a trivial distinction, ownership in place means that, subject to the rule of capture, owners of the mineral estate have a vested property interest in the oil and gas (or groundwater). As such, the "realty" includes the resources below the surface and the owner of the land owns those resources separately and distinctly and is accorded the usual remedies against trespassers who appropriate the resources or act in a way that destroys the market value of the resources.

In 2012, the Texas Supreme Court held in *Edwards Aquifer Authority v. Day* that landowners own all groundwater under their land separately, distinctly, and exclusively.<sup>6</sup> The *Day* case revolved around whether a compensable taking occurred when the water authority issued restrictive permits establishing maximum amounts of water that users could withdraw from the aquifer running underneath their land. This necessarily called for an answer to whether groundwater was owned in place. The Texas Supreme Court held that landowners with groundwater under their property have a right to exclude notwithstanding the rule of capture. After *Day*, the common law regarding the ownership of groundwater in place states that each landowner owns any groundwater beneath their property separately, distinctly, and exclusively and is accorded the usual remedies against

trespassers who appropriate the groundwater or destroy its market value.<sup>7</sup>

In 2016, the Texas Supreme Court considered whether the Accommodation Doctrine applied to groundwater estates.<sup>8</sup> In *Coyote Lake Ranch v. City of Lubbock*, the city of Lubbock had purchased the ranch's groundwater in 1953. In 2012, the city began mowing extensive paths to prospective drill sites and the ranch sued to enjoin the city from proceeding. The ranch argued that the city had a duty to use only the amount of surface reasonably necessary to its operations and a duty to conduct its operations with due regard for the rights of the surface owner. Essentially, the ranch was pleading the Accommodation Doctrine, which up to this point applied only to oil and gas estates. The city contended that the law imposes no duty on groundwater owners to accommodate surface owners. The court held that the Accommodation Doctrine applies to solve conflicts between the surface and groundwater estates in the absence of an agreement between the parties imposing different standards. In order to apply the Accommodation Doctrine, the surface owner must prove that the groundwater owner's use of the surface precludes or substantially impairs the existing use; that the surface owner has no available, reasonable alternative to continue existing use; and that the groundwater owner has reasonable, customary, and industry-accepted methods available to access and produce the water while allowing the surface owner to continue their existing use.<sup>9</sup>

*Coyote Lake Ranch* and *Day* illustrate that landowners with groundwater underneath their property are gradually receiving increased protection under Texas law when their access and rights to the groundwater are impaired or destroyed. The complete extent of this expansion is yet to be seen but owners of groundwater estates now have legal precedent seemingly on their side when arguing for compensatory damages when their groundwater rights are adversely affected. Condemning authorities can no longer claim that access to groundwater is an uncompensable interest without fighting against recent Texas Supreme Court cases.<sup>10</sup> The ancient rule of capture and the modern Accommodation Doctrine have come together in a way that enhances the chances of landowners with groundwater interests to receive compensation when their groundwater rights are taken, damaged, or destroyed. **TBJ**

## Notes

1. John 4:6-12.
2. See *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904).
3. See *Getty Oil Company v. Jones*, 470 S.W.2d 618 (Tex. 1971).
4. See *Tarrant County Water Control and Imp. Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993).
5. See *Id.* at 912-913.
6. *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012).
7. *Id.* at 832.
8. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016).
9. *Id.* at 64-65.
10. See *Day*, 369 S.W.3d 814, at 838 (holding that landowners have a constitutionally compensable interest in groundwater).



### JUSTIN HODGE

is a trial lawyer concentrating on eminent domain and condemnation. A partner in the Houston office of Johns Marrs Ellis & Hodge, he also teaches a course on eminent domain and land takings at the University of Houston Law Center. Hodge has testified before the Texas Legislature to promote eminent domain reform.



### GRAHAM TAYLOR

is a third year law student at the University of Houston Law Center and clerk at Johns Marrs Ellis & Hodge.