



Landowners' Groundwater Rights: Another Step Forward

Testimony before the House Natural Resources Subcommittee on Special Water Districts Committee on HB 3028

by Kathleen Hartnett White

Good afternoon to Chairman Burns and other members of this Subcommittee:

I am Kathleen Hartnett White, distinguished senior fellow and director of the Armstrong Center for Energy and the Environment at the Texas Public Policy Foundation, former chairman of the Texas Commission on Environmental Quality, and former director of the Texas Water Development Board and the Lower Colorado River Authority.

I am here to support HB 3028 as a critical addition to Texas groundwater law, specifically Texas law governing the actions of local Groundwater Conservation Districts (GCDs). HB 3028 would codify the landmark ruling of the Texas Supreme Court in 2012 (*Edwards Aquifer Authority v Day*, 2012. 55 Tex. Sup. J. 343 (2012)) regarding the ownership of groundwater in place.

In *Day*, the Supreme Court emphatically concluded that a landowner has a real private property right/ownership in the groundwater beneath his or her land—a property right in scope equivalent to a landowner's ownership in the oil and natural gas resources below the land. In so doing, the Court clarified the legal consequences of SB 332 enacted in 2011. Reaffirming long-standing state law, SB 332 states that “a landowner owns the groundwater below the surface of the landowner's land as real property.”

HB 3028 takes a needed step to codify the *Day* ruling in those provisions of Chapter 36 of the Texas Water Code regarding the authority of local GCDs. The bill requires that GCDs “shall protect” landowners' property rights in groundwater and “may not restrict exercise” of those rights unless necessary to protect a clear public interest. In rules, permits, management plans, and desired future conditions, GCDs would be obligated to allow maximum production consistent with the landowner's correlative right to a “fair share.”

After decades of vigorous debate over the question “who owns the groundwater,” the Texas Supreme Court decided that the landowner owns the groundwater in place in the same way that the landowner owns the oil and gas below the land. And like property interests in oil and gas, *Day* concludes that groundwater ownership in Texas has long been a “correlative right” as a matter of law that gives the landowner the opportunity to produce his or her “fair share” of a common resource. Although subject to reasonable regulation, this means that a landowner's groundwater rights are protected by the Texas and U.S. Constitutions.

As the *Day* court simply put it: “Whether groundwater can be owned in place is an issue we have never decided. But we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently.”

After the rapid proliferation of local GCDs following SB 1 and 2—almost twenty years ago—disputes arose around the scope of landowners' rights versus the scope of a local GCD's regulatory authority to restrict or deny exercise of those rights. Legally, some contended that the landowner's right was confined to the rule of capture.

Others claimed that the state somehow owned the groundwater in place.

In 2011 and 2012, the Texas Legislature and the Texas Supreme Court upheld and clarified the landowner's real private property right in the groundwater under his or her land. HB 3028 wisely would require GCDs to incorporate these findings in their actions.

Texas already has a head start on an appropriate system in Chapter 36 of the Texas Water Code for upholding correlative rights in groundwater. Yet, it is a vague regulatory framework compared to that for oil and gas. Since the early 1900s, the Texas Railroad Commission has evolved a workable regulatory system for protecting correlative rights in oil and gas. Now, perhaps, we need to refine and expand the existing regulatory framework for groundwater to protect the constitutional rights of groundwater owners. HB 3028 provides a great step in the right direction.

Texas faces a historic choice. Texas can reaffirm the landowner's vested ownership with confidence that secure private rights will maximize stewardship, conservation, and efficient use of groundwater for all Texans. Or, Texas can deny—or remain silent about—a right basic to land ownership for over a century in exchange for greater confidence in government control.

History has shown across the world, in this country, and most recently in the shale revolution in Texas, that clear property rights offer the most effective legal mechanism for achieving not only private goals, but also the public good—an abundant and sustainable water supply.

In *Day*, the Texas Supreme Court ruled by quoting language from a 1948 opinion regarding the scope of a landowner's property interest in oil and gas.

The Supreme Court's ruling is worth recalling:

"In Elliff, we restated the law regarding ownership of oil and gas in place:

In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The oil and gas beneath the soil are considered a part of the realty. 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.

We now hold that this correctly states the common law regarding the ownership of groundwater in place." ☆

