



Rights of a Groundwater Owner

Testimony on HB 4112 before the Texas Legislature Natural Resources Committee of the House of Representatives

by Leigh Thompson, *Policy Analyst*

Chairman and Members of the Committee:

My name is Leigh Thompson and I am a policy analyst in the Armstrong Center for Energy and Environment at the Texas Public Policy Foundation, a non-profit, non-partisan free market think tank based here in Austin. Thank you for the opportunity to speak today regarding HB 4112.

The 82nd Legislature clarified that landowners own the groundwater below the surface of their property unless otherwise severed. House Bill 4112 seeks to further clarify this property right by attempting to codify the recent Texas Supreme Court case *Edwards Aquifer Authority v. Day*.^{*} This case likened oil and gas to groundwater and ultimately held that the landowner's private property right extends to the groundwater in place in the same way it does with oil and gas.

In Texas, landowners have absolute title in severalty to the groundwater in place beneath their land. The rule of capture does not preclude ownership in place of groundwater; it is a corollary to the rights of a landowner and describes the manner in which the groundwater right is exercised according to regulation. A landowner's right to the groundwater beneath his real property is an exclusive and private property right and he may not be deprived of that right without a taking of his private property. The rule of capture provides that a landowner has a right to exclude others from groundwater beneath his property, but one that cannot be used to prevent drainage.

The *Day* Court found that correlative rights through reasonable regulation offers landowners the opportunity to produce their "fair share" of groundwater in place. The Court saw no basis in the argument that landowners did not possess correlative rights in their groundwater under the auspices that groundwater and oil and gas were dissimilar. Rather, similar to oil and gas regulation, one purpose of regulatory provisions found in the Edwards Aquifer Authority Act is to afford landowners their "fair share" of the groundwater beneath their property. The Court found that both oil and gas and groundwater represent a shared resource that must be conserved under the constitution.

Today, the common law as recognized in *Day* considers groundwater in place part of the realty. Each landowner 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."

TPPF supports the intention behind HB 4112, but would encourage an amendment that incorporated the text of the *Day* opinion. First, common law, while rooted in precedent, is subject to change. As such, codifying a moving goal post can prove problematic. Second, an important function of statutory law is to provide guidance to those administering the law. Providing specific language aids local Groundwater Conservation Districts who are tasked with making daily decisions about regulation of groundwater. Without statutory specificity TPPF will remain neutral. ★

^{*} *Edwards Aquifer Authority v. Day*, 369 S.W. 3d 814 (2012) (referenced throughout).

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