

Good Day or Bad Day?

What *EEA v. Day* Means for Texas Water Rights.

Augustus L. Campbell
City of Houston Legal Department

May 9, 2012



Good Day?

The Facts



- 1956: Well drilled on “The Ranch”
- 1984: Well casing removed; water irrigates 7 acres
- 1993: Edwards Aquifer Authority Act Passed
- 1994: Day and McDaniel Purchase “The Ranch” (381 acres)
- 1996: Day files Initial Regular Permit (heard about 600 af permit)
- 1999: Day drills a replacement well (obtained 14 af permit)



Groundwater Precedent

Texas Supreme Court Cases Cited in the *Day* Case

Case	Cite	Facts	Holding/Judgment
<i>Houston & T.C. Railway v. East</i>	81 S.W. 279 (Tex. 1904)	East sued the railroad after the railroad's well caused East's well to dry up	The court applied the rule of capture to groundwater, finding in favor of the railroad
<i>Sipriano v. Great Spring Waters of America, Inc.</i>	1 S.W.3d 75 (Tex. 1999)	Very similar to <i>East</i> ; Great Spring Waters (Ozarka) pumps 90,000 gallons per day; Sipriano sues when the well runs dry.	The court held that the rule of capture still applies to groundwater but may be limited by the legislature



Keeping the Rule of Capture?

East: Every State except New Hampshire adopted the rule

Day: Every state except Texas has abandoned the rule.



Groundwater Precedent

Texas Supreme Court Cases Cited in *Day*

Case	Cite	Facts	Holding/Judgment
<i>City of Corpus Christi v. City of Pleasanton</i>	276 S.W.2d 798 (Tex. 1955)	Pleasanton sued Corpus Christi for wasting groundwater by transporting the water downstream	The court held that the rule of capture provides absolute ownership, finding for Corpus
<i>Friendswood Dev. Co. v. Smith-SW Ind.</i>	576 S.W.2d 21 (Tex. 1978)	Smith SW sued Exxon's development company for subsidence injury	Subsidence is an exception to the rule of capture; Exxon not liable for subsidence
<i>City of Sherman v. PUC</i>	643 S.W.2d 681 (Tex. 1983)	PUC sued to block city's well drilling outside city	GCDs, not PUC, could block city as landowner



Exceptions to the Rule

Texas recognizes three exceptions to the rule of capture:

1. Malicious Injury
2. Wanton or Willful Waste
3. Injury from Subsidence



Day's Key Holding:

“Land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation by article I, section 17(a) of the Texas Constitution.”

Note: The legislature still has police power and can regulate groundwater through Groundwater Conservation Districts, etc.



Why Now?

SB 332, RS 2011:

“The legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property.”

Codified as Tex. Water Code § 36.002(a)

Note: SB 332 Does not apply to EEA, HGSD, or FBSD



What Does it Mean?

The government may regulate a landowner taking groundwater, but at some point the landowner can sue the government for regulatory taking of groundwater.

See Penn Central Trans. Co. v. City of New York, 438 U.S. 104 (1978).



How to Apply Penn Central

The government must compensate the property owner if the property owner

- Is wholly deprived of an economically beneficial use of the property;
- Cannot obtain reasonable investment-backed expectations; and
- Faces policy that fails to balance the property rights against public good.



What Does that Mean?

- The courts will have plenty of opportunities to tell us!
- Groundwater is more like oil and gas; less like surface water.
- GCDs will review basis for permits and keep quiet.
- Exceptions to Rule of Capture more important.

