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Coyote Lake Ranch v. City of Lubbock: a ranch, a city and the battle over surface use

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Abstract: In a time when the competition for water resources is increasing, water law and policy for groundwater is evolving, bringing to the fore the conflict between surface use and groundwater. Unlike the oil and gas context where the mineral estate is dominant, the superiority of severed groundwater to the surface estate has remained uncertain. The recent Texas Supreme Court case, *Coyote Lake Ranch v. City of Lubbock*, addressed this question, holding that the accommodation doctrine (long applied to mineral estates) applied to groundwater interests in that case. On its face, the case was a dispute between a Texas city and a landowner over the use and damage to surface property caused by groundwater development. The implications of the Supreme Court's holding, however, run deep and are significant in this time of growing water scarcity. The *Coyote Lake Ranch* case signals a continued push toward unifying the law governing mineral and groundwater law and emphasizes the need for the courts and the Texas Legislature to be proactive in balancing the interests and rights of all parties.

Key words: Coyote Lake Ranch, Lubbock, accommodation doctrine, groundwater, surface use

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INTRODUCTION

In an age where surface water resources are over-allocated while the competition among urban, industrial, and agricultural uses for water is increasing because of the higher uncertainty in available water resources, the ownership, control, and conservation of groundwater is on the leading edge of water law and policy. Large-scale commercial projects make control over groundwater and surface uses critically important to landowners and business owners alike. For example, the Vista Ridge Pipeline Project intends to pump 50,000 acre-feet of groundwater per year for 30 years from the Carrizo-Wilcox Aquifer in Burleson County, Texas to supply San Antonio and its growing population and water demand with water. Similar projects are either underway or in the planning stage. Groundwater is the new battlefield on which competing interests for water are fighting for control.

In conjunction with the changing water law and policy for groundwater, the conflict between surface use and groundwater is equally pressing. Texas has no surface-use statute in either the oil and gas or groundwater context, which can leave landowners at odds with those attempting to access and use groundwater resources. Unlike with oil and gas where the mineral estate is dominant to the surface estate, Texas law had not yet addressed whether severed groundwater could be superior to the surface estate. Accessing groundwater can be just as devastating to the surface area as oil and gas production, and it provides yet another aspect of a growing tension between landowners and those who seek to access and use groundwater.

Under this backdrop comes the recent *Coyote Lake Ranch v. City of Lubbock* case. On its face, it is a dispute between a Texas city and a landowner over the use and damage to surface property caused by groundwater development. Beneath the surface is an epic battle between severed groundwater estates and surface owners and the extent to which a surface owner can control the method and means by which groundwater is accessed. The city of Lubbock long ago acquired the groundwater rights underlying the Coyote Lake Ranch, which is a large ranch about 90 miles northwest of the city. Although a written deed memorialized the conveyance, in 2013 the ranch sought to enjoin the city from taking steps to access the groundwater, alleging that the city's actions were unreasonably interfering with the ranch's use of the property and that access to the groundwater could be accomplished by other reasonable alternative means that minimized impacts to the landowner's surface uses. Through the suit, the courts were faced with a new question for groundwater law: should the accommodation doctrine (long applied in the oil and gas context to mineral estates) now be applied to groundwater in the surface estate? The implications of this case run deep and are more important than ever in a time when water resources are growing scarce, the demand for groundwater is increasing, and conflicts between surface uses and groundwater access are on the rise.

GROUNDWATER: A NEW FRONTIER IN SEVERED ESTATES

The inception of modern groundwater law in Texas is slightly more than a century old. This beginning may be found not in the Texas Constitution or statutes but in the courts of Texas in the 1904 Texas Supreme Court case, *Houston & Texas Central Railway Co. v. East*. The *East* case takes place in the small North Texas town of Denison at the turn of the 20th century. The railroad company found itself in the midst of a severe drought and was in need of water for its passengers and steam locomotives.[1] It found a location near Denison where several other groundwater wells existed and were producing. The railroad company drilled its own well, which produced 25,000 gallons per day.[2] Other railroad companies had wells in the area as well, producing hundreds of thousands of gallons of groundwater per day.[3] It was not long before the other smaller wells of residents, like East, began to run dry.[4] East filed suit seeking damages.[5] The district court found in favor of the railroad holding that no correlative rights existed between the parties as to the groundwater.[6] East appealed to the Dallas Court of Appeals, who reversed the district court relying on the reasonable use doctrine and awarded damages to East.[7] The Texas Supreme Court heard the case in 1904 and unanimously reversed the Court of Appeals.[8] For the first time, the rule of capture was applied to groundwater:

> An owner of soil may divert percolating water, consume or cut it off, with impunity…So the owner of land is the absolute owner of the soil and of percolating water, which is part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface.[9]

In 1917, the Texas Legislature identified water, including groundwater, as a natural resource in the state worthy of protection and conservation. It amended the Texas Constitution to add article XVI, section 59, allowing the Legislature to make

[1] *Hous. & Tex. Cent. Ry. Co. v. East,* 81 S.W. 279, 280 (Tex. 1904).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *East*, 81 S.W. at 280.

[7] *Id.*

[8] *Id.* at 282.

[9] *Id.* at 281.

laws relating to the conservation of natural resources (such as water) and providing authority to set up conservation and reclamation districts to manage such resources.[10] From the beginning, the conservation of natural resources focused on minerals (primarily oil and gas) and water, and the law followed suit. In 1949, the Legislature passed the Groundwater Conservation District Act of 1949,[11] establishing groundwater conservation districts and giving them the power to regulate by rule groundwater in Texas.[12] For many decades following this Act, the Legislature and courts left regulation and management of groundwater issues primarily to local control by the districts.[13]

In 1993, the Legislature was faced with a new threat of federal intervention concerning over-production of groundwater resources, more specifically the resources in the Edwards Aquifer.[14] After the Sierra Club filed suit alleging the taking of endangered species because of a failure to ensure adequate water levels in the Edwards Aquifer, a federal judge ordered that the State take action or the Edwards Aquifer would become subject to regulation by the U.S. Fish and Wildlife Service.[15] In response, the Texas Legislature passed the Edwards Aquifer Authority Act that created the Edwards Aquifer Authority and placed certain permit limits and rulemaking by the authority to ensure continued spring flow during drought. In an effort to "split the baby" between the pressure for local control versus the pressure for greater mainstream regulation and conservation of groundwater resources, the Legislature created this new category of regulation in the Edwards Aquifer Authority, which would become significant in the development of groundwater law over the years to come.

In 1997, the Texas Legislature undertook a substantial overhaul of the Texas Water Code through Senate Bill 1.[16] One of the most important aspects of this overhaul in the groundwater context was the confirmation that groundwater conservation districts are the preferred method of regulation of groundwater in the State of Texas.[17] Local control won the day yet again.

In 1999, the Texas Supreme Court took up the issue of groundwater ownership for the first time in decades. In *Sipriano v. Great Spring Waters of America, Inc.*, the Court considered a case between a landowner and Ozarka concerning depletion of groundwater resources.[18] Ozarka moved to dismiss the case relying on the rule of capture and ownership in place.[19] Sipriano and other landowners argued that their action fell within one of the exceptions to the rule of capture of negligent subsidence, waste, or malice.[20] The landowners asked the Court to overturn the rule of capture. But the trial court was not persuaded and found in favor of Ozarka. The landowners appealed to the Tyler Court of Appeals, which affirmed the district court's summary judgment in Ozarka's favor, stating that if the absolute ownership rule is to be overturned it should be done so by the Legislature or the Texas Supreme Court.[21] Although it recognized the extensive criticism of the rule of capture, the Texas Supreme Court upheld the application of the rule in Texas, reasoning that the actions taken by the Legislature should be given time to work.[22] Though concurring with the opinion of the Court, Justice Hecht identified the shortcomings of the rule of capture, noted that Texas is the only state still applying the rule of capture, and stated that the rule should be overturned.[23] Justice Hecht, however, agreed with the conclusion of the Court to wait to see if the Legislature's actions would address the problems.[24]

In 2011, the Texas Legislature took up the issue of groundwater ownership through Senate Bill 332. Prior to this action, the Water Code's statement of ownership of groundwater did not address whether a right in groundwater arose only upon capture or existed while in place beneath the owner's property.[25] Senate Bill 332 attempted to clarify this point of contention by stating unequivocally that a landowner had a vested right in the groundwater beneath its land.[26]

Beginning in 2012, a succession of seminal cases came before the Texas Supreme Court that initiated a new burst of progres-

[10] Tex. Const. art XVI, § 59.

[11] Act of May 23, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559 (codified at Tex. Water Code § 36.002.

[12] "The ownership and rights of the owners of land and their lessees and assigns in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, subject to rules promulgated by the district." Tex. Water Code § 36.002.

[13] Corwin W. Johnson, *Texas Groundwater Law: A Survey and Some Proposals*, 22 Nat. Resources J. 1017, 1022 (1982).

[14] Fred O. Boadu et al., *An Empirical Investigation of Institutional Change in Groundwater Management in Texas: The Edwards Aquifer Case*, 47 Nat. Resources J. 117, 125-27 (2007).

[15] *Id.* at 126; *see Sierra Club v. Lujan*, No. MO-91-CA-069, 36 ERC 1533, 1993 WL 151353, at 34 (W.D. Tex. Feb. 1, 1993). 1993 WL 151353, at 34 (W.D. Tex. Feb. 1, 1993).

[16] Tex. S.B. 1, 75th R. S. (Tex. 1997).

[17] Act of June 2, 1997, S.B. 1, 75th Lege., R.S., ch. 1010, § 4.21, 1997 Tex. Gen. Laws 3610-3683 (codified at Tex. Water Code § 36.0015).

[18] *Sipriano v. Great Spring Waters of Am., Inc*, 1 S.W.3d 75 (Tex. 1999).

[19] *Id.*

[20] *Id.* at 76-78.

[21] 973 S.W.2d 327, 330 (Tex. App.—Tyler 1993, writ granted).

[22] 1 S.W.3d at 80-81.

[23] *Id.* at 81-82.

[24] *Id.* at 83.

[25] *See* Tex. Water Code § 36.002.

[26] Act of May 29, 2011, 82nd Leg., R.S., ch. 1207, § 1, 2011 Tex. Gen. Laws 3224 (codified at Tex. Water Code § 36.002).

sion in Texas groundwater law by reliance on long-established oil and gas law. In 2012, the Texas Supreme Court considered the issue of "ownership in place" and its application to groundwater. In the landmark case *Edwards Aquifer Authority v. Day*, the Court held that ownership in place applies to groundwater.[27] The *Day* case involved two farmers who bought nearly 400 acres overlying the Edwards Aquifer on which they planned to grow oats and peanuts and to graze cattle.[28] Day applied to the Edwards Aquifer Authority for a permit to pump water from an existing well on his property for irrigation purposes.[29] After some back and forth, the Authority granted his application but limited it to 14 acre-feet a year. Day appealed through the administrative process and later filed suit alleging a taking of his property. Concluding that Day had a constitutionally protected interest in the groundwater in place beneath his property, the Court analogized groundwater to oil and gas, reasoning that both are governed by a single principle: that each is a shared resource and must be conserved.[30] The concept of ownership in place seeks to achieve this end.[31] Out of *Day*, two trends arose: 1) the Texas Supreme Court took an active role in setting water policy; and 2) the Court relied on oil and gas law to govern groundwater.

Having clarified the groundwater ownership regime in *Day*, another important case found its way to the San Antonio Court of Appeals. In *Edwards Aquifer Authority v. Bragg*, the Court answered the specific question of whether the Edwards Aquifer Authority's denial of a permit and reduction of water allowed under another permit constituted a taking.[32] In this case, the landowner owned pecan orchards and requested allowances to use groundwater for irrigation.[33] The Edwards Aquifer Authority allowed a lower amount of water than requested for one permit and denied the other permit request outright based on the landowner's failure to adequately demonstrate historic use. The landowner sued for damages, alleging the denial of the permit was a taking.[34] Relying on *Day*, the Court found the action to be a taking and went on to address how compensation should be determined, remanding the case to the trial court for a determination of damages.[35] The Texas Supreme Court notably declined to hear the case, allowing the San Antonio Court of Appeals decision to stand.[36] On remand, a jury awarded $2.5 million to the Braggs for the regulatory takings.

The Texas Supreme Court has emerged as the key policymaker on water law. While the Texas Legislature has been politically unable to refine the law, the courts have taken up the mantle. Both *Day* and *Bragg* leave open questions about the extent to which groundwater rights may be limited by regulation. The cases marked a subtle shift by the courts to balance the interests between landowners and regulation and management of groundwater by groundwater conservation districts. Although local control still reigns supreme in groundwater management, courts are showing a shift concerning the competing interests of landowners, businesses exploiting groundwater resources for their interests, and management by groundwater conservation districts. These cases focused on ownership and control by conservation districts relying on oil and gas law. The cases said little about the coming disputes over the right to sever and produce groundwater versus the right to the surface. Texas has no surface damage act, and Texas policy has long recognized the dominant mineral estate right to reasonably utilize the surface for production without compensation.[37] These conflicts have existed for decades and have spawned many small wars in the oil and gas context. Alongside this shifting of groundwater policy came the *Coyote Lake Ranch* case, providing courts with an opportunity to consider and adjust the balance of groundwater regulation by applying the accommodation doctrine to severed groundwater in the surface estate. With the growth of groundwater and size of projects coming online, a fight over use of the surface by groundwater developers was sure to arise. It did with *Coyote Lake Ranch v. City of Lubbock.*

THE ACCOMMODATION DOCTRINE: THEN AND NOW

The accommodation doctrine is a common law doctrine that addresses the inevitable conflict between owners of severed estates. The doctrine is triggered when on a severed estate, a mineral interest owner substantially interferes with an existing surface use. The rights of a mineral owner to use the surface are well recognized but not well defined. They are in the eye of the beholder. Texas courts attempt to strike a balance between

[27] *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 832 (Tex. 2012).

[28] *Id.* at 818.

[29] *Id.* at 820.

[30] *Id.* at 823.

[31] *Id.* at 842.

[32] *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 126 (Tex. App.—San Antonio 2013, pet. denied). Notably, the modern groundwater ownership jurisprudence has involved the Edwards Aquifer Authority, and while these cases may be analogized and applied to general groundwater conservation districts, the courts have yet to do so.

[33] *Id.* at 124.

[34] *Id.* at 126.

[35] *Id.* at 146, 152.

[36] *Id.* at 126.

[37] *See* Andrew M. Miller, Comment, *A Journey Through Mineral Estate Dominance, The Accommodation Doctrine, and Beyond: Why Texas is Ready to Take the Next Step with a Surface Damage Act*; 40 Hous. L. Rev. 461 465, 491-97 (2003); *see also* Andrew D. Lewis, Comment, *The Ever-Protruding Stick in the Bundle: The Accommodation of Groundwater Rights in Texas in Oil and Gas,* 2 Tex. A&M L. Rev. 79, 82 (2014).

the interests of enjoyment and use of the surface and the interest in development and production of minerals. Courts do not always find it easy to keep the peace between Texans who believe their property rights are sacred and an oil industry that has fueled the state's economy for decades.

The Texas Supreme Court first adopted the accommodation doctrine in 1971, in its landmark decision of *Getty Oil Co. v. Jones*.[38] In *Getty*, a surface estate owner brought suit against a mineral lessee seeking to enjoin its installation of beam-type pumping units,[39] arguing that it would prevent the operation of an irrigation system, which the surface owner used to cultivate cotton. The Texas Supreme Court ruled in favor of the surface owner, reasoning that mineral owners may be forced to accommodate preexisting surface uses.

In its arguments, Getty Oil Company contended that it acted in a reasonable manner[40] in its installation and use of the pumping units, and alternatively, that its rights to use the air above the surface were absolute and subject to no qualifications. The Court disagreed with the latter argument, stating that "the rights implied in favor of the mineral estate are to be exercised with *due regard* for the rights of the owner of the servient estate."[41] At first glance, the principle articulated by the Court appeared to simply reaffirm that mineral owner amay exercise their rights pursuant to their property interest, but in doing so, must also abide by the rule of reasonable use and use no more of the surface than is reasonably necessary to achieve development of the minerals.

From the decision in *Getty Oil*, the legend of the accommodation doctrine was born. The Court set forth a test to determine whether a mineral owner may be required to accommodate a surface owner: (1) where there is a preexisting use of the surface; (2) the mineral interest owner's use of the surface precludes or substantially impairs the existing use of the surface; and (3) there are industry-established alternatives available on the tract to recover the minerals.[42]

Just one year after *Getty Oil*, the Texas Supreme Court again examined the bounds of the delicate balance between the interests of mineral owners and surface owners. In a decision that many consider to be a retreat from the headway it forged in *Getty Oil*, the Court held that an oil company was entitled to the use of a substantial amount of water—which is considered part of the surface estate—in its secondary recovery waterflood operation.[43] Here, the Court permitted Sun Oil Company to use up to 100,000 gallons of freshwater per day in its oil production operation, even though the harvest of that large amount of water would deplete an underground reservoir and hinder the surface owner's ability to farm crops. The Court distinguished *Sun Oil* from *Getty Oil* under the third element of the accommodation doctrine, finding that no alternative methods were available for Sun Oil to accomplish its purpose under the lease.[44] Requiring Sun Oil to compensate the surface owner for damages for failed crops or forcing the company to go outside of the tract to acquire the necessary amount of water for its operation would degrade the rights of the dominant estate.[45]

In 2013, the Texas Supreme Court seemed poised to reexamine its three-element accommodation doctrine and determine its applicability to a non-continuous, but annually recurring surface use.[46] Homer Merriman, a pharmacist by occupation and cattle rancher by hobby, owned a 40-acre tract where XTO Energy held a lease to the severed mineral estate. Once a year, Merriman used the tract to sort and work his cattle; he did so in permanently installed fenced corrals. XTO approached Merriman about drilling a natural gas well on the tract and commenced operations despite Merriman's opposition and fear that it would interfere with his cattle operations.[47]

The Court in *Merriman* departed from the established accommodation doctrine. Under a traditional analysis of the three elements of the accommodation doctrine, Merriman would likely have prevailed.[48] Instead, the Texas Supreme Court adjusted the goalposts by shifting the burden to the landowner to prove that he did not have any reasonable alternatives for *his* surface use. Before *Merriman*, courts required the landowner to prove only that the mineral owner had an industry accepted alternative on the tract to recover the minerals. After *Merriman*, in order for a landowner to prevail on an accommodation doctrine claim, it appears that a surface owner must now prove a fourth element—that the surface owner himself

[38] *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621-22 (Tex. 1971).

[39] The beam-type pumping units at issue here are vertical in nature, extending approximately 17 feet from the ground. At the time Jones brought his suit, Getty had already installed one beam-type pumping unit on one well located in the northwest corner of the tract. This unit was placed just outside the circumference of Jones' pivoting irrigation system, so it did not interfere with Jones' surface activities. *See Getty*, 470 S.W.2d at 620.

[40] *See supra* note 34. The right of ingress and egress gives the mineral interest owner the right to use the surface insofar as reasonably necessary to develop the minerals.

[41] *Getty Oil*, 470 S.W.2d at 621 (emphasis added).

[42] *Id.* at 622.

[43] *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 809-10 (Tex. 1972).

[44] *Id.* at 812.

[45] *Id.* ("To hold that Sun can be required to purchase water from other sources or owners of other tracts in the area, would be in derogation of the dominant estate.").

[46] *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (Tex. 2013).

[47] *Id.* at 247.

[48] *See* Courtney R. Potter, *The Accommodation Doctrine Revisited: Implications in Law and in Policy*, 46 St. Mary's L. J. 75, 88-90 (2014).

does not have any reasonable alternatives to his surface use.[49] It appears the mineral owner now can avoid accommodating a surface use simply by pointing at a reasonable alternative to the landowner's surface use.

Ultimately, the purpose of the accommodation doctrine is a noble one—to properly balance the rights of the mineral owner with the interests of the surface owner and to ensure fairness in a complicated arrangement of severed estates. Given the dominance of the mineral estate and the absence of a surface-use statute in Texas, the accommodation doctrine is the only real protection held by a surface owner. But as seen in *Merriman*, even that protection can be a pretty small stick. But as discussed above, the spirit of the doctrine does not always prevail, and Texas courts struggle to find the equilibrium. Yet, the accommodation doctrine is the current umbrella under which surface owners may seek refuge against unreasonable and destructive activities of the mineral estate owners and lessees. With this history of groundwater law and the accommodation doctrine before it, the *Coyote Lake Ranch* case reached the courts.

THE ACCOMMODATION DOCTRINE AND GROUNDWATER: COYOTE LAKE RANCH

A little background

In 1953, West Texas found itself in the middle of an exceptional and devastating drought.[50] This, for Texas, was the drought of record.[51] Cities were scrambling for untapped sources of water to supply residents. Hazel and L.A. Putrell owned a ranch in Bailey County, Texas, located approximately 90 miles northwest of the city of Lubbock.[52] The ranch, known as Coyote Lake Ranch, is now around 40 square miles, covers 26,000 acres, and rests over the Ogallala Aquifer. The Ogallala Aquifer is the principal source of water for the Texas High Plains, spanning a large area beneath eight states from Texas to South Dakota.[53] The ranch is covered with sand dunes that are protected by natural grasses. These grasslands also serve as a natural habitat for the Lesser Prairie Chicken, which has been designated a threatened species by the U.S. Fish & Wildlife Service.[54] Currently, the ranch is used for agricultural operations, grazing cattle, and hunting.[55]

Knowing that water was a diminishing resource, the city of Lubbock presciently looked decades ahead to identify a known source of future water supply. The city found its answer with a significant acquisition of groundwater rights from Coyote Lake Ranch. On January 30, 1953, the Putrells conveyed to the city of Lubbock the ranch's groundwater, reserving some water for domestic use, ranching operations, oil and gas production, and agricultural irrigation.[56] Consistent with the early sophistication in the Texas Panhandle and South Plains regarding groundwater, the deed conveying the groundwater rights for the ranch to the city was lengthy and detailed. As part of its reservation of water, the ranch was allowed to drill one or two wells in each of 16 specified areas for agricultural irrigation.[57] Over time, the ranch drilled 18 irrigation wells for watering wheat and other crops. The wells irrigate nine crop circles, each spanning 128 acres in area.[58] The remaining groundwater belonged to the city of Lubbock.[59]

In addition to specifying conditions for use of the groundwater by the ranch, the deed sets forth specific parameters and requirements concerning the city's right to use the surface when accessing the groundwater.[60] Among the lengthy and detailed provisions, the deed states that the city of Lubbock would:

- pay $3.00/acre per year for all ground surface occupied by housing facilities, fenced enclosures, and roads constructed and used by it;
- pay for damages to any surface property proximately caused by the operations or activities on the land by the city;
- install and maintain gates and cattle guards on its roads;
- have full rights of ingress and egress on the ranch and may drill water wells and test wells on the land except that no well may be drilled within one-fourth mile of any presently existing windmill;
- have the right to use all or part of the ranch necessary or incidental to the taking production, treating, transmis-

[49] *Id.* at 250-51. ("Therefore, we consider only whether Merriman produced legally significant evidence that he did not have any reasonable alternatives for conducting his cattle operations on the tract . . . .").

[50] Robert L. Lowry, Jr., *A Study of Droughts in Texas*, Tex. Water Dev. Bd., at 17-18 (Dec. 1959), *available at* https://www.twdb.texas.gov/publications/reports/bulletins/doc/B5914/B5914.pdf.

[51] *Id.* at 19-20.

[52] *Coyote Lake Ranch, LLC v. City of Lubbock*, No. 14-0572, Pet'r's Merits Br. at App'x. 4, (Tex. Apr. 1, 2015) [hereinafter Pet'r's Br.].

[53] Tex. Water Dev. Bd, *Ogallala Aquifer*, *available at* http://www.twdb.texas.gov/groundwater/aquifer/majors/ogallala.asp (last visited Jan. 12, 2017).

[54] Tex. Parks & Wildlife Dep't, *Lesser Prairie Chicken Wildlife Management Plan*, PWD 1046-W7000, *available at* https://tpwd.texas.gov/publications/pwdforms/media/pwd_1046b_w7000_lesser_prairie_chicken_wmp.pdf (Dec. 2006).

[55] Pet'r's Br. at 16.

[56] *Id.* at 16, App'x 4, 165-66.

[57] *Id.* at App'x 4, 165-66.

[58] *Id.* at 16.

[59] *Id.* at App'x 4, 165-66.

[60] *Id.* at App'x 4, 166.

sion and delivery or water; and
- be entitled to construct certain facilities (including water lines, fuel lines, power lines, communication lines, barricades, and access roads) on, over and under the ranch lands necessary or incidental to the city's operations to access the water.[61]

Prior to the suit, the city drilled seven wells on the northern side of the ranch. For nearly 60 years, the agreement between the ranch and the city functioned without issue.[62] After new owners acquired the ranch, the city's actions began to create conflict as the actions threatened to disrupt the new owners' surface use of the ranch.

In 2012, facing yet another exceptional drought, the city began exploring plans to exercise its rights and increase water extraction from the ranch. As a part of its plans, the city indicated it may drill as many as 80 wells—20 test wells in the middle of the ranch and an additional 60 wells spread across the ranch.[63] The ranch objected to the city's announced plans, contending that such extensive drilling would irrevocably damage the surface and increase erosion of the fragile sand dunes.[64] The city pointed to the broad rights given to it by the 1953 deed and began mowing paths through the ranch lands to possible drill sites. The ranch then filed suit to enjoin the city from proceeding,[65]presenting a first-of-its-kind legal fight between a surface owner and a severed groundwater owner, a fight that had existed for decades in oil and gas.

At the same time the battle over the ranch's surface and groundwater use was brewing, Texas courts were busy considering and changing the face of groundwater law, shifting toward greater protection of landowners and conservation of groundwater resources through cases such as *Day* and *Bragg*.[66] Both cases signaled a shift by the Texas Supreme Court toward taking a more active role in setting water policy. Although the Texas Legislature attempted to establish and refine groundwater law and policy by passing Senate Bill 1 and Senate Bill 332, among several other statutes, the need for clarity and further policy-making persisted. With the Texas Legislature limited by political constraints and faced with the rapidly developing issues in groundwater, the Texas Supreme Court became the logical alternative for refining the law through reliance on oil and gas law and other key jurisprudence, such as takings liability for groundwater regulation. The *Day* and *Bragg* cases also signaled a definite trend by the Court toward following and applying oil and gas law and principles to groundwater law.

To the courthouse

After Lubbock took steps to begin testing for the proposed plan, the ranch sued the city, alleging claims of inverse condemnation, breach of contract, negligence, and declaratory judgment.[67] As a part of its suit, the ranch sought injunctive relief to stop the city's encroachment on and damage to the ranch.[68] The trial court granted the ranch's request for a temporary restraining order and later a temporary injunction. In its order granting the temporary injunction, the trial court focused on the potential damage to the ranch by the city's actions and stated "[the City]'s proposed well field plan is likely accomplished through *reasonable* alternative means that do not unreasonably interfere with [the Ranch]'s current uses."[69] The court then set the case for trial.[70]

The city interlocutorily appealed the injunction to the Amarillo Court of Appeals. The city alleged that the trial court abused its discretion by issuing a temporary injunction based on a misapplication of the accommodation doctrine to the case. The parties agreed that the primary issue in the appeal was whether the accommodation doctrine from oil and gas law could be applied to groundwater.[71]

The city argued that the express terms of the 1953 deed governed the relationship between the city and the ranch concerning the city's use of the surface to access the groundwater. In the city's view, the accommodation doctrine could not apply to the groundwater context because, unlike with mineral estates, neither the surface estate nor the groundwater estate are dominant.[72] The city also argued that even if the accommodation doctrine could apply in the groundwater context, it does not apply in this particular case because the terms of the 1953 deed would govern over the common law doctrine.[73]

The ranch, on the other hand, argued that the groundwater estate is similar to the mineral estate, claiming that the owner of a severed groundwater estate owes the same "due regard" for the surface owner that an oil and gas lessee owes a surface

[61] *Id.*

[62] *Id.* at 16.

[63] *Id.* at 17.

[64] *Id.*

[65] *See Coyote Lake Ranch, LLC v. City of Lubbock*, No. 9245, Pl.'s First Am. Orig. Pet. & App. for Temp. Restraining Order, (287th Dist. Ct., Bailey Cty, Tex. Nov. 26, 2013) [hereinafter Pl.'s First Am. Orig. Pet.].

[66] *See Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 832 (Tex. 2012).; *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 126 (Tex. App.—San Antonio 2013, pet. denied).

[67] Pl.'s First Am. Orig. Pet. at 17.

[68] *Id.*

[69] *City of Lubbock v. Coyote Lake Ranch, LLC*, 440 S.W.3d 267, 270 (Tex. App.—Amarillo 2014, pet. granted). (emphasis added).

[70] *Id.*

[71] *Id. at 272.*

[72] *Id.* at 273.

[73] *Id.* at 273, n. 2.

owner.[74] The ranch contended that applying the accommodation doctrine to groundwater estates is a logical and necessary extension of recent Texas Supreme Court authority explicitly extending other oil and gas doctrines to the groundwater context.[75]

The Court of Appeals decision

The question presented to the Amarillo Court of Appeals was whether the accommodation doctrine could be applied to severed groundwater estate owners.[76] At the outset, the Court of Appeals acknowledged that *Coyote Lake* was a case of first impression.[77] The Court of Appeals considered the ranch's argument to apply the accommodation doctrine and declined to do so. Citing a lack of authority to support the ranch's position, the Court reasoned that *Day* did not support such an extension of the accommodation doctrine in the groundwater context, and that even if it did, it should be left to the Texas Supreme Court (or the Texas Legislature) to recognize and pronounce such an extension of the law.[78] Finding the injunction to be an abuse of discretion, the Court of Appeals reversed the trial court's decision and remanded the case for further proceedings.[79]

The Texas Supreme Court steps in

The ranch sought review before the Texas Supreme Court. It argued once again that the accommodation doctrine should apply to groundwater in the surface estate just as it does for mineral estates. Amicus curiae briefs were filed on behalf of both sides by a number of organizations, including the Texas Farm Bureau, the Texas and Southwestern Cattle Raisers Association and Texas Cattle Feeders Association supporting the ranch's position and the Texas Municipal League supporting the city's position.

The Court first looked closely at the 1953 deed between the city and the ranch. The city maintained that the deed controlled and determined the rights between the parties. The Court reasoned that although the deed touched upon certain aspects of the rights conferred to the city and the ranch, it did not resolve the dispute between the parties.[80]

The Court proceeded to set forth the history of the accommodation doctrine as applied to mineral estates, beginning with *Getty Oil*, the case in which the doctrine was first announced:

> [W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee….Under such circumstances the right of the surface owner to an accommodation between the two estates may be shown.[81]

The Court continued its examination of the history of the accommodation doctrine with *Sun Oil*, where it broadened the application of the accommodation doctrine in the oil and gas context.[82] In *Sun Oil*, the Court highlighted the importance and trend toward conflict resolution and accommodation of both estates.[83]

The Court next drew a line to its decision in *Humble Oil & Refining Co. v. West*, where it discussed how the accommodation doctrine was applied in a "different situation"—that of "adjusting correlative rights."[84] Applying the accommodation doctrine in the context of royalty interests on native gas, the Court remanded the case for a balancing of the interests of the parties.[85] In *Tarrant County Water Control and Improvement District No. One v. Haupt, Inc.*, the Court applied the doctrine to a governmental entity in the condemnation context.[86] More recently in the Court's 2013 decision in *Merriman v. XTO Energy, Inc.*, it reiterated the importance of fairness to the parties and balancing their rights and interests when applying the accommodation doctrine.[87]

In highlighting the benefits of the accommodation doctrine, the Court reasoned:

> The accommodation doctrine, based on the principle that conflicting estates should act with due regard for each other's rights, has provided a sound and workable basis for resolving conflicts between ownership interests. The paucity of reported cases applying the doctrine suggests that it is well-understood and not of-

[74] *Id.* at 273.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 273-74

[78] *Id.* at 275.

[79] *Id.*

[80] *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 59-60 (Tex. May 27, 2016).

[81] *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622-23 (Tex. 1971).

[82] *Coyote Lake Ranch*, 498 S.W.3d at 62; *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 817 (Tex. 1972).

[83] *Sun Oil,* 483 S.W.2d at 817.

[84] *Coyote Lake Ranch,* 498 S.W.3d at 62; *Humble Oil & Refining Co. v. West*, 508 S.W.2d 812, 815 (Tex. 1974).

[85] *Humble Oil*, 508 S.W.2d at 819.

[86] *Coyote Lake Ranch,* 498 S.W.3d at 62; *Tarrant Cty. Water Control & Improvement Dist. No. 1 v. Haupt, Inc.*, 854 S.W.2d 909, 911-12 (Tex. 1993).

[87] *Coyote Lake Ranch,* 498 S.W.3d at 62-63; *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 250 (Tex. 2013).

> ten disputed. We have applied the doctrine only when mineral interests are involved. But similarities between mineral and groundwater estates, as well as in their conflicts with surface estates, persuade us to extend the accommodation doctrine to groundwater interests.[88]

Bolstering its holding further, the Court set forth a number of ways in which mineral and groundwater estates are similar:

1. Both exist in subterranean reservoirs in which they are fugacious.
2. Both can be severed from the land as a separate estate.
3. Both severed estates have the same right to use the surface.
4. Both estates are subject to the rule of capture.
5. Both are protected from waste.
6. Both are owned by the landowner in place.[89]

Although there are obvious differences between water and minerals, the differences provide no basis for treating the estates differently in terms of ownership or the accommodation doctrine.[90] The Court explained:

> Common law rules governing mineral and groundwater estates are not merely similar; they are drawn from each other or from the same source. The dispute here over the City's right to use the Ranch is much the same as the disagreement between Getty Oil and Jones. Resolution of both requires an interpretation of the severed estate's implied right to sue the surface. The accommodation doctrine has proved its worth in such cases.[91]

In addressing the city's chief argument against extension of the accommodation doctrine to groundwater estates—that it has never been held to be "dominant" as is a mineral estate—the Court reiterated that dominant in this context means only "benefitted" not "superior."[92] "[T]he estate is dominant for the same reason a mineral estate is; it is benefitted by an implied right to the reasonable use of the surface. The surface estate is not servient because it is lesser or inferior but because it must allow the exercise of that implied right."[93] According to the Court, although the 1953 deed gave the city the implied right of reasonable use of the surface as well as the right to do what is necessary and incidental to access the groundwater, it does not define what is reasonable, necessary or incidental. Such use is to be determined with due regard for the rights of the surface estate, which is the heart and soul of the accommodation doctrine.[94]

The Court held that the accommodation doctrine, well known in oil and gas law, would now apply to govern conflicts between severed groundwater and the surface estate.[95] While it declined to state so directly, the Court's opinion masked the implicit conclusion that groundwater is and has always been dominant to the surface estate. While not a part of this opinion, the issue of groundwater dominance will undoubtedly be an issue for the Court in the future.

Following the modification in *Merriman*, as stated by the Court, the burden rests with a surface owner to prove:

1. the groundwater owner's use of the surface completely precludes or substantially impairs the existing use,
2. the surface owner has no available, reasonable alternative to continue the existing use, and
3. given the particular circumstances, the groundwater owner has available reasonable, customary, and industry-accepted methods to access and produce the water and allow continuation of the surface owner's existing use.[96]

Although the Court affirmed the Court of Appeals' judgment reversing the temporary injunction, it noted that the remanded proceedings must be consistent with the Court's opinion.[97] As of the publication of this article, the case remains pending at the trial court on remand.

GROUNDWATER IN A POST-*COYOTE LAKE RANCH* WORLD: IMPLICATIONS AND BEST PRACTICES

The implications of *Coyote Lake Ranch* are significant. It solidifies the Texas Supreme Court's recent trend aligning the law over groundwater and minerals in Texas. This will not end here. In this regard, it raises the questions of what other ways and what other doctrines will be extended from the oil and gas context to groundwater. For example, should the Legislature consider drafting specific provisions concerning surface use by severed groundwater (and mineral) estates? *Coyote Lake Ranch* also raises the following issues:

1. The Texas Supreme Court has emerged as policy-making body for groundwater.
2. Questions remain. Was the Court correct in its decision in *Coyote Lake Ranch*? Is this an issue the Legislature should address? How would the accommodation doctrine and the rule of capture apply to cases where the

[88] *Coyote Lake Ranch,* 498 S.W.3d at 63.

[89] *Id.* at 63-64

[90] *Id.*

[91] *Id.* at 64.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 64-65.

[97] *Id.* at 65.

groundwater rights are split into percentages? In the case when production continues to the point that it destroys all economically viable use of the surface estate (i.e., no groundwater left for irrigation of the surface), can the accommodation doctrine be used to moderate production volumes and, in turn, the rule of capture?

3. As for the accommodation doctrine, questions as to its application remain and will undoubtedly emerge. Namely, does the doctrine apply equally where there are no contractual provisions as there were in *Coyote Lake Ranch*?
4. Is a continued path by the Court to apply oil and gas law to groundwater the most prudent course?
5. Tension remains fierce between surface use and development of the severed groundwater estate. Does *Coyote Lake Ranch* suggest that the Legislature should look at creation of a new doctrine or surface damages legislation applicable to groundwater?

While many questions remain, one thing is certain: *Coyote Lake Ranch* will be at the heart of many groundwater law and policy discussions for some time to come.

This shift comes at a critical time when large-scale commercial projects, such as the Vista Ridge Project and others like it, are at their zenith. The implications for water scarcity are substantial. First with *Day* and ownership of groundwater in place and now with *Coyote Lake Ranch* and the accommodation doctrine balancing surface uses and the right to access groundwater, landowners have opportunities to exercise power in ways they have not before. But this new power is a double-edged sword as it can work not only to slow groundwater access and depletion in some cases but also provide a basis for allowing large-scale projects to move forward that may threaten long-term groundwater resources.

What should landowners take away from *Coyote Lake Ranch*? Perhaps the best way landowners can benefit from *Coyote Lake Ranch* is to get a surface-use agreement when severing groundwater rights. As the Court in *Coyote Lake Ranch* explained, the terms of the agreement would control over the common law if they are sufficiently drawn to do so. The reason the deed did not control was because it did not address the disputed issues between the parties—what was reasonable, necessary and incidental to accessing the groundwater.[98] A well-drafted surface-use agreement will address issues of use, damage to the property, easements, area, allowances, and restrictions. These agreements should be drafted with future owners, title concerns, lenders, and property value in mind. The deed in *Coyote Lake Ranch* was highly developed, thoroughly addressed the intended surface uses, and accomplished many of these concerns, and yet, it nonetheless fell short in the eyes of the Court. Perhaps additional language constituting a statement of cooperation between the surface owner and the groundwater holder could help avoid litigation in future cases and ensure production activities do not unreasonably impact the surface uses of the property beyond the needs of production. Additionally, agreements should describe more completely the activities that may be considered reasonably, necessary, and incidental to producing the groundwater.

It is more important than ever to counsel clients carefully when buying a ranch or when severing groundwater rights. Severing groundwater rights is not what it was in 1953 when the Putrells conveyed their interests to the city of Lubbock. Severing groundwater is as technical as leasing oil and gas interests, perhaps even more so given the paucity of law in the area. Large commercial projects can threaten to drain aquifers, cause significant damage to surface uses and land, and disrupt or destroy a landowner's use and enjoyment of his property. Lawyers must provide strong counsel on surface-use agreements when groundwater rights are severed. These agreements should be forward-thinking and drafted with an eye toward minimizing intrusions and damage to the surface use. It is important to note too that until the Texas Legislature addresses the open questions regarding severed groundwater and surface rights, including the accommodation doctrine, the holding of *Coyote Lake Ranch* will remain the sole standard to landowners. And the possibility always remains that the pendulum could shift away from landowners with a shift in perspective on the Court. Therefore, ensuring landowners have carefully crafted well-drafted surface-use agreements is key.

CONCLUSION

The push toward unifying the law governing mineral and groundwater law is gaining momentum. *Coyote Lake Ranch* is only the latest in a recent spate of cases aligning the two areas of law. Although the law is moving in the direction of broadening landowner rights, landowners must be diligent in protecting those rights. The severance of groundwater rights requires careful consideration, negotiation, and written agreements setting forth the specific terms of how the surface may be used by the holder of the severed groundwater estate. Perhaps the lesson from *Coyote Lake Ranch* is that, in an era when groundwater use is ever-increasing and ever-changing, the courts and the Texas Legislature must be proactive in defining the parameters of these uses and balancing the interests and rights of all parties.

[98] *Coyote Lake Ranch,* 498 S.W.3d at 59.