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Water Use Rights in Oil and Gas Operations

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I. Water Transactions in the Oil and Gas Basins

Many families and ranchers who have held or bought lands in oilfield country have discovered that the most valuable part of their property is not the oil, but the underground water. Hydraulic fracturing has increased the need for groundwater in oilfield areas, and while efforts are underway to reduce this need, we are still years away from eliminating it. Consequently, millions, if not billions, of dollars have been exchanged among oil and gas companies, midstream water companies, landowners, and ranchers, all centered around water. A cottage industry has even emerged solely for producing groundwater in Texas for transportation to New Mexico, where groundwater laws differ from those in Texas. Despite the water crisis in Texas, it surprises many that mining is only the third-largest consumer of water in the state. Although the oil and gas industry often faces criticism for the volumes of water used in fracking, it accounts for only about 2 percent of the total water demand statewide.

II. Texas Water Law

To understand groundwater in Texas, we have to understand what it is, which arguably is up for debate right now at the Texas Supreme Court in *Cactus Water Services, LLC v. COG Operating, LLC*, No. 23-0676, which the Texas Supreme Court granted petition for review on January 31, 2025 and set oral argument for March 18, 2025.[1]

The Texas Water Code states that "'Groundwater' means water percolating below the surface of the earth."[2] Groundwater is a part of the surface estate until severed—"Water, un[-]severed expressly by conveyance or reservation, has been held to be a part of the surface estate."[3] The Texas legislature further recognizes this ownership in Texas Water Code Section 36.002: "The legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property."

[1] This paper will not address the intricacies or arguments in the *Cactus* case.

[2] TEX. WATER CODE ANN. § 36.001.

[3] *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972).

Texas courts adopted the rule of capture to groundwater.[4] While groundwater has been around at least since mankind, Texas law first recognized groundwater in place as a real property interest only in 2012, in the historic *Edwards Aquifer Auth. v. Day* opinion—"We now hold that this correctly states the common law regarding the ownership of groundwater in place."[5]

We are all well aware of a severed mineral estate's implied right to "use of as much of the premises as is reasonably necessary to produce and remove the minerals",[6] and that right includes the reasonable right to use the groundwater of the premises.[7] Yet we didn't know if the

[4] *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279, 281 (Tex. 1904), reaffirmed in 1999 in *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 80 (Tex. 1999) ("Given the Legislature's recent efforts to regulate groundwater, we are not persuaded that it is appropriate today for this Court to insert itself into the regulatory mix by substituting the rule of reasonable use for the current rule of capture.").

[5] "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." *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 831–32 (Tex. 2012) (internal citation omitted).

[6] *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971) ("It is well settled that the oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease; but 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.").

[7] "The implied grant of reasonable use extends to and includes the right to use water from the leased premises in such amount as may be reasonably necessary to carry out the lessee's operations under the lease." *Sun Oil Co.*, 483 S.W.2d at 811 (emphasis added); *see Guffey v. Stroud*, 16 S.W.2d 527, 528 (Tex. Comm'n App. 1929) ("The grant of the oil carried with it a grant of the way, surface, soil, water, gas, and the like essential to the enjoyment of the actual grant of the oil."); *see also Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649, 652 (Tex. Civ. App.—Amarillo 1941, writ ref'd).

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