



GRAY REED®  
ATTORNEYS & COUNSELORS

## GROUNDWATER LAW CONTINUES TO EVOLVE – TEXAS LANDOWNERS BE READY

by Stephen Cooney  
May 8, 2019



You have just arrived on the new ranch property you just purchased, leaving the rat race of city life and ready to get to work on the land. You allowed the seller to reserve the minerals so long as he waived his rights to come on to your new property to drill for oil and gas, which he gladly agreed to do. So, on your first day on the ranch you are stunned to see pumping equipment, trucks and a crew ready to set up a pad, build roads, lay pipeline and start drilling. Must be a simple mistake, but no, the crew tells you they are not here to drill for oil and gas but to drill for the groundwater. Sure, you noticed on your title commitment that the groundwater rights were severed decades ago but never has anyone drilled for groundwater and the severance did not include access rights to the surface to drill. After all, you thought, Texas law allows implied surface rights only to mineral owners not groundwater rights owners ... so there was nothing to worry about. A Texas Supreme Court case changed that in 2016 and the effects of that case should now be a concern to land purchasers in every transaction.

It is well established under Texas law that a property owner may sever the mineral and surface estates and convey them separately. It is equally established that the mineral estate is deemed the “dominant” estate, giving it implied rights to use as much of the surface estate as reasonably necessary to produce the minerals. It has long been recognized in oil and gas law that without these implied rights, the reservation or conveyance of the minerals would otherwise be worthless. Groundwater can also be severed from the surface estate and conveyed separately. However, it has not been clear whether the groundwater owner enjoyed the same implied rights as the mineral owner. The Texas Supreme Court answered this question in *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W. 3d 53 (Tex. 2016), finding that a severed groundwater right would likewise be worthless if the groundwater owner could not enter upon the land in order to extract the groundwater.

The *Coyote Lake* court also ruled that the Accommodation Doctrine, long recognized in oil and gas law, applies to severed groundwater rights, meaning, in a nutshell, that, absent an agreement to the contrary, a groundwater owner must accommodate an existing use by the surface owner in extracting the groundwater. For example, if the surface owner is using the land to grow crops, the groundwater owner must not interfere with that use in its drilling operations.

This continues a trend by the Texas Supreme Court in drawing upon oil and gas law to provide guidance in growing groundwater matters and disputes. This trend began in earnest in 2012 with the unanimous decision in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012) when the court stated: “Whether groundwater can be owned in place is an issue we have never decided. Be we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently.”

### **TABLES HAVE TURNED BETWEEN GROUNDWATER OWNERS AND SURFACE OWNERS**

These rulings have a tremendous impact on landowners and owners of severed groundwater rights. The tables have been turned as between groundwater owners and surface owners of a piece of property. Before *Coyote Lake*, the groundwater owner had a strong incentive to have a surface use agreement to have access to the surface in order to produce and extract the groundwater. Today that is no longer needed. It is the surface owner who has the strong incentive for a surface use



agreement to limit the groundwater owner's use of the surface rights. Absent such an agreement, the Accommodation Doctrine will apply. The *Coyote Lake* court, again drawing from oil and gas law, ruled that in applying the Accommodation Doctrine the surface owner would have the burden to prove that (i) the groundwater owner's use completely precludes or substantially impairs the existing surface use, and (ii) there is no reasonable alternative method available to the owner of the surface estate by which the existing use can be continued. If the surface owner can carry that burden, the surface owner must further prove the groundwater owner has available reasonable, customary, an industry-accepted methods to access and produce the water and allow continuation of the surface owner's existing use. This is a dramatic shift for surface owners who until now thought they only had one "dominant" estate to deal with – the mineral estate. Oil and gas operators will normally obtain title opinions as to who owns the minerals of a certain piece of property. They may now also be seeking groundwater title opinions to see if the groundwater estate has been severed and thus a competing "dominant" estate. Indeed the *Coyote Lake* court acknowledged future tension of potentially dueling dominant estates by simply commenting "we leave that issue for another day."

### **LANDOWNERS BEWARE – DO YOU OWN YOUR GROUNDWATER?**

There are countless groundwater reservations in deeds in Texas that suddenly have substantial implied rights. As illustrated by the example above, surface owners likely paid little attention to such reservations, but now may wake up one day to a groundwater owner on the surface drilling a well, digging for pipelines, building roads, etc., as part of such groundwater owner's implied right to use the surface. In land transactions today, dealing with the minerals as far as reserving them or including surface waivers or surface use agreements is routine. The same now must be done for the groundwater.

Estate planners should take note as well. It is common practice, for example, to sever the minerals of ranchland for future generations regardless of what is planned for the surface. This is due partly to the established oil and gas law and marketplace for minerals. There is predictability. The groundwater law is still evolving and an established marketplace needs much more time to develop. However, that time is coming and with Texas' continuing population growth, the value of and, with now some legal certainty in groundwater law, the increase in groundwater transactions will rise.

### **ABOUT THE AUTHOR**



**[Stephen Cooney, Counsel – scooney@grayreed.com](mailto:scooney@grayreed.com)**

*Stephen Cooney focuses on representing buyers and sellers in negotiating and documenting the sale, purchase, lease, development, finance and operation of commercial properties. He also advises clients and negotiates deals concerning a wide range of other commercial real estate matters, including land use issues, deed restrictions, access to water resources and the formation and operation of property owners associations. Stephen is Board Certified in Commercial Real Estate Law by the Texas Board of Legal Specialization.*