Lawyers Say Ruling Bad For Landowners

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Photo illustration by Todd Wiseman

Last week, agriculture and landowner groups heralded a Texas Supreme Court ruling favoring a South Plains ranch as a major win for private property rights, but some lawyers and conservationists are painting the decision as more of a win for developers and water marketers.

The unanimous ruling, issued last Friday, expanded a 45-year-old tenet of oil and gas law that enables "surface" landowners who don't own the minerals beneath their property to force drillers to accommodate their existing use of the land. The 18-page ruling said the so-called "accommodation doctrine" — established by a 1971 state Supreme Court ruling — also should apply in cases in which landowners don't own the groundwater under their property.

That means surface landowners now have a specific legal doctrine on which to challenge plans to pump water from below their property. Groups like the Texas and Southwestern Cattle Raisers Association say it's a major victory for landowners, providing them with a new legal tool.

But the burden of proof under the accommodation doctrine is incredibly high, and falls squarely on the surface landowner, noted Austin water lawyer Vanessa Puig-Williams, who represents the Trinity Edwards Springs Protection Association. Landowners must not only prove that drilling operations will substantially impair their existing use of the land and that there are no reasonable alternatives available to them but also show that reasonable alternatives are available to the producer. Historically, it's been difficult to meet that burden in oil and gas drilling disputes, she and other lawyers noted.

"The accommodation doctrine is really not that protective of the surface owner's interests," Puig-Williams said.

"We're just giving them better gloves in a boxing match, but they're still the underdog," said Amy Hardberger, who teaches water law at St. Mary's University School of Law.

In its ruling, the state Supreme Court also established for the first time that groundwater rights are — like mineral rights — dominant over surface rights. That means severed groundwater owners now have an explicit, and expansive, right to access the surface tract with or without striking a contract with or compensating the surface owner.

"That is an enormous leap," said Fort Worth water lawyer Jim Bradbury. "A week ago, if you're the surface-only owner, you know that an oil and gas company might be able to come on your property — that word is sort of out — but you didn't believe that anybody else had the right to come on your property. Now you do."

Dallas water lawyer Mark McPherson said he and other lawyers interpreted prior court rulings to mean that a person could not transfer a "naked water right," i.e., one that doesn't specifically include any rights to use the surface to access the groundwater. Now, he said, "every naked Texas water right carries with it the right to use as much of the surface as necessary to produce it (the water) just like with the mineral estate."

"The surface owner is going to lose more rights than they will ever gain back through the accommodation doctrine," he said.

Cattle raisers association officials dismiss the notion that water marketers will have a field day after the ruling, contending that the court "didn't grant developers any right they didn't already have." Development of water resources has been, and will still be, driven by demand, they say.

"Those groups already had a right to separately sell and convey water rights before this opinion was issued," said Joseph Fitzsimons, a San Antonio lawyer who serves on the association's board of directors and helped draft an amicus brief supporting the South Plains ranch. While the accommodation doctrine "is not a strong protection," he said it at least provides a mechanism for resolution of disputes.

But the association also is openly pro-development, with another association board member noting that the quicker resolutions of those disputes "will eventually allow the promotion of water marketing."

"The markets are necessary so that our groundwater has value," said Arthur Uhl, who works at the same law firm as Fitzsimons, noting the accommodation doctrine is the default — applying only to cases where the contract doesn't specify the terms of mineral owner access.

Even the Amarillo lawyer who represented the South Plains ranch known as Coyote Lake before the state Supreme Court acknowledged the ruling could create issues for surface landowners with older, less-detailed leases that are silent on the issue of access.

"I don't really see that it's going to cause a lot of problems with the newer transaction and the newer leases," said Marty Jones. "But the older deeds like Coyote Lake Ranch" could be different, he said.

While they are growing in number, Jones emphasized that the number of instances where surface and groundwater rights have been severed are "still few and far between," at least compared to severed mineral rights.

The "very interesting and very good" thing about the ruling was the court signaling that oil and gas law could be applied to groundwater law, which Jones said has "evolved very slowly because there are so few controversies that arise" that lead to lawsuits and court rulings.

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Hardberger, the law school professor, finds the correlation problematic because she said it assumes that water, like oil, is only valuable after it's been extracted from the ground.

The ruling "is only putting us further down the wrong path of how we think about water and its long-term sustainability," she said. "How are we all going to live in this state into the future and have water? It's often really hard for me to imagine how that's going to be successful when everyone is kind of moving into the 'mine' mentality and the courts are essentially assisting that. The problem with water is it's not mine, it's ours."

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