DO OIL, GAS AND WATER MIX?
THE ACCOMMODATION DOCTRINE

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In a case now pending before the Texas Supreme Court, the Court is asked to apply the long-standing oil and gas "accommodation doctrine" to a situation where groundwater is severed from the surface estate. Surprisingly, several groups have weighed in, filing amicus briefs on both sides. Yet, the issue involved in *Coyote Lake Ranch, LLC v. The City of Lubbock*, 440 S.W.3d 267 (Tex. App.—Amarillo 2014, pet. granted) is not novel or earth-shaking—it is the mere application of centuries old law regarding servitudes. But apparently the mention of oil and gas law in connection with any aspect of the groundwater realm causes fear and loathing in groundwater districts across the State. *Coyote Lake Ranch* has become a lightning rod for those who still refuse to accept the holding in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), In *Day*, the Texas Supreme Court invited the application of Texas oil and gas law to groundwater by stating: "[w]hether groundwater can be owned in place is an issue we have never decided...[b]ut we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently." *Id.*

This paper explains the issues involved in *Coyote Lake Ranch*, reviews some of the views articulated by the amici, and explores other aspects of groundwater law that could—and hopefully will—benefit from application of long-established oil and gas law.

The Coyote Lake Dispute

Coyote Lake Ranch, LLC owns a large ranch in Bailey County, near the New Mexico border. The Ranch is primarily used for agriculture, cattle ranching, and hunting. Parts are deliberately left with natural cover as a habitat for the Lesser Prairie Chicken—a threatened species.

In 1953, the Ranch's prior owner conveyed some of the groundwater rights to the City of Lubbock. But the conveyance reserved to the surface owner enough water "to carry on usual and normal domestic and ranching operations and undertakings upon said lands," and to dig irrigation wells for agricultural purposes in certain locations. The Ranch has drilled eighteen such wells and installed center-pivot irrigation systems for watering its wheat and other crops.

Although the deed requires the City to pay for all surface uses, including the roads and well sites it creates, the City has not done so. The deed also requires the City to pay for surface damage, including when it destroys grass lands. During the last six decades, the City has developed only seven wells in one small field on the Ranch's extreme northern border. However, the City has announced a development plan to build 80 municipal water wells spread across the Ranch. The City first plans to drill test wells. The Ranch's center, where the City proposes to drill its wells, is a sand-dune field, with some of the loosest soils on the Ranch. When the ground cover is removed, substantial wind erosion occurs. This can create a "blowout" taking years to recover.

Grasses prevent the sand from blowing in some areas. But the City's plan requires mowing paths to where it plans to drill test wells. Although the City used some existing Ranch roads (essentially tire ruts with grass growing between them), the City mowed numerous paths across the Ranch's surface to reach the well sites.

The Ranch uses rotational grazing practices so cattle will not damage the fragile ecosystem. But after the City mowed paths across their pastures, cattle began to use them as cattle trails, aggravating the damage. The mowed areas and well sites cannot be fenced to keep cattle out, either, because it would result in cross-fencing that would render the rest of the pastures unusable. Moreover, replanting grass in the mowed swaths would not necessarily alleviate the harm. Even if the grass sprouted and grew in the prevailing drought conditions, the cattle would overgraze on the new grass and destroy it. This damage could have been minimized by a different mowing configuration, one the City decided not to utilize, or by providing irrigation to the mowed areas, an option the City rejected.

Some of the proposed City wells will impede the sweep of the Ranch's center-pivot irrigation systems. Not only that, but the grid arrangement will create a large number of "cells" of isolated grassland. The Ranch's owner applied to governmental agencies seeking to have the Ranch designated as a formal habitat for its population of Lesser Prairie Chickens, which are a threatened species. But the City wants to power its permanent wells with overhead power lines. Overhead power lines will render the property unsuitable as a prarie chicken habitat because the prarie chicken's natural predators will use the power lines as a perch. . This negatively affects the Ranch's designation as a habitat, since Texas Parks & Wildlife specifically looks for property

unencumbered by overhead power lines. It also decreases the amount of mitigation payments the Ranch will receive from Texas Parks & Wildlife.

Ranch representatives asked the City to bury the power lines, which is a common practice. The City concedes it is feasible to bury the lines, and it has done so on other projects. But the City refused to do so on this ranch.

Based on the above record, the trial court applied the accommodation doctrine to temporarily enjoin the City from:

- mowing, blading, or otherwise destroying the growing grass;
- proceeding with any drilling without consulting the Ranch regarding potential impacts; and
- erecting power lines to proposed well fields.

The City appealed the trial court's injunction, and the Amarillo Court of Appeals reversed, noting that no Texas court had applied the accommodation doctrine to a severed groundwater estate. The court's opinion went on to suggest that the Texas Supreme Court should take that step. Following this directive, the Ranch filed a petition for review in the Texas Supreme Court, which was granted. The Court asked for full briefing on the merits and heard oral argument on October 14, 2015. As of this writing, the Court has not handed down an opinion.

Arguments for Adapting the Accommodation Doctrine to Severed Groundwater Estates

In Texas, the mineral estate is dominant over the fee estate. *See*, e.g., *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967). So, traditionally, mineral owners could use as much of the surface as was reasonably necessary to extract and produce minerals, since without that right, mineral ownership would be worthless. *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943). As mineral production increased, however, the Supreme Court recognized that the right should not always be absolute. So the Court expressly recognized the accommodation doctrine in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971). Yet it had been foreshadowed in many earlier cases. *See id.* at 621. The accommodation doctrine "focuses on balancing the respective rights of the parties." *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 250 (Tex. 2013).

> 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.

Getty Oil Co. v. Jones, 470 S.W.2d at 621.

In *Getty Oil*, John Jones, the surface owner, sought to enjoin Getty Oil from building pumping units that prevented Jones from using his center-pivot irrigation system. *Id.* The Court emphasized that it had recently recognized surface soil as a natural resource and, while Getty had the right to reasonably use the surface for production of minerals, "it is not ordinarily contemplated . . . that the utility of the surface for agricultural . . . purposes will be destroyed or substantially impaired." *Id.* at 622 (quoting *Acker v. Guinn*, 464 SW.2d 348 (Tex. 1971)). Instead, the "due regard concept defines more fully what is to be considered in the determination of whether a surface use by the lessee is reasonably necessary." *Id.*

Of course, if there is only one way to develop the minerals, then it can be used because the mineral estate is ultimately dominant:

> There may be only one manner of use of the surface whereby the minerals can be produced. The lessee has the right to pursue this use, regardless of surface damage. *Id.* at 622.

But in the usual case, when alternatives do exist, then the mineral-estate owner must accommodate the existing use of the surface owner:

> [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. *Id.*

Said more simply, under the accommodation doctrine, a "mineral owner's exercise of its right to use of the surface cannot unreasonably infringe on the surface owner's right of surface use if reasonable alternative surface uses are available to the mineral owner." *Tarrant Cnty.*, 854 S.W.2d at 912.

This nicely accommodates the competing ownership interests. The mineral estate remains dominant: If no reasonable alternative surface uses are available, the mineral owner can do what is necessary to produce the minerals. But if there are reasonable alternatives, then the mineral owner must accommodate the surface owner by using them.

Recently, the Supreme Court reiterated the accommodation doctrine in *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013). *Merriman* also clearly explained the respective burdens of proof. "To obtain relief on a claim that the mineral lessee has failed to accommodate

an existing use of the surface, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued." *Merriman*, 407 S.W.3d at 249. "If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use." *Id.*

But should this well settled doctrine to be extended to a severed groundwater estate? Texas law views groundwater ownership as functionally analogous to the ownership of mineral rights. *See Edwards Aquifer Authority v. Day*, 369 S.W.3d at 831-832. Like oil and gas, groundwater is severable from the surface estate, and once severed no longer belongs to the surface estate. *Fleming Foundation v. Texaco, Inc.*, 337 S.W.2d 846 (Tex. Civ. App.—Amarillo 1960, writ ref'd, n.r.e.). A severed groundwater estate is, in all relevant ways, identical to a mineral estate. Both are severable interests in land. *Evans v. Ropte*, 96 S.W.2d 973, 974 (Tex. 1936); *see also Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 831 (Tex. 2012) (adopting oil-and-gas rule that landowner has "absolute title ***in severalty***" to groundwater beneath land) (emphasis added); *City of Del Rio v. Clayton Sam Colt Hamilton Tru*st, 269 S.W.3d 613, 617-18 (Tex. App.—San Antonio 2008, pet. denied) (determining that groundwater can be severed from the surface estate by reservation in a deed).

Once severed, there is no reason to treat the relationship between groundwater and surface estates any differently from the relationship between mineral and surface estates. Like oil and gas, groundwater can be owned, and is owned in place. Like oil and gas, it can be severed and owned separately from the surface. And like oil and gas, once severed, its usefulness depends entirely on access to the surface estate. *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943). That said, the corollary should be that an estate containing severed groundwater will be dominant to the surface estate. However, like oil and gas estates, the exercise of the dominant rights must pay due regard to the rights of the surface owner.

Arguments Offered by Opponents of Progress in Groundwater Law

The City of Lubbock and several amici curiae have advanced arguments for rejecting the application of the accommodation doctrine to groundwater. All are specious.

Groundwater is Not Separate from the Surface Estate. A favorite argument appears to be that the accommodation doctrine—and by inference all oil and gas law—should not be applied because groundwater is part of the surface estate, while oil and gas are part of the mineral estate. This argument ignores the legal reality that oil and gas, before severance, are also regarded as part of the bundle of rights belonging to the surface owner. Thus, it is legally correct to say that oil and gas belong to the surface owner, just like groundwater, until a severance effects a change in the estate.

Ownership in place and not the particular substance at issue determines severability. *See Wilderness Cove, Ltd. v. Cold Spring Granite Co.*, 62 S.W.3d 844, 849 (Tex. App.—Austin 2001, no pet.). In *Wilderness Cove*, the Austin Court of Appeals answered the question of whether or not a mineral lease resulted in the conveyance of *in situ* granite as a severable estate. *Id.* That court concluded that the *in situ* granite was severable from the surface. *Id.* In reaching its conclusion the Austin court noted that, "Texas adheres to the 'ownership in place' doctrine and, it is well established under this doctrine that a severance creates a separate corporeal estate in minerals." *Id.* So, groundwater (like oil and gas or granite) belong to the surface owner but becomes a separate estate once severed. Just like oil and gas or granite. This does not represent some radical change in the law—it represents a long-established legal result of selling parts of the bundle of rights.

In this regard, it is curious that Canadian River Municipal Water Authority has filed an amicus brief opposing the Ranch's view. CRMWA owns nearly all of the groundwater beneath Roberts County but very little of the surface. If severed groundwater somehow remains part of the surface estate, those conveyances are suspect.

But in the final analysis, the argument that the accommodation doctrine should not apply to groundwater because it is part of the surface estate merely reflects confusion about the legal status of a severed estate. Yes, groundwater belongs to the surface owner until severed, but once severed, it no longer belongs to the surface estate.

Groundwater is Just Different from Oil. Which leads to another argument advanced by opponents of the accommodation doctrine: that groundwater is just fundamentally different from oil and gas, and the courts therefore should not be drawn into applying oil and gas law to groundwater. These arguments were advanced by many of the same amici in connection with the *Day* case, and the Supreme Court rejected them, turning to its opinion in *Ellif v. Texon Drilling Co. et. al*:

> In our state the landowner is regarded has having absolute title ***in severalty*** to the oil and gas in place beneath his land. The only qualification of that 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. [emphasis added]
> ...
> We now hold that this correctly states the common law regarding ownership of groundwater in place.
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> *Day*, 369 S.W.3d at 831-32 *quoting* 210 S.W.2d 558, 561

Is the fact that "water is not a mineral" dispositive? In other words, is there something in the molecular composition of water that should cause groundwater law to be different from oil and gas law? The answer is "no" and for several reasons. First, in many instances, oil, gas and water are produced from the same formation, with the water often being contaminated by the hydrocarbons. Should the hydrocarbons in such a formation be governed by one set of legal principles and the groundwater another? Is the lack of a carbon atom in the molecular structure somehow legally significant? The mere difference in molecular structure should not be momentous from a property law standpoint.

Taking the analysis further, is brackish water, which is full of minerals of various kinds, subject to "mineral" law or groundwater law? Where saltwater exists in formations under a landowner's property, is the salt (a mineral by definition) subject to different legal principles than the water in which it is dissolved? Again, no compelling analysis is offered upon which to stake any such legal distinction.

Therefore, courts should turn to oil and gas law to determine questions arising from the nature of groundwater. Like oil and gas, groundwater is part of the real property between the

surface and the center of the earth; it is owned until severance by the surface owner; it is subject to drainage because it is transitory or fugacious; it is subject to barter or sale as real property below the surface and as personalty once reduced to possession at the surface. It is these characteristics that Texas courts should examine when deciding whether oil and gas law provides authoritative guidance for groundwater issues.

The Accommodation Doctrine Would Re-Write Groundwater Conveyances. A frequently repeated argument is that adopting the accommodation doctrine in groundwater situations will override carefully crafted language in deeds and other instruments by which the groundwater has been severed. *See, for example,* Amicus Curiae Brief on the Merits of Canadian River Municipal Water Authority, which attaches a lengthy deed carefully defining the rights of the surface owner and the groundwater owner. The assumption that groundwater conveyances are somehow vastly more sophisticated than modern oil and gas leases is unsupported and reflects unfamiliarity with the documents associated with the State's most valuable natural resource.

This very argument was advanced by Getty Oil in *Getty Oil v. Jones,* and was rejected by the Supreme Court. There, the oil and gas lease at issue expressly granted "land," "for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building roads, tanks, power stations, telephone lines, houses for its employees, and other structures *thereon* to produce, save, take care of, treat, transport, and own said products." *Getty Oil Co. v. Jones,* 470 S.W.2d 618, 620-2 (Tex. 1971) (emphasis added). John Jones, the surface owner, argued that Getty Oil's pumping unit—expressly authorized under the lease—interfered with the center-pivot irrigation system that Jones used to water his crops. *Id*. This Court held that the rights conveyed by the lease carried with them an obligation to accommodate existing surface uses whenever feasible. *Id*. at 622.

Getty Oil cited a leading law review article to support that proposition. *Id*. at 621 (citing Page Keeton & Lee Jones, Jr., *Tort Liability & the Oil & Gas Industry,* 35 TEX. L. REV. 1, 3-4 (1956)). The article noted that "[t]he typical oil, gas and mineral lease contains express provision for the use of the surface for carrying out the purposes of the lease." Keeton & Jones, 35 TEX. L. REV. at 3. That language is like that found in the *Getty Oil* lease and generally provides:

> The lessor hereby grants, leases and lets exclusively unto lessee for the purpose of investigating, exploring, prospecting, drilling, mining for and producing oil, gas and all other minerals, and of

> laying pipe lines, building tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products and housing its employees.

Id. Significantly, the article concluded that "[w]hile the language is not expressly so restricted, all courts would hold that this provision means that the lessee can do such things only so long as they are reasonably necessary, or, alternatively, that *he must exercise his respective rights and privileges with reasonable regard for the rights and privileges of the holder of the servient estate in the leased premises*." *Id*. at 4 (emphasis added).

This article, which predated *Getty Oil* by fifteen years, recognized the longstanding "due regard" principle in Texas law. *See, e.g., General Crude Oil Co. v. Aiken*, 344 S.W.2d 668, 669 (Tex. 1961) (recognizing mineral-estate dominance but noting that "right is to be reasonably exercised with due regard to the rights of the surface owners"); *Gulf Prod. Co. v. Cont'l Oil Co.*, 132 S.W.2d 553, 562 (Tex. 1939) (holding that "the surface estate is servient to the mineral estate for the purposes of the mineral grant, but even this right is to be reasonably exercised with due regard to the rights of the owner of the surface").

That principle forms the basis of the accommodation doctrine. *See Tarrant Cnty. Water Control & Improvement Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993) ("The accommodation doctrine is based on this concept of 'due regard.'"). So even though the Court did not formally recognize the accommodation doctrine until *Getty Oil*, the seeds of the rule had been planted much earlier.

Applying the Accommodation Doctrine Will Result in Litigation. Several amici argue that adopting the accommodation doctrine will cause undue litigation and confusion in the groundwater world, preventing the orderly development of that resource. However, in the 40 years since the Supreme Court expressly recognized the accommodation doctrine, only about 20 Texas cases even discuss the rule, and far fewer hold that it has been violated. *See, e.g.*, Heron, 19 BUFF. ENVTL. L.J. at 99 (noting that the doctrine "has not made a large difference in the ordinary surface use case" in Texas); Stuart C. Hollimon, *The Accommodation Doctrine: Its Current Status and Future Application*, SW. LEGAL FOUND.: 45TH ANNUAL INST. ON OIL & GAS LAW & TAXATION at 3--10-11(1994) (observing that Texas courts have applied the doctrine narrowly, with just two cases actually applying the doctrine in the twenty years after *Getty Oil*).

When warned of the looming specter of mass litigation, bear in mind that there are literally hundreds of thousands of oil and gas leases across the State,[1] while there are relatively few severances of groundwater estates. Similar prophecies abounded around the time of the Court's decision in *Getty Oil*. Perhaps most notably, the dissent in *Getty* incorrectly predicted that the accommodation doctrine would obviate the usefulness of all oil and gas leases generally, stating that, due to the majority's holding: "[t]he oil and gase lease becomes a mere letter in the sand, to be washed away by the tidal wave which will be caused by the majority holding." A keen observer of Texas oil and gas law will note that, in the forty-five years since *Getty*, the oil and gas lease has not been washed away by a tidal wave of accommodation doctrine litigation. The predictions of gloom and doom have not been borne out in the oil and gas world; and those who resist the accommodation doctrine's applicability to groundwater provide no sound basis for assuming their prognostications will apply to water.

"You Caint Drink Oil." Finally, as seen in the *Day* case, some amici attempt to differentiate between oil and gas law and groundwater law based on the premise "you can't drink oil," that is, groundwater is of much greater importance to the development of the State than is oil or gas. That assertion is flawed for a number of reasons. First, the perceived social utility of a substance cannot be the basis for determining the law applicable to it. For example, real property law, not sociology, must be consulted when it comes to determining the ownership of real property.

Second, by what scale of importance to society should legal principles be weighed? Oil and gas are issues related to national security and the future of our country.[2] Should these underground fugacious substances therefore be afforded a different property status than groundwater? The importance of groundwater or oil and gas is reflected in and drives its value; it does not determine the legal principles applicable to each. Salt is imperative to human life and has, in the past, been used as currency. Should its importance to life determine the law applicable to it? In *Day,* the Court responded to the social utility argument advanced by EAA by noting:

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[1] In 2015, there were 291,996 known oil and gas wells in Texas. *FracTracker Alliance* website, last accessed April 16, 2016.

[2] "And for the sake of our economy, our security, and the future of our planet, I will set a clear goal as president: In 10 years, we will finally end our dependence on oil from the Middle East." — President Barack Obama, as quoted at www.pickensplan.com, accessed January 17, 2009.

> To differentiate between groundwater and oil and gas in terms of importance to modern life would be difficult. Drinking water is essential for life, but fuel for heat and power, at least in this society, is also indispensable. Again, the issue is not whether there are important differences between groundwater and hydrocarbons; there certainly are. But we see no basis in these differences to conclude that the common law allows ownership of oil and gas in place but not groundwater. *Id. at* 831.

Conclusion

Application of the accommodation doctrine to groundwater is a logical step. It is logical because the substances are legally indistinguishable—both are underground fugacious substances; both are governed by the same principles of ownership, severance and sale; both are subject to the rule of capture, drainage and offset; and the enjoyment of both relies on access to the surface. Given the paucity of accommodation doctrine litigation between mineral and surface estate owners, application of the doctrine to groundwater cannot reasonably be anticipated to cause the end of the world as we know it.