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Who owns groundwater in the aquifer?

By Colin McDonald - Express-News

AUSTIN — The ownership and control of groundwater pumping rights in Texas is now in the hands of the state Supreme Court.

On Wednesday, the nine justices heard arguments in a case that pits the right of a landowner near Von Ormy to pump from the Edwards Aquifer against the government's authority to regulate the use of ground and surface water.

For more than a decade, the Edwards Aquifer Authority has argued that in order for it to regulate pumping, landowners cannot own the water in the Edwards Aquifer.

It was first time the state's highest court considered that argument.

Scores of landowners, private organizations, cities and state agencies that disagree with the EAA packed the courtroom and formed a line outside.

“Any ruling by the Court that in any manner destabilizes groundwater ownership rights could have dire consequences for Texans and the Texas economy,” wrote Texas Comptroller Susan Combs.

The EAA was created by state law in 1993 to ensure a future water supply for the region and protect endangered species by limiting pumping from the aquifer.

Instead of allowing landowners to continue to pump as much water as they wanted as long as they put it to some beneficial use, the authority issued pumping permits and put a cap on the total amount that could be pumped.

In 1996, Burrell Day and Joel McDaniel requested a permit to pump 700 acre-feet from the ground. The two wanted to start a peanut and oat farm on the 350-acre ranch they had recently purchased. Their plan was to use the free-flowing water from a well drilled by the previous owner that was filling a 50-acre man-made lake on the property. The EAA denied their application for groundwater. It

told the landowners that if they wanted to use the water in the lake, which is considered surface water and therefore controlled by the state, then they would need a permit from the Texas Commission of Environmental Quality, not the EAA.

The EAA issued a permit for Day and McDaniel to pump 14 acre-feet a year.

The two sued in district court, arguing the EAA had “taken” their property by denying them the right to pump. Day died last year.

“They have regulated us out of our ownership of the groundwater by regulating it to the point of it being useless,” said Day's and McDaniel's lawyer Tom Joseph.

Because the well water mostly evaporated out of the shallow lake and never flowed off the property, Joseph argued it never became state water. Instead, it should be considered groundwater because it came from the well. As groundwater, it belongs to the landowners because they own the well.

The EAA countered the landowners did not have a constitutionally protected right to the water beneath their land and therefore could not sue.

The lines were drawn, and some 14 years and multiple appeals in federal and state courts later, the Texas Supreme Court agreed to hear the case.

In general, the other courts agreed with the EAA and the outcome of the permit process. But the state Court of Appeals ruled landowners do have “some ownership rights in the groundwater.”

On Wednesday, the EAA argued that if the groundwater is owned by the landowners, then it and the roughly 95 groundwater conservation districts in the state would be open to a lawsuit every time they tried to limit pumping or be forced to compensate landowners.

“This is no small question for the authority,” the EAA lawyers wrote in their brief to the court.

The EAA would have its “legs pulled out from underneath it” if the court ruled against it, EAA lawyer Pamela Baron told the justices.

Justice Harriet O'Neill questioned that logic, pointing out a “takings” claim is difficult to prove, and water ownership would not necessarily limit the power of the EAA.

Justice Nathan Hecht also challenged the EAA's stance and asked Baron if the landowners don't own the water beneath their land, then who does?

Baron replied that no one had to own groundwater.

But if the landowner does not own the water, Hecht continued, then what protection is there from the state coming in and taking all of the water for another use?

Baron said the landowners and the water would be protected from such a radical change by locally elected board members of the EAA and the conservation districts. If the board members did something the landowners did not like, they would be voted out.

To Joseph, Hecht questioned why the EAA's limit on pumping was any different than a zoning restriction. Both limit the value and use of a property, but the zoning is not considered a "taking."

Joseph argued that the rule of capture, which has historically allowed landowners to use all the water they can, should still apply.

But it was specifically that approach to water use the EAA was formed to curtail.

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