

# Oil and Gas, Natural Resources, and Energy Journal

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Volume 1 | Number 6

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April 2016

## For Texas, Now is the Time to Force Groundwater Owners to Accommodate

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### Recommended Citation

Hilary C. Soileau, *For Texas, Now is the Time to Force Groundwater Owners to Accommodate*, 1 OIL & GAS, NAT. RESOURCES & ENERGY J. 465 (2016),  
<http://digitalcommons.law.ou.edu/onej/vol1/iss6/2>

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# ONE J

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VOLUME 1

NUMBER 6

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## FOR TEXAS, NOW IS THE TIME TO FORCE GROUNDWATER OWNERS TO ACCOMMODATE

HILARY SOILEAU

### *I. Introduction*

Groundwater is extremely important to the American economy and lifestyle, supplying approximately twenty percent of the nation's water used in 2010.<sup>1</sup> While the main uses of groundwater are irrigation and public supply, groundwater also accounts for ninety-eight percent of domestic water withdrawals, primarily supplying rural areas via personal water wells.<sup>2</sup>

Legal scholars have long determined that geography is a valid consideration in water law principles.<sup>3</sup> Settlers of the American West understood that obtaining water was necessary for survival, and maintaining access to water required a unique system of water rights premised on the

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1. Nancy L. Barber, *Summary of Estimated Water Use in the United States in 2010*, U.S. Geological Survey (Nov. 4, 2014, 3:38 PM), <http://pubs.usgs.gov/fs/2014/3109/pdf/fs2014-3109.pdf> (noting that Texas is the second-largest consumer of water out of all fifty states).

2. For 2005, most of the fresh groundwater withdrawals, sixty-eight percent, were for irrigation, while another nineteen percent was used for public-supply purposes, mainly to supply drinking water to much of the nation's population. *Groundwater Use in the United States*, U.S. Geological Survey (July 30, 2015 2:17 PM) <http://water.usgs.gov/edu/wugw.html>.

3. In the eastern United States, where water is more abundant, the riparian doctrine allows a property owner with access to waterways to make "reasonable use" of the water. In the western United States, however, where water is more scarce, water rights are dependent upon first-come-first-served administrative appropriation of a quantity of water if and when that water is available from the requested source. GREGORY S. WEBER, JENNIFER L. HARDER, & BENNETT L. BEARDEN, *CASES AND MATERIALS ON WATER LAW* 2–10 (9th ed. 2014).

ability to divert the water from a flowing stream.<sup>4</sup> State governments eventually regulated this process to ensure that senior water users maintained their rights and to reserve water for statutorily deemed beneficial uses.<sup>5</sup> In the arid West where less surface water was available, scientific and technological advancements in water wells and pumps<sup>6</sup> have created a larger supply of water to meet the ever-growing demand.<sup>7</sup>

Despite its utility, groundwater remained a mystical concept to humans until the advent of groundwater modeling, which engineers use to simulate and predict aquifer conditions; nonetheless, these modeling systems output inconsistent results, and laymen may still be unaware of the engineering required to extract groundwater or the natural replenishment of the underground source.<sup>8</sup> Unlike surface water, groundwater is primarily hidden from plain sight and decidedly fugitive in nature.<sup>9</sup> These characteristics create difficulty in predicting groundwater's movement (regarding both direction and speed).<sup>10</sup> Considering that annual recharge and long-term accumulation determine the water supply, difficulties also exist in predicting groundwater availability.<sup>11</sup>

Further, unlike surface water, which only requires a dredged ditch to divert the flow, utilization of groundwater requires far greater expenses to drill wells and install pumps.<sup>12</sup> The long-term, continuous pumping may result in groundwater depletion when extraction rates exceed replenishment rates.<sup>13</sup> The depletion decreases water quality and increases pumping costs and land subsidence.<sup>14</sup> In Texas, recurring drought and population growth compound these problems; further, Texas treats groundwater as a private

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4. *Id.*

5. *Id.*

6. *Id.* at 376.

7. *Groundwater Use in the United States*, *supra* note 2.

8. *See, e.g.*, WEBER, HARDER, & BEARDEN, *supra* note 3 at 371; *Sorenson v. Lower Niobrara Natural Res. Dist.*, 376 N.W.2d 539, 543 (Neb. 1985) (stating that models are "vulnerable to 'garbage in, garbage out,'" meaning that a model is "only as good as the validity of the data supplied").

9. *See, e.g.*, *Fugitive Resource*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Mineral*, BLACK'S LAW DICTIONARY (10th ed. 2014).

10. WEBER, HARDER, & BEARDEN, *supra* note 3 at 372 (stating that groundwater flow is concededly slower than surface water flow).

11. *Id.*

12. *Id.*

13. *Groundwater Depletion*, U.S. Geological Survey (Dec. 9, 2015 12:50 PM) <http://water.usgs.gov/edu/gwdepletion.html>

14. *Id.*

property interest, allowing owners to sever it from the surface above it.<sup>15</sup> In response, Texas has developed a unique groundwater management system comprised of conservation districts that enforce consumption caps, evaluate use efficiency, and measure groundwater levels.<sup>16</sup>

But because policymakers cannot easily perceive groundwater and its depletion, water conservation policies in Texas have developed slowly. The Texas Groundwater District Act of 1949 gave authority to water districts to manage groundwater conservation.<sup>17</sup> The High Plains Underground Water Conservation District No. 1, created in 1951, was the first such district and has evolved over the last half a century into the most active conservation district in the state.<sup>18</sup> By the 1950s, Texas common law had adopted groundwater policies that were not conducive to conservation because courts based decisions on oil and gas case law that Texas had previously developed. These concepts, such as the rule of capture, encourage full development of the resource rather than conservation.<sup>19</sup>

Still, the application of oil and gas principles to groundwater, while based on convenience and familiarity, is logical when considering the similarities between subsurface mineral resources and groundwater. Groundwater extraction is more similar to oil and gas extraction than to surface water diversion.<sup>20</sup> Property owners may sever groundwater rights, like mineral rights, from surface rights.<sup>21</sup> In Texas, groundwater wells are also subject to regulations similar to those imposed upon oil and gas wells, including well registration with local groundwater conservation districts,

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15. Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 250-251 (2001).

16. Sandra Postel, *Drought Hastens Groundwater Depletion in the Texas Panhandle*, National Geographic (July 24, 2014) <http://voices.nationalgeographic.com/2014/07/24/drought-hastens-groundwater-depletion-in-the-texas-panhandle/>.

17. Behnaz Bolhassani, *Groundwater Management Policy in Texas: Challenges and Recommendations*, Texas Water Policy, 12 (Dec. 6, 2014) <http://static1.squarespace.com/static/54c15aa8e4b08b9c092063a6/t/54d01bb4e4b0a76a040f2382/1422924724333/RP-Bolhassini.pdf>.

18. Postel, *supra* note 16, *See also Groundwater Conservation District Facts*, Texas Water Development Board (2015) [http://www.twdb.texas.gov/groundwater/conservation\\_districts/facts.asp](http://www.twdb.texas.gov/groundwater/conservation_districts/facts.asp).

19. The rule of capture states that the person to capture the resource owns the resource; because this policy is not conducive to groundwater conservation, which is generally considered a priority in western states with arid climates, Texas remains the only western state in which the rule of capture applies to groundwater. Bolhassani, *supra* note 17.

20. *Oil and Gas Production Activities*, Tribal Energy and Environmental Information, <http://teeic.indianaffairs.gov/er/oilgas/activities/act/index.htm>.

21. *Ask Larry\_Groundwater Rights*, Texas Rural Water Association (July 23, 2014) <http://www.trwa.org/?300>.

well construction standards, spacing and reporting requirements, and production limits.<sup>22</sup> With Texas' wealth of developed oil and gas case law, courts have reasonably applied oil and gas principles to groundwater.

Although case law has applied other oil and gas principles to groundwater, courts have never applied the accommodation doctrine that way. Texas applies the accommodation doctrine to severed mineral estates and allows the surface owners to recover damages if the mineral owner's use of the surface unreasonably damages the surface despite the existence of reasonable alternatives that would not damage the property.<sup>23</sup>

*Coyote Lake Ranch, LLC v. The City of Lubbock* presents the Texas Supreme Court with the opportunity to employ the doctrine regarding severed groundwater estates. As a prerequisite, application of the accommodation doctrine also requires an adoption of the view that the groundwater estate is the dominant estate and the surface estate is the servient estate, with the accommodation doctrine serving as a negotiation between the interests of each estate holder. Court interpretations favoring the view of the severed groundwater estate as a private property interest rather than a natural resource to be conserved, along with the relative youth of the body of regulations governing groundwater, have weakened the authority of water districts. A decision favoring the accommodation doctrine's applicability to groundwater could both protect the property owner and encourage a legislative stance on smart groundwater production and resource development.

## II. Law before the case

For over 100 years, Texas courts have applied oil and gas doctrines to groundwater. In 1904, the Supreme Court of Texas applied the rule of capture to groundwater.<sup>24</sup> A railroad company owned property in fee simple and drilled water wells on the land for use by its locomotives.<sup>25</sup> The railroad's new wells depleted the supply of preexisting wells on an adjacent homestead, but the Court found that the railroad should have free and absolute use of the water that would flow out of the railroad's wells.<sup>26</sup>

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22. Russell S. Johnson, *Groundwater Law and Regulation*, Texas Bar CLE, <http://www.texasbarcle.com/materials/Special/Excerpt%20from%20Groundwater%20Law%20and%20Regulation.pdf>.

23. Andrew M. Miller, *A Journey Through Mineral Estate Dominance, the Accommodation Doctrine, and Beyond: Why Texas is Ready to Take the Next Step with a Surface Damage Act*, 40 HOUS. L. REV. 461, 484 (2003).

24. Hous. & Tex. Cent. R.R. Co. v. East, 81 S.W. 279 (1904).

25. *Id.* at 280.

26. *Id.*

Should the railroad's use of groundwater exhaust the source, the railroad would not be liable unless the consumption was malicious or unreasonable.<sup>27</sup> Only an adjoining landowner's equal rights to absolute use of the reserve beneath the adjacent property can limit the absolute free use of the groundwater that flows out of land.<sup>28</sup> The Court reasoned that, like oil and gas,<sup>29</sup> groundwater is a fugitive resource,<sup>30</sup> the movement and origin of which is a mystery; therefore, recognition of a correlative right would interfere with the property rights of adjacent lots owned by farmers, ranchers, railways, roads, sanitation plants, and domestic users.<sup>31</sup>

The rule of capture is an equitable doctrine: it considers the limitations of determining the amount from an underground reservoir that should vest in each surface owner above the reservoir.<sup>32</sup> “[W]e need not, therefore, pause to consider the scope of the legislative authority to regulate the exercise of mining rights and to direct the methods of their enjoyment so as to prevent the infringement by one miner of the rights of others.”<sup>33</sup> Thus, the unpredictable nature of fugitive resources such as oil, natural gas, or groundwater precludes liability for reasonable use. Texas remains the only western state to have applied the rule of capture to groundwater.<sup>34</sup>

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27. *Id.* at 282.

28. *Brown v. Humble Oil & Refining Co.*, 83 S.W.2d 935, 942 (Tex. 1935) (quoting *Ohio Oil Company v. Indiana*, 177 U.S. 190, 202) (“But there is a coequal right among them all to take from a common source of supply.”).

29. *Thompson v. Consolidated Gas Utilities Corporation*, 300 U.S. 55, 71–72 (1937) (explaining that oil and gas will migrate from high pressure areas underground to low pressure areas, with an indifference as to whether or not transportation pipelines are already established above those low pressure areas and as to who owns the areas to which the resources are traveling).

30. *Mineral*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A mineral in liquid or gaseous form that is capable of migrating from one place to another and that one must reduce to possession to acquire ownership of.”).

31. *East*, 81 S.W. at 281.

32. *Texas Oil and Gas Property Rights*, Bearden Law Firm, 8 <http://www.beardenlawfirm.com/Texas%20Oil%20and%20Gas.pdf>.

33. *Brown*, 83 S.W.2d at 942 (quoting *Ohio Oil Company*, 177 U.S. at 202 (quoting *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 60 (1898))).

34. *Everything You Need to Know About the Rule of Capture*, CourthouseDirect (Aug. 19, 2015, 8:00 AM), <http://info.courthousedirect.com/blog/everything-you-need-to-know-about-the-rule-of-capture>; *See generally* *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (1999) (affirming over ninety years of application of the common law rule of capture despite technological advances allowing a more accurate prediction of quantity and movement of groundwater); *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21 (Tex. 1978) (holding that, in addition to the exceptions to the rule of capture adopted in

In response to the Court's application of the rule of capture to groundwater, the Texas legislature authorized the Railroad Commission to regulate groundwater production through permitting, spacing, pooling, unitization, prorating, etc.; used effectively, these regulations prevent waste, overproduction, and unfair drilling practices.<sup>35</sup> Courts still permit actions to prevent malicious or wanton conduct, such as waste.<sup>36</sup>

In addition, Texas' Water Code "recognizes that a landowner owns the groundwater below the surface of the landowner's land," which conceptually is the same as ownership in place.<sup>37</sup> As recently as 2012, the Supreme Court of Texas applied the theory of ownership in place to groundwater.<sup>38</sup> The Court held that the Texas Constitution's takings clause applies to groundwater and requires adequate compensation in exchange for consumption.<sup>39</sup> The court reasoned that, while the rule of capture recognized ownership of groundwater *at the surface* after being pumped, it would not be antithetical to ownership of groundwater *in place*.<sup>40</sup> A landowner of a fugitive resource still has the right to exclude by preventing drilling or otherwise entering the subsurface, and if the adjacent owner is producing, the subsurface owner can drill an offset well to capture his proportionate share.<sup>41</sup> This ability to exclude further demonstrates that the landowner's right to the oil and gas beneath his land is "an exclusive and private property right."<sup>42</sup> Although this holding reinforced individual property rights, it diminished the role of the Edwards Aquifer Authority and other similar water management districts, and it demonstrated a disconnect

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*East*—wanton waste or malicious injury—a third exception exists where a landowner's negligence while pumping causes subsidence).

35. See, e.g., *Brown*, 83 S.W.2d at 938, 941, 944; *Oil & Gas Division*, Railroad Commission of Texas (July 20, 2015, 12:17 PM), <http://www.rrc.state.tx.us/about-us/organization-activities/divisions-of-the-rrc/oil-gas-division/>; TEX. NAT. RES. CODE ANN. § 81.051 (Vernon 1978).

36. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012).

37. *Id.* at 832; TEX. WATER CODE § 36.002.

38. *Day*, 369 S.W.3d at 830; *but see* 1-2 EUGENE KUNTZ & OWEN ANDERSON, A TREATISE ON THE LAW OF OIL AND GAS §2.4 (2015) (contrasting the two major theories of ownership—where the rule of capture grants ownership of all substances under land, the exclusive-right-to-take grants exclusive right to capture any substance below the land and only grants ownership once the substance is subject to capture and control).

39. *Day*, 369 S.W.3d at 817 (citing Tex. Const. art. I, § 17(a)) ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made.").

40. *Id.* at 826.

41. *Id.* at 830.

42. *Id.* at 829 (quoting *Tex. Co. v. Daughtery*, 176 S.W. 717, 720 (Tex. 1915)).

between the courts and the legislature regarding the priority level of conserving water.<sup>43</sup>

The case law applying the rule of capture and ownership in place to groundwater evolved from fact patterns where the landowner asserted property rights in the groundwater beneath said landowner's surface, but an owner may sever these two estates. Severance of a mineral estate occurs when the surface owner conveys the surface land but reserves all or a portion of the mineral rights (or vice versa).<sup>44</sup> Without explicitly stating that the transfer includes surface rights only (or mineral rights only), the two estates would transfer together.<sup>45</sup> When this severance occurs, the accommodation doctrine may affect a mineral owner's property rights.

As of yet, courts have not applied the accommodation doctrine to groundwater. In Texas, the Supreme Court established the doctrine's application to oil and gas in 1971.<sup>46</sup> A landowner purchased a tract of land subject to prior mineral leases across the entire property.<sup>47</sup> The landowner subsequently drilled irrigation wells and installed a sprinkler system consisting of connected pipes raised seven feet in the air to irrigate the entire property with greater efficiency and less labor resources.<sup>48</sup> After the installation of the irrigation system, an oil and gas lessee drilled two additional wells on the property with pumping units ranging from seventeen to thirty-four feet high, thus prohibiting use of the self-propelled irrigation system.<sup>49</sup> The landowner sued for an injunction to restrain the lessee from using the vertical space for the pumping units, which inhibited the automatic sprinklers and consequently depreciated the value of the property based on a decrease in production potential.<sup>50</sup>

The Court applied the accommodation doctrine, which states that if a lessee's actions are impeding on a preexisting use of the surface and reasonable alternatives to the lessee's actions exist, then the lessee must adapt to accommodate the surface owner.<sup>51</sup> The burden of proof falls on the surface owner (servient estate) to show that the pumping units were not

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43. Bolhassani, *supra* note 17 at 14.

44. *Oil & Gas Exploration and Surface Ownership*, Railroad Commission of Texas (Sept. 9, 2015, 10:37 AM), <http://www.rrc.state.tx.us/about-us/resource-center/faqs/oil-gas-exploration-and-surface-ownership/>.

45. *Id.*

46. *Getty Oil Company v. Jones*, 470 S.W.2d 618 (Tex. 1971).

47. *Id.* at 620.

48. *Id.*

49. *Id.*

50. *Id.* at 619–20.

51. *Id.* at 622.

reasonably necessary.<sup>52</sup> Two other operators on the landowner's property had adapted their pumping units to allow maximum use of the irrigation system—one by placing the pumping units in concrete cellars and the other by using hydraulic pumping units that were less than seven feet tall.<sup>53</sup> Based on the availability of these alternatives, the Court found that it was not reasonably necessary for the lessee to install pumping units that impede on the irrigation system, even if that particular type of pumping unit was more economical than the two alternatives used by the other producers on the land.<sup>54</sup>

Ownership of real property includes the rights to use the surface and that which is below and above it. But, once a conveyance severs the subsurface from the surface, the accommodation doctrine recognizes that the surface owner should maintain the full rights to the surface and the space above it as needed for most effective use.<sup>55</sup> The mineral estate, as the dominant estate, may use as much of the premises as is *reasonably necessary* to produce minerals, but this right must be exercised with due regard for the rights of the servient surface estate.<sup>56</sup> Thus, the lessor must first prove that the lessee's use of the surface substantially impaired the lessor's existing use; only then are the reasonable alternatives to the lessee's actions even considered.<sup>57</sup> For example, in *Merriam v. XTO*, a landowner managing a cattle operation leased to an oil and gas operator.<sup>58</sup> The operator proposed a well location that the surface owner insisted would interfere with the cattle roundup, but the lessee drilled the well anyway, and the surface owner sought permanent injunction based on the accommodation doctrine.<sup>59</sup> The surface owner could not prove that moving his temporary corrals from the location near the well to a new location on the same tract would substantially impair his cattle operation.<sup>60</sup> The Supreme Court of Texas granted summary judgment in favor of the oil and gas operator.<sup>61</sup>

In 1982, the state legislature expanded the common law accommodation doctrine in the Texas Natural Resources Code, allowing surface owners to

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52. *Id.* at 623.

53. *Id.* at 620.

54. *Id.* at 621.

55. *Id.*

56. *Id.*

57. 407 S.W.3d 244, 249 (Tex. 2013).

58. *Id.* at 247.

59. *Id.*

60. *Id.* at 251.

61. *Id.* at 252.

limit mineral estate owners' use of surface based on *future* development of the land.<sup>62</sup> Per Section 92.002, surface owners may apply to the Railroad Commission of Texas to have land designated as a "qualified subdivision," which requires the surface tract of less than 640 acres (A) located in a county with a population greater than 400,000 or adjacent to such a county, (B) subdivided in compliance with zoning orders (residential, industrial, or commercial), and (C) containing at least an eighty acre tract for oil and gas operations.<sup>63</sup> This regulation balances Texas' need for full utilization of land resources in response to the state's significant population growth with the goals of full and effective exploitation of mineral resources.<sup>64</sup>

Courts based the accommodation doctrine on the premise that the mineral estate is the dominant estate and demands use of the surface estate in order to maximize the value of the mineral estate.<sup>65</sup> An easement allowing the mineral estate owner to use the surface typically burdens the surface estate, which deems it lesser.<sup>66</sup> Courts view the accommodation doctrine as a happy medium, allowing the dominant estate owner to use the servient estate while preventing unbridled use by enforcing liability for unreasonable damages to the servient estate.<sup>67</sup> The application of the accommodation doctrine to groundwater would necessitate the view that the surface estate is also servient to the groundwater estate. Texas, however, has never applied dominant estate theories to groundwater.<sup>68</sup>

### III. Statement of the case

In 1953, the Purtell family, predecessors in interest to Coyote Lake Ranch, LLC ("CLR"), conveyed unto the city of Lubbock, Texas ("City"), exclusive rights to the groundwater under the land at issue, together with the full and exclusive rights of ingress and egress, allowing the City to drill

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62. *SWEPI LP v. Railroad Commission of Texas*, 314 S.W.3d 253, 256 (Tex. App.—Austin 2010).; TEX. NAT. RES. CODE ANN. §§ 92.001-.007 ("Mineral Use of Subdivided Land") (explaining that a "[m]ineral estate owner's use of the surface is limited to . . . only as necessary to adequately use the operations sites[.]" and a "[mineral owner] may not alter, diminish, or impair the usefulness of an operations site or appurtenant road or pipeline easement unless the amendment or replat is approved by the commission.").

63. *SWEPI* at 256–57.

64. *Id.* at 257, 262.

65. A dominant estate "benefits from an easement" because the owner of the dominant estate has an interest in, usually in the form of the right to use, another person's land. *Estate*, BLACK'S LAW DICTIONARY (10th ed. 2014).

66. *Id.*

67. *Miller*, *supra* note 23, at 484.

68. *City of Lubbock v. Coyote Lake Ranch, LLC*, 440 S.W.3d 267 (Tex. App.—Amarillo 2014).

water wells and test wells for ground water exploration and production and to construct and maintain water lines, power lines, and access roads, among other things, along with the rights to use all of said lands “necessary or incidental to the taking” of underground water and “the production, treating and transmission of water therefrom.”<sup>69</sup>

The parties were cordial until 2012 when the City proposed a well field plan and CLR responded with a lawsuit.<sup>70</sup> CLR alleged that the master plan breached the terms of the original conveyance (“Lubbock Deed”) based on locations chosen for at least two of the eighty planned wells, causing unreasonable drainage of groundwater used to operate windmills on the property.<sup>71</sup> CLR also alleged that the City’s mowing practices destroyed the grass and caused blowouts by piling sand into dunes, thus prohibiting the utilization of the property for grazing.<sup>72</sup> The suit entailed four causes of action—inverse condemnation, breach of contract, negligence, declaratory judgment<sup>73</sup>—and later, CLR requested a temporary injunction, preventing any progress on the master plan until after trial on the causes of action.<sup>74</sup> The trial court granted the temporary injunction, citing CLR’s argument that the City failed to indicate (1) the necessity of its well field plan for the ranch and (2) that the proposed use of the ranch is the least damaging method available: thus, the City did not demonstrate due regard to the surface owner, CLR.<sup>75</sup> The City appealed, claiming that the trial court erroneously applied the accommodation doctrine by enforcing the City to pay due regard to CLR beyond the required good faith and fair dealings and “reasonably necessary” obligations expected of any contractual relationship.<sup>76</sup>

#### *IV. Decision of the Case*

The scope of review was limited to the validity of this temporary injunction founded on the accommodation doctrine’s applicability to groundwater.<sup>77</sup> On review, the court dissolved the order and reversed and

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69. *Id.* at 269–270.

70. *Id.* at 270.

71. *Coyote Lake Ranch, LLC v. City of Lubbock*, 2013 WL 9924064, at \*2 (287th Dist. Ct. Bailey County, Tex. Nov. 26, 2013).

72. *Id.*

73. *Id.* at \*2-4.

74. *City of Lubbock v. Coyote Lake Ranch, LLC*, 440 S.W.3d 267, 270 (Tex. App.–Amarillo 2014).

75. *Coyote Lake Ranch*, 2013 WL 9924064, at \*4.

76. *Lubbock*, 440 S.W.3d at 270.

77. *Id.* at 274.

remanded the trial court's holding based on a finding of abuse of discretion.<sup>78</sup> CLR appealed to the Texas Supreme Court.

*V. Analysis*<sup>79</sup>

The Supreme Court must first decide whether the accommodation doctrine is applicable to groundwater and whether the contractual terms and obligations of the Lubbock Deed supersede the accommodation doctrine analysis before examining the merits of whether the accommodation doctrine elements exist within the present facts. This inquiry includes recognition of policy implications of applying a new doctrine of obligation to the groundwater estate. Applying the accommodation doctrine, the surface owner has the burden of proving subsurface estate holder's activity on the surface substantially impairs a pre-existing surface use and that a reasonable alternative means of achieving production goals exists that would not infringe of the surface estate's pre-existing use. If the accommodation doctrine is not applicable, however, the issues on remand would focus on the contractual, volitional rights and obligations of each party.

*Was the accommodation doctrine the underlying principle for granting temporary injunction?*

The Seventh Court of Appeals concurred with the City that the accommodation doctrine was the guiding principle behind the trial court's injunctive order, finding that "CLR seems to agree somewhat."<sup>80</sup> Although the trial court's order does not explicitly name the accommodation doctrine and is silent as to any other cause of action, the Texas Rules of Civil Procedure require that "[e]very order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms."<sup>81</sup> Further, a temporary injunction requires a cause of action and a probable right to relief sought, but the appellate court held that no right to relief existed where the the court granted relief based on the accommodation doctrine, which does not apply to groundwater and therefore cannot bestow a right to relief.<sup>82</sup>

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78. *Id.*

79. The City raises the issue of whether the Texas Supreme Court has jurisdiction to hear this interlocutory appeal regarding the temporary injunction, but that analysis is outside the scope of this note. Respondent's Brief on the Merits at 12, *Coyote Lake Ranch, LLC v. City of Lubbock*, 2013 WL 9924064 (2013). (No. 14-0572).

80. *Id.* at 271.

81. *Id.* (quoting TEX. R. CIV. P. 683).

82. *Id.*

Consequently, the appellate court held that the trial court abused its discretion by misapplying the accommodation doctrine to these facts.<sup>83</sup>

Courts, however, should review injunctions in light most favorable to the injunctive order.<sup>84</sup> Here, a light most favorable to the order, if all parties acknowledge that the accommodation doctrine was the basis of the order, requires the appellate court to perform an in-depth examination at the reasonableness of applying the oil and gas doctrine to groundwater. The Seventh Court of Appeals does this analysis primarily by distinguishing *Day*, which does not apply the accommodation doctrine or even speak to the subsurface estate holder's rights or the affect those rights may have on the surface estate. *Day's* analysis of the rule of capture and ownership in place, however, are valuable to the peremptory dominant and servient estate analysis required of the accommodation doctrine. True comprehensive analysis requires more than a citation to *Day's* holding alone; instead, the Court should have further considered and expanded upon the analogous nature of the mineral estate and the groundwater estate before determining that the trial court abused its discretion.

The appellate court's only analysis outside of *Day* involved a rejection of judicial activism in favor of deference to Texas Congress's lack of express intent that the accommodation doctrine should apply to a groundwater estate.<sup>85</sup> Although Congress has statutorily applied the accommodation doctrine to a mineral estate, the common law application of the accommodation doctrine to the mineral estate in the *Getty* holding prompted that action. So although the lower court does not approve of judicial activism, judicial action alerted the legislature to the issues between the dominant and servient estates in the mineral context, and the legislature may require the same prompting here.

*Would the application of the accommodation doctrine negate the City's contractual rights?*

The language of the Lubbock Deed allows

full and exclusive rights of ingress and egress in, over, and on said lands, so that the Grantee of said water rights may at any time and location drill water wells and test wells on said lands for the purpose of investigating, exploring[,] producing, and getting access to percolating and underground water; . . . together with the rights to use all that part of said lands

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83. *Id.* at 275.

84. *Id.* at 271.

85. *Id.* at 275.

necessary or incidental to the taking of percolating and underground water and the production, treating and transmission of water therefrom and delivery of said water to the water system of the City of Lubbock only.<sup>86</sup>

The City argues that *this language* controls rather than the accommodation doctrine because parties can contract out of common law doctrines.<sup>87</sup> CLR also contends that a contractual relationship *could* contravene a common law doctrine but does not in this case.<sup>88</sup> The dispute here centers on whether the language of the Lubbock Deed is consistent or conflicting with the accommodation doctrine. A 1997 Texas case, *Landreth v. Melendez*, found that a contract allowing surface use “usual, necessary, and convenient” to operation negated the accommodation doctrine.<sup>89</sup> The Lubbock Deed specifically allows any surface use incidental to production or transmission of water at any time and location. According to the City, this contractual agreement, entered into voluntarily by CLR’s predecessor, would also negate the accommodation doctrine and annul CLR’s right to enjoin the City from use.

CLR contends, in contrast, that the Lubbock Deed does not supersede accommodation doctrine analysis because, unlike the *Landreth* deed, the Lubbock Deed contemplates damages for harm to the surface estate by the City.<sup>90</sup> The Lubbock Deed does not contract out of liability for damages to the surface estate by any process necessary or incidental to groundwater production. In both the *Getty* deed, which established the accommodation doctrine, and the Lubbock Deed, the lessees agreed to pay for damages to surface property.<sup>91</sup> Although the Lubbock Deed granted full and exclusive rights of surface use, lessees still must pay for surface damages that impede on the surface owner’s right to use the surface.

If this distinction applies, dominant estate holders will want contracts that explicitly exempt them from damages, as *Landreth* did, while servient estate holders will negotiate for “due regard” surface-use language. The Canadian River Municipal Water Authority submitted an amicus brief addressing the modern easement and deed forms, which employ

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86. City of Lubbock v. Coyote Lake Ranch, LLC, 440 S.W.3d 267 (Tex. App.–Amarillo 2014).

87. See *supra* note 79 at 27 (citing DeWitt City. Elec. Coop, Inc. v. Parks, 1 S.W.3d 96, 105 (Tex. 1999)).

88. Petitioners’s Brief on the Merits at 44, Coyote Lake Ranch, LLC v. City of Lubbock, 2013 WL 9924064 (2013) (No. 14-0572);

89. *Landreth v. Melendez*, 948 S.W.2d 76, 78 (Tex. App.–Amarillo 1997).

90. See *supra* note 88 at 37, 39.

91. *Id.*

accommodation doctrine language: a savvy surface owner may therefore negotiate to opt into the accommodation doctrine. The City's response returns to the conveyance at the heart of the transaction—if both parties agree the Lubbock Deed contemplates surface damage liability, the expansion of the accommodation doctrine is unnecessary.

The Court could avoid answering the accommodation doctrine question altogether and instead focus on the language of the property conveyance. If this is the case, parties to groundwater conveyances should carefully consider the language when drafting contracts, as the words within the four corners will continue to control the rights and obligations of the parties. If the Court instead finds that the accommodation doctrine does apply to groundwater, all previous conveyances would be subject to new interpretation as many contracts contain less detail than the conveyance at issue here.

*If the accommodation doctrine was principle to the injunctive order, was there a dominant and servient estate?*

The accommodation doctrine balances the rights between the dominant and servient estates. This balance is essential for severed surface and subsurface estates because the parties concerned with efficient production are not the same parties concerned with preserving the surface for purposes outside of production of the subsurface resource.

The relationship between the dominant mineral estate and the servient surface estate is analogous to the relationship between the groundwater estate and the surface estate. A grant or retention of subsurface (mineral or groundwater) rights would be utterly valueless without a simultaneous grant or retention of the right to enter the surface and operate on the land to extract the subsurface resource, whether that entails installing pumps and storage tanks or constructing roads and pipelines to transport the product on and off the property. This rationally follows from the principle of ownership in place, which allows the mineral estate owner to possess a vested possessory interest in all fugitive resource percolating underground in a certain area, and rule of capture, which determines ownership based on what the owner removes from the ground. If the ownership cannot take place until extraction and the right to extract requires use of a certain area where the subsurface estate owner holds no surface rights, the opportunity for extraction of a subsurface resource necessitates surface use.

The reasonable necessity of the quantity and method of land use requires a case-by-case analysis.<sup>92</sup> Still, the subsurface conveyance's depends on some privilege of surface use. When the conveying instrument burdens the surface estate with an easement, the plain language of the contract which transferred the property rights initially determines the scope of the easement. Parties are free to contract specific rights, encumbrances, and privileges but should contractually acknowledge a servitude on the surface estate to the benefit of the subsurface estate because the surface estate stands between the subsurface estate holder and the subsurface product. Even if the Court neglects to address whether the groundwater and surface estates are subject to the dominant and servient estate theory, the two estates contractually operate in tandem this way regardless, allowing for continued analysis of whether the accommodation doctrine applies to balance the rights between the two estates. The City argues that groundwater is not a mineral and therefore the accommodation doctrine cannot apply<sup>93</sup>; this argument is irrelevant as the Court did not generate the accommodation doctrine specifically for mineral estates but instead to balance the rights of the dominant and servient estates.

*What are the repercussions and benefits of applying the accommodation doctrine to groundwater?*

Application of the accommodation doctrine may complicate groundwater production in a state where groundwater is already subject to heavy regulation. Texas groundwater regulations vary from district to district.<sup>94</sup> Because the government established groundwater conservation districts to conserve the resource,<sup>95</sup> these complications make it more difficult to

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92. *Texas Ag Stats*, Texas Department of Agriculture, <http://www.texasagriculture.gov/About/TexasAgStats.aspx>; *Id.* at §2(a).

93. *See supra* note 88 at 20; TEX. NAT. RES. CODE ANN. § 53.1613(a).

94. The Texas Water Development Board oversees groundwater management plans from 100 conservation districts and two subsidence districts. *Groundwater Conservation Districts*, Texas Water Development Board (2015), [https://www.twdb.texas.gov/groundwater/conservation\\_districts/index.asp](https://www.twdb.texas.gov/groundwater/conservation_districts/index.asp)

95. WEBER, HARDER, & BEARDEN, *supra* note 3 at 363. ("In 1997, the Texas Legislature . . . creat[ed] local districts . . . to require permits . . . for large wells, and to give districts authority to regulate water transfers outside their boundaries.").

harvest the groundwater while Texas' population grows<sup>96</sup> and the state faces a lack of water supply after extended drought.<sup>97</sup>

Despite the potential for complications, CLR argues that Texas courts rarely apply the accommodation doctrine—about twenty times since its origin in the Texas Supreme Court.<sup>98</sup> The accommodation doctrine “has not made a large difference in the ordinary surface use case”<sup>99</sup> in Texas because a mineral estate owner only must accommodate where other reasonable means of operation exist.<sup>100</sup>

Further, addressing the accommodation doctrine's applicability now will help both surface and groundwater estate owners establish who possesses which rights prior to any future disputes in the face of years of drought and increased demand for municipal water supply from the growing population. The accommodation doctrine has also successfully managed to balance the economic importance of the Texas energy sector with the land needs of the state's growing population. Although Texas leads the oil and gas industry, an industry which encourages full development of resources,<sup>101</sup> the energy sector must still accommodate an existing agriculture use, for example, which also plays a huge role in the Texas economy.<sup>102</sup> Where the accommodation doctrine could not prohibit groundwater production, courts should enforce it to protect existing surface uses in support of a diversified Texas economy.

Regarding the mineral estate, the Texas legislature expanded the accommodation doctrine's protections beyond the existing uses to include

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96. The population of Texas increased by 1.8 million between the 2010 and 2014 censuses. *Texas*, US Census Bureau (Dec. 1, 2015, 4:11 PM), <http://quickfacts.census.gov/qfd/states/48000.html>.

97. *Dried Out Confronting the Texas Drought*, StateImpact, <https://stateimpact.npr.org/texas/drought/>.

98. Rachel Heron, Justin S. Duclos, & Shaun A. Goho, *The Interpretation of Surface Easements in Severance Deeds as a Limit on Hydraulic Fracturing Practices*, 19 BUFF. ENVTL. L.J. 73, 98-99 (2012)).

99. *Id.*

100. The three-part accommodation doctrine test considers whether “(1) There is an existing use by the surface owner; (2) The mineral lessee's activity would substantially impair the existing surface use; and (3) The mineral lessee has a reasonable alternative available on the leased premises.” *Davis v. Devon Energy Prod. Co.*, 136 S.W.3d 419, 423 (Tex. App.—Amarillo 2004).

101. 1-3 EUGENE KUNTZ & OWEN ANDERSON, *A TREATISE ON THE LAW OF OIL AND GAS* §3.2 (2015) (“It has also been said that the owner of the surface and the owner of the mineral rights have the right to enjoy their respective estates to the highest degree possible not inconsistent with the rights of the other.”).

102. *Texas Ag Stats*, Texas Department of Agriculture, <http://www.texasagriculture.gov/About/TexasAgStats.aspx>.

future uses, as well.<sup>103</sup> That statute balances the interest of the growing population with the interest of the energy industry's role in the Texas economy.<sup>104</sup> Should the accommodation doctrine expand to groundwater estates, the legislature may consider enacting a similar statute protecting the servient estate's pre-existing *and* future uses.<sup>105</sup> Statutory language regarding the accommodation doctrine's application to groundwater could emphasize the need for balancing the growing demand for groundwater in light of population growth with the growing concern for the environment in light of groundwater depletion. For example, the proposed statute could track the language of Texas Natural Resources Code, Section 92.002(3)(A) and (C), which both recognize that certain highly populated areas need groundwater and surface area for the production thereof; (B) could, however, change to reflect a need for compliance with conservation and replenishment standards in the area in addition to the zoning requirement.<sup>106</sup> These considerations acknowledge the need to protect the state's water sources without slowing the leasing process because the filing of these future protections give adequate notice. A statutory response to the adoption of the accommodation doctrine may be a best-case scenario to help meet Texas' future water-supply needs.

*If the accommodation doctrine is not applicable, is the City's master plan beyond the scope of the City's contractual rights? What are the issues on remand?*

If the Court decides the accommodation doctrine does not apply to the groundwater estate, CLR must prove that the City breached a term of the Lubbock Deed.<sup>107</sup> Otherwise, CLR cannot recover damages from conduct that CLR contractually authorized. The Lubbock Deed impliedly allows mowing as a necessity for access and safety to drill and test wells on the property. So CLR has no valid complaint about the City's choice to drill test wells on a particularly sandy area of the property as the deed allows wells "at any location" except "within one-fourth (1/4) mile of any of the presently existing windmill wells."<sup>108</sup> If any wells are within this explicitly prohibited range, this breach may entitle CLR to damages. Further, if CLR

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103. TEX. NAT. RES. CODE ANN. §§ 92.001-.007 ("Mineral Use of Subdivided Land")

104. *SWEPI*, 314 S.W.3d at 256.

105. *Id.* at 257, 262.

106. *Id.* at 256-57.

107. Douglas Hale Gross, Annotation, *What constitutes reasonably necessary use of the surface of the leasehold by mineral owner, lessee, or driller under an oil and gas lease or drilling contract*, 53 A.L.R.3d 16 § 2(a).

108. *See supra* note 88 at 39.

can prove that the location of any well takes groundwater in derogation of the rights reserved to CLR by their predecessors in the Lubbock Deed, specifically “such quantities of water as may be required to carry on usual and normal domestic and ranching operations and undertakings upon said lands,” CLR could win another breach of contract claim. Finally, the contract did not specifically request below-ground utilities, but it did require that the city remove any material that detracts from effective surface use by the surface owner; the Court would need to decide whether utility lines qualify as clutter and whether serving as a threatened species habitat is an effective use of the surface by the owners.<sup>109</sup> Even if the City did not breach the Lubbock Deed, the conveyance obligates the City to pay for surface-use damages, which requires CLR to show damages from the checkerboard mowing patterns, overhead power lines, and chosen well locations.<sup>110</sup>

That outcome will result in parties negotiating compensation for damages within the contract. Where water regulatory boards, such as groundwater conservation districts, already control spacing and unitization of groundwater wells, the need to explicitly describe damages within the contract has even greater necessity.<sup>111</sup> Surface owners may find that groundwater owners will have little motivation to rebuff the implied right to use the surface or to agree to damages when Courts refuse to apply the accommodation doctrine, which reinforces the implied concept that the subsurface estate holder is the dominant estate and owes little to the surface estate holder.<sup>112</sup>

Along with the breach of contract claims, the trial court would confront issues of inverse condemnation and negligence on remand. “Reasonably necessary” analysis in contract law intertwines torts principles and property law principles. Texas courts have collapsed reasonable necessity into a two-step test: a court first would consider whether the subsurface estate holder acted negligently, thus causing unreasonable harm; and second would consider whether the subsurface estate holder acted with reasonable

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109. *Id.*

110. *Id.*

111. WEBER, HARDER, & BEARDEN, *supra* note 3, at 363.

112. Further, in a previous Texas case, the court noted that a surface damages clause, depending on the language, could create liability even outside a breach of contract or tort liability and instead simply as a rental fee for use. *Meyer v. Cox*, 252 SW.2d 207 (Tex. App.—San Antonio 1952).

necessity compared to the actions of the prudent business person operating for subsurface resources on the surface area.<sup>113</sup>

Parties may prove reasonable necessity by showing that the lessee's use of the surface is not reasonably necessary because other non-interfering and reasonable alternatives exist.<sup>114</sup> While this analysis is eerily similar to the accommodation doctrine analysis, the accommodation doctrine requires conflicting surface uses while the reasonable necessity analysis considers only the lessee's surface use.<sup>115</sup> In deciding against the accommodation doctrine, a court should consider the (1) lack of incentive to respect surface rights because of the reasonable necessity analysis, which grants broad rights but does not consider harm to the surface estate; (2) the difficulties in predictive contracting, and (3) the unequal bargaining power of the lessor in surface contract negotiations.

*How does the accommodation doctrine apply to the present facts?*

If the accommodation doctrine applies, the Court will sustain the temporary injunction if CLR can prove that the City substantially impaired CLR's existing surface use and had an alternative to the harmful action. Regarding the soil blowouts from the mowing and the test wells, CLR must prove negative effects on its cattle grazing and that an alternative mowing pattern or well locations would have prevented damage. The alternative mowing pattern likely would not take more money, nor would it take much more time, but the accommodation doctrine disbars inconvenience to the dominant estate holder from the list of valid reasons that proposed alternatives are unworkable. The City dragged equipment with tractors across the sandy area to access the water wells, disintegrating the sandy soil even more and creating deeper ruts in the surface. Although it may cost more or take more time to develop a different means to transport the equipment, the City would still have to accommodate the surface owner *if* the court, in a balancing test, finds that the surface owner's damages outweigh the inconvenience to the groundwater estate owner in utilizing the alternative means.<sup>116</sup> Finally, the overhead power lines prevent CLR from obtaining stipends for serving as a habitat to threatened species. A court would have to determine whether this is an existing use first, based off the time of the conveyance; if it is, then CLR would prove that less harmful

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113. Gross, *supra* note 107 (citing *Wohlford v. American Gas Production Co.* 218 F.2d 213 (1955)).

114. *Id.* at § 2(d) (citing *Trenolone v. Cook Exploration Co.*, 166 S.W.3d 495 (Tex. App.—Texarkana 2005)).

115. *Texaco, Inc. v. Faris*, 413 SW2d 147 (Tex. App.—El Paso 1967).

116. 1-3 Kuntz, *Law of Oil and Gas* § 3.2 (2015).

means exist, such as burying power lines. Because it is questionable whether this was an existing use, this is the least likely of the three claims to benefit from the application of the accommodation doctrine.

The accommodation doctrine is a more flexible alternative to a surface damages act. Yet a surface damages act protects a surface owner who generally has less bargaining power to negotiate liability prior to the contract, and it is more predictable and uniform than analyzing surface damages claims on a conveyance-by-conveyance basis. Parties, however, value the freedom to contract in these types of property conveyances rather than a uniform statutory mandate.

#### *VI. Recommendations and Conclusion*

The parties have stipulated that the basis of the temporary injunction is the applicability of the accommodation doctrine, and resolution of the case will involve a decision on the application of the accommodation doctrine to groundwater estates. Although the appellate court did not review the trial court's injunction in a light most favorable to the order by not fully analyzing the merits of applying the accommodation doctrine to a groundwater estate, the appellate court upheld its sense of judicial integrity by refusing to partake in judicial activism and instead deferring to the state's high court or legislature for resolution.

The groundwater estate operates as a dominant estate because utilization of the groundwater rights necessitates encumbering the surface estate. Because these two estates operate in tandem, it is equitable for the dominant estate, which requires use of the surface, to accommodate the existing surface uses as long as the accommodation does not hinder the dominant estate's rights and privileges. The accommodation doctrine, which only requires the dominant estate to change its means of operation where there exists a reasonable alternative that still allows total use of the groundwater rights, will make groundwater production inconvenient, but not impossible. The need to conserve a valuable natural resource validates, or even necessitates, these complications in groundwater production, just as the increased groundwater regulations since the 1940s have been justified.<sup>117</sup>

Not only is Texas suffering from groundwater depletion, but Texas also chooses to treat groundwater as a real property interest. Therefore, regulatory bodies should hold owners of a groundwater estate responsible for unnecessary groundwater use which negatively affects adjacent landowners. This regulation also allows for economic prosperity in other

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117. Bolhassani, *supra* note 17.

areas, namely agriculture, where the surface owner has full and efficient use of land. This consideration of servient estates changes the past century of court decisions favoring the property interest of the groundwater estate owner rather than deferring to the conservation districts.

Regardless of how the Court decides the issue, the legislature can statutorily expand on the common law, prohibit the common law, or codify it in exact terms used by the judiciary. The “what if” of a statutory expansion of the common law doctrine is not any more valid than the “what if” of the legislative repercussions following any judicial decision. Still, courts should recognize that the adoption of the doctrine could encourage the legislature to respond in support of conservation.

Application of the accommodation doctrine to groundwater estates also would not impede the freedom to contract. Voluntary consent to duties and privileges would be valid but read in light of the accommodation doctrine’s due regard requirement. Therefore, the Court should both adopt the accommodation doctrine and expand on the contractual language that could allow parties to contract out of accommodation doctrine liability. The Lubbock Deed, in which the City explicitly assents to pay for surface damages, complies with the accommodation doctrine because the accommodation doctrine allows continued production and use to the fullest extent but may impose duties or financial obligations on the dominant estate holder. The Deed permits the City to use the land “at any time and location” and in any way “necessary or incidental” to production or transportation, but must do so with due regard for the surface estate by occasionally modifying its methods. Finally, because the accommodation doctrine will force groundwater estate owners to operate with due regard, they may become more willing to participate in upfront negotiation of terms regarding surface use.

Because groundwater is physically and legally more analogous to subsurface minerals, Texas groundwater policy must catch up with Texas oil and gas policy. Texas created the accommodation doctrine, and many other states followed suit in adopting this doctrine to balance the rights between surface owners and mineral owners. The application of this doctrine to other subsurface resources, such as groundwater, will be influential to other states and demonstrates a priority on economic development that does not otherwise detract from the value of groundwater production; rather, the decision to adopt this oil and gas policy for groundwater may enlighten the masses that the oil and gas mantra of full production is inefficient, or even wasteful, when applied to groundwater.