

## COYOTE LAKE RANCH, LLC V. CITY OF LUBBOCK: THE ACCOMMODATION DOCTRINE EXPANDED

**Synopsis:** In 1953, the City of Lubbock (The City) purchased the groundwater interests underlying Coyote Lake Ranch (The Ranch) to supply its residents.<sup>1</sup> After the City announced plans to further develop the groundwater underlying the Ranch in 2012, the Ranch protested and sought an injunction.<sup>2</sup> The Ranch claimed the City owed the surface owner a duty to accommodate its existing use of the surface and could use only as much of the surface that was reasonably necessary.<sup>3</sup> The City argued it was operating under its rights granted by the deed.<sup>4</sup> The Bailey County District Court awarded the Ranch its injunction, and the parties soon found themselves before the Supreme Court of Texas.<sup>5</sup> As a matter of first impression, the Supreme Court expanded the accommodation doctrine to interests in groundwater and awarded the groundwater estate “dominant” status over the surface.<sup>6</sup> The Court also found the deed in question failed to resolve the dispute and remanded the dispute back to the trial court to be reviewed with the application of the accommodation doctrine.<sup>7</sup> Now, parties should consider the manner in which operations are to be conducted when drafting instruments.<sup>8</sup>

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1. Coyote Lake Ranch, LLC, v. City of Lubbock, 498 S.W.3d 53, 55-56 (Tex. 2016) [hereinafter *Coyote Lake Ranch*].

2. *Id.* at 57.

3. *Id.*

4. *Id.*

5. *Id.* at 58.

6. *Coyote Lake Ranch*, 498 S.W.3d at 63-64 (internal quotes omitted).

7. *Id.* at 59, 65.

8. See generally Pet’rs Br. on the Merits at 40, *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53 (2016) (No. 14-0572) [hereinafter Pet’rs Br.].

## I. INTRODUCTION

Under the accommodation doctrine, the mineral owner must act in due regard of the surface owner.<sup>9</sup> However, parties enjoy the right to agree however they see fit, and such express agreements trump the common law accommodation doctrine.<sup>10</sup> In *Coyote Lake Ranch, LLC v. City of Lubbock*, the Plaintiff sought an injunction against the Defendant, who owned the groundwater interests underlying the Plaintiff's land.<sup>11</sup> The Plaintiff argued that the Defendant could only utilize as much of the surface as was reasonably necessary to develop the groundwater.<sup>12</sup> In turn, the Defendant argued its activities were lawful under the Deed and that in the development of its groundwater interests, it owed no duty of accommodation to the surface owners.<sup>13</sup>

The Bailey County District Court granted the temporary injunction for the Plaintiff, reasoning that the Defendant's activities would likely impose unreasonable damages onto the Plaintiff.<sup>14</sup> The Court of Appeals for the Seventh District of Texas reversed the district court's injunction, finding that the accommodation doctrine did not extend to groundwater interests and left any groundbreaking change of law to the Supreme Court of Texas.<sup>15</sup>

The Supreme Court affirmed the Court of Appeals' decision to overturn the injunction, but found the Deed in question failed to resolve the parties' dispute.<sup>16</sup> Accordingly, the Court found as a matter of first impression that the accommodation doctrine applied to groundwater interests.<sup>17</sup>

The background section of this note discusses the procedural and factual background of the *Coyote Lake Ranch* case. It also analyzes the Bailey County District Court's reasoning and the Court of Appeals' reasoning. The analysis section discusses the Supreme Court's reasoning and the Concurring opinion. Further, it examines the implications of the Supreme Court's decision and seeks to address the decision's impact on agreements with accommodation doctrine consequences. It also briefly examines the similarities between Texas groundwater law and Texas oil and gas law, and the effects thereof.

## II. BACKGROUND

### A. Factual Background

In the midst of "the most costly and one of the most devastating droughts in 600 years," the City of Lubbock (the City) purchased the groundwater underlying Coyote Lake Ranch (the Ranch) to supply water to its residents.<sup>18</sup> The Ranch's prior owners, L.A. and Hazell Purtell, granted the City

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9. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971).

10. *Id.* at 625 (McGee, J., dissenting).

11. *Coyote Lake Ranch*, 498 S.W.3d at 57.

12. *Id.*

13. *Id.*

14. *Id.* at 59.

15. *City of Lubbock v. Coyote Lake Ranch, LLC*, 440 S.W.3d 267, 275 (Tex. App. 2014).

16. *Coyote Lake Ranch*, 498 S.W.3d at 59-60, 65.

17. *Id.* at 65.

18. *Id.* at 55-56 (internal quotes omitted).

all of the percolating and underground water in, under, and that may be produced from the . . . land . . . together with the exclusive right to take such water from said tracts of land . . . together with the full and exclusive rights of ingress and egress in, over, and on said lands, so that the [City] 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 string, lay, construct, and maintain water and fuel pipe lines and trunk, collector, and distribution water lines, power lines, communication lines, air vents with barricades, observation wells with the barricades, if required, not exceeding ten (10) square feet of surface area, reservoirs, booster stations, houses for employees, and access roads on, over and under said lands necessary or incidental to any of said operations, together with the rights to erect necessary housing for wells, equipment and supplies, together with perpetual easements for all such purposes, together with the rights to use all that part of said lands 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>19</sup>

The 1953 Deed also reserved to third parties the right to use as much water as required for “normal domestic and ranching operations” and all water necessary for the production of oil and gas.<sup>20</sup> It allowed the Ranch owners the right to irrigate and clarified that the instrument did not convey an interest in oil and gas.<sup>21</sup>

The conveyance required the City to pay three dollars per acre per year for occupying any of the surface for “housing facilities, fenced enclosures and roads constructed and used by it.”<sup>22</sup> Further, the City was liable to the Ranch for any damages to the surface caused by its operations and required to maintain the Ranch’s cattle guards.<sup>23</sup> Finally, the 1953 Deed prevented the City from drilling within a quarter mile of any windmill wells located on the property.<sup>24</sup>

The Ranch consists of roughly 26,600 acres on the Texas border with New Mexico in Bailey County, Texas.<sup>25</sup> Presently, the Ranch is utilized for agriculture, hunting, and cattle production, and it heavily depends on the groundwater from the Ogallala Aquifer that lies beneath the Ranch to sustain its operations.<sup>26</sup> Prior to 2012, the City drilled seven water wells on the Ranch.<sup>27</sup>

Responding to the loss of a previous water source and years of drought, the City sought to initially drill as many as twenty test wells on the Ranch with an additional sixty wells to be drilled on the Ranch later.<sup>28</sup> However, the Ranch protested, claiming it would interfere with their activities on the surface.<sup>29</sup> Specifically, the Ranch claimed the City’s plan to mow and remove grass would result in

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19. Pet’rs Br. at 73.

20. *Id.*

21. *Id.* at 74.

22. *Id.*

23. *Id.*

24. Pet’rs Br. at 75.

25. *Coyote Lake Ranch*, 498 S.W.3d at 55.

26. *Id.*

27. *Id.* at 57.

28. *Id.* at 57; Resp’ts Br. on the Merits at \*2-3, *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53 (2016) (No. 14-0572) [hereinafter Resp’ts Br.].

29. *Coyote Lake Ranch*, 498 S.W.3d at 57.

wind erosion, damaging the Ranch's soil.<sup>30</sup> Furthermore, the Ranch asserted that its existing cattle would only further aggravate the damage and that it could not fence the mowed areas because it would render much of the Ranch unusable due to cross-fencing.<sup>31</sup> After failed attempts to reach an agreement, the City began operations.<sup>32</sup>

### B. Injunction

Immediately after the City began its operations, the Ranch sought an injunction against it, claiming the City owed both a contractual and common law obligation to use only as much of the surface as is reasonably necessary to produce the groundwater.<sup>33</sup> The City opposed, claiming the 1953 Deed granted it full rights to pursue its desired operations.<sup>34</sup> Further, the City argued that the recognized duty to accommodate the surface owner placed upon mineral owners did not extend to groundwater owners.<sup>35</sup> During the hearing for the temporary injunction, the Ranch's manager testified that the City's operations would cause destructive wind erosion that would only worsen due to the Ranch's current cattle operations and would prevent grass from growing back.<sup>36</sup> Furthermore, the Ranch presented an alternative development plan to develop the groundwater and evidence that the City's proposed power lines would promote "hawks to roost and prey" on the endangered Lesser Prairie Chicken living on the Ranch.<sup>37</sup>

The trial court granted the temporary injunction, determining that the City's operations have and would continue to damage the Ranch if continued without due regard to the current uses of the Ranch.<sup>38</sup> Specifically, the Bailey County District Court enjoined the City from mowing or removing grass on the Ranch, continuing with any drilling without consulting the Ranch first, and erecting power lines.<sup>39</sup> Ultimately the trial court held the City's proposals would unreasonably interfere with the Ranch's current activities and cause irreparable harm.<sup>40</sup>

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30. *Id.*

31. Pet'rs Br. at 17.

32. *Coyote Lake Ranch*, 498 S.W.3d at 57 (The City started mowing native grass to reach potential drill sites).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Coyote Lake Ranch*, 498 S.W.3d at 57. *See generally* Final Rulemaking, Endangered and Threatened Wildlife and Plants: Lesser Prairie-Chicken Removed from the List of Endangered and Threatened Wildlife, 81 Fed. Reg. 47,047 (2016) (to be codified at 50 C.F.R. pt. 17) (The Lesser Prairie Chicken was delisted from the Federal List of Endangered and Threatened Wildlife); *see also* Notice of Petition Findings and Initiation of Status Review, Endangered and Threatened Wildlife and Plants: 90-Day Findings on Three Petitions, 81 Fed. Reg. 86,315 (2016) (to be codified at 50 C.F.R. pt. 17) (the status of the Lesser Prairie Chicken is currently under review by the U.S. Fish & Wildlife Service).

38. *Coyote Lake Ranch*, 498 S.W.3d at 58.

39. *Id.*

40. *Id.*

### C. Appeal

The City brought an accelerated interlocutory appeal, arguing the 1953 Deed expressly allowed for its proposals and that the accommodation doctrine did not extend to groundwater owners.<sup>41</sup> In its review, the Court of Appeals for the Seventh District of Texas restricted its review to whether the accommodation doctrine applied to the groundwater estate, noting that the trial court's order was silent as to any other cause of action alleged.<sup>42</sup>

The City advocated that the accommodation doctrine did not extend to the relationship between a severed groundwater owner and the surface estate.<sup>43</sup> Further, the City contended that even if the accommodation doctrine applied, the provisions of the "1953 Deed would prevail over general accommodation doctrine principles."<sup>44</sup> However, the Ranch argued the Supreme Court of Texas's reasoning in *Edwards Aquifer Authority v. Day* applied and should extend further to the relationship between a groundwater owner and the respective surface owner.<sup>45</sup>

The court disagreed, finding that the *Day* decision failed to grant the severed groundwater owner an implied right to utilize the surface for its development.<sup>46</sup> It found that *Day* failed to speak to the rights and duties between surface owners and severed groundwater owners.<sup>47</sup> Further, the court pointed out that the Supreme Court implied a limitation on analogizing oil and gas to groundwater in *Day*.<sup>48</sup> Finally, the court reversed and dissolved the lower court's injunction, interpreting that *Day* did not support extending the accommodation doctrine to a severed groundwater estate and deferred to the Supreme Court to make such a recognition.<sup>49</sup>

The Supreme Court of Texas granted the Ranch's petition for review.<sup>50</sup>

### D. The Supreme Court of Texas's Decision

As a matter of first impression, the Court held the accommodation doctrine applies to groundwater interests when conflicts arise that "are not governed by the express terms of the parties' agreement."<sup>51</sup> The Court began by examining the

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41. *City of Lubbock*, 440 S.W.3d at 273.

42. *Id.* at 271-72.

43. *Id.* at 273.

44. *Id.* at 273 n.2.

45. *Id.* at 274 (citing *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 831-32 (Tex. 2012) [hereinafter *Day*]); see *Day*, 369 S.W.3d at 829, 831 ("Groundwater, like oil and gas, often exists in subterranean reservoirs in which it is fugacious . . . 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.").

46. *City of Lubbock*, 440 S.W.3d at 275.

47. *Id.* at 274.

48. *Id.* at 275.

49. *Id.*

50. *Coyote Lake Ranch*, 498 S.W.3d at 58 n.12 (citing 58 TEX. SUP. CT. J. 1600 (2015)) (The Texas Supreme Court's finding that it has conflicts jurisdiction over the case is not included within the scope of this casenote).

51. *Id.* at 64.

language of the 1953 Deed to determine if its express provisions would alone govern the City's operations on the Ranch.<sup>52</sup> It noted that the 1953 Deed allowed for the City to drill "at any time and location," but restricted the City to do so only for operations pertaining to groundwater.<sup>53</sup> Next, the Court turned to the 1953 Deed's "necessary or incidental" limitations, noting that the language failed to clarify whether the City may conduct any of its drilling operations anywhere on the Ranch or only where it is "necessary or incidental" for full groundwater access on the Ranch.<sup>54</sup> The Court considered that if the City's interpretation was correct, it would hold "an . . . absolute right to use the surface," whereas if the Ranch was correct, the City could only drill where the Ranch allowed, as long as the Ranch did not impair full access to the groundwater.<sup>55</sup> It found the Deed "simply silent on the subject," disagreeing with the City's interpretation.<sup>56</sup> However, the Court determined that the Ranch's Lesser Prairie Chicken concerns offered little weight against the City's increased cost of burying power lines, thus finding the overhead power lines necessary or incidental.<sup>57</sup> Next, it turned to the issue of whether the accommodation doctrine applied to groundwater.<sup>58</sup>

Chief Justice Hecht, writing for the Court, revisited that a Texas landowner holds the right to sever the surface and mineral estate, and also the ability to convey the two estates separately.<sup>59</sup> Next, the Court recalled that under common law, a severed mineral estate enjoys an implied right to use the surface estate as reasonably necessary because "a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land. . . ."<sup>60</sup> Finally, the Court noted that the mineral estate is often referred to as "dominant" because it obtains an implied right to use the "servient" surface estate, not because it holds any superiority over the surface estate.<sup>61</sup>

The Court looked to the underlying principle of the accommodation doctrine and explained that two estates must act upon their own respective rights while simultaneously paying due regard for the other estate's rights.<sup>62</sup> Next, the Court

52. *Id.* at 59.

53. *Id.* at 57 (internal quotes omitted).

54. *Id.* (internal quotes omitted).

55. *Coyote Lake Ranch*, 498 S.W.3d at 59; Resp'ts Br. at 29-30 ("[T]he accommodation doctrine is irrelevant to the facts presented, because the 1953 Deed expressly allows all of the actions taken or proposed by the City. If the Ranch objects to the City's current or proposed exercise of its contractual rights, that is a contract dispute to which the accommodation doctrine simply does not apply. . . . Here, the Deed granted broad rights to the City to explore and produce its groundwater . . . but did not specify or restrict any particular manner or method by which the City could perform its contractual rights. The Ranch now wants to strip the City of its expressly permitted means of producing the groundwater."); Pet'rs Br. at 44 ("But when the parties have neither addressed the *manner* of surface use nor incorporated accommodation principles, the accommodation doctrine remains vital to balancing the parties' respective rights.") (emphasis added).

56. *Coyote Lake Ranch*, 498 S.W.3d at 59.

57. *Id.* at 59 (noting that if the Ranch's concern over the Lesser Prairie Chicken was as important as the City's concerns over buried pipelines, then buried power lines would have proven necessary or incidental).

58. *Id.* at 60.

59. *Id.*

60. *Id.* (citing *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967); citing *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971); quoting *Harris v. Curie*, 176 S.W.2d 302, 305 (Tex. 1967)).

61. *Coyote Lake Ranch*, 498 S.W.3d at 60.

62. *Id.* at 60-61 (citing *Acker*, 464 S.W.2d at 352).

reflected upon its first application of the accommodation doctrine in *Getty Oil Co. v. Jones*, where it offered protection to a surface owner whose lessee sought to obstruct the already-existing irrigation systems in favor of setting pumpjacks anywhere on the surface.<sup>63</sup> Furthermore, it noted that the burden exists upon the surface owner to demonstrate that the dominant estate's use not be reasonably necessary, and the alternatives offered are weighed in light of the surface owner's available alternatives.<sup>64</sup>

Next, the Court recognized the broad applications of the accommodation doctrine as demonstrated between its use to resolve disputes between separate estates, mineral owners and their subjecting royalty interests, and governmental entities.<sup>65</sup> Finally, the Court turned to its recent decision in *Merriman v. XTO Energy Inc.*, which further clarified the necessary elements and underlying principle of the accommodation doctrine.<sup>66</sup>

The Court then recognized that it had never applied the accommodation doctrine to groundwater, but it did find similarities between groundwater and minerals and their respective conflicts with surface owners persuasive enough to apply the accommodation doctrine to groundwater interests.<sup>67</sup> It first recognized that both groundwater and minerals exist in a fugacious manner, and groundwater interests can be severed just as a mineral interest can be severed.<sup>68</sup> Further, the Court noted that a severed groundwater estate owner holds identical rights to that which a mineral owner holds in surface rights – a right of ingress and egress and to develop the estate.<sup>69</sup> The Court reminded the parties that water, like oil and gas, is subject

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63. *Id.* at 61 (citing *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971)). *See Jones*, 470 S.W.2d at 622 (“[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.”). Three accommodation doctrine elements are provided under *Jones*: (1) reasonable alternatives exist for the mineral owner to develop; (2) mineral owner's current activities force the surface owner to abandon her current use; and (3) no practical alternatives exist for the surface owner.

64. *Coyote Lake Ranch*, 498 S.W.3d at 61 (citing *Jones*, 470 S.W.2d at 623; *Humble Oil & Ref.*, 420 S.W.2d at 134).

65. *Id.* at 62 (quoting *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 817 (Tex. 1972) (implied right to utilize groundwater found on leased premises as reasonably necessary to conduct leasehold operators); (citing *Humble Oil & Ref. Co. v. West*, 508 S.W.2d 812 (Tex. 1974) (holding that the accommodation doctrine applied between the fee owner of mineral rights and its subjecting royalty interests to calculate royalties of injected native gas)); (citing *Tarrant Cty. Water Control & Improvement Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993) (accommodation doctrine applies to government entities)).

66. *Id.* at 62-63 (quoting *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249-50 (Tex. 2013)). *See also Merriman*, 407 S.W.3d at 249 (“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. . . . 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.”).

67. *Coyote Lake Ranch*, 498 S.W.3d at 63.

68. *Id.* at 63 (citing *Evans v. Ropte*, 96 S.W.2d 973 (Tex. 1936)). *See Evans*, 96 S.W.2d 973 (right to take groundwater is an interest in land that can be severed and conveyed).

69. *Coyote Lake Ranch*, 498 S.W.3d at 63 (citing *Evans*, 96 S.W.2d at 974). *See Evans*, 96 S.W.2d at 974 (conveyance of groundwater grants right to enter the surface to develop the groundwater and “do everything necessary and appropriate for the accomplishment of that purpose.”).

to the rule of capture, and thus, both are protected against waste.<sup>70</sup> Lastly, the Court reminded the parties of its recent decision in *Day*, which established that groundwater is owned in place, just as oil and gas are owned in place.<sup>71</sup> Ultimately, these shared principles between the groundwater estate and the mineral estate compelled the Court to apply the accommodation doctrine to groundwater.<sup>72</sup>

Interestingly, the Court furthered its impression on the groundwater estate by declaring it a dominant estate over the surface estate.<sup>73</sup> However, the Court reiterated that the surface estate was not inferior, only that it must allow access in order for the groundwater estate to exercise its implied right.<sup>74</sup> The Court also refused to imply terms, such as adopting a requirement of reasonable use, instead finding that the groundwater estate enjoys an implied right to use the surface reasonably and, in this case, an expressly given right to perform operations that are “necessary or incidental” to groundwater development.<sup>75</sup> It then explained that no new approach was needed to resolve surface estate issues for groundwater owners because of the accommodation doctrine’s overwhelming success at settling disputes.<sup>76</sup> The Court then formally applied the accommodation doctrine as clarified in *Merriman* to conflicts between the surface estate and severed groundwater estates:

As stated in *Merriman*, the surface owner must prove that (1) the groundwater owner’s use of the surface completely precludes or substantially impairs the existing use, (2) the surface owner has no available, reasonable alternative to continue the existing use, and (3) given the particular circumstances, the groundwater owner has available reasonable, customary, and industry-accepted methods to access and produce the water and allow continuation of the surface owner’s existing use.<sup>77</sup>

Finally, the Court agreed with the judgment of the Court of Appeals that the temporary injunction should be reversed, remanding the case, but instructed the trial court to consider the implications of the accommodation doctrine into its proceedings.<sup>78</sup> It found that preventing the City from destroying any grass denied the City its right of access under the 1953 Deed.<sup>79</sup> Further, the Court found the 1953

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70. *Coyote Lake Ranch*, 498 S.W.3d at 63 (citing *Stephens Cty. v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290, 292 (1923)). See generally *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904) (Adoption of the Rule of Capture in Texas); see generally *Eliff v. Texon Drilling Co.*, 210 S.W.2d 558 (Tex. 1948) (allowed suit for wasteful oil and gas drainage caused by negligence of the lessee).

71. *Coyote Lake Ranch*, 498 S.W.3d at 63 (citing *Day*, 369 S.W.3d at 829-32).

72. *Id.* at 64.

73. *Id.* (“[T]he estate is dominant for the same reason a mineral estate is; it is benefitted by an implied right to the reasonable use of the surface.”).

74. *Id.* (“The surface estate is not servient because it is lessor or inferior but because it must allow the exercise of that implied right.”).

75. *Id.*

76. *Coyote Lake Ranch*, 498 S.W.3d at 64.

77. *Id.* at 64-65 (citing *Merriman*, 407 S.W.3d at 249).

78. *Id.* at 65. See *id.* at 65 n.55 (The Court refused discussing the accommodation doctrine implications when both the groundwater and mineral estates are severed and come into conflict); Respt’s Br. at 22-23; Unofficial Transcript of Oral Argument, *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53 (2016) (No. 14-0572), 2016 WL 6734669 [hereinafter Oral Argument]; *Coyote Lake Ranch, LLC v. City of Lubbock*, No. 14-0572, 2016 Tex. LEXIS 836 (2016).

79. *Coyote Lake Ranch*, 498 S.W.3d at 65.



Deed gave the City the right to erect power lines, dismissing the injunction.<sup>80</sup> Lastly, the Court looked to the temporary injunction's consulting requirement, determining it to be inappropriate and overly broad.<sup>81</sup>

### III. ANALYSIS

#### A. *The Majority*

In *Coyote Lake Ranch, LLC v. City of Lubbock*, the Supreme Court of Texas affirmed the Court of Appeals for the Seventh District of Texas' ruling, effectively reversing the Ranch's injunction.<sup>82</sup> However, the Court held, as a matter of first impression, that the accommodation doctrine applied to groundwater interests, and the groundwater estate now enjoys "dominant" status – the implied right to use the surface for the purpose of development.<sup>83</sup>

This case appears profound because the 1953 Deed's terms seemed to grant the City broad powers over its use of the Ranch.<sup>84</sup> According to the Court, two far-reaching opposing viewpoints could be construed from the 1953 Deed: (1) the City enjoys an absolute right over the surface and could use it however it desired or (2) the City is empowered to drill only where the Ranch allows it to "as long as full access to the groundwater is not impaired."<sup>85</sup> The decision hinged on the Court's belief that the 1953 Deed was "simply silent" on its meaning of "necessary or incidental," and the Court believed the correct method of resolving the dispute rested with the accommodation doctrine, rather than the application of contractual common law principles.<sup>86</sup>

The Majority's reasoning for granting the groundwater estate dominance and its emphasis on the relationship between estates should be considered in future conflicts between surface owners and any respective dominant estates.<sup>87</sup> According to the Court, the correct method of weighing separate estate owners' rights can only be determined by measuring the dominant estate's rights against that of the servient estate owner – in this case the surface owner – rather than in the abstract.<sup>88</sup> This reasoning may prove problematic and disrupt the original intentions of several older agreements, especially if the use of the surface changes long after the original agreement.<sup>89</sup> Without question, many landowners, like the landowners in

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Pet'rs Br. at 73.

85. *Coyote Lake Ranch*, 498 S.W.3d at 59.

86. *Id.* at 59, 65 (internal quotes omitted).

87. *Id.* at 64.

88. *Id.* ("What is reasonable, necessary, or incidental for the severed estate cannot be determined in the abstract but must be measured against, and *with due regard for*, the rights of the surface estate.") (emphasis added).

89. Michael P. Vargo, *Why the Accommodation Doctrine Should Not Apply to Groundwater Owners Under Coyote Lake Ranch, LLC v. City of Lubbock*, 6 HOUS. L. REV. 167, 176-77 (2016) (quoting Jennifer Cornejo, *Accommodating Another Wrinkle in Texas Water Law? – Coyote Lake Ranch LLC v. Lubbock*, VINSON & ELKINS WATER L. BLOG (Sept. 23, 2015), <http://water.velaw.com/AccommodatingAnotherWrinkleinTexasWaterLaw-CoyoteLakeRanchLLCvLubbock.aspx>).

*Coyote Lake Ranch*, exhaust many resources over the language concerning surface deeds and other instruments.<sup>90</sup> Now, previous groundwater agreements may no longer be interpreted as originally intended if courts take the Majority's approach.<sup>91</sup>

The Ranch's injunction proved insufficient, even with the Majority's decision to apply the accommodation doctrine to groundwater interests.<sup>92</sup> The Majority made clear that the injunction prohibiting "all mowing, blading, or destroying grass on the Ranch" denied the groundwater estate its implied right to utilize the surface.<sup>93</sup> This clearly demonstrates that the accommodation doctrine cannot bar the dominate estate owner from access.<sup>94</sup> Further, the Court found the 1953 Deed's express allowance of power lines controlled, standing by the principle that express terms override the accommodation doctrine.<sup>95</sup> Finally, the Majority's finding that an injunction requiring consultation is inappropriate shows that broad injunctions inadequately serve as appropriate vehicles for surface owners under the accommodation doctrine.<sup>96</sup>

The Majority's opinion also presents questions concerning the workings of the accommodation doctrine when two or more severed estates come into conflict.<sup>97</sup> For example, uncertainty now lingers if the new dominant groundwater estate directly interferes with the historically dominant mineral estate's use of the surface.<sup>98</sup> Further, this concern extends to other property interests in Texas, most notably wind rights, as the City argued.<sup>99</sup> The Court's refusal in *Coyote Lake Ranch* to resolve this question only raises significant questions that it will likely resolve later: "We leave that issue for another day."<sup>100</sup>

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90. John McFarland, *Coyote Lake Ranch v. City of Lubbock: Accommodation Doctrine Applies to Groundwater*, OIL & GAS LAWYER BLOG (June 1, 2016), <https://www.oilandgaslawyerblog.com/2016/06/coyote-lake-ranch-v-city-lubbock-accommodation-doctrine-applies-groundwater.html>.

91. See *id.*; see also Vargo, *supra* note 89, at 176-77; Kiah Collier, *In Weighty Water Ruling, Texas' High Court Backs Landowner*, TEX. TRIB. (May 27, 2016), <https://www.texastribune.org/2016/05/27/water-ruling-texas-high-court-backs-landowners>.

92. *Coyote Lake Ranch*, 498 S.W.3d at 65.

93. *Id.*

94. See generally *id.*

95. *Id.* (The Ranch failed to demonstrate that every power line would threaten the Lesser Prairie Chicken).

96. See generally *id.*

97. *Coyote Lake Ranch*, 498 S.W.3d at 65, n.55. See Resp'ts Br. at 22-23; see also Rhonda Jolley, *The Accommodation Doctrine and Dominant Estate Rulings Regarding Groundwater*, BRANSCOMB P.C. (June 10, 2016), <http://www.branscombpc.com/the-accommodation-doctrine-and-dominant-estate-rulings-regarding-groundwater>.

98. Jolley, *supra* note 97.

99. Resp'ts Br. at 23 ("... [B]ut its argument would apply with equal force to timber estates, crop estates, and possible wind rights, which are only examples of severable surface estate. . . ."); see generally Jared Berg, *Ending the Game of Chicken: Proposed Solutions to Keep Texas Wind Developers and Mineral Lessees from Ruffling Each Other's Feathers*, 11 TEX. J. OIL, GAS & ENERGY L. 143 (2016); Chantel James, *Windustry and the Accommodation Doctrine: Should Oklahoma Follow in the Steps of the Lone Star State?*, 67 OKLA. L. REV. 901 (2015).

100. *Coyote Lake Ranch*, 498 S.W.3d at 65, n.55.

### B. Concurring Opinion

Justice Boyd, joined by Justice Willet and Justice Lehrmann, agreed with the Majority that the accommodation doctrine applies to groundwater interests in cases in which conflicts are not apparent in the party's agreement.<sup>101</sup> However, the Justices disagreed whether the 1953 Deed's express terms controlled over the party's primary dispute.<sup>102</sup>

The Concurrence examined the 1953 Deed in three parts.<sup>103</sup> First, it noted that the instrument granted the City a right of ingress and egress over the Ranch so that it could "*at any time and location drill water wells and test wells.*"<sup>104</sup> Next, the City was given certain rights to "*access roads on, over and under said lands necessary or incidental to any of said operations.*"<sup>105</sup> Finally, the 1953 Deed allowed the City "*the rights to use all that part of said lands necessary or incidental*" to taking water.<sup>106</sup>

Justice Boyd disagreed with the Majority's viewpoint that the Deed appeared "simply silent" on whether the City enjoyed broad rights to drill anywhere it pleased or only rights to access the groundwater.<sup>107</sup> Instead, he believed the City enjoyed an express grant to drill anywhere and at any time.<sup>108</sup> Further, he opined if native grass overlaid one of the chosen locations, the 1953 Deed granted the City the right to mow it, and the accommodation doctrine should not apply.<sup>109</sup> However, the Concurrence agreed with the Majority that the accommodation doctrine applied to the City's decisions to build roads on the Ranch.<sup>110</sup> Justice Boyd reasoned that phrases such as "necessary or incidental" often create disagreements among parties that are meant for the accommodation doctrine to reconcile.<sup>111</sup>

The Concurrence appears to consider the parties' original terms, unless clear room for disagreement presents itself.<sup>112</sup> Further, it looks only to the 1953 Deed, rather than the entirety of the relationship between the City and the Ranch.<sup>113</sup> Essentially, it argues that the accommodation doctrine should only come into play when an instrument "leave[s] substantial room for disagreement."<sup>114</sup>

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101. *Id.* at 65-66 (Boyd, J., concurring).

102. *Id.*

103. *Id.*

104. *Id.* (emphasis in original).

105. *Coyote Lake Ranch*, 498 S.W.3d at 66 (emphasis in original).

106. *Id.* (emphasis in original).

107. *Id.* at 67 (internal quotes omitted).

108. *Id.*

109. *Id.*

110. *Coyote Lake Ranch*, 498 S.W.3d at 67.

111. *Id.* (internal quotes omitted) (citing *Merriman*, 407 S.W.3d at 249; citing *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 100, 103 (Tex. 1984)) ("Because phrases like 'necessary or incidental,' 'necessary or useful,' and 'necessary and convenient' leave substantial room for disagreement, we have applied the accommodation doctrine to inform their meaning by imposing a reasonableness standard on the uses the agreements permit.")

112. *See generally id.* at 65-67.

113. McFarland, *supra* note 90.

114. *Coyote Lake Ranch*, 498 S.W.3d at 67 (Boyd, J., concurring).

### C. Implications

Texas courts first employed the accommodation doctrine in *Getty Oil Co. v. Jones* in 1973 to govern disputes arising between the dominant mineral estate and the separate, servient surface estate.<sup>115</sup> Since then, the doctrine has been applied, reaffirmed, and clarified.<sup>116</sup> Now, the accommodation doctrine has found its way to groundwater interests.<sup>117</sup> *Coyote Lake Ranch, LLC v. City of Lubbock* suggests that groundwater, as well as oil and gas agreements, now face broader exposure to the accommodation doctrine.<sup>118</sup>

As such, parties should, now more than ever, negotiate and carefully phrase their express terms.<sup>119</sup> Important factors include specifying the manner of use the dominant estate enjoys over the servient estate and whether the dominant estate is liable for surface damages.<sup>120</sup> Parties wishing to avoid the effects of the accommodation doctrine should speak to manner of use exercised by the dominant estate.<sup>121</sup> Surface owners should seek due regard language for the accommodation doctrine.<sup>122</sup>

Dominant estate holders desiring to avoid accommodation doctrine applications need to focus on the instrument's language regarding its manner of use of the servient estate.<sup>123</sup> Further, such manner of use language appears to require specific, precise, and unambiguous phrasing to avoid unfavorable interpretations of express terms.<sup>124</sup> One example may come from the deed in *Landreth v. Melendez*, in which the dominant estate could operate using "all usual, necessary and convenient means."<sup>125</sup> In fact, both the Ranch and the City argued that *Landreth* supported their respective positions before the Supreme Court.<sup>126</sup> The *Landreth* court found that "all usual, necessary and convenient means" granted the dominant estate an explicit and unambiguous right over the surface.<sup>127</sup> Further, the *Landreth* deed further exempted the mineral owner from surface damages.<sup>128</sup> It appears

115. See generally *Jones*, 470 S.W.2d 618.

116. See generally *Humble Oil & Ref. Co.*, 420 S.W.2d 133; *Merriman*, 407 S.W.3d 244.

117. *Coyote Lake Ranch*, 498 S.W.3d 53.

118. McFarland, *supra* note 90.

119. See generally *id.*; Hilary Soileau, *For Texas, Now is the Time to Force Groundwater Owners to Accommodate*, 1 OIL & GAS, NAT. RES., & ENERGY J. 465 (2016).

120. Pet'rs Br. at 30-47; Resp'ts Br. at 27-40; see Soileau, *supra* note 119, at 477.

121. See, e.g., Pet'rs Br. at 40. See also Soileau, *supra* note 119, at 477.

122. Soileau, *supra* note 119, at 477.

123. *Id.*; Pet'rs Br. at 40.

124. See generally David E. Pierce, "The Common Law of Surface Use to Develop Oil and Gas," *Oil & Gas Agreements: Surface Use in the 21st Century* 1-1 (Rocky Mt. Min. L. Found. 2017). See also Soileau, *supra* note 119, at 477.

125. *Landreth v. Melendez*, 948 S.W.2d 76, 81 (Tex. App. 1997); see also Pet'rs Br. at 30-47.

126. See Pet'rs Br. at 40 (arguing that the 1953 Deed did not speak to the manner in which the surface could be used); Resp'ts Br. at 33-34 (arguing the 1953 Deed was broader than the deed in *Landreth*); Pet'rs Reply Br. at 13-16, *Coyote Lake Ranch, LLC v. City of Lubbock*, 440 S.W.3d 267 (2016) (No. 14-0572); see also *Coyote Lake Ranch*, 498 S.W.3d 53 (interestingly, the Court chose not to discuss *Landreth* in *Coyote Lake Ranch*, despite both parties' reliance).

127. *Landreth*, 948 S.W.2d at 81.

128. *Id.* at 79.

exemption of the accommodation doctrine calls for specificity regarding the *manner* of use.<sup>129</sup> In other words, detailing *how* operations may be conducted may prove more likely to avoid triggering the accommodation doctrine.<sup>130</sup>

Next, ambiguous phrasing that leaves room for disagreement, as mentioned by Justice Boyd, should not be utilized if attempting to avoid accommodation doctrine applications.<sup>131</sup> These phrases include, but are not limited to, “necessary or incidental, necessary or useful, and necessary and convenient” and are imperative to be avoided.<sup>132</sup> Finally, another solution to eliminate any accommodation doctrine application is to expressly state that the accommodation doctrine will not apply to the lessee’s use of the surface.<sup>133</sup>

On the other hand, parties desiring protection of the accommodation doctrine should seek language requiring the dominant estate to pay due regard for the surface.<sup>134</sup> Further, surface owners’ previous practice of specific restrictions should continue, such as requiring the dominant estate to pay for surface damages.<sup>135</sup> Additionally, phrases the *Coyote Lake Ranch* concurrence noted, such as “necessary or incidental,” leave room for differing interpretations and could therefore be included to trigger the accommodation doctrine.<sup>136</sup> Finally, another option for surface owners includes expressly applying the accommodation doctrine.<sup>137</sup>

Another accommodation doctrine lesson to be learned from *Coyote Lake Ranch* might include considering the contract’s long-term relationships.<sup>138</sup> For instance, the *Coyote Lake Ranch* court appeared to consider the long-term relationship between the Ranch, a successor to the original grantor, and the City.<sup>139</sup> Anticipating future parties and other possible uses of the surface can eliminate future problems, especially with a party’s successor.<sup>140</sup> One solution might be including strict consent to assign clauses and specific successors and assigns language contractually binding a successor to the intentions of the original holder.<sup>141</sup>

The Court’s extension of the accommodation doctrine to groundwater interests appears to influence furthering accommodation doctrine application to other interests as well.<sup>142</sup> For example, the Supreme Court of Texas recently utilized its

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129. See also Pet’rs Br. at 40; Soileau, *supra* note 119, at 477.

130. See generally Pet’rs Br. at 40.

131. *Coyote Lake Ranch*, 498 S.W.3d at 67 (Boyd, J., concurring).

132. *Id.* (internal quotations omitted).

133. McFarland, *supra* note 90.

134. Soileau, *supra* note 119, at 477.

135. William B. Burford, 6 WEST’S TEX. FORMS, MINERALS, OIL & GAS § 3:2 (4) (4th ed.) (A surface owner may expressly limit the lessee from certain activities such as drinking alcoholic beverages, preventing hunting, demanding surface reclamation, and designating access and drilling areas).

136. See generally *Coyote Lake Ranch*, 498 S.W.3d at 67 (Boyd, J., concurring) (internal quotes omitted).

137. See generally McFarland, *supra* note 90.

138. *Id.*

139. *Id.*

140. *Id.*

141. See generally Harper Estes & Douglas Prieto, *Contracts as Fences: Representing the Agricultural Producer in an Oil and Gas Environment*, 73 TEX. B.J. 378, 385 (2010).

142. See generally *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017). See also Pet’rs Br. at 13 (While other states – including Alaska, Arkansas, Colorado, North Dakota, and Utah – have adopted the accommodation doctrine, all have yet to cite *Coyote Lake Ranch*).

reasoning in *Coyote Lake Ranch* to justify extending the accommodation doctrine to an oil and gas lessee's operations on an adjacent tract for the purposes of developing a lease.<sup>143</sup> Texas courts historically utilized the accommodation doctrine to resolve disputes, even in unique ways, and the continuing practice appears furthered through the Court's reasoning in this case.<sup>144</sup>

#### D. Groundwater or Mineral?

The Texas Legislature made it clear that groundwater is "not [to] be considered a mineral."<sup>145</sup> However, throughout Texas groundwater case law, the courts equated the characteristics of groundwater to that of oil and gas.<sup>146</sup> The *Coyote Lake Ranch* court once again reiterated many of these historical comparisons:

Groundwater and minerals both exist in subterranean reservoirs in which they are fugacious. An interest in groundwater can be severed from the land as a separate estate, just as an interest in minerals can be. A severed groundwater estate has the same right to use the surface that a severed mineral estate does. Both groundwater and mineral estates are subject to the rule of capture. And both are protected from waste. These similarities led us to hold in *Edwards Aquifer Authority v. Day* that groundwater, like oil and gas is owned . . . below the surface. We acknowledged the important difference between water and hydrocarbons: water is an "often . . . renewable," "life-sustaining" resource used "for drinking [,] recreation, agriculture, and the environment," while oil and gas are "essentially non-renewable . . . commodit[ies] for energy and in manufacturing."<sup>147</sup>

These comparisons uncovered enough similarities throughout the past century for the groundwater law to be virtually identical to that of "minerals" in Texas: Rule of capture, ownership in place, and now the accommodation doctrine.<sup>148</sup>

Simply stating groundwater differs from its fossil fuel counterparts virtually fails to afford groundwater any significant distinction from that of minerals in the eyes of the state judiciary.<sup>149</sup> This raises the question of whether groundwater is treated any differently than oil and gas.<sup>150</sup> Ultimately, Texas determined that landowners and groundwater producers will dictate the future of groundwater.<sup>151</sup>

#### IV. CONCLUSION

The facts of *Coyote Lake Ranch* are unique in that the contract allowed for wells to be drilled "at any time and location" to access groundwater, but limited

143. *Lightning Oil Co.*, 520 S.W.3d 39 (constitutes a surface use under the accommodation doctrine).

144. See generally *Coyote Lake Ranch*, 498 S.W.3d 53; *Sun Oil*, 483 S.W.2d 808; *Humble Oil & Ref. Co.*, 508 S.W. 812; *Moser*, 676 S.W.2d 99.

145. TEX. NAT. RES. CODE ANN. § 53.1631(a) (West 2003).

146. *Coyote Lake Ranch*, 498 S.W.3d at 63-64. See *Fleming Found. v. Texaco, Inc.*, 337 S.W.2d 846, 851-52 (Tex. App. 1960) (holding that water is not "a thing of like kind to oil and gas," but is technically a mineral); *Day*, 369 S.W.3d at 829-31.

147. *Coyote Lake Ranch*, 498 S.W.3d at 63-64 (citing *Day*, 369 S.W.3d at 831) (internal quotes omitted).

148. *Id.* at 55; *Day*, 369 S.W.3d 814; *Houston*, 81 S.W. 279.

149. See generally *Coyote Lake Ranch*, 498 S.W.3d 53; *Day*, 369 S.W.3d 814.

150. See generally *Kiah Collier, Lawyers Say Ruling Bad for Landowners*, TEX. TRIB. (May 27, 2016), <https://www.texastribune.org/2016/06/04/lawyers-say-ruling-bad-landowners>.

151. See, e.g., *Day*, 369 S.W.3d at 832-33.

the grantee use of the surface for its operations to what only is “necessary or incidental.”<sup>152</sup> The Supreme Court of Texas held the Deed left unclear whether this language governed the parties’ dispute and applied the accommodation doctrine to groundwater interests.<sup>153</sup> This case may potentially force parties to describe in detail the manner in which operations may be conducted.<sup>154</sup> Further, this case may be persuasive to further the extension of the accommodation doctrine to other estates and between new interests in the future.<sup>155</sup>

Parties desiring to construe instruments with accommodation doctrine applications in mind should consider the manner in which the contract shall be carried out and the long-term relationship of the parties.<sup>156</sup> Open-ended language such as “necessary or incidental” requires careful consideration before drafting it into agreements.<sup>157</sup> The Texas Supreme Court’s holding in *Coyote Lake Ranch* should be broadly construed and applied to every surface usage agreement drafted in the future.<sup>158</sup>

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152. *Coyote Lake Ranch*, 498 S.W.3d at 57 (internal quotes omitted). See Pet’rs Br. at 73.

153. *Coyote Lake Ranch*, 498 S.W.3d at 59, 64.

154. See generally Pet’rs Br. at 40-44.

155. See generally Resp’ts Br. at 23.

156. See generally Pet’rs Br. at 40-44.

157. *Coyote Lake Ranch*, 498 S.W.3d at 67 (Boyd, J., concurring) (internal quotes omitted).

158. See McFarland, *supra* note 90.

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