

Who Determines Ownership of Water Rights in Texas?

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The Texas Supreme Court will hear oral arguments on March 24, 2022 in *Pape Partners, Ltd. v. DRR Family Properties LP*, a case posing the question of who determines ownership of water rights in Texas, the courts or the Texas Commission on Environmental Quality?



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Background

In 2014, the Papes purchased farmland. As part of the purchase, sellers conveyed surface water rights to the Papes. The Certificates of Adjudication for the surface water rights was originally in 1986 as part of a judgment in a lawsuit under the Texas Water Rights Adjudication Act. The Papes contacted the TCEQ to record their purchase of water rights.

The TCEQ noted other potentially interested landowners that they might own an interest in the water rights, including an adjacent landowner, DRR. DRR responded by filing a change of ownership form, and the TCEQ determined that DRR owned a portion of the water rights. The TCEQ modified its records to reflect this ownership.

The Papes disagreed with the TCEQ determination and moved to reverse its decision, which was denied. The Papes did not make an administrative appeal of the decision, but instead, filed this lawsuit seeking a declaration that it owns all of the water rights in the property that it purchased. The Papes also made claims against DRR for trespass to try title, adverse possession, and to quiet title.

DRR moved to dismiss the lawsuit, claiming that the Papes failed to exhaust their administrative remedies and, as such, the court did not have jurisdiction to hear the case. The trial court granted the motion to dismiss. The Papes filed an appeal.

Court of Appeals Opinion

The sole issue on appeal is whether it is within the jurisdiction of the TCEQ or of the courts to determine ownership of water rights. The Waco Court of Appeals held that it is the TCEQ that has exclusive jurisdiction to determine water rights and, thus, dismissed the case.

Generally speaking, the power to determine disputed property rights rests with the courts. Courts of general jurisdiction are presumed to have subject matter jurisdiction unless the Texas Constitution or another law gives that jurisdiction to another court, tribunal, or administrative agency. An administrative agency may only exercise powers expressly granted to them by law. This grant may either be expressly stated or there must be a “pervasive regulatory scheme” indicating intent to infer exclusive jurisdiction. If an agency has that jurisdiction, then a party is required to exhaust all administrative remedies prior to seeking juridical review of an agency’s determination.

Here, the Papes argue that the Texas Water Code does not grant exclusive jurisdiction to determine water right ownership to the TCEQ. The Water Code grants TCEQ “primary authority to establish surface water quality standards, which it implements, in part, in its permitting actions.” Thus, the court held, “although the statute does not expressly grant exclusive jurisdiction over water rights to the

TCEQ, the regulatory scheme behind surface water permits is pervasive and indicative of the Legislature's intent that jurisdiction over the adjudication of surface water permits is ceded to the TCEQ."

The Papes also argue that allowing the TCEQ to have jurisdiction over water rights ownership disputes violates separation of powers. The separation of powers doctrine is violated when one branch of government is given a power more properly attached to another branch. The court found this was not the case here, as the Texas Constitution authorized the Legislature to give this authority to the TCEQ.

Because the court determined TCEQ had exclusive jurisdiction, then the Papes were required to follow the agency review process. It is undisputed that they failed to do so, thus, the court affirmed the dismissal of the case.

Dissent

Chief Justice Tom Gray wrote a dissenting opinion, in which he lays out why he believes it is the courts, not the TCEQ, that should have jurisdiction over this dispute.

First, looking at the Texas Water Rights Adjudication Act, passed in 1967, he notes that the legislature used the phrase "water rights adjudication" as a "short-hand" reference to "the delegation to regulate the conservation of the natural resource of surface water by determining the amount of use, place of use, purpose of use, point of diversion, rate of diversion, and in the appropriate situation, included the acreage to be irrigated." Thus, when the Legislature included "water rights adjudication" in granting authority to the TCEQ 18 years later, that is what it had in mind, rather than the authority to adjudicate title or ownership disputes related to water rights, as that has been traditionally left to the courts.

Second, Chief Justice Gray stated that it would be impractical for the TCEQ to have exclusive jurisdiction over all water rights and noted this would mean every will contest, contract, deed, and other dispute over a water right would have to be decided by the TCEQ, while every other ownership interest would have to be decided separately by the courts. He believes the TCEQ regulatory system is not designed to determine ownership, but merely to track recorded ownership.

He would reverse the trial court and remand the case for further proceedings to litigate the merits of the ownership dispute.

Texas Supreme Court

The Papes filed a Petition for Review with the Texas Supreme Court, which was granted. Oral argument has been set for March 24, 2022.

A number of amicus briefs have been filed in the Court in support of the Petition. Most interestingly, the TCEQ filed an amicus brief supporting the Papes, disclaiming any such jurisdiction to determine water rights ownership. Both the Texas & Southwestern Cattle Raisers Association and the Texas Water Conservation Alliance filed letters in support of the Papes' argument.