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## Dygaard Land P'ship v. Hoover, 39 S.W.3d 300 (Tex. App. 2001)

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grant. Moreover, a conveyance of adjacent land, done by the owner of both the water and the surrounding land, transfers riparian rights, absent express provisions to the contrary. As the Lake was an appurtenance to the deed and the deed did not exclude use of the Lake, the court concluded The Pointe was entitled to free use of the Lake.

LMA argued the non-navigability of the Lake prevented riparian rights from passing in the deed. The court noted that navigability only served to determine ownership of land under the water, and riparian rights concerning use do attach to non-navigable water.

The court then addressed the nature and extent of The Pointe's rights. The court acknowledged that the party attempting to prove an implied easement existed must demonstrate three factors. First, the party must show a separation of title occurred. The court found separation of title occurred when LDC transferred the property to The Pointe and LMA. Second, the party must demonstrate the use continued over a long period. The court found over thirty years prior to LDC's transfer, LDC created the Lake specifically to develop lakeside homes on the adjacent property. Finally, the party must show the easement was necessary for further enjoyment of the land. The court noted that without access to the Lake, the property would be useless for lakeside development. Therefore, the court held The Pointe's rights to use the Lake were in the form of an implied easement.

*Sara Wagers*

## TEXAS

**Dyegard Land P'ship v. Hoover, 39 S.W.3d 300 (Tex. App. 2001)**  
(holding original covenants prohibiting drilling for minerals did not prohibit lot owners from drilling water wells because water is not a mineral).

In May 1994, Dyegard Land Partnership ("Dyegard") with the approval of Oak View Estates, a rural subdivision, filed a subdivision plat and restrictive covenants with the Parker County Clerk. The thirty-eight covenants restricted building design, construction materials, and property use. Covenant eighteen expressly prohibited, on any lot within Oak View Estates, the drilling, quarrying, mining, prospecting, or development of minerals of any kind, and the construction of wells, tunnels, tanks or any other structure used for mineral boring.

In 1997, Robert and Jackie Hoover and Donald and Cynthia Tye (collectively, the "Hoovers") purchased lots from Dyegard with notice that their lots were subject to the original covenants. Dyegard provided Oak View Estates with water from a central water system. After purchasing the lots, the Hoovers discovered problems with

pressure, quantity, and volume of water provided, and explored the possibility of drilling a private well on their lots. Dyegard denied their request, claiming covenant eighteen barred water well drilling. Subsequently, Dyegard amended covenant eighteen to expressly prohibit well drilling for private water sources.

The Hoovers filed suit for declaratory judgment in the District Court of Parker County, claiming the covenants did not restrict water well drilling on their lots. Dyegard's response stated the amended covenants specifically prohibited drilling water wells and further, the original covenant language prohibited water well drilling. The Hoovers filed a motion for summary judgment. The trial court granted the Hoovers' motion.

Dyegard appealed to the Second District Court of Appeals of Texas, and contended the trial court erred because the original covenants expressly prohibited well drilling. Moreover, Dyegard argued the trial court erred because the amended covenants were enforceable.

Dyegard argued the covenant clearly prohibited drilling for water, because water is a mineral. The court of appeals did not agree. The appellate court pointed to *Fleming Foundation v. Texaco, Inc.*, where that court held the definition of minerals excluded water. Furthermore, the Texas Property Code defines mineral to mean oil, gas uranium, sulphur, and other substances, yet, purposely omits water. The appellate court also noted that laws pertaining to groundwater developed entirely separately from oil and gas law. Covenant eighteen's extensive list of mining prohibitions contributed to the court's conclusion that the covenant referred to minerals, and not water. The appellate court concluded the Hoovers could drill water wells under the original covenants, because water is not a mineral.

Dyegard maintained the amended covenant clarified any ambiguity by clearly prohibiting water wells within Oak View Estates. The Hoovers argued the amended covenants were not valid, because the original covenants did not authorize Dyegard to make modifications to the covenants without property owner concurrence. The appellate court concluded the original covenants clearly reserved the developer's right to amend the covenants, thus finding Dyegard's amendment valid as a matter of law.

The appellate court affirmed summary judgment that the original covenants allowed the Hoovers to drill water wells, reversed summary judgment regarding the amended covenants' validity, and remanded for further proceedings.

*Holly Kirsner*

**Hess v. McLean Feedyard, Inc., No. 07-99-0519-CV, 2000 Tex. App. LEXIS 8114 (Tex. App. Nov. 28, 2000)** (affirming no-evidence summary judgment motion on basis that landowners failed to produce expert evidence on the cause of alleged water contamination).