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## **Groundwater Conservation Districts Litigation Update**

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## GROUNDWATER CONSERVATION DISTRICTS LITIGATION UPDATE GREGORY M. ELLIS

This paper presents a short summary of current, active cases involving groundwater or groundwater conservation districts in Texas. The cases are listed alphabetically within each subdivision.

### **Texas Supreme Court:**

#### ***Edwards Aquifer Authority v Bragg***

Glenn and Jolynn Bragg (“Braggs”) applied to the Edwards Aquifer Authority (“EAA”) for permits for irrigation on two pecan orchards, the “D’Hanis” orchard and the “Home Place” orchard. However, under the EAA enabling Act, permits could only be granted for the amount of water withdrawn during the Act’s historic use period (1971 – 1992). As a result, the EAA denied the D’Hanis application on the basis that there was no irrigation during the historic use period. The EAA granted the Home Place application at the statutory minimum for agricultural irrigation wells of 2 acre feet of water per acre actually irrigated during any one year of the historic use period. The Braggs claimed a constitutional taking of their common law water rights and sought compensation from the EAA. The Braggs originally sued the EAA for federal civil rights violations as well but all of those claims were denied in federal court and the state takings claim was remanded to state court.

Following a bench trial, the court ruled:

- that EAA Act’s enactment and implementation did not deprive Plaintiffs of ALL economically viable use of their property;
- EAA Act’s enactment and implementation “substantially advance the government’s legitimate interest”
- statute of limitations does not bar actions;
- the Authority’s denial of the D’Hanis Initial Regular Permit application “unreasonably impeded the Plaintiff’s [sic] use of the D’Hanis Orchard as a pecan farm, causing them a severe economic impact; interfered with their investment-backed expectations, and constituted a regulatory taking of the Plaintiff’s [sic] property” under the *Penn Central* and *Sheffield* (Texas) cases for which the compensation owed the Braggs is \$134,918.40 (calculated from the difference, per acre, in the value of dry land farm land and Edwards-irrigated farm land);
- the Authority’s granting of the Home Place Initial Regular Permit for less than requested “unreasonably impeded the Plaintiff’s [sic] use of the Home Place Orchard as a pecan farm, causing them a severe economic impact; interfered

with their investment-backed expectations, and constituted a regulatory taking of the Plaintiff's [sic] property" under the *Penn Central* and *Sheffield* (Texas) cases for which the compensation owed the Braggs is \$597,575 (current market value of \$5,500 for 108.65 acre-feet of EAA permitted rights that were requested, but not granted).

The total amount of compensation due to the Bragg's was \$732,493.40.

The judge's findings of fact and conclusions of law found, among other things:

- that "the Authority acted solely as mandated by the Act and without discretion in denying the D'Hanis Application and in granting a permit on the Home Place Property for 120.2 acre-feet of annual Edwards Aquifer water withdrawals"; and
- the Authority's requested attorney's fees were reasonable.

Notably, the Bragg court considered whether the relevant parcel for a takings could be limited to the groundwater estate in the regulated Edwards Aquifer and accepted such an approach with respect to the Home Place Property, though it was rejected for the D'Hanis Property. Further, the court determined that the Braggs should be compensated for the Home Place Property not based on the value of groundwater rights under the common law Rule of Capture but based on the water rights the Braggs *did not obtain* from the EAA.

Both parties appealed the decision to the 4<sup>th</sup> Court of Appeals, which held both methodologies followed by the trial court were incorrect and that the value of the property as a whole must be the value considered under a takings analysis. The Court examined the three *Penn Central* factors and ruled that:

1) the economic impact on the Bragg's—the diminished value of their property as pecan orchards with unlimited access to groundwater—brought on by the EAA regulation weighed heavily in favor of a finding of a compensable taking of both orchards;

2) the Braggs' investment-backed expectations as to both orchards were reasonable, and weighed heavily in favor of a finding of a compensable taking of both orchards; and

3) the nature of the regulation and the importance of protecting terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state, weighed heavily against a finding of a compensable taking.

As a result, the Court concluded the permitting system imposed under the EAA Act resulted in a regulatory taking of both the Home Place Orchard and the D'Hanis Orchard. However, the court could not determine (from the record) the appropriate level of

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