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Texas Water Law Case Update

Trey Nesloney

Author Contact Information:
Trey Nesloney
Booth, Ahrens & Werkenthin, PC
Austin, TX

tnesloney@baw.com
512.472.3263

Texas Water Law Case Update

GROUNDWATER CASES

***Bragg v. Edwards Aquifer Auth.*, No. 06-11-18170-CV (38th Dist. Ct., Medina County, Feb. 22, 2016) ("*Bragg Remand*")**

This case is a continuation of the lengthy dispute between the Edwards Aquifer Authority ("EAA") and the Braggs that stems from the EAA's denial of groundwater production permits sought by the Braggs to supply water to their pecan orchards. The Braggs own two pecan orchards in Medina County, Texas, that are located over the Edwards Aquifer. *See Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 124 (Tex. App.—San Antonio 2013, pet. denied). In 1993, the Texas Legislature enacted the EAA Act to manage the Edwards Aquifer and to "sustain the diverse economic and social interests dependent on the aquifer." *Id*. The EAA Act established a new comprehensive regulatory scheme to control use of groundwater from the aquifer and created the EAA to implement this scheme. *Id*. at 124-25. The Texas Legislature also directed the EAA to manage groundwater withdrawals from the Edwards Aquifer through a permit system that gives preference to existing users that could demonstrate historic use (withdrawals from the aquifer) between June 1, 1972 and May 31, 1993. *Id*. at 125. The Braggs applied for two groundwater permits for their two orchards, but the EAA denied one application and only partially granted the other due the Braggs failure to state groundwater use during the historical period. *Id*. at 126.

In response to these denials, the Braggs first sued the EAA for failing to prepare and conduct Takings Impact Assessments under the Texas Private Real Property Rights Preservation Act, but lost at the Texas Supreme Court. *See Bragg v. Edwards Aquifer Auth.*, 71 S.W.3d 729 (Tex. 2002). Then the Braggs sued the EAA alleging a takings claim and federal civil rights violations, but the federal claims were eventually denied in federal court; however, the takings claim was remanded to state court. *See Bragg v. Edwards Aquifer Auth.*, 2007 WL 2491834 (W.D. Tex. Aug. 31, 2007), *aff'd*, 342 Fed. Appx. 43 (5th Cir. 2009).

On remand, the trial court granted the Braggs' motion for partial summary judgment, concluding that the EAA's actions resulted in a regulatory taking. *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 126 (Tex. App.—San Antonio 2013, pet. denied). A bench trial was held to determine compensation, which focused on the amount of water the Braggs were entitled to and the value of that water. *Id*. The trial court ruled that the Braggs were entitled to $732,493.40 ($134,918.40+$597,575.00) in compensation from the EAA for being granted an amount less than what was requested in their applications. *Id*.

On appeal, the Fourth Courts of Appeals analyzed the case using the *Penn Central* factors and held "the record supports the conclusion that the permitting system imposed under the [EAA] Act resulted in a regulatory taking of both" of the Braggs' orchards. *Id*. at 146. However, the court of appeals disagreed with the trial court as to the proper method by which compensation should be calculated, stating that "just compensation should be determined by reference to the highest and best use of the properties, which here are the pecan orchards." *Id*. at 151. "[W]e conclude the 'property' actually taken is

the unlimited use of water to irrigate a commercial-grade pecan orchard, and that 'property' should be valued with reference to the value of the commercial-grade pecan orchards immediately before and immediately after the provisions of the [EAA] Act were implemented or applied" to the orchards. *Id*. at 152. Concluding that the trial court erred in calculating the Braggs' compensation, the Court of Appeals remanded the case to allow the trial court to calculate the compensation owed on the orchards as the difference between the value of the land as commercial-grade orchards with unlimited access to Edwards Aquifer water immediately before implementation of the EAA Act compared to the value immediately after the EAA Act's implementation. *Id*. at 152-53.

Based on that directive, a jury awarded the Braggs $2,551,049.60 in compensation as a result of the regulatory taking on February 22, 2016. *See generally Bragg Remand*. When factoring in pre-judgment interest, the Braggs' recovery is estimated to be over $4 million.

***Coyote Lake Ranch, LLC v. City of Lubbock*, 14-0572, 2016 WL 3176683 (Tex. May 27, 2016) ("*Coyote Ranch*")**

In a landmark decision for Texas water law, the Texas Supreme Court extended the "accommodation doctrine" (a doctrine developed and historically applied in Texas oil and gas cases) to use of and access to groundwater rights, and also explicitly recognized the existence of a groundwater estate that is severable from and dominant over the surface estate. The accommodation doctrine, sometimes also referred to as the "alternative means" doctrine, was first stated in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), as a way of balancing the rights of the servient surface estate with the dominant mineral estate, as follows:

> [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.
> *Id.* at 622.

In *Coyote Ranch*, the City of Lubbock bought Coyote Lake Ranch, LLC's (the "Ranch") groundwater during a drought in 1953. *Coyote Ranch* at *1. As part of the deed granting the groundwater to the City of Lubbock, the Ranch reserved the right to access the groundwater associated with the land for domestic use, ranching operations, oil and gas production, and agricultural irrigation. *Id*. The deed also contained lengthy and detailed provisions controlling the City of Lubbock's right to use property in order to access, test, drill wells for, and produce the groundwater. *Id*. at *1-2. Specifically, the deed conveyed to the City of Lubbock "all of the percolating and underground water in, under, and that may be produced" from the ranch, "together with the 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." *Id*. at *2, fn. 6. The deed also gave the City of Lubbock the right to use the part of the land "necessary or incidental" to the taking, production, treating,

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