

LAWYERS, WATER AND MONEY:

Threats to
Regulation of
Groundwater
arising from
EAA v. Bragg

EDWARDS AQUIFER AUTHORITY V. DAY

- Texas Supreme Court, following legislation made clear that land ownership includes groundwater in place and that it cannot be taken for public use without compensation under Constitution.
 - Recognized the reasonable right to regulate.
 - “Unquestionably, the state is entitled to regulate GW production.”
- What is the public use for a permit denial or limit?
- Court dodged the question of whether state has ultimate liability or is immune.
 - How do you charge a District with liability for conserving what it has statutory duty to protect?
- SA COA lit the fuse on takings and TxSCT opened the door wide.

MORE QUESTIONS THAN ANSWERS

- Court in Day said:
 - While the expense of [takings] litigation cannot be denied, groundwater regulation need not result in takings liability. The Legislature's general approach to such regulation has been to require that all relevant factors be taken into account. The Legislature can discharge its responsibility under the Conservation Amendment without triggering the Takings Clause. But the Takings Clause ensures that the problems of a limited public resource-the water supply-are shared by the public, not foisted on a few.
 - Sounds good, but Bragg Court said EAA did exactly what Legislature required?



HOW DO YOU SAY NO?

- What is the function of government other than to say “no” for the benefit of the whole?
 - Court or Legislature needs to answer this.
- By analogy, Legislature sets requirements for permits. TCEQ then develops rules for the permitting process. TCEQ routinely denies permits on the basis that the conditions fail to meet what the legislature said.
 - No takings liability for that.
 - Subtle difference is that applicants cannot claim a vested Constitutional right to operate without a permit.
- But Districts are playing much the same role as TCEQ.



PENN CENTRAL “TEST”

- 1. Economic Impact
 - District will almost always lose this. What about economic impact of GW availability in the future?
- 2. Investment Backed Expectation
 - Districts will lose this factor also. Landowners always will have purchased expecting unlimited use.
- 3. Character of Governmental Action
 - This has to belong to the District, last best hope if demonstrated adequately.
- 4. Surrounding and Relevant Circumstances
 - Judges Choice?

DOES PENN CENTRAL TEST WORK?

- Court must consider all Penn Central factors together-
 - Ad hoc analysis of facts
 - Open invitation for inconsistent results
- Bigger question is does this test cover the key issues in GW regulation?
 - A fluid resource that can be replenished
 - Migrates over property boundaries
 - Drought
 - Free right of adjoining landowners to “Come and take it”
 - To preserve must limit and deny
- Far different than zoning or landmarks regulation commonly seen in takings cases



WHAT HAPPENED IN BRAGG?

- Landowners had two pecan orchards purchased at different times.
 - Home Place 60 acres (1979), well drilled in 1980
 - D'Hanis 42 acres (1983), well permitted by GCD completed in 1995
- Using figures outside the historical period, Braggs sought permits at Home Place (228af) & D'Hanis (193.12af)
- EAA granted Home Place permit (120.2af) and denied D'Hanis permit for no historical use
- Court awards Braggs \$597,575 on Home Place and \$134,918 on D'Hanis



WHAT DID THE BRAGG COURT SAY?

- Court says that EAA acted solely as mandated by the Act.
 - No dispute that EAA's actions dictated by the Act.
- Court looked at a series of questions regarding the taking claims.
 - Is the District really the proper party to the case or is it the State?
 - What is the statute of limitations and when does it begin?
 - Did the EAA's actions in limiting and denying the permits amount to a taking?
 - How should damages be measured for the takings?

WHO IS THE PROPER PARTY AND WHO PAYS?

- EAA argued that the State of Texas that passed the Act should be liable for any takings arising out of the Act.
- Recognizing that this was an issue of first impression, Court walked through pages of analysis on potential liability for takings and then in the end punted much like the Court in Day.
- It said that EAA had acted precisely as the Act required.
- The Court avoided whether the State should be a party and instead found that EAA was a proper party.

HOW LONG DO YOU HAVE TO SUE?

- Significant dispute over the statute of limitations for the Braggs.
 - EAA said that it was 10 years from '96 commencement of Act
 - Braggs said that it was 10 years from permits
 - Court said 10 years is the proper time period but it begins to run only when a permit is denied or limited.
- The Act references compensation upon implementation, which the Court determined to be the permits.
- Key question as to whether the Act was the taking or the permits

WERE THE EAA'S ACTIONS A TAKING OF PROPERTY?

- EAA granted a reduced permit(Home Place) and denied the second permit (D'Hanis)
- Law on takings is that if there is no physical taking (highway row) or absolute loss of economic use, Penn Central factors:
 - Economic Impact
 - Interference with Investment Backed Expectations
 - Character of Governmental Action
 - In all fairness and justice-any other relevant consideration
- Not a hard straight line test
- Taking is a Question of Law=Judge

ECONOMIC IMPACT/ PENN #1

- Must be a substantial impact. Even if regulation destroyed most profitable use does not equate to a taking.
 - Lost profits are a factor
 - Court analyzes all the needs and costs for the pecan orchards
 - Braggs contend that they would have to lease water or reduce orchards
- EAA argues that increased cost of irrigation is only 10% and court responds that no hard set of rules, look at other factors
- Despite what amounts to only a 10% increase, we do not consider this a merely incidental value.....
- Regulations forces Braggs to lease what they had before unrestricted use.

INVESTMENT BACKED EXPECTATIONS

PENN #2

- Court admits that this factor is difficult to apply to groundwater
- Did the owner undertake risks or make investments based on expectation
 - Historical use of property is a factor
 - Knowledge of regulations is also a factor
- Court says Braggs had expectation to use as much groundwater as they wanted and strangely says they were reasonable
- Court says although Braggs did not expect that there would never be regulations, the lack of regulations at the time shaped their expectations.

NATURE OF REGULATION/ PENN #3

- This should have been the big one for EAA to even the score
- Court says State is empowered to regulate GW
- After one page of generalities and quote from the Act, with no analysis, Court says this factor weighs against a taking
- Robust defense of the requirements, methods, science, data and purpose of the Act is missing

OTHER CONSIDERATIONS/ PENN #?

- No definition of what the factors can or should be
 - Just a wild card
- Court says that we believe that we can look at the nature of the Plaintiffs business beyond financial
- Business is Ag, Ag needs water, pecans need water, water is rain or GW, rain is inconsistent and unpredictable

Therefore, Braggs WIN!

Concludes that permitting system under Act was a taking



SO, HOW MUCH DO WE OWE?

- Question over when the value is determined, and Court determines that valuation is at time of permits
- Braggs wanted all denied water x Market Value/af
 - Cite to condemnation of GW in Property Code
- EAA wanted valuation on parcel as a whole
- Court says some strange and inconsistent things-rambling
- Property taken is unlimited water for pecans, so value is commercial grade pecan orchard immediately before and after permits
- Remand for valuation of each parcel as pecan orchard with unlimited GW vs as permitted value



PROBLEMS WITH BRAGG

- Many will read this as Chapter 2 of Day
 - Deny or limit a permit, you will pay
 - Everyone gets paid the difference between unlimited and what they get
- If this becomes the norm, Districts will pay again and again for the same water not used
 - Water will still be there in place, never “taken”
- District just set a rate of production for the health of the aquifer and common benefit
- What happens if Bragg neighbor received wide open permit for multiple wells-not a taking and water is gone.

STRATEGIC STEPS FROM HERE

- Identify cases highlighting key favorable issues to take up through other Texas Courts of Appeal;
- Don't let central Texas and EAA cases make all the law
- Develop Amicus partners and well reasoned briefs;
- Create packages of evidence for Districts to utilize in hearings and briefs;
 - Explanation of the process, including DFC
 - GW data
 - Threats of granting the permit and others on file
 - Economic value of long term conservation
 - If permit is not denied or limited, risks for future, neighbors harmed, and system Legislature designed fails

- Give the court a hundred reasons to rule for you

OTHER POLICY THOUGHTS

- Districts need a safe harbor, if you follow this process there is no liability
- Insurance from Legislature for takings liability
- Indemnity from Legislature
- Specific legislation on taking requirements for GW permits and method for damages
- Adaptive permits like TCEQ

THERE WILL BE MORE

- Forestar, a water developer sought a permit to pump 45,000af/yr from underneath Bastrop and Lee counties
 - Lost Pines GCD voted to issue a permit for 12,000af/yr
- Forestar upped the ante by contracting with Hays County for \$1 Million/yr to reserve water
- Lost Pines just denied a rehearing request
- “I can tell you that if they deny the request at the next hearing, Forestar has already gotten the lawsuit together and Lost Pines will lose.”

Hayes County Judge Bert Cobb, Austin Statesman
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RAIN





JAMES D. BRADBURY, PLLC

JIM@BRADBURYCOUNSEL.COM

FORT WORTH / AUSTIN

817.339.1105

512.343.3626