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Cover photo: An artesian well, belonging to catfish farmer Ronnie Pucek, in the Edwards Aquifer in 1993. © Peter Essick

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Commentary: A New Day? Two interpretations of the Texas Supreme Court's ruling in *Edwards Aquifer Authority v. Day and McDaniel*

Russell S. Johnson[1], Gregory M. Ellis[2]

Editors' Note: Many in Texas waited patiently for the Texas Supreme Court decision on *Edwards Aquifer Authority v. Day and McDaniel*, arguably the most important decision on Texas groundwater law in a generation. Regardless of which way the decision went, it undoubtedly would have a big impact on the management of groundwater resources in the state. We were not disappointed. The decision is complicated and, in places, seemingly contradictory. By opening groundwater management to regulatory takings, a door to another complicated area of law has been opened. Although the *Day* case answers some questions, others remain unanswered. And there are strong opinions on what *Day* means and doesn't mean.

While the Texas Supreme Court considered the *Day* case, Russ Johnson and Greg Ellis regaled audiences at multiple venues on their views on the case and what the court would or should do. Johnson's arguments leaned toward the landowner perspective while Ellis's arguments leaned toward the groundwater conservation district perspective. With the *Day* case decided, we thought it would be informative to ask Johnson and Ellis what they thought *Day* meant. Given the topic and nature of the contributions, only the editorial board reviewed the papers before accepting them for publication. As expected, the papers are interesting and informative—and help set the stage for the path forward.

Keywords: Texas water law, Texas groundwater law, Edwards Aquifer Authority, day case

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A New Day? Landowner perspective

By Russell S. Johnson

NATURE OF THE GROUNDWATER OWNERSHIP RIGHT

Although the rule of capture has been the law in Texas since 1904 and has been consistently described as a property right incident to ownership, the courts were never required to define the exact nature of the right until recently. Beginning with the *Houston & T.C. Ry. Co. v. East* case, the courts described the rule of capture as a real property right but never clearly defined when or if the right is vested. This is particularly important in the context of regulating the exercise of that right, as discussed later. In *East*, the Texas Supreme Court, citing New York law, said:

> An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.

Houston & T.C. Ry. Co. v. East, 81 S.W. 279, 281 (Tex. 1904) (quoting *Pixley v. Clark*, 35 N.Y. 520 (1866)). Similarly, in *Pecos County*, the El Paso Court of Appeals stated:

> It seems clear to us that percolating or diffused and percolating waters belong to the landowner, and may be used by him at his will...These cases seem to hold that the landowner owns the percolating water under his land and that he can make a non-wasteful use thereof, and such is based on a concept of property ownership.

Pecos County Water Control & Improvement District No. 1 v. Williams, 271 S.W.2d 503, 505 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

The Texas Supreme Court in *Friendswood Development Co. v. Smith-Southwest Industries, Inc.* refused to abandon the rule of capture, noting that it had become "an established rule of property law in this State, under which many citizens own land and water rights." 576 S.W.2d 21, 29 (Tex. 1978).

In spite of these statements, which imply that groundwater is owned by the landowner, the Texas Supreme Court had not, prior to its recent decision in *Edwards Aquifer Authority v. Day and McDaniel*, provided a description of the nature of the ownership right embraced by the absolute ownership rule. In *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999), the Supreme Court deftly avoided a discussion of the nature of the ownership right and instead held that it was inappropriate for the Court, given the Legislature's efforts to expand the powers of groundwater conservation districts, to insert itself into the regulatory mix by substituting the rule of reasonable use for the rule of capture. *Sipriano*, 1 S.W.3d at 80. The Court noted that any modification of the law would have to be guided by constitutional and statutory considerations, implying that ownership of groundwater is a property right and protected by the Constitution.

In the 1 case where the issue was argued to be directly relevant, *Barshop v. Medina County Underground Water Conservation District*, the Supreme Court avoided making a definitive decision on the issue. 925 S.W.2d 618 (Tex. 1996). In *Barshop*, landowner plaintiffs filed suit prior to the implementation of the Edwards Aquifer Authority Act (EAAA or Act), claiming that the Act violated the Texas Constitution by taking their rights to use Edwards Aquifer groundwater. The plaintiffs claimed that the Act deprived landowners within the jurisdiction of the Edwards Aquifer Authority (the Authority) jurisdiction of their vested property right in groundwater in violation of the Constitution. Plaintiffs conceded that the State has the right to regulate the use of groundwater but maintained that they had a vested property right in the water, which the Act took away. The State countered that groundwater under the rule of capture, while an ownership right in real property, was not vested until the water was actually reduced to possession and therefore the Act, which provided for regulation of use, could not result in a taking. *Id.* Without resolving these conflicting arguments or deciding the nature of the ownership right, the Supreme Court held that the Act was not unconstitutional on its face, ruling that the plaintiffs had failed to establish that, under all circumstances, the Act would deprive landowners of their property rights. Therefore, the Supreme Court did not have to resolve definitively the clash between property rights in water and regulation of water—that is whether the Act, as it might be applied, could result in an unconstitutional taking.

> While our prior decisions recognize both the property ownership rights of landowners in underground water and the need for legislative regulation of water, we have not previously considered this point at which water regulation unconstitutionally invades the property rights of landowners. The issue of when a particular regulation becomes an invasion of property rights in underground water is complex and multi-faceted. The problem is further complicated in this case because Plaintiffs have brought this challenge to the Act before the Authority has even had an opportunity to begin regulating the [Edwards] Aquifer.

> Despite these problems and competing interests, this case involves only a facial challenge to the Act. Because Plaintiffs have not established that the Act is unconstitutional on its face, it is not necessary to the disposition of this case to definitively resolve the clash between property rights in water and regulation of water.

Id. at 626.

Recently, the issue of the nature of the groundwater right was squarely before the Fourth Court of Appeals of Texas in 2 cases. In both cases, the Court was confronted with questions of law requiring analysis of the ownership interest in groundwater. In both decisions, the Court concluded that groundwater was owned as real property.

In *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, the issue was whether a seller's reservation in the conveyance of "all water rights associated with said tract" prevented the buyer from drilling a well and producing groundwater on the tract conveyed. 269 S.W.3d 613, 614 (Tex. App.—San Antonio 2008, pet. denied). Litigation was initiated after the buyer, the City of Del Rio, drilled a water well on the purchased tract. The city argued that the Trust's reservation of water rights could not be effective and that under the rule of capture, the corpus of groundwater cannot be owned until it is reduced to possession. *Id*. at 616. The Court reviewed the Supreme Court's authority holding that percolating water is part of and not different from the soil, that the landowner is the absolute owner of it, and that it is subject to barter and sale like any other species of property. *Id*. at 617 (*et. al*). The Court distinguished the absolute ownership rule from the rule of capture, holding that the rule of capture is a tort rule denying a landowner any judicial remedy and was developed as a doctrine of nonliability for damage, not a rule of property. *Id*. at 617-18. The Court concluded that "under the absolute ownership theory, the Trust was entitled to sever the groundwater from the surface estate by reservation when it conveyed the surface estate to the City of Del Rio." *Id*. at 617. The city's petition to the Texas Supreme Court was denied.

Shortly thereafter, in *Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex. App.—San Antonio 2008), the Fourth Court of Appeals reviewed a summary judgment in favor of the Authority on Day's and McDaniel's claim that the operation of the EAAA and the Authority's decision to deny Day and McDaniel a permit to produce groundwater constituted a taking under the Texas Constitution. The Authority petitioned the Texas Supreme Court to review this decision, and Day and McDaniel sought review of the decision denying them a permit. The Supreme Court granted the petitions for review.

FACTS OF THE *DAY* CASE

Under the EAAA, landowners who had historically used Edwards Aquifer groundwater for irrigation purposes were assured by the legislation of a minimum permit amount of 2 acre-feet of production per year per acre irrigated. Mr. Day and Mr. McDaniel (Day) jointly owned a tract of land located within the Authority's jurisdiction that had a well that flowed under artesian pressure. Day's predecessor in title irrigated a portion of the property directly from the well and a much larger portion of the property from an impoundment on a creek to which the artesian flow had been directed by a ditch constructed by the landowners. The Authority granted Day a permit for 14 acre-feet of groundwater based upon irrigation of land directly from the well but denied the request for a permit for land irrigated from the impoundment. The Authority determined that the water pumped from the impoundment on the property was surface water and therefore owned by the State and did not constitute historical use of groundwater from the Edwards Aquifer.

PROCEDURAL HISTORY

Day appealed the decision to state District Court, claiming error by the Authority. In the alternative, they argued that the actions of the Authority constituted a constitutional taking and an inverse condemnation of their groundwater rights and sought damages. The Authority then sued the State in the same proceeding, alleging that the State should be liable in the event the Court found there was a taking.

The trial court granted the Authority's and the State's motions for summary judgment on the constitutional takings claims, finding that the plaintiffs had no vested right to groundwater under their property and granted a take-nothing summary judgment on all of Day's constitutional claims. The trial court disagreed with the Authority's decision to deny Day a permit.

The parties appealed to the Fourth Court of Appeals. The Court agreed with the Authority's conclusion that the water used from the lake was state water and not groundwater and reversed the trial court's judgment granting a permit for acres irrigated with water from the impoundment. The Court reversed the take-nothing judgment granted on summary pleadings on the takings claim and remanded to the trial court for further proceedings on the constitutional claims. The Court of Appeals concluded that landowners have ownership rights in groundwater, that those rights are vested and are therefore constitutionally protected, and reversed the trial court's grant of summary judgment on these issues. The Court held that the landowners' "vested right in the groundwater beneath their property is entitled to constitutional protection." *Id*. at 756.

Both the State and the Authority filed petitions for review of the Court of Appeal's decision that plaintiffs have a vested and constitutionally protected interest in groundwater beneath their property. Day filed a petition for review, claiming error by the Court of Appeals in denying a permit for acres irrigated with water from the impoundment. The Texas Supreme Court granted all petitions for review.

While the case was still awaiting a decision, the 82nd Texas Legislature passed legislation addressing the ownership issue. Senate Bill 332 amended section 36.002 of the Texas Water Code to clarify the Legislature's view of the nature of the ownership interest and rights of landowners while recognizing that regulation and management of groundwater resources under the Conservation Amendment is a matter of public interest. Section 36.002 now provides that landowners own the groundwater below the surface as real property, which entitles the landowner to drill for and produce the groundwater below the surface, subject to the common law limitations against waste, malice, or negligent subsidence and the regulatory authority outlined by the Legislature in chapter 36.

Specifically, within amended section 36.002, subsection (c) provides that nothing in chapter 36 should be construed as granting authority to deprive or divest a landowner of the ownership and rights described by section 36.002. Subsection (d) states that the section does not prohibit a district from limiting or prohibiting the drilling of a well not in compliance with district rules for spacing or tract size or affect the ability of a district to regulate groundwater production authorized by chapter 36. Subsection (d)(3) clarifies that districts are not required to allocate to a landowner a proportionate share of available groundwater based on acreage owned, in effect stating that the ownership right does not require the application of a correlative rights rule to groundwater. Subsection (e) exempts certain water management entities from the section. Specifically, it provides that the section does not affect the ability to regulate groundwater as authorized by the laws creating and governing the Edwards Aquifer Authority, the Harris-Galveston Subsidence District, or the Fort Bend Subsidence District.

THE ARGUMENT AT THE SUPREME COURT

At the Supreme Court, Day and numerous Amici argued that the ownership right of landowners in groundwater beneath their land is a vested real property right protected by the U.S. and Texas Constitutions from taking without compensation. Several Amici argued that the absolute ownership rule as applied to minerals had created a vested property right protected from uncompensated taking, finding that the minerals were owned in place.

The Authority argued that the rule lacked attributes essential to the ownership of property: the right to exclude others and enforce those rights. The Authority also argued that groundwater should be treated differently because the law recognizes correlative rights in oil and gas but not in groundwater. Finally, it argued that groundwater is so fundamentally different from oil and gas that ownership rights in oil and gas should not bind the Court to apply those rights to groundwater. The State argued that while landowners do have some ownership rights in groundwater, they were not, in this case, sufficient to support a takings claim.

THE SUPREME COURT ANSWERS THE QUESTION OF THE NATURE OF LANDOWNER GROUNDWATER RIGHTS

On February 24, 2012, the Texas Supreme Court issued a 50-page, unanimous opinion in *Edwards Aquifer Authority v. Day* affirming the Fourth Court of Appeals and confronting and answering for the first time the question of whether a landowner's groundwater rights are a vested real property right protected by the Texas and U.S. Constitutions' prohibitions against uncompensated taking. 369 S.W.3d 814 (Tex. 2012). The opinion, written by Justice Hecht, begins with a succinct summary of the issue presented in the decision:

> We decide in this case whether land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation guaranteed by Article 1, § 17(a) of the Texas Constitution. We hold that it does.

Id. at 817. The opinion reviews the history of the EAAA and its key provisions and summarizes the facts leading up to the Authority's decision to deny Day a permit for groundwater use from an impoundment on a water course. The Authority found that the water used from the impoundment had become surface waters of the State and that Day were therefore not entitled to a groundwater production permit for water withdrawn from the impoundment and used for irrigation.

The Supreme Court affirmed the Authority's decision, finding that Day had failed to prove that their use of water was groundwater and not state water. This statement of the law has profound implications for any landowner using groundwater to supplement water in an impoundment on a water course. As stated by the Court:

> We do not suggest that a lake can never be used to store or transport groundwater for use by its owner. We conclude only that the Authority could find from the evidence before it that that was not what had occurred on Day's property.

Id. at 823. The Supreme Court then provided a detailed summary of the history of the rule of capture from its adoption in

East to the decision in *Sipriano*, finally concluding that ownership of groundwater in place had never been decided by the Court. The Court noted that while it had never addressed the issue with regard to groundwater, it had done so long ago with respect to oil and gas, to which the rule of capture also applies. The Court noted that while ownership of gas in place did not entitle the owner to specific molecules of gas, which could be diminished through drainage, with proper diligence they could be replenished or obtained. The Court stated that while the molecules are in the ground, they constitute a property interest. The Court, quoting its previous decisions, noted that the right to the oil and gas beneath a landowner's property is an exclusive and private property right inherent in land ownership, which may not be deprived without a taking of private property.

The Supreme Court found that there was no basis in the differences cited between groundwater and oil and gas to conclude that the common law allows ownership of oil and gas in place but not groundwater. Specifically, the Court quoted itself regarding the ownership of oil and gas in place, before affirming this was its holding:

> In our state the landowner is regarded as having absolute title and severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value.
>
> We now hold that this correctly states the common law regarding the ownership of groundwater in place.

Id. at 831-32. The Court cited the legislative revisions to section 36.002 described above as demonstrating the Legislature's understanding of the interplay between groundwater ownership and groundwater regulation.

The Supreme Court then analyzed whether Day had stated a viable takings claim. In so doing, the Court rejected the argument that the Authority's regulatory action could be considered a *per se* taking for Fifth Amendment purposes and instead applied the regulatory takings analysis originally adopted by the U.S. Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In *Penn Central*, the Court identified several factors that have particular significance in determining whether the regulation rises to the level of a taking under the Constitution. Primary among those factors are the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action—in essence an analysis of the reasonableness of the regulation in light of the goals to be achieved and the impacts reasonably expected—must be considered.

Because this factual inquiry was not developed in the summary judgment proceeding, the Texas Supreme Court agreed with the Fourth Court of Appeals of Texas that summary judgment against Day's taking claim should be reversed and the issue remanded to the trial court.

As a side note, the Supreme Court rejected Day's complaint that section 36.066(g) of the Texas Water Code, which authorizes an award of attorneys' fees and expenses to a groundwater conservation district that prevails in a suit like the underlying action, violated equal protection. The Court found the State has a legitimate interest in discouraging suits against groundwater districts to protect them from costs and burdens associated with such suits and that a cost-shifting statute is rationally related to advancing that interest. Landowners who file takings claims should be aware of this provision.

IMPACTS ON SURFACE AND GROUNDWATER MANAGEMENT AND REGULATION

The opinion in *Edwards Aquifer Authority vs. Day* resolved decades of conflict concerning the nature of the ownership right held by landowners in groundwater in Texas. By applying the case law applicable to oil and gas, the Texas Supreme Court has determined that groundwater is "owned in place" by the landowner and that this ownership right can support a claim for uncompensated taking under the state and federal constitutions. The Court's decision profoundly affects the interface between groundwater and surface water law on the landowner's property and outlines the current Court's view on the law that should be applied when a takings claim is brought by a landowner against a groundwater conservation district.

First, the Supreme Court concluded that the groundwater produced by Day from the well lost its character as groundwater and became surface water of the State of Texas when the water from the well reached and entered the intermittent creek on the Day and McDaniel property. Day had constructed a conveyance mechanism to move the groundwater from the well to the creek and assumed that they could withdraw their "groundwater" from an impoundment on their property without obtaining a permit from the State. The Supreme Court found that the Authority correctly determined that the groundwater became surface water when it entered the creek, therefore losing its character as groundwater and extinguishing the ownership interest of Day in the groundwater.

By so finding, the Supreme Court has likely inadvertently converted what many landowners assumed was their lawful

use of groundwater into unlawful diversions of state water without a permit. Many rural properties have groundwater wells and facilities constructed so that the groundwater can be used from an impoundment on the landowners' property. If the impoundment is on a watercourse, or the groundwater is withdrawn and used by the landowner after entering a watercourse, the Supreme Court's opinion implies that this will be viewed as an unlawful diversion of state water, even though the water diverted would not have been there but for the actions of the landowner. The Court made mention of the fact that Day had not measured the amount of water flowing from the well to the lake or the amount pumped from the lake into the irrigation system, that there was no direct transportation from source to use, and that the withdrawal was only periodic, as needed, to irrigate the adjacent acreage. The Court made much of the fact that the lake was apparently not used to store water for irrigation but was primarily used for recreation. However, landowners should be aware of this decision and the potential impact it may have on their ongoing water use on their property.

THE TAKINGS ANALYSIS

After determining that landowners do have a constitutionally compensable interest in groundwater, the Texas Supreme Court could, and probably should, have simply reversed and remanded to the trial court for consideration of Day's taking claim. Instead, the Court wrote on whether the Authority's regulatory scheme had resulted in a taking of that ownership interest. Given the procedural history of the case (a takings claims denied on Motion for Summary Judgment by the Authority), the Court was not obligated to address this issue; the issue was not directly before it.

Despite this, the Court engaged in an extensive analysis of regulatory takings claims. As described by the Court, 3 analytical categories of takings have been developed under Texas and federal law. Two categories of regulatory action generally deemed to be *per se* takings are (1) situations where the government requires owners to suffer a permanent physical invasion of their property and (2) regulations that completely deprive owners of all economically beneficial use of their property. The Court noted that outside of these 2 relatively narrow categories, regulatory takings challenges are governed by the standards set forth by the U.S. Supreme Court in *Penn Central*. *Penn Central* holds that there is not a set formula for evaluating regulatory takings claims but identified several factors that had particular significance. Primary among those factors are the economic impact of the regulation on the claimant and the extent to which the regulation interferes with distinct investment-backed expectations. In addition, the Supreme Court indicated that the character of the government action may be relevant in discerning whether a taking has occurred. Quoting its own decision in *Sheffield Development Co. vs. City of Glenn Heights*, the Court noted that all the surrounding circumstances must be considered in applying a reasonableness test so that, in the end, whether the facts are sufficient to constitute a taking is a question of law. *Day* at 839 (quoting *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 600 (Tex. 2004)).

Noting that the case was before it on summary judgment, the Supreme Court examined the evidence and concluded that the 3 *Penn Central* factors did not support summary judgment for the Authority and the State and that a full development of the record may demonstrate that the Authority's actions were too restrictive of Day's groundwater rights and without justification in the overall regulatory scheme. *Id*. at 838-43. The Court rejected the Authority's argument that if groundwater regulation can result in compensable takings, the consequences will be disastrous. *Id*. at 843-44.

WHAT CONSTITUTES A TAKING?

The *Day* Court did not answer the question of what actions will or will not be considered a taking under the *Penn Central* analysis. In fact, the Court could hardly pronounce such an absolute rule given that all takings analyses are fact dependent. So, what is a groundwater conservation district to do?

The short answer is that groundwater conservation districts must consider the goals they seek to accomplish by regulation in comparison to the economic impact on landowners within their jurisdiction. Specifically, groundwater districts should consider the impact on investment-backed expectations of subsequent regulation and the economic impact to landowners of the application of these regulations. This analysis has particular application to groundwater users who have made investments based upon their ability to produce groundwater, which are interfered with by the regulations. Interference alone, or negative economic consequences alone, are not sufficient, by themselves, to support a takings claim. A deciding court must measure the regulatory goals against the economic impacts.

Despite claims to the contrary, the *Day* decision does not mandate a correlative rights approach to be used by groundwater conservation districts to avoid takings claims. A strict correlative rights system would inevitably have negative economic consequences for those already using groundwater inconsistent with whatever correlative rules are developed by the district. This is particularly true if the district assumes that all correlative rights will be exercised since these situations do not and have not occurred historically.

Groundwater conservation districts should be particularly concerned about the basis for their decision establish-

ing a desired future condition. Specifically, absent findings of adverse consequences associated with less restrictive desired conditions, districts will be challenged if the restrictions levied cause severe economic dislocation and are designed to meet a laudable goal—one that, if not met, would not result in catastrophic consequences.

CONCLUSION

Prior to the decision in *Edwards Aquifer Authority v. Day and McDaniel*, many groundwater conservation districts in Texas were advised that regulations restricting access to groundwater could not support a takings claim. After the decision, these groundwater districts will need to reconsider their approach to establishing limits and, in particular, examine and justify the reasons for those limits. Absent such justification, proof of economic dislocation or loss of investment-backed expectations will undoubtedly result in takings claims that could be successfully pursued.

A New Day? District perspective

By Gregory M. Ellis

THE DAY CASE

The Texas Supreme Court issued its opinion in *Edwards Aquifer Authority v. Day and McDaniel*, 55 Tex. Sup. Ct. J. 343, 369 S.W.3d 814 (Tex. 2012) holding that there is a vested property right in groundwater prior to capture, and the Courts must now consider whether a particular government action rises to the level of a regulatory taking. This paper discusses the background of the *Day* case, the Court's opinion, and the impact the opinion will have on future litigation and groundwater regulation generally.

Synopsis[1]

Farmers Day and McDaniel applied for an Initial Regular Permit (IRP) from the Edwards Aquifer Authority (the Authority) claiming 700 acre-feet of water rights. They presented evidence of having an Edwards Aquifer well and that they irrigated 150 acres of pasture from a lake on the property and an additional 7 acres directly from the well. The lake was filled by artesian flow from the well that discharged to a ditch and included intermittent surface water flows. The Authority issued a permit for 14 acre-feet based on the 7 acres irrigated directly from the well; Day and McDaniel appealed the permit decision and filed multiple constitutional claims, including a takings claim for the groundwater lost. The Texas Supreme Court upheld all the permitting decisions made by the Authority, including limiting the permit to 14 acre-feet for the land irrigated directly from the well, but also held that landowners have a vested property right in groundwater prior to capture and Day and McDaniel were therefore entitled to have the Court consider whether any of their property was taken through this permitting action.

Facts

The Authority conducted a contested case hearing on the application by Day and McDaniel. During the contested case hearing, the evidence concerning when and how many acres were irrigated was disputed. Testimony ranged from a low of 150 acres to a high of 300 acres irrigated plus recreational use of 50 acre-feet in a lake on the property that was an impoundment on the creek. In addition, the evidence demonstrated that Day and McDaniel had diverted water directly from the well to irrigate 7 acres of property adjacent to the well site.

The Authority does not regulate any formation other than the Edwards Aquifer, and the record does not indicate if Day and McDaniel attempted to access any formations other than the Edwards Aquifer. Day and McDaniel have not applied for a Term Permit as provided by Section 1.19 of the Authority's enabling Act[2].

Procedural History and Claims

At the conclusion of the contested case hearing, the Authority determined that the water pumped from the impoundment on the property was surface water and therefore owned by the State and did not constitute historical use of groundwater from the Edwards Aquifer. Thus, the Authority denied the permit application for the acres of property irrigated from the impoundment of the property. The Authority found that Day and McDaniel had shown historical use of groundwater on the 7 acres adjacent to the well and issued a permit to withdraw 14 acre-feet of water per year from the aquifer.

Day and McDaniel appealed to state District Court claiming error by the Authority. In addition and in the alternative, they argued that the actions of the Authority constituted a constitutional taking and an inverse condemnation of their groundwater rights and sought damages. The Authority interplead the State as a third-party defendant seeking contribution and indemnity from the State on the takings claims made by Day and McDaniel.

[1] Parts of this paper were taken from a December 2010 paper co-authored by Gregory M. Ellis and Russell S. Johnson presented at the University of Texas School of Law 2010 Texas Water Law Institute (December 2–3, 2010, Austin, Texas).

[2] Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, amended by Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of May 28, 2001, 77th Leg., R.S., ch. 966, §§ 2.60-.62 and 6.01-.05, 2001 Tex. Gen. Laws 1991, 2021-2022, 2075-2076; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of June 1, 2003, 78th Leg., R.S., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193; Act of May 23, 2007, 80th Leg., R.S., ch. 510, 2007 Tex. Gen. Laws 900; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01-2.12, 2007 Tex. Gen Laws 4612, 4627-4634; Act of May 28, 2007, 80th Leg. R.S., ch. 1430, §§ 12.01-12.12, 2007 Tex. Gen. Laws 5848, 5901-5909; Act of May 21, 2009, 81st Leg., R.S., ch. 1080, 2009 Tex. Gen. Laws 2818 [hereinafter "EAA Act"]. Citations are to the EAA Act's current sections, without separate references to amending enactments. A compilation of the EAA Act including all amendments can be found on the Authority's website, at http://www.edwardsaquifer.org/files/EAAact.pdf.

The District Court held that the water pumped from the impoundment on the Day and McDaniel property was not state surface water. The Court found that the water used was groundwater from the aquifer and found, based on the record, that this water had been used to irrigate a 150 acres of the Day and McDaniel property, and that Day and McDaniel were entitled to a permit to withdraw 300 acre-feet of aquifer groundwater per year in addition to the 14 acre-feet authorized by the Authority. The Court granted the Authority's and State's motions for summary judgment on the constitutional takings claims finding that the plaintiffs had no vested right to groundwater under their property, and granted a take nothing summary judgment on all of Day's and McDaniel's constitutional claims.

Both parties appealed to the Fourth Court of Appeals in San Antonio. The Court of Appeals agreed with the Authority's conclusion that the water used from lake was state water and not groundwater and reversed the District Court's judgment granting a permit for acres irrigated with water from the impoundment. The Court of Appeals affirmed the Authority's decision granting plaintiffs' permit only for the 7-acre tract that was irrigated with groundwater directly from the well. The Court of Appeals reversed the take nothing judgment granted on summary pleadings on the takings claim and remanded to the District Court for further proceedings on the constitutional claims. The Court of Appeals concluded that landowners have some ownership rights in groundwater, that those rights are vested and are therefore constitutionally protected, and reversed the District Court's grant of summary judgment on these issues.

Both the State and the Authority filed petitions for review of the Court of Appeal's finding that plaintiffs have a vested and constitutionally protected interest in groundwater beneath their property. Day and McDaniel filed a petition for review claiming error by the Court of Appeals to deny a permit for acres irrigated with water from the impoundment and making several constitutional claims. Eventually all 3 petitions were granted and answered by the Texas Supreme Court.

The Texas Supreme Court's opinion, issued February 24, 2012, affirmed the opinion of the Fourth Court of Appeals on the primary issues and remanded the case back to the District Court for a full hearing on the takings issues raised by the plaintiffs. The opinion covers a number of issues and includes a comprehensive discussion of Texas groundwater and property law. Both sides filed motions for rehearing that were denied on June 8, 2012.

The first 8 pages of the opinion provide a recitation of the facts and procedural history of the case, including the findings of the administrative law judge during the original permit hearings, the decision of the Authority's Board of Directors, the holdings of the District Court judge on appeal from the Board decision, and finally the opinion of the Court of Appeals. Of course, the biggest question was the nature of the property right in groundwater prior to capture, to which the Supreme Court devotes most of its discussion.

Before reaching the discussion of the property right, however, the Supreme Court reviewed the Authority's permit decision. Because the Authority held that the water allowed to flow into the creek bed became state water, the Board denied that portion of the application based on acres irrigated out of the creek-fed lake. First the Supreme Court determined that groundwater flowing into a surface-water course loses its nature as groundwater and becomes surface water owned by the State, citing the definition of state water as any "water of ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state" (citing § 11.021(a), Water Code). The Supreme Court also noted that the Legislature specifically declared surface water "when put or allowed to sink into the ground, . . . loses its character and classification . . . and is considered percolating groundwater.'" (citing § 35.002(5), Water Code). The lone exception it cited is a situation where the owner of the groundwater obtains a "bed and banks" permit to use the water course as a conduit for privately owned water (citing § 11.042(b), Water Code). However, there is no mention of the Chapter 36 definition of "waste," which includes "willfully or negligently causing, suffering, or allowing groundwater to escape into any river, creek, natural watercourse, depression, lake, reservoir, drain, sewer, street, highway, road, or road ditch, or onto any land other than that of the owner of the well unless such discharge is authorized by [a wastewater discharge] permit . . .". § 36.001(8)(E), Water Code. That definition should require the Supreme Court to find that the groundwater discharge to the creek was wasteful, and therefore could not form the basis of a permit.[3] Either way, the Supreme Court held the Board reached the correct decision on the permit.

Having determined the permit decision was correct, the Supreme Court turned its attention to the takings issue. The District Court decided that Day and McDaniel failed to meet the threshold issue of having a vested property right that could be taken. The Supreme Court held that groundwater should be "owned in place" the same as oil and gas property. The Supreme Court then inexplicably spends 10 pages of the opinion discussing prior groundwater cases and how the Supreme Court

[3] "To the extent water is available for permitting, the board shall issue the existing user a permit for withdrawal of an amount of water equal to the user's maximum beneficial use of water **without waste** during any 1 calendar year of the historical period." § 1.16(e), Edwards Aquifer Authority Act (emphasis added).

had never before held that groundwater was owned in place. It cited the original groundwater case, *Houston & T.C. Railway v. East*, saying, "No issue of ownership of groundwater *in place* was presented in *East*, and our decision implies no view of that issue." (emphasis in original). The opinion then discusses 4 cases decided since *East* (*City of Corpus Christi v. City of Pleasanton*, Friendswood *Development Co. v. Smith-Southwest Industries, Inc.*, *City of Sherman v. Public Utility Commission*, and *Sipriano v. Great Spring Waters of America, Inc.*), finding that "[i]n none of them did we determine whether the water was owned in place."

The discussion on ownership ends with comparisons to oil and gas cases and early holdings that oil and gas is owned in place. An important statement that appears to be dicta is that the ownership interest is based on "volumes that, while they could be diminished through drainage, with 'proper diligence', could also be replenished through drainage." This statement ignores one of the major differences between oil and gas formations and aquifers; almost all the aquifers in the state are replenished through recharge from the surface. Any drainage that occurs may be fully replaced during the next rain event (especially true for the Edwards Aquifer, which measures well levels on a daily basis[4]). The "volumes" of oil and gas formations may be determined by measuring the formation; the same cannot be said for rechargeable groundwater formations. (*See* discussion of these differences on page 24 of the *Day* opinion.)

The opinion also addresses a recent Supreme Court decision in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, where the Court denied an action for trespass liability based on "fracing" operations that may have extended onto the plaintiff's land. The majority opinion in that case was that the plaintiff failed to state a claim for damages:

> In this case, actionable trespass requires injury, and Salinas's only claim of injury—that Coastal's fracing operation made it possible for gas to flow from beneath Share 13 to the Share 12 wells—**is precluded by the rule of capture**. That rule gives a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner's tract. The rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation. Salinas does not claim that the Coastal Fee No. 1 violates any statute or regulation. Thus, **the gas he claims to have lost simply does not belong to him.**

Coastal Oil 268 S.W.3d 1, 9 (Tex. 2008) (citations omitted; emphasis added).

The majority re-iterates this reasoning a few pages later in the same opinion:

> [A]llowing recovery for the value of gas drained by hydraulic fracturing usurps to courts and juries the lawful and preferable authority of the Railroad Commission to regulate oil and gas production. Such recovery assumes that the gas belongs to the owner of the minerals in the drained property, contrary to the rule of capture. While a mineral rights owner has a real interest in oil and gas in place, "this right does not extend to *specific* oil and gas beneath the property"; ownership must be "considered in connection with the law of capture, which is recognized as a property right" as well. The minerals owner is entitled, not to the molecules actually residing below the surface, but to "a fair chance to recover the oil and gas in or under his land, *or* their equivalents in kind."

Coastal Oil 268 S.W.3d 1, 9 (Tex. 2008) (citations omitted; emphasis in original).

The Day opinion makes all of this applicable to groundwater.

Finally, the comparison to oil and gas is concluded with a reference to *Elliff v. Texon Drilling Co.* and the following quote, in which the phrase "oil and gas" has been replaced with "groundwater":

> In our state the landowner is regarded as having absolute title in severalty to the [groundwater] in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The [groundwater] beneath the soil [is] considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the [groundwater] under his land and is accorded the usual remedies against trespassers who appropriate the [groundwater] or destroy [its] market value.

210 S.W.2d 558, 561 (internal citations omitted in original).

Section IV of Justice Hecht's opinion discusses whether Day and McDaniel had properly stated a takings claim, in light of the Court's decision that groundwater represents a constitutionally protected, vested property right. That discussion begins with a lengthy recitation of the history of groundwater regulation and the powers and duties of groundwater conservation districts. Then the Supreme Court held that facts in the record could not support a "physical invasion" taking; specifically, having been granted a permit for 14 acre-feet and could potentially drill a well for exempt uses up to 25,000 gallons per day[5], Day and McDaniel could not claim a permanent physical invasion of their property. Justice Hecht added some interesting dicta by stating, "It is an interesting question, and one we need not decide here, whether regulations depriving

[4] See http://data.edwardsaquifer.org/display_technical_m.php?pg=j17_live

[5] The opinion assumes each landowner may only drill 1 well for exempt uses, but there is no such limitation in either the Edwards Aquifer Authority Act, the Authority's Rules, or Chapter 36 of the Water Code.

a landowner of all access to groundwater—confiscating it, in effect—would fall into the category." Presumably that would require district rules (or perhaps permit decisions) deny any possible permit for any amount of groundwater, along with a prohibition on wells even for exempt use. Until an actual case arises, however, this issue remains just "an interesting question."

The Supreme Court then held that the "summary judgment record" was inconclusive on the issue of whether the permit decision denied Day and McDaniel "of all economically beneficial use" of their property. In reviewing the 3 *Penn Central* factors (see discussion *infra*), the Supreme Court held the record was incomplete on the first factor (the regulation's economic impact on the property) and the second factor (the owner's investment-backed expectations) but concentrated most of its effort on the third factor: the character of the governmental action.

The discussion of groundwater regulation in terms of takings analysis began with a strong endorsement of the need for regulation. Citing both *East* and the "Conservation Amendment[6]" the court said, "Groundwater provides 60% of the 16.1 million acre-feet of water used in Texas each year. In many areas of the state, and certainly in the Edwards Aquifer, demand exceeds supply. **Regulation is essential to its conservation and use**" (emphasis added).

The opinion then differentiates between the goals and methods of regulating groundwater and regulating oil and gas, concluding that while oil and gas regulation may generally be based on surface acreage, groundwater regulation "that affords an owner a fair share of subsurface water must take into account factors other than surface area." Reviewing the Authority's statutory regulatory scheme and its emphasis on historic use, Justice Hecht made a comparison to surface-water statutes that also awarded permits based on historical use and found that there are fundamental differences. Specifically he said that riparian surface water rights are usufructuary and did not represent an ownership interest. "Furthermore, non-use of groundwater conserves the resource, 'whereas[] the non-use of appropriated waters is equivalent to waste.' To forfeit a landowner's right to groundwater for non-use would encourage waste." (citing *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*). This argument ignores the fact that groundwater in the Edwards Aquifer flows from property to property and eventually out 1 of many springs[7]. Just as water flowing down a river is lost either to the next landowner or to the sea, groundwater in the Edwards Aquifer cannot be "conserved" through non-use. If landowners could conserve all their groundwater by not producing it, no regulation would be necessary. The Justice also argues that historical use regulations "would have been perversely incentivized to pump as much water as possible" had they known the historic use regulations were imminent. Of course that is exactly why the Legislature set the historic period from June 1, 1972, to May 31, 1993—to prevent people from "gaming the system" by pumping groundwater to inflate their historical claims. Sec. 1.16(a), EAA Act. It is also why the Legislature required the permits be based on "user's maximum beneficial use of water **without waste**." Sec. 1.16(e), EAA Act, emphasis added. Pumping groundwater without putting it to a beneficial use would accomplish nothing. Although there may be incentives to overproduce, there are adequate safeguards to prevent it.

It is at this point in the opinion the Supreme Court attempts to interpret the meaning and intent of the recent amendments to Section 36.002 (S.B. No. 332 from the 82nd Legislature), a task made difficult by the compromises afforded to pass the legislation. The Supreme Court concluded that "deprive" and "divest" as used in subsection (c) of Section 36.002 "does not include a taking of property rights for which adequate compensation is constitutionally guaranteed." The constitutional protection for taking private property is adequate compensation; there is no prohibition against the government taking property for public uses. Therefore, the prohibition in Sec. 36.002 (c) against depriving or divesting someone of their property goes beyond the constitutional protection. One could easily argue that a groundwater conservation district (other than the Authority, the Harris-Galveston Subsidence District, or the Fort Bend Subsidence District) is prohibited from denying a landowner permission to drill at least 1 well for some beneficial purpose. The Supreme Court's interpretation seems to be that even if that 1 well is allowed, there must still be a complete takings analysis to see if that regulation goes too far. Indeed the Court goes on to say, "a landowner cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during an historical period and supply is limited."[8] The Supreme Court affirmed the opinion of the Fourth Court of Appeals that the case must be remanded to fully explore the takings claims.

The Supreme Court then addressed various other constitutional issues raised by the plaintiffs. First, an administrative body has no authority to decide constitutional issues, so it is improper to raise them as part of an administrative hearing process. Second, there is no constitutional requirement that the Board of Directors personally conduct hearings as opposed to referring them to a hearings examiner. Third, the Court

[6] Art. XVI, Section 59, Texas Constitution.

[7] The opinion cites the Amicus brief filed by the Canadian River Municipal Water Authority, which is located in the Texas Panhandle over the Ogallala Aquifer, a very different aquifer.

[8] It is interesting to note that the Court did not address Term Permits as authorized by Sec.1.19, EAA Act, as a means of allowing some beneficial use of the groundwater.

did not need to address the "open courts" and "due process" arguments against the provision in the Administrative Procedures Act that allows ex parte communications between the administrative law judge and agency staff not involved in the contested case because Day and McDaniel did not claim any such contact occurred. Fourth, the plaintiffs' other due process claim against the substantial evidence rule is dismissed because they did not present any evidence that they were prevented from presenting at the hearing. The Court also pointed out that the substantial evidence rule does not "operate to restrict Day's evidence on his takings claim." The only interpretation of that statement must be that a party to an appeal of an administrative decision is allowed to present new evidence regarding constitutional takings claims without being bound by the substantial evidence rule.

Finally, the Supreme Court dismissed the plaintiffs' equal protection argument against application of Sec. 36.066(g), Water Code, which requires payment to a groundwater conservation district all attorneys' fees and court cost in a suit in which that district substantially prevails without affording the same consideration to any other party to that suit. The Court upheld the Fourth Court of Appeals decision on that issue because the State's interest in discouraging lawsuits against groundwater conservation districts is rationally related to the cost-shifting provision in the statute.

This unanimous decision by the Supreme Court may open the door to any number of suits against any number of groundwater conservation districts. The immediate impact may be that districts shy away from protection for historical uses and more toward either a correlative rights or reasonable-use regulatory plan, both of which will likely prove to be very expensive for cities and others with high demand. The most interesting aspect of the decision is its derision for protecting historical uses. Because takings litigation is generally centered around investment-backed expectations, one would think historical users would deserve the most protection, and any regulation that is aimed at protecting those investments would be the most likely to pass constitutional muster. Instead, the Court turned that analysis on its ear by deriding protection of historical uses to the potential detriment of landowners who have yet to invest a dime (beyond the purchase price of their property). Mr. A. Dan Tarlock, in his well-known reference "Law of Water Rights and Resources, 2012 ed.," discussed the *Day and McDaniel* decision in §4:29 as follows:

> [T]he Texas Supreme Court . . . adopted the oil and gas rule of ownership in place for groundwater which inverts the usual objective of takings law—the protection of investment backed expectations—because the regulation of future uses may be more likely to be a taking compared to the restriction of existing uses!

Tarlock provides further analysis of the decision in **§4:36:**

> Lower Texas appellate courts rendered a series of decisions suggesting that the [EAA] Act was not a taking. However, the Texas Supreme Court opened the door to taking claims by unnecessarily hardening the state's doctrine of capture by adopting the oil and gas rule of ownership in place for groundwater and thus inverting the usual objective of takings law—the protection of investment backed expectations. The oil and gas rule is a fiction to allow landowners to lease the right to extract oil and gas, and no other state has applied it to groundwater.

A. Dan Tarlock, *Law of Water Rights and Resources* **§§4.29, 4.36 (2012 ed.).**

The Supreme Court's decision would allow several parties to raise takings claims in future permitting decisions: the applicant, an existing well owner, and a landowner with a desire to "conserve" his groundwater through non-use. Once an aquifer has reached its limit (meaning the aggregate of all withdrawals meets or exceeds the amount the aquifer can sustain or the amount that will achieve the chosen desired future condition for that aquifer), what decision should a groundwater conservation district make? If the district denies an application because all available groundwater supply has already been permitted and is being produced by others, the applicant will surely sue. If the district grants the application but then reduces the permits for all other existing users, the existing users will certainly sue. If the district grants the application and does not reduce any other permitted uses thereby allowing aquifer levels to decline, surely the landowner, in attempting to "conserve" his water, will sue because the district's actions are allowing his vested property rights to be confiscated by others.

It may well turn out that after all the litigation is said and done very few plaintiffs will have prevailed. An "inverse condemnation" or "regulatory taking" is difficult to prove, and even if the plaintiff prevails he must pass the additional hurdle of proving up damages. Until these issues are settled through multiple lawsuits over multiple aquifers testing multiple regulatory methodologies, groundwater conservation districts will be diverting resources towards litigation defense and away from where they are most sorely needed: data collection and aquifer modeling. Although Sec. 36.066(g), Water Code allows districts to recoup their costs in suits where they prevail, that does not mean they will actually recover any funds.

When these suits are filed, how they will be prosecuted and what arguments may be raised are complicated issues. Regulatory takings are fact-dependent and addressed on an ad hoc basis, even though they are ultimately considered as legal matters to be decided by a court. Each new suit will require a complete analysis. The next section of this paper reviews the current state of regulatory takings law in Texas.

REGULATORY TAKINGS

Regulatory Takings from *Pennsylvania Coal* to *Lucas* and *Dolan*

Both the United States and Texas constitutions provide protection against the State taking private property without compensation. *See* Tex. Const. art. I, § 17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.") *and* U.S. Const. amend. V. ". . . nor shall private property be taken for public use without just compensation." Although the provisions are a little different, Texas courts have always applied the federal analysis to cases brought under the Texas Constitution. *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004).

Historical Takings Analysis

The courts rejected the idea of regulatory takings until 1922 when the U.S. Supreme Court decided *Pennsylvania Coal Co. v. Mahan*, 260 U.S. 393 (1922). As a means to control surface subsidence, the State required coal companies to leave subsurface columns of coal in place. Up to 98% of the coal could be removed, but the coal companies claimed the State had taken the remaining 2%. The State argued the regulation was a legitimate use of the State's police powers. The U.S. Supreme Court held that regulations *can* reach the level of a takings if they go "too far" and interfere with the rights of property owners.

Over the next 50 years, the concept moved very little. In the 1960s, the U.S. Supreme Court began to address the question of where to draw the line, or "how far is too far." Because no bright line presented itself, the Court turned to equity and fairness. The Court ruled that the police powers could affect a taking both if it caused a physical occupation of property and if it burdened a few individuals with costs that should be shared by the whole. The Takings Clause is there to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40 (1960). Without the bright line, each regulatory endeavor became an ad hoc analysis of who benefited and how much.

In the late 1970s and early 1980s, the Court found regulatory takings could occur along a continuum, beginning with physical invasions (per se taking), categorical takings, and regulatory takings. A categorical taking occurs if the regulation does not substantially advance a legitimate state interest or if it denies an owner all economic use of the property. *Agins v. City of Tiburon*, 447 U.S. 255 (1980). A regulatory taking occurs if the property is unfairly burdened; fairness is determined by considering the regulation's economic impact on the property, the owner's investment-backed expectations, and the character of the governmental action. *Penn Central Transportation Co. V. City of New York*, 483 U.S. 104 (1978). Again, the lack of a bright line led to ad hoc decisions based on the facts of each individual case.

Of particular interest to the various parties considering Texas groundwater issues are a pair of cases dealing with certain fundamental aspects of property ownership. The first case was *Hodel v. Irving* where the U.S. Supreme Court held that being able to pass property in a will was so fundamental to ownership that removing that right would be a taking. 481 U.S. 704 (1987). The Court ruled that although property rights did represent a bundle of sticks, and removing only 1 stick from the bundle did not generally reach the level of a taking, there are some sticks in the bundle so fundamental to the ownership interest that they could not be removed without affecting the entire property right. The second case involved another "fundamental right:". . . the right to exclude others from the property." The U.S. Army Corps of Engineers required the owners of Kuapa Pond in Hawaii to allow the public access to their pond. The Corps concluded that improvements to the pond made it a navigable stream and therefore waters of the United States. The Court said:

> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979).

Some argue that *Kaiser Aetna* should have been decided as a physical invasion case because the government claimed the waters of the pond as waters of the United States. The difference is that the government would not be occupying the land but would require the landowners to allow access to the public. That debate is purely academic because the result is the same: the owner is entitled to compensation.

Although property rights had been described as a "bundle of rights," and that removing 1 or more "sticks" from the bundle would not devalue the entire interest so much that compensation must be paid, clearly some of the "sticks" weigh more than others. Where the regulations affected 1 of the "fundamental" sticks in the bundle, or excessively burdened the entire bundle, the government has taken the property. One of those sticks so fundamental to property ownership is the right to exclude—

the right to build a fence around that property and protect it. That raises the question that if the owner never had that right to begin with, what value can be applied to that particular stick in the property bundle? The rule of capture prevents a landowner from building that fence—any adjacent landowner may lower water levels or even dry up wells with impunity. *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75 (Tex. 1999). If the landowner cannot prevent a neighbor from capturing that property just how much can it be worth?

The Current Takings Analysis

The primary impediment to completing a takings suit has been the ripeness issue. Most cases involved "as applied" challenges rather than facial challenges. This is true for 2 simple reasons: (1) No one complains until the regulation keeps them from doing something and (2) facial challenges are extremely difficult because the plaintiff has to show *no* possible constitutional application of the regulation can exist. The typical takings case begins with an application to develop land or enhance a building. Once refused by the administrative body, the applicant sues for the value of the land, usually hoping the State will relent and allow the development. When the State does not relent, the plaintiff must first prove that the claim is ripe for adjudication.

In a variety of cases, and a variety of jurisdictions, the courts have required the plaintiff to return to the administrative body seeking another possible solution or possible use for the property. First, the property owner must file a "meaningful" application, meaning they cannot apply for uses clearly not permissible. In *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), the Court complained that the property owner's plans were "exceedingly grandiose." The Court held that the plaintiff should have filed a more reasonable application, which would likely have been approved, and therefore the claim was not ripe for consideration.

The basic ripeness question revolves around the question of finality. In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the Court held that the claim was not ripe because the plaintiff never obtained a final determination. This is different from the exhaustion of remedies requirement. Exhaustion of all administrative remedies simply means completion of the administrative appeal process. Finality is achieved by obtaining a determination of what *will* be allowed on the property. In *Williamson* the Court also required the property owner to seek a variance to the offending ordinance.

A number of cases have now been turned aside for lacking ripeness. Cases have been dismissed for failure to make formal application (*Eide v. Sarasota County*, 908 F.2d 529 (11th Cir. 1990)), failure to file for a variance (*Amwest Investments v. City of Aurora*, 701 F.Supp. 1508 (D. Colo. 1988)), and failure to have a final decision (*Kinzli v. City of Santa Cruz* 818 F.2d 1449 (9th Cir. 1987). Some courts have even ruled that the property owner must file an application even if doing so is futile. *See Kinzli*, *Shelter Creek Dev. Corp. V. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988). State courts are following suit. *See City of Jacksonville v. Wynn*, 650 So.2d 182 (Fla. App. 1995); *Ventures Northwest Ltd. Part. V. State*, 896 P.2d 70 (Wash. App. 1995); and *City of Iowa City v. Hagen Electronics, Inc.*, 545 N.W.2d 530 (Iowa 1996). However, a property owner is "not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 352 n. 7 (1986). In *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex.1998) the Texas Supreme Court ruled the plaintiff's claims were ripe even though an application that met the new ordinances standards was never filed. The Court concluded that, "under the circumstances of this case, the Mayhews were not required to submit additional alternative proposals, after a year of negotiations and $500,000 in expenditures, to ripen this complaint." *Mayhew,* 964 S.W.2d at 932.

The U.S. Supreme Court addressed some of the confusion created by the ad hoc analysis required by decisions in the late 1980s in a pair of cases in the early 1990s. The first was the landmark decision of *Lucas v. South Carolina Coastal Council*, 505 U.S. 103 (1992). Mr. Lucas was a developer who owned property along the South Carolina coast, and as such had to submit development plans to the Council. After successfully developing a number of lots along the waterfront, Lucas purchased 2 remaining lots for his personal use. In the meantime the Council increased the size of the "construction-free zone" to include the 2 Lucas-owned lots. Following the Council's decision, Lucas was prohibited from building on his property, or as 1 Justice put it, he could only use the property for camping. Lucas sued for compensation, and the Supreme Court ruled in his favor.

The Court specifically held that the government takes property when its regulations leave the landowner with no economically beneficial use of the land. There was no balancing test against the police powers and no need to inquire into the purpose for the regulation or the legitimate state interest being advanced therein. The regulation had gone so far that the government may as well have physically occupied the property. The Court allowed only 2 exceptions to this new per se takings rule: (1) the regulation prevented a nuisance that could have been prevented under the common law and (2) the regulation was part of a state's background principles of real property.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court defined the rules that must be followed when analyzing exaction cases. An exaction is when the government requires dedication of some portion of the subject property as a condition

to receive a development permit. In Dolan, the City required a plumbing supply store to dedicate a bike path and greenway as a condition to a building permit. In reviewing the City's actions, the Court set out a 3-part test:

1. Does the permit condition seek to promote a legitimate state interest?
2. Does an essential nexus exist between the legitimate state interest and the permit condition?
3. Does a required degree of connection exist between the exactions and the projected impact of the development?

After determining the City met both of the first 2 conditions, the Court held that the exactions required of the Dolans were not "roughly proportional" to the impact. This "rough proportionality" test was described as an individualized determination that the exaction was related both in the nature and extent of the development's impact. As a disjunctive test, if the government fails any of the 3 prongs, the property owner is due compensation. The Court also pointed out that the exaction required public access to the greenway, meant as a floodplain easement. The public access was once again a government trespass, stepping on the "fundamental" right to exclude others.

While these cases provided some structure to takings cases, a large number of the cases still come down to an ad hoc, "I know it when I see it" analysis. Because government agencies are smart enough to create legislative history sufficient to pass the legitimate state interest test, and most can create the essential nexus necessary to pass the second test, that leaves only the rough proportionality question. Just as the *Pennsylvania Coal* decision left courts little guidance as to when a regulation went "too far," the courts have little guidance as to when a regulation is "roughly proportional." In addressing any takings claim, we now seem to have a several step process to follow. First, determine what property interest was taken. If the property interest is 1 of the fundamental sticks in the bundle or if the property is so burdened that the entire bundle loses all economically viable use, the case is a per se taking. One measure of whether the affected property right is fundamental is whether the State could have taken the same action under nuisance law or based on the background principles of property law. The next step is to determine whether the State's action promotes a legitimate state interest and if the regulation has the essential nexus to that state interest. Finally, the Court must do an ad hoc analysis of whether the regulation is roughly proportional to impact of the activity.

So the "current takings analysis" reverts back to 1978 where the U.S. Supreme Court set out a 3-prong test in *Penn Central*, a case involving the owners of Grand Central Station in New York City and the City's ordinance prohibiting substantial alteration of "historic structures." Penn Central Transportation Company wanted to further develop the Grand Central Station property by constructing office space above it. The City's Landmarks Preservation Commission prohibited any such development, thereby requiring the property continue to be used as a railroad station with the existing commercial spaces. Before the U.S. Supreme Court, the landowners argued that their development rights for the air space above the terminal had been taken by the City's decision. The Court articulated a 3-part test for determining regulatory takings (that do not fall into either the physical occupation or categorical takings):

1. the "economic impact" of the government action,
2. the extent to which the action "interferes with distinct investment-backed expectations," and
3. the "character" of the action.

Measuring the economic impact of a government regulation should be fairly straightforward, especially in light of the facts of the *Penn Central* case itself. Penn Central Transportation Company (and its predecessor owners of Grand Central Station) had operated the railroad terminal for 65 years, and nothing in the regulation prevented or restrained those operations in any way. In essence, the company could always do what it had always done, so could not thereby claim any economic impact of the regulation. Where the regulation does have an economic impact, that impact must be measured against the investment-backed expectations of the landowner. One of the key considerations is whether the landowner had notice of the regulation when the property was purchased. Although such notice is not a bar to a takings claim (See *Palazzolo v. Rhode Island* 535 U.S. 606 (2001)), it is a strong factor in determining if the landowner could have reasonably "expected" a different result given the nature of the regulation. Finally, the *Penn Central* opinion requires a review the "character" of the governmental action, a term that has been difficult to define and utilize.

Discussion of the "character" of the government action has taken several turns and followed multiple definitions. In *Lucas* the Court characterized the government action to be tantamount to a physical invasion of the property, leading to "categorical" takings as opposed to regulatory takings. In fact, if the government action is so burdensome as to prevent all economically viable use of the property, the rest of the *Penn Central* analysis becomes irrelevant. Other courts have reviewed the purpose of the regulations as a balancing test against the private interests, in essence determining if the costs of the regulation are best borne by individual landowners or by the public at large. *Agins v. City of Tiburon* 447 U.S. 255 (1980) (overruled by Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)). Another interpretation is found in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987), where the Court reviewed the regulation in terms of reciprocity of advantage: that the regulated community both benefits from and is bur-

dened by a regulation. This may be a particularly useful way to view groundwater regulation, where a landowner may not be allowed to withdraw as much water as desired, but neither will his neighbor. The overall regulation should ensure all landowners are protected in exchange for their acceptance of the limitations in their permits.

In 2005 the U.S. Supreme Court handed down its opinion in Lingle, overruling the earlier decision in Agins and providing some clarification regarding the character question in takings litigation. In Lingle the Court specifically repudiated the "substantially advances a legitimate government purpose" as a test better brought under due process arguments instead of takings litigation where the primary purpose is to determine if a regulation is so burdensome as to require compensation be paid. Any regulation that does not advance a legitimate government purpose should be invalid on its face, thereby removing the regulation and any need for a takings analysis. Further, Lingle appears to have limited the "character" part of the Penn Central analysis (at least as far as it applies to groundwater regulation) to the reciprocity of advantage question. If the regulation is targeted to a small number of landowners who will ultimately benefit very little from the regulation's impact on the entire community, then a court should be more likely to find there has been a taking. If, however, the regulation is applied broadly and helps benefit the entire regulated community (as well as the public at large), then the government will have met the burden imposed by the third prong of the Penn Central test.

The Texas Supreme Court has always followed the *Penn Central* analysis to review regulatory takings suits, and the 2 seminal cases for Texas are *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex.1998) and *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004) (both decided before *Lingle*).

The standard for compensable regulatory takings in Texas is set forth in detail by the Texas Supreme Court in *Mayhew v. Town of Sunnyvale*. Following the *Penn Central* takings analysis, *Mayhew* found a compensable regulatory taking can occur if:

1. the regulation does not substantially advance a legitimate governmental purpose,
2. the regulation denies the owner all economically viable use of the property, or
3. the regulation unreasonably interferes with the owner's use and enjoyment of the property.

The first factor is now out of place based on the U.S. Supreme Court decision in *Lingle*; a regulation that does not advance a "legitimate governmental purpose" should be considered invalid and the Court may void such a regulation under a due process argument.[9] If the invalid regulation causes irreparable harm before it can be rectified by the Court, then certainly takings compensation would also be due, but that is a separate analysis that doesn't involve the first prong of the *Mayhew* test. The second factor reflects the decision in the *Lucas* case and would only apply to groundwater regulation where the landowner is denied access to any groundwater and either (1) the entire property loses all economic value (the plaintiff proves the land cannot be developed without access to the groundwater) or (2) the courts find that groundwater should be considered a separate estate from the land and therefore valued separately. (See discussion below regarding the problems of valuing an estate of uncertain size.)

Most regulatory takings cases center on the third factor, which the *Mayhew* opinion divides into 2 parts:

1. the economic impact of the regulation, and
2. the extent to which the regulation interferes with distinct investment-backed expectations.

In *Mayhew* the Court considered a city's decision to deny a proposed planned development and whether that denial caused a taking of the developer's property. The trial court had ruled in favor of the developer, including findings that the development's value prior to the town's zoning ordinance requiring 1 unit per acre in planned developments was greater than $15,000,000, but as a result of the town's denial the property was only worth $2,400,000 fair market value. The Court of Appeals reversed the District Court's judgment and dismissed the Mayhews' claims against the town, holding that none of the claims was ripe for adjudication. *Town of Sunnyvale v. Mayhew,* 905 S.W.2d 234 (Tex. App.—Dallas 1994) (Tex. App.—Dallas 1994), *rev'd on other grounds by Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922 (Tex.1998). The Texas Supreme Court held that the claims were ripe for adjudication: "The ripeness doctrine does not require a property owner, such as the Mayhews, to seek permits for development that the property owner does not deem economically viable." *Mayhew,* 964 S.W.2d at 932. Because the claims were ripe, the Court then had to perform the takings analysis.

The Court quickly disposed of the first 2 factors, holding that the town's ordinances did advance a legitimate state interest and that the property held some economic value after the town's decision. *Mayhew,* 964 S.W.2d at 935 and 937, respectively. That left the final factor and the balancing test between the economic impact of the denial and the property owner's investment backed expectations. The Court ruled against the Mayhews because they did not have a "reasonable investment-backed expectation to build 3,600 units on their property."

[9] The Texas Supreme Court discussed this issue and recognized various critiques of the rule, but then held that Texas is bound by the U.S. Supreme Court precedent. *Sheffield*, 140 S.W.3d at 674. Presumably Texas courts must now also follow the precedent in *Lingle*.

Mayhew, 964 S.W.2d at 937. The Mayhews originally purchased the property for ranching and only later decided to offer it up for development. The historical use of the property is "critically important when determining the reasonable investment-backed expectation of the landowner." *Mayhew,* 964 S.W.2d at 937.

The 2004 case involving Sheffield Development provides some additional detail in analyzing takings claims. Just as the Mayhews wanted a higher density development, the Sheffield Development Co. investigated property that was partially developed and purchased the property relying on the ability to continue development at the same density. Days after Sheffield purchased the property, the City of Glenn Heights adopted a moratorium on accepting new plats until it could review its zoning ordinances to ensure they were consistent with the comprehensive land-use plan. Eventually the city re-zoned the Sheffield's property to only allow half the number of homes. Sheffield sued the City for takings and other constitutional claims, most of which the trial court found in Sheffield's favor, and, following a jury trial on the damages, Sheffield was awarded $485,000 in damages. The Tenth Court of Appeals ruled that the re-zoning did constitute a compensable taking, reasoning that the economic damages (a 38% reduction in the value of its property) and that the rezoning unreasonably interfered with Sheffield's investment-backed expectations. *City of Glenn Heights v. Sheffield Development Co.,* 61 S.W.3d 634 (Tex. App.—Waco 2001) *rev'd by Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004).

On appeal, the Texas Supreme Court reversed the Court of Appeals and rendered a decision in favor of the City. First, the Court said the City's rezoning effort, although perhaps flawed in intent and execution, was not significantly different than the zoning effort made by cities every day. *Sheffield*, 140 S.W.3d at 679. Further, because Sheffield could not show damages from the moratorium that were distinct from the rezoning or that the 15-month delay caused by the moratorium impacted its reasonable investment-backed expectations, the moratorium did not cause a taking. *Sheffield*, 140 S.W.3d at 680.

Perhaps because local governments and state agencies work to avoid incurring any takings liability, there are a dearth of cases where plaintiffs have successfully won takings damages. In 2006 the Fourth Court of Appeals ruled a taking had occurred in the case of *City of San Antonio v. El Dorado Amusement Co. Inc.*, 195 S.W.3d 238 (Tex. App.—San Antonio 2006, pet. denied). In that case the City zoning changed on the plaintiff's property, which had been operating for 18 years providing on-site alcohol consumption, and the new prohibition on alcohol sales changed both the profitability and sale value of that property. Damages were awarded for both lost profits until the property was sold and the loss of value at that sale. *El Dorado*195 S.W.3d at 248.

A 2011 oil and gas case from the 14th Court of Appeals held that a taking occurred when the City of Houston prevented the owner of certain mineral rights from drilling to capture those minerals and the owner's lease eventually expired. *City of Houston v. Maguire Oil Co*., 342 S.W.3d 726 (Tex. App.—Houston [14 Dist.] 2011). In that case the only estate at issue was the severed mineral rights, and the Court held a taking had occurred when city staff erroneously applied a city ordinance that prohibited oil and gas wells in the city's extraterritorial jurisdiction to the Plaintiff's property, which was located within the city limits. *Maguire*, 342 S.W.3d at 747. The damages awarded were based on the difference, if any, between the fair market value of Maguire's mineral estate immediately before and immediately after the revocation of the drilling permit by the City.

REGULATING GROUNDWATER THROUGH GROUNDWATER CONSERVATION DISTRICTS

The Texas Legislature first began creating local regulatory agencies for the purpose of conserving groundwater in 1951, long after the 1917 voter ratification of the "Conservation Amendment," Section 59, Article XVI, Texas Constitution. The agencies, now known as groundwater conservation districts, cover either an entire aquifer or some manageable portion thereof. Their only duty is to protect the resource so that those who depend on groundwater are assured of a plentiful, clean supply. Groundwater conservation districts have 3 regulatory tools at their disposal: spacing requirements, production limitations, and production fees[10]. These 3 tools are typically implemented through a permitting system, and most groundwater conservation districts require permits to drill a new well and operating or production permits for a specific term of years.

Groundwater Conservation District Jurisdiction

Spacing Requirements

Nearly all of the groundwater conservation districts above the Ogallala Aquifer in the Texas Panhandle have adopted spacing requirements that prevent new wells from being drilled within a certain distance of any other well, and in some instances within a certain distance of the property line. The Ogallala is a flat, sandy aquifer, and the primary problems are depletion

[10] Not all districts have all 3 of these tools. Nearly all groundwater conservation districts were created by special legislation and the powers and duties of each are unique.

and overlapping cones of depression. Every water well creates a cone of depression centered at the well and spreading out for some distance from the well. The distance it spreads is dependent on the hydrogeology of the aquifer. In the case of Mr. East, the railroad well's cone of depression extended onto the East property and Mr. East claimed the railroad's well operations drained all the water out of his well. Wells much deeper and more powerful than were possible in 1904 can have cones of depression that reach for great distances.

By spacing out the wells, the local district can minimize the impact of overlapping cones of depression. This helps ensure each landowner access to some amount of water. Please note that the rule of capture still applies: Whiteacre cannot sue Blackacre for allowing the cone of depression to extend onto Whiteacre. But the district's spacing regulation helps protect *both* properties and thereby increases both the land values and productivity.

Production Limitations

In other areas, such as Houston and San Antonio, spacing requirements would have little or no effect on the problems facing those particular aquifer systems. In Houston the problem is subsidence—the sinking of the land surface due to groundwater withdrawals. In San Antonio the problem is rapidly dropping aquifer levels during periods of drought, adversely affecting both well owners and surface springs. In both locations the preferred method of regulation is limiting the amount of water that can be produced from each regulated well. By reducing the overall production, the aquifer pressure and water levels can be maintained to prevent the harm.

Again, the rule of capture still applies. The Texas Supreme Court was asked to address this specific issue in 1978, 2 years after the creation of the Harris-Galveston Coastal Subsidence District when a group of landowners filed suit against an industrial group for causing its land to subside. *Friendswood v. Smith-Southwest Indus.*, 576 S.W.2d 21 (Tex. 1978). The Court held that the rule of capture still applied, so the defendant owed the plaintiff no duty of care. The Court did, however, prospectively modify the rule of capture to allow for future suits where the plaintiff could show that negligent pumping by the defendant had caused plaintiff's land to subside. Never did the Court even consider what some have argued: that inside groundwater conservation districts the rule of capture has been abolished or modified.

As aquifer depletion becomes more of a problem and as cities begin looking to rural groundwater supplies as their future water source, more and more groundwater conservation districts are adopting production limitations. The overall effect will be a safer supply for everyone.

Production Fees

Production fees, the third tool, are not available to all of the groundwater conservation districts in the state and are greatly limited by statute. Even with the statutory limits, fees can be used to help reduce production. The Harris-Galveston Subsidence District is the only district that has adopted a fee schedule designed to create an economic disincentive to pumping groundwater. In the *Beckendorff v. Harris-Galveston Coastal Subsidence Dist.*, 558 S.W.2d 75, (Tex. Civ. App.—Houston [14th Dist.] 1977), writ ref'd *per curiam*, 563 S.W.2d 239 (Tex. 1978), decision the Houston Court of Appeals specifically approved the use of fees as a regulatory tool designed to reduce production. The Austin Court of Appeals agreed 13 years later in *Creedmoor Maha Water Supply Corp. v. Barton Spring-Edwards Aquifer Conservation Dist.*, 784 S.W.2d 79 (Tex. App.—Austin 1989, writ denied). In both cases the Appellate Court said that the fees were designed to create a disincentive to pump groundwater and were thereby regulatory tools rather than taxes.

Takings Implications of Groundwater Regulations

Every aspect of groundwater regulation may be rife with takings implications and certainly potential litigation. Collectively the groundwater conservation districts must set desired future conditions for the various aquifers within a groundwater management area. § 36.108, Water Code. Once the desired future condition is set for a given aquifer, each groundwater conservation district must regulate that aquifer to achieve that goal. § 36.1071, Water Code (Management Plan requirements); § 36.1132, Water Code (permitted groundwater production will achieve an applicable desired future condition). The amount of groundwater that may be withdrawn annually (and still achieve the desired future condition) is represented by the modeled available groundwater. § 36.1132(b)(1), Water Code. Taken together these legislative mandates create a perfect storm for litigation. If the district continues to issue permits without limitation, the district is subject to enforcement action by the Texas Commission on Environmental Quality. § 36.1082(b)(7), Water Code. That district may also be the target of a suit by a landowner whose groundwater levels are steadily dropping because of the production authorized by the district. If the district sets a limit on production and stops issuing permits, an existing landowner that cannot get a permit to drill a well is likely to file a takings claim (see discussion of the *Bragg* case *supra*). The only other option is for the district to continue issuing permits for new wells, and then require reductions in all permits to assure achieving the desired future condition. Of course, permittees

forced to reduce their pumping are likely to sue based on their investment-backed expectations.

Whether any of the claims will succeed depends entirely upon an analysis under *Mayhew* and *Day and McDaniel*, and whether a landowner has been denied a "fair share" of the groundwater. Each case will be judged on its own facts, including the district's management plan, regulations and permit decisions, and the plaintiff's property interests and investment-backed expectations.

FUTURE CASES

Bragg v EAA

Bragg v. Edwards Aquifer Authority, No. 06-11-18170-CV (38th Jud. Dist., Medina County, Tex., filed Nov. 21, 2006)

Glenn and Jolynn Bragg ("Braggs") applied to the Edwards Aquifer Authority for Initial Regular Permits to irrigate 2 pecan orchards: the "D'Hanis" orchard and the "Home Place" orchard. In both cases the Braggs requested 6 acre-feet of groundwater per acre, citing the higher water demand for pecan trees, although neither well had ever produced that amount of groundwater either during the historical use period or during any year prior to filing the litigation. However, under the Edwards Aquifer Authority Act permits may only be granted for the amount of water withdrawn and beneficially used during an historical use period (1971–1992). The well at the Home Place orchard had historical use, but the D'Hanis Orchard well was drilled in 1995 and did not qualify for an Initial Regular Permit. As a result, the Authority denied the D'Hanis permit application on the basis that there was no irrigation during the historical use period. The Authority granted the Home Place permit application at the statutory minimum for agricultural irrigation wells of 2 acre-feet of water per acre (which is more than the amount ever actually produced from that well) for each acre of land actually irrigated during any 1 year of the historical use period. The Braggs claimed a constitutional taking of their common law water rights and sought compensation from the Authority. The Braggs originally sued the Authority 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 Edwards Aquifer Authority Act's enactment and implementation did not deprive plaintiffs of all economically viable use of their property and concluded that

- the Act's enactment and implementation "substantially advance the government's legitimate interest" in protecting the Edwards Aquifer and the associated springs;
- no statute of limitations bar actions brought for takings claims raised as part of the permitting process;
- 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 Aquifer-irrigated farm land in Medina County); and
- the Authority's granting of the Home Place Initial Regular Permit for less than the amount 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 the 108.65 acre-feet of EAA permitted rights that were requested, but not granted).

The total amount of compensation found owed 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" in an Initial Regular Permit 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 that same calculus 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 their groundwater rights but based on the groundwater rights the Braggs requested from the Authority but did not receive.

The Authority and the Braggs each filed notices of appeal, and the parties' briefs have all been filed with the Fourth Court of Appeals in San Antonio. In addition, 3 amicus briefs were filed, 1 by the San Antonio Water System in support of the Authority and 2 filed in support of the Braggs by the Pacific

Legal Foundation and the Texas Farm Bureau, et al[11] (other amicus briefs are likely to be filed in the near future). The Court of Appeals heard oral argument on March 28, 2013.

The Medina County District Court held that the Authority took the Bragg's property through 2 actions:

1. denying a permit to withdraw non-exempt groundwater from a well and
2. granting a permit for an amount less than the landowners requested.

Neither approach considered alternative groundwater supplies still available to the Braggs, thereby creating law that grants a vested property right in each and every aquifer formation beneath a property as a severable estate. Neither approach considered the Edwards Aquifer groundwater still available to the Braggs through exempt-use domestic and livestock wells or Section 1.19 term permits, thereby creating law that grants a vested property right in each and every type of permit offered by a district. The Fourth Court of Appeals must clarify just how takings analysis should be applied to groundwater regulation, and provide a regulatory path that groundwater conservation districts may follow to avoid taking private property in the future.

As groundwater conservation districts approach the limits on the amount of groundwater that may be produced and still achieve that aquifer's desired future condition each Board of Directors will be faced with a choice of denying new applications (highly unlikely in light of the *Day* decision) or reducing existing permits. Under this District Court's analysis, every groundwater conservation district would be potentially liable for money damages for every denied application *and* for every reduced permit. There is no path to nonliability other than foregoing any regulation.

Other Potential Lawsuits

The potential for takings lawsuits filed against groundwater conservation districts is virtually limitless. Because each aquifer is different the regulations addressing who gets permits and for how much is different. Potential plaintiffs includes those who are denied permits, those whose permits are reduced and any landowner who watches aquifer levels decline over time. Not only will production limitations be challenged, but spacing limitations as well.

Key questions include:

1. Does this mean every urban and suburban lot owner is entitled to a water well and some amount of groundwater (or compensation)? What is the "fair-share" due to a small-lot landowner?
2. Can a landowner file suit against a groundwater conservation district for allowing groundwater beneath his property to decline (caused by permits for withdrawal on other properties)?
3. Are municipalities that prohibit or restrict water wells now also facing takings liability?
4. Is there a potential for federal takings claims in addition to state takings claims?
5. Can groundwater conservation districts say "no permit this year" without takings liability, or would they face liability for a temporary takings? How will this affect water conservation requirements and drought restrictions?
6. Do historical users, who have investment-backed expectations, have the best claim for a takings?
7. Is domestic and livestock use enough of a "fair share" or is that going to depend on how many acres the landowner controls?
8. Is there a vested property right to each aquifer or formation, or as long as the landowner has access to some reasonable amount of groundwater can restrictions on tapping other formations avoid takings liability?

CONCLUSION

The argument over groundwater regulation in Texas will be settled as groundwater conservation districts all over the state continue to tighten controls on groundwater production and landowners begin filing takings claims. Cities will continue to look for plentiful, affordable water supplies for their growing populations, and rural areas will continue to worry about their long-term supplies as aquifer production increases. People who are looking to protect future supplies often speak of aquifers as "our water," while those who are seeking to sell water supplies only refer to "my water." In fact, groundwater is neither "ours" nor anybody's "mine," which is exactly why reasonable regulation is so necessary. Landowners cannot fence their groundwater, cannot quantify the water that flows past their property underground, and cannot prevent anyone from drying up their well. Landowners' only "fence" is a strong groundwater conservation district permit quantifying their ability to capture groundwater and the requirement that their neighbors obtain permits. Fighting against that regulation through takings lawsuits will only weaken everyone's claim to ownership of groundwater.

[11] Other Amici on the Texas Farm Bureau brief: Texas and Southwest Cattle Raisers Association, Texas Forestry Association, Texas Association of Dairymen, Texas Wildlife Association, and Texas Cattle Feeders Association.