"Case Law Update" [1]

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Introduction: This paper presents a summary of active, current, or recently resolved cases that could impact the availability of water or development of water resources, either surface or groundwater. Cases in federal court are presented first, followed by those in Texas courts.

Federal Cases

Kansas v. Nebraska, et al.[2]

History. The Republic River originates in Colorado, crosses the northwestern corner of Kansas, and enters and travels through much of southwestern Nebraska before re-entering Kansas. During the 1930s, the Republican River Basin experienced extended drought, only interrupted by one deadly flood. The federal government then undertook an array of irrigation projects to control flooding and disperse the available water. "But the Government insisted that the three States of the Basin first agree to an allocation of its water resources. As a result of that prodding, the States negotiated and ratified the Republican River Compact."[3] Congress approved that agreement and, thus, it became federal law.[4]

In 1998, Kansas filed an action with the United States Supreme Court contending that Nebraska's groundwater pumping was to Kansas's detriment under the Republican River Compact. In 2002, the parties reached a stipulated agreement that included an accounting procedure under which "imported water," brought into the Republican Basin by human activity, would not count towards that state's recorded consumption. In 2007, after the end of the first accounting period, Kansas petitioned the Supreme Court for monetary and injunctive relief as Nebraska was exceeding its water allocation. Nebraska asserted that the Accounting Procedure improperly counted "imported water." The Supreme Court appointed a Special Master to investigate the matter.

Findings of the Special Master. "After two years of conducting hearings, receiving evidence, and entertaining legal arguments, the Special Master issued his report and recommendations."[5] Per the Master, Nebraska "knowingly failed to comply" with the Compact by exceeding its allocation by 70,869 acre-feet over the 2005–06 accounting period. The Master proposed a $3.7 million award for Nebraska's breach and $1.8 million partial disgorgement of Nebraska's gain; however, the Master found an injunction against Nebraska unwarranted. The Master also recommended reformation of the accounting procedures so Nebraska would not be charged for using

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[2] Kansas v. Nebraska, et al., No. 126 (574 U.S. ___ (2015) decided Feb. 24, 2015).

[3] *Id* at 2.

[4] *See* Act of May 26, 1943, ch. 104, 57 Stat. 86 (1943).

[5] *See* Kansas v. Nebraska, et al., No. 126 at 5 (574 U.S. ___ (2015) decided Feb. 24, 2015).

State's attorney's fees and litigation costs."[17] Under the American Rule, attorney fees are not awarded unless allowed by statute.[18] The majority did agree that how the Master determined the $1.8 million disgorgement was not specified. The Master's report contained less explanation than the Court would have liked. "But then again, any hard number reflecting a balance of equities can seem random in a certain light."[19]

The Court also rejected an injunction against Nebraska, noting its recent compliance efforts and finding Kansas not in danger of a recurrent violation. "Nebraska is now on notice that if it relapses, it may again be subject to disgorgement of gains."[20] The dissent concurred on this matter.

Lastly, the Court ordered reformation of the accounting procedure and related computer model as a means of correcting "subsidiary technical agreements to promote accuracy in apportioning waters under a compact."[21] "In 2006, for example, the Procedures charged Nebraska with using 7,797 acre-feet of Platte River water, over 4% of the State's allotment. By our estimate, just that single year's miscalculation cost Nebraska over $1 million."[22] "The amendment will damage Kansas in no way other than by taking away something to which it is not entitled."[23] The dissent, in contrast, returns to private contract law and believes "reformation is thus only available when the parties reach an agreement but then 'fail to express it correctly in writing.'"[24] Noting that there was no dispute as to terms, the majority believes "accounting procedures control determinations of the consumptive use of imported water"[25] and terms can be interpreted "to allow for some imperfection in the groundwater models."[26]

Texas v. New Mexico[27]

Texas v. New Mexico is a recent case pending before the United States Supreme Court. Texas's motion for leave to file a complaint was granted on January 27, 2014. This interstate dispute stems from the Rio Grande Reclamation Project ("Project") and was authorized pursuant to the Rio Grande Reclamation Project Act ("Rio Grande Project Act").[28] More specifically, this dispute is about the Rio Grande Compact.[29] This dispute centers on the Elephant Butte Reservoir, located approximately 105 miles north of the Texas state line and approximately 80 miles north of Las Cruces, New Mexico.[30] Colorado is a named party only because the state is a signatory to the Compact.[31]

Construction of the Project began in 1910 with the Elephant Butte Reservoir, followed by the Caballo Reservoir.[32] The Project works through an irrigation system that is highly dependent on collecting flow from the initial

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[17] *See* Kansas v. Nebraska, et al., No. 126 at 12 (574 U.S. ___ (2015) decided Feb. 24, 2015) (Thomas, J., dissenting).
[18] *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res., 532 U.S. 598, 602 (2001).
[19] *See* Kansas v. Nebraska, et al., No. 126 at 19 (574 U.S. ___ (2015) decided Feb. 24, 2015).
[20] *Id.* at 20.
[21] *Id.* at 24.
[22] *Id.* at 22.
[23] *Id.* at 27.
[24] *See* Kansas v. Nebraska, et al., No. 126 at 13 (574 U.S. ___ (2015) decided Feb. 24, 2015) (Thomas, J., dissenting).
[25] *See* Kansas v. Nebraska, et al., No. 126 at 14 (574 U.S. ___ (2015) decided Feb. 24, 2015).
[26] *Id.* at 18.
[27] Texas v. New Mexico, No. 22O141 (U.S. filed Jan. 8, 2013).
[28] *See* Mot. of the United States for Leave to Intervene as a Pl., Compl. in Intervention, & Mem. in Supp. of Mot. to Intervene as a Pl. at 2, Texas v. New Mexico, Texas v. New Mexico, No. 22O141 (U.S. filed Feb. 27, 2014); Rio Grande Reclamation Project Act of February 25, 1905, ch. 798, 33 Stat. 814 (1905).
[29] *See* Rio Grande Compact Act of May 31, 1939, ch.155, 53 Stat. 785 (1939).
[30] *See* Mot. of the United States for Leave to Intervene at 1, Texas v. New Mexico, No. 22O141 (U.S. filed Feb. 27, 2014).
[31] *Id.*
[32] *Id.* at 2.

On February 27, 2014, the United States filed a motion for leave to intervene that was supported by Texas. Likewise, New Mexico "asserted that the United States is an indispensable party to this action."[45] The United States articulated three federal interests: the Bureau of Reclamation's operation of the Project, delivery of water to those without a contract with the Secretary of the Interior or water consumption in excess of contract amounts, and the Compact's water delivery requirements to Mexico.[46] On March 31, 2014, the United States was granted leave to intervene as a plaintiff.

On November 3, 2014, the Supreme Court appointed A. Gregory Gimsal, a commercial litigation attorney from New Orleans, Louisiana, as Special Master. One month later, EBID filed a motion to intervene. Initially, all parties responded to EBID's motion to intervene; however, the deadline to reply has been extended until March 20, 2015. The Special Master's first task will likely be to address the motion to dismiss submitted by New Mexico on April 30, 2014.[47]

Aransas Project v. Shaw[48]

In 2007, the Texas legislature passed Senate Bill 3 ("S.B. 3"), establishing the Environmental Flows Allocation Process, also known as "E-flows."[49] Senate Bill 3 mandates the Texas Commission on Environmental Quality ("TCEQ") adopt environmental flow standards for each of Texas's seven major river basins and bays to support a sound ecological environment, set aside unappropriated water, if available, help satisfy the environmental flow, and implement an adjustment for such conditions in permits or amended water rights.[50]

As a result of S.B. 3, TCEQ developed a scheme for collecting data to support E-flow recommendations.[51] For each river basin and bay system, a stakeholder team and a science team considers and recommends flows to TCEQ, in addition to two statewide groups that oversee the entire process. The statewide Environmental Flows Advisory Group is responsible for appointing members to the statewide Science Advisory Committee ("SAC"), as well as appointing members to each local stakeholder team.[52] The SAC provides overall direction and coordination and ensures consistent and acceptable scientific principles are utilized during all allocation of flows.

The Aransas Project ("TAP") petitioned TCEQ for a water permit for freshwater to remain instream in the Guadalupe and San Antonio river systems to ensure sufficient freshwater reaches the Aransas Wildlife Refuge ("Refuge") and areas adjacent to San Antonio Bay, the critical habitat for endangered whooping cranes. TAP's permit request was denied and on December 7, 2009, TAP gave notice of intent to sue.

Prior Proceedings. On March 10, 2010, TAP filed suit alleging that the TCEQ had violated Section 9 of the Endangered Species Act ("ESA")[53] by failing to properly manage freshwater inflows into the San Antonio and Guadalupe bays during the 2008-2009 winter. This failure caused an unlawful "take" of whooping cranes,

[45] *See* Reply Mem. for the United States in Supp. of Mot. to Intervene as Pl., at 2 Texas v. New Mexico, No. 22O141 (U.S. filed Mar. 14, 2014).
[46] *Id.* at 1–2.
[47] *See* Richard S. Deitchman, *United States Supreme Court Name Special Master in Rio Grande Litigation*, SOMACH SIMMONS & DUNN (November 10, 2014), http://www.somachlaw.com/alerts.php?id=300.
[48] Aransas Project v. Shaw, 756 F.3d 801 (5th Cir. June 30, 2014), *amended by* Aransas Project v. Shaw, 775 F.3d 641 (5th Cir. Dec. 15, 2014).
[49] *See* TEX. WATER CODE § 11.1471 (West 2013) (requiring the commission to adopt appropriate environmental flow standards and set-asides).
[50] *See* TEX. WATER CODE § 11.1471(a) (West 2013).
[51] *See* TEX. WATER CODE § 11.02362 (West 2013) (developing Environmental Flow Regime Recommendations to support Section 11.1471).
[52] *See* TEX. WATER CODE § 11.0236 (West 2013) (establishing parameters for the Environmental Flows Advisory Group).
[53] *See* 16 U.S.C. § 1531 (2014).

Fifth Circuit Opinion. The Fifth Circuit Court of Appeals reversed the trial court in an opinion issued June 30, 2014.[59] The court found TAP did not show TCEQ's issuance of water rights was the proximate cause of the whooping cranes' death.

The court rejected the appellant's challenge to standing, finding "little doubt that TAP alleged sufficient facts concerning the components of standing to justify pursuing the litigation"—injury due to crane death and diminishment in the cranes' enjoyment, a theory of causation, and potential future harm.[60]

The court then examined the issues impacting the *Burford* doctrine, under which federal courts abstain from determining complex issue of state law or weighing state policy decisions. The court quickly concluded that the cause of action arose out of federal law, specifically the Endangered Species Act, and favored not abstaining.[61] As to the unsettled state law, the court found abstention unnecessary because TCEQ would not violate state law if required to abide by the injunction and there were no other *Burford* conditions present. Though Texas had an interest in managing its water supplies, the federal interest in protecting endangered species was stronger and weighs against abstention.[62] The court found that the Texas Water Code and its implementation to protect Texas' finite water resources provide a delicate balance that would be disrupted by federal intervention.[63] Finally, the court examined whether a state forum exists for the relief sought, finding the abstention unwarranted since TCEQ is actually prohibited from granting water rights for environmental needs.[64] The district court did not abuse its discretion by declining to abstain.

On July 28, 2014, TAP filed a petition for rehearing en banc. The court denied rehearing and submitted a revised opinion on December 15, 2014. The court astutely removed the following statement: "A district court finding may [] be disregarded if it is infected by legal error."[65] Otherwise, the court revised only the language related to the proximate cause. The court added the two aspects under the common law of proximate cause include direct relationship and foreseeability.[66] "The district court's formulation and its ensuing opinion ignore both of those concepts, as it nowhere mentions remoteness, attenuation, or the natural and probable consequences of actions."[67] Thus, the court concluded that "[w]hen the record permits only one resolution of the factual issue after the correct law is applied, remand is unnecessary."[68] The revised opinion did not disturb the court's initial reasoning concerning injunctive relief; without Defendant's liability, the court found injunctive relief unwarranted. The district court was found to have made only one conclusory finding regarding future imminent harm to the whooping cranes and applied a "relaxed" standard in its granting of injunctive relief.[69] The district court focused exclusively on 2008–2009, giving no attention to evidence in subsequent years during which the Fifth Court noted a steadily increasing flock.[70] "Injunctive relief for the indefinite future cannot be predicated on the unique events of one year without proof of their likely, imminent replication."[71]

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[59] *See* Aransas Project v. Shaw, 756 F.3d 801, 806 (5th Cir. June 30, 2014), *amended by* Aransas Project v. Shaw, 775 F.3d 641 (5th Cir. Dec. 15, 2014).
[60] *Id.* at 809.
[61] *Id.* at 810.
[62] *Id.* at 811–12.
[63] *Id.* at 812.
[64] TEX. WATER CODE § 11.0235(d)(1) (West 2013).
[65] *See* Aransas Project v. Shaw, 756 F.3d 801, 814 (5th Cir. June 30, 2014), *amended by* Aransas Project v. Shaw, 775 F.3d 641 (5th Cir. Dec. 15, 2014).
[66] *See* Aransas Project v. Shaw, 775 F.3d 641, 658 (5th Cir. Dec. 15, 2014).
[67] *Id.*
[68] *Id.*
[69] *Id.* at 660.
[70] *Id.*
[71] *Id.* at 660–61.

The Edwards Aquifer Authority Act's purpose is to maintain balanced representation of water users, while answering the voting rights concerns raised by the Department of Justice's ("DOJ") 1993 objection.[87] Accordingly, the current EAA board totals 15 voting directors: four (4) from the West (representing "agricultural" interests), seven (7) from Bexar County (representing "urban/military" interests), and four (4) from the East (representing "springflow" interests); plus two (2) appointed nonvoting members: one (1) appointed from interests in the West, and one (1) from the 'springflow' area.[88] This act was approved by DOJ on August 8, 1995.[89] Plaintiffs seek declaratory and injunctive relief to enforce the Equal Protection Clause of the United States Constitution and the Voting Rights Act, based mainly on the lack of equal population numbers within the EAA's single-member districts.[90] Now the City of San Antonio, acting by and through the San Antonio Water System ("SAWS"), has intervened and the Texas Secretary of the State has been added as a defendant.[91] SAWS feels the level of representation on the EAA board does not match the fees paid ($24 million) by SAWS's Bexar County customers to EAA.[92] SAWS customers supply 70% of the funding, yet are represented by only 7 out of the 15 board member positions (46%).[93]

The parties entered into an Agreed Scheduling Order on August 8, 2013 and are proceeding with discovery and trial on the causes of action based solely on the one-person, one-vote claim. The case was argued before Judge Garcia in the Western District of Texas on June 2, 2014.[94]

The Supreme Court has found in three instances an exception to the one-person, one-vote principle.[95] The *Salyer-Ball* exception, taken from party names in two of the decisions, requires "that activities be far removed from normal government activities, and . . . that those activities have a disproportionate effect on those people who have the right to vote."[96] The EAA seeks to insert a third part to the analysis such that "[i]f those two requirements are met, there is then a final part of the analysis which requires that the voting scheme applicable to the special purpose entity be reasonably or rationally related to its purpose."[97]

EAA cites several court decisions under which the first prong of the *Salyer-Ball* test means not performing general government functions or being a special purpose district. And EAA consequently asserts it too is a

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[87] *See* Bragg v. Edwards Aquifer Auth., 71 S.W.3d 729 (Tex. 2002). The EAAA remains uncodified, but an unofficial compilation can be found on the Authority's website at http://www.edwardsaquifer.org/files/download/ 5a48e1d88ffe061.

[88] Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350; as 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, §§ 2.60–2.62 and 6.01–6.05, 2001 Tex. Gen. Laws 1991, 2021 and 2075; 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; Act of May 28, 2007, 80th Leg., R.S., ch. 1430, §§ 12.01–12.12, 2007 Tex. Gen. Laws 5848, 5901; Act of May 21, 2009, 81st Leg., R.S., ch. 1080, 2009 Tex. Gen. Laws 2818; and Act of May 20, 2013, 83rd Leg., R.S., ch. 783, 2013 Tex. Gen. Laws 1998 § 1.09.

[89] *See* Complaint, LULAC v. Edwards Aquifer Auth., No. 5:12-cv-620 2012 WL 4864672 (W.D.Tex. 2012) at n.10.

[90] *See id.* at ¶ 1; 42 U.S.C. §1983 (West 2013).

[91] Colin McDonald, *SAWS Joins Suit Against EAA*, SAN ANTONIO EXPRESS-NEWS (Aug. 27, 2012), http://www.mysanantonio.com/news/environment/article/SAWS-joins-suit-against-EAA-3819008.php.

[92] Press Release, San Antonio Water Sys., SAWS Seeks to Join LULAC Suit Against EAA (Aug. 27, 2012), http://www.saws.org/latest_news/Newsdrill.cfm?news_id=859.

[93] *Id.*

[94] *See* Neena Satija, *Edwards Aquifer Plan Gets High Honor at Turbulent Time*, TRIB+WATER (Co-publication of The Texas Tribune and The Meadows Center for Water and the Environment) (Jan. 16, 2014), https://www.texastribune.org/plus/water/vol-2/no-3/edwards-aquifer-plan-gets-high-honor-turbulent-tim/.

[95] Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); Assoc. Enters., Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973); Ball v. James, 451 U.S. 355 (1981).

[96] Mot. of Def. EAA for Summ. J. on Pls.' One-Person, One-Vote Equal Protection Claim 2, Mar. 5, 2014.

[97] Kessler v. Grand Cent. Dist. Mgmt. Ass'n, 158 F.3d 92, 108 (2nd Cir. 1998).

Plaintiffs criticize EAA for having failed "to show any discernable link between the weighting of voting power and the impact of the [EAA]'s actions" and debunk a voting allocation based on acreage as posited by amicus Texas Farm Bureau.[105] The court is to look at both the burdens and benefits of an entity's activities when determining if a disproportionate impact is reflected in an unequal voting scheme.[106] The plaintiffs concede that "the benefits of the [EAA]'s activities . . . are distributed widely across the [EAA]'s jurisdiction, and are not concentrated in any pattern that reflect the . . . voting scheme."[107] However, the burdens, particularly the financial ones, fall on "Bexar County, where individual voters have the least amount of voting power"[108] causing failure under the second prong of the *Salyer-Ball* test.

The plaintiffs note that only the EAA has moved for summary judgment under a "rational basis." "In the unlikely event the Court finds that the [EAA] is exempt from the one person, one vote requirement, the numerous fact issues concerning the [EAA]'s rational basis argument issue preclude summary judgment in favor of the [EAA].[109]

State Cases

Environmental Processing Systems, L.C. v. FPL Farming Ltd.[110]

On February 6, 2015, the Texas Supreme Court decided this landmark case which characterized a confrontation between oil and gas disposal and private property rights.[111] However, this case also has implications for water production. The question facing the court was whether trespass occurs when injected waste water from oil production migrates under the property of an adjacent landowner.[112]

Background. In 1997, Environmental Processing Systems ("EPS") drilled a 7,000 foot well about 400 feet from its boundary with FPL Farming ("Farming"), an adjacent rice farm.[113] The well was used to inject non-hazardous waste from oil and gas production into a stratum containing briny water.[114] During the permitting process, EPS admitted the injected waste would migrate beneath Farming's property within 10 years.[115] Farming filed suit claiming it was due compensation for EPS' injected wastes now trespassing under its property.[116]

This case has a long and complex procedural history. In the first decision from the 75th District Court of Liberty County, a jury returned a verdict in favor of EPS, finding no trespass.[117] Farming appealed to the Beaumont Court of Appeals, which affirmed a finding of no trespass, because EPS had been issued a valid disposal permit

[105] *Id.* at 45.
[106] Kessler v. Grand Central District Management Assoc., Inc., 158 F.3d 92,104 (2d Cir. 1998).
[107] Pls.' Joint Mot.for Partial Summ. J. on One Person, One Vote Equal Protection Claim 48, Apr. 28, 2014.
[108] *Id.* at 46.
[109] Pls.' Reply in Supp, of Their Joint Mot. for Partial Summ. J. on One Person, One Vote Claim 15, May 29, 2014.
[110] Envtl. Processing Sys., L.C. v. FPL Farming Ltd., 2015 WL 496336 (Tex. Feb. 6, 2015).
[111] *Id.* at *10.
[112] *Id.* at *1.
[113] Br. for Pet'r at 5, Envtl. Processing Sys., L.C. v. FPL Farming, Ltd., 2015 WL 496336 (Tex. Feb. 6, 2015).
[114] *Id.* at 5–6.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 5.

property of the overlying landowner . . . . Thus, EPS'[s] argument that because this case involves briny saltwater over 7,000 feet below the surface that Farming has not put to a beneficial use is irrelevant to determining ownership of the water and, consequently, the right to exclude."[132] Counsel for EPS pointed out that Farming was not limited by the injected waste water, as it too could use the same formation to inject. EPS also attempted to distinguish (albeit weakly) *Edwards Aquifer Authority v. Day*, "as in *Day* there was a government imposed limitation on the amount of water that could be pumped from the ground, and no such limitation applies to Farming . . . ."[133]

Supreme Court Opinion. Thirteen months later, on February 6, 2015, the Texas Supreme Court finally rendered a decision, completely sidestepping "whether Texas law recognizes a trespass cause of action for deep subsurface wastewater migration."[134] We now know that in Texas, that lack of consent is an element of trespass that the plaintiff must prove, and is not an affirmative defense on which the defendant bears the burden. The Court reviewed trespass jurisprudence since the Republic of Texas[135] and pointed out in a lengthy footnote the error and confusion on the matter in other jurisdictions.[136] The states that can stand to be enlightened as to the elements of a trespass include: Alabama, Alaska, California, Colorado, Illinois, Louisiana, Maryland, North Carolina, Vermont, and Wisconsin.[137]

Some curious facts were noted in the opinion. "During the initial [injection well] permitting process . . . Farming's predecessor-in-title, J.M. Frost III, requested a hearing to contest EPS's permit applications. Frost later reached a settlement with EPS, forgoing his contest in exchange for $185,000. The parties reduced their agreement to a writing reflecting that the settlement was binding on all successors-in-title."[138] "The trial court excluded the settlement agreement between Frost and EPS."[139] If the trial court had not excluded the settlement, Farming—as successor—might have been found to have had notice and hence consented to EPS's injections. Thank goodness things turned out otherwise, so this controversy got considered twice by the Texas Supreme Court—which fully vetted and then resolved for eternity which party has burden to show consent or lack thereof as part of a trespass claim!

Texas Farm Bureau v. Texas Commission on Environmental Quality[140]

This unsettled dispute tries to reconcile the priority applied when water rights are curtained in times of drought or emergency.

Prior history and regulation. During the 2009 drought, Dow Chemical Company, a senior water rights holder near the mouth of the Brazos River, made a priority call—demanding junior water rights holders stop storing or diverting water.[141] Afterwards, the Texas Commission on Environmental Quality ("TCEQ") issued a letter to all

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[132] Tiffany Dowell, *Summary of Oral Argument in Environmental Processing v. F.P.L. Farming*, TEX. AGRIC. L. BLOG (Jan. 5, 2014), http://agrilife.org/texasaglaw/2014/01/07/summary-of-oral-argument-in-environmental-processing-v-f-p-l-farming/ (emphasis added).

[133] *Id.*

[134] Envtl. Processing Sys., L.C. v. FPL Farming Ltd., 2015 WL 496336, at *10 (Tex. Feb. 6, 2015).

[135] *Id.* at *4–6.

[136] *Id.* at *7 n.10.

[137] *See id.* (suggesting a "lack of reasoning and consistency in allocating the burden of pleading and proving consent" in these states).

[138] *Id.* at *1.

[139] *Id.* at *2.

[140] Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, No. 13-13-00415-CV (Tex. App.—Corpus Christi argued Apr. 24, 2014).

[141] *See* SUNSET ADVISORY COMMISSION DECISIONS: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON-SITE WASTEWATER TREATMENT RESEARCH COUNCIL 56 (2011),

On December 14, 2012, the Texas Farm Bureau ("Farm Bureau"), initially along with two of its members, filed suit against TCEQ in the state district court in Travis County, alleging TCEQ exceeded its statutory authority when implementing Drought Rules by not basing suspensions solely on time priority.[154] Farm Bureau contended that the emergency permit authorization procedure in Water Code § 11.139 was suitable to satisfy urgent water needs.[155] Farm Bureau further contended that § 11.139 provides compensation to senior water rights holders transferring their water rights under emergency conditions.[156]

TCEQ argued that it needed to consider water use preference under Water Code §§ 11.024 and 11.053 "to the greatest extent practicable";[157] such preferences not being based on strict priority.[158] TCEQ further maintained that it had both a statutory and constitutional duty to ensure its actions promoted and protected public health, safety, and welfare.[159] As for Water Code § 11.139, TCEQ asserted that the more cumbersome emergency permitting procedure was not workable for most entities, particularly for small municipalities, and not practical in a widespread emergency.[160]

The district court entered judgment in favor of Farm Bureau on June 6, 2013, holding the Drought Rules exceeded TCEQ's statutory authority and failed to apply time priority suspensions as required by Water Code § 11.027.[161] The trial court also held that TCEQ had no police power or general authority to exempt junior water rights from a suspension order, but declined to rule on Farm Bureau's motion to prevent suspension.[162]

TCEQ appealed the case which automatically superseded the district court's judgment under the Tex. R. App. P. Rule 24.4. The case was transferred from the Third to the Thirteenth Court of Appeals on docket equalization. Farm Bureau sought to have the supersedeas lifted in a motion to the district court, which after briefing cited a need to take evidence. Farm Bureau appealed. The Courts of Appeals are split on the issue of whether Rule 24.4 provides supersedeas in all cases.[163] Since the case was transferred on docket equalization, the thirteenth court was required to follow the decision of the original appellate court. The Thirteenth Court of Appeals remanded to the district court for a hearing on the merits of lifting the stay. After a one-day evidentiary hearing, the district court ruled Farm Bureau failed to show supersedeas should be lifted and had waived its right to an evidentiary hearing. No appeal was taken on this holding, so parties addressed the merits of the case.

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[154] Br. of Appellee at 2, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, No. 13-13-00415-CV (Tex. App.—Corpus Christi argued Apr. 24, 2014); *see also* Br. of Appellant at 7, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, No. 13-13-00415-CV (Tex. App.—Corpus Christi argued Apr. 24, 2014).

[155] Br. of Appellee at 21, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, No. 13-13-00415-CV (Tex. App.—Corpus Christi argued Apr. 24, 2014).

[156] *See* Br. of Appellee at 21, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, No. 13-13-00415-CV (Tex. App.—Corpus Christi argued Apr. 24, 2014); *see also* TEX. WATER CODE §11.139(j) ("The person granted an emergency authorization under Subsection (h) of this section is liable to the owner and the owner's agent or lessee from whom the use is transferred for the fair market value of the water transferred as well as for any damages caused by the transfer of use.").

[157] Br. of Appellant at 16, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, No. 13-13-00415-CV (Tex. App.—Corpus Christi argued Apr. 24, 2014).

[158] *Id.* at 16–17 ("If the term 'to the greatest extent practicable' had been intended to subordinate every mandate in Section 11.053(b) to strict priority, it would have been applied to every mandate. It was not.").

[159] Br. of Appellant at 11, 18, 20, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, No. 13-13-00415-CV (Tex. App.—Corpus Christi argued Apr. 24, 2014). It should be noted that Section 11.053 of the Water Code does not contain such a provision.

[160] *Id.* at 17.

[161] Br. of Appellant at App. 2, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, No. 13-13-00415-CV (Tex. App.—Corpus Christi argued Apr. 24, 2014) (Order on Cross Motions for Summary Judgment).

[162] *See id.*

[163] *See, e.g.*, In re State Bd. for Educator Certification, 411 S.W.3d 576, 577 (Tex. App.—Austin 2013, no pet.) (mem. op.) (holding that a government agency's right to supersede a lower court's judgment is not absolute).

Besides an interest in compensation for suspended water rights, Farm Bureau cites existing options to aid curtailments: allowing diversions to junior rights holders during high flow periods,[177] requiring conservation of water rights holders,[178] or relaxing environmental flow requirements.[179] Also, Farm Bureau refutes all statutes and constitutional references that TCEQ claimed as conferring explicit or implied power to disregard the prior appropriation system.[180]

This case was argued on April 24, 2014, and as of the date of this writing an opinion has yet to be issued.

Bragg v. Edwards Aquifer Authority[181]

Legal History. This legal controversy has rendered many decisions as it has gone up and down the judicial ladder.[182] In 2006, the Braggs—who own two pecan orchards in Medina County—brought a second suit against the Edwards Aquifer Authority ("EAA") for a taking, damaging, or destruction of their property.

In 1993, the Texas Legislature enacted the Edwards Aquifer Act (the "Act") to manage said aquifer and to sustain the diverse economic and social interests dependent upon it and empowered EAA to regulate groundwater withdrawals by a permit system. EAA is "a governmental agency and a body politic and corporate" and a "conservation and reclamation" district and a political subdivision of the State of Texas.

The Braggs own two pecan orchards in Medina County: the sixty-acre Home Place and the forty-two-acre D'Hanis property. They drilled an Edwards Aquifer irrigation well on the Home Place in 1980 to irrigate their pecan trees and in 1995 drilled an Edwards well on their D'Hanis property. The EAA eventually issued an annual pumping permit of 120.2 acre-feet for the Home Place and denied a permit to the D'Hanis property, since the well was drilled after the historical period ended on May 31, 1993.[183] The issued permit would not provide sufficient water for the Home Place orchard, because pecan trees need more water over time as they mature.[184]

The trial court held that (1) Bragg suffered a regulatory taking on each orchard; (2) calculated the proper compensation due to Bragg for each orchard because of the taking; and held that (3) the Braggs' claims were not barred by statute of limitation.[185]

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[177] Br. of Appellee at 18–19, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, No. 13-13-00415-CV (Tex. App.—Corpus Christi argued Apr. 24, 2014).
[178] *Id.* at 19–20.
[179] TEX. WATER CODE §11.148.
[180] *See* TEX. WATER CODE §§ 11.024, 11.134(b), 12.014; *see also* TEX. CONST., art. XVI, § 59(a) (amended 2003).
[181] Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118 (Tex. App.—San Antonio 2013, pet. filed) (revised opinion affirming the lower court's decision that commercial pecan growers suffered a regulatory taking because of the permitting system imposed under the Edwards Aquifer Act). The revised opinion replaced an earlier decision rendered on August 28, 2013, and altered sentences describing the arguments made by the parties regarding the financial impact of irrigation costs on the Braggs, but it did not change the substance of the court's prior decision.
[182] *See* Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118, 147–48 (Tex. App.—San Antonio 2013, pet. filed) (concluding that the Private Real Property Rights Preservation Act did not require the EAA to conduct a Takings Impact Assessment before adopting rules for issuance of permits); Bragg v. Edwards Aquifer Auth., No. 08-50584, 342 F. App'x. 43 (5th Cir. 2009) (concluding Bragg had no equal protection claim because he could not demonstrate he was treated differently than any other similarly-situated person); Bragg v. Edwards Aquifer Auth., No. SA-06-CV-1129-XR, 2008 U.S. Dist. LEXIS 1921 (W.D. Tex. Jan. 9, 2008) (holding "if [EAA's] actions constitute a taking, they constitute a regulatory one, not a physical taking").
[183] *See* Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118, 126 (Tex. App.—San Antonio 2013, pet. filed).
[184] *Id.* at 140.
[185] *Id.* at 126.

condemnation suit on November 21, 2006, more than ten years later, and are time-barred from recovery. EAA noted that in their first suit, the "Braggs sought to invalidate EAA's permitting rules and proposed action on their applications, which they contended resulted in a taking of their property, but they chose not to assert a takings claim at that time."[198]

EAA warned that "landowners can control when their takings claims accrue," since "even when a variance or a permit hearing is futile, limitations would not begin to run until the futile act was pursued or until the regulatory agency actually took steps to enforce the regulation against a specific landowner."[199] Surely this is a situation that the Texas Supreme Court would wish to avoid.

Raising another significant issue, EAA asked the Supreme Court to determine a different limitations rule for "landowners who did not seek permits within the statutory time frame."[200] "A group of landowners, who did not initially file, recently filed permit applications more than 15 years late. After the EAA denied those applications as untimely, the landowners sued for a taking. EAA further moved to dismiss the takings claims as barred by limitations, and the landowners relied on *Bragg* for the proposition that limitations did not begin to run until EAA denied their 15-year-late permit applications."[201]

Takings of Home Place and D'Hanis Property. The Fourth Court of Appeals first cited the *Day* decision, in which the Texas Supreme Court held that the landowner holds "absolute title in severalty to the water . . . beneath his land."[202] That rule of ownership is qualified only in "that it must be considered in connection with the law of capture and is subject to police regulations."[203]

The court of appeals next determined that the appropriate regulatory takings analysis is the factual inquiry governed by the standards established by the U.S. Supreme Court in *Penn Central Transport Co. v. New York City.*[204] The three *Penn Central* factors are: (1) loss in value due to the regulation, (2) impact on the investment-backed expectations of the property owner, and (3) the nature of the regulation.[205] After discussing the *Penn Central* factors, the Fourth Court of Appeals held that the Act resulted in a regulatory taking of both orchards.[206]

> Economic Impact. The trial court held the best use of both parcels of Bragg's land was as pecan orchards, because the cost of converting to irrigated farmland was economically prohibitive.[207] In evaluating the first *Penn Central* element, the appeals court re-examined many of the facts presented at the trial court, which established the Braggs invested more than $2,000,000 in land, equipment, and labor in their twenty plus years of owning both orchards.[208] The court noted that the Braggs had removed trees in order to minimize need for additional water rights.[209] The court determined the Act forced the Braggs to buy what they already owned "prior to the regulation: an unrestricted right to the

[198] *Id.* at 9.
[199] *Id.* at 43.
[200] *Id.* at 44.
[201] *Id.* at 46–47 (citing GG Ranch, Ltd. V. Edwards Aquifer Auth., No. SA-14-CV-00848-FB (W.D. Tex. 2014)).
[202] *See Bragg*, 421 S.W.3d at 132 (citing *Day*, 369 S.W.3d at 831).
[203] *See Day*, 369 S.W.3d at 832 (quoting Elliff v. Texon Drilling Co., 210 S.W.2d 558, 561 (Tex. 1948) (internal citations omitted).
[204] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[205] *Id.* at 124.
[206] *See Bragg*, 421 S.W.3d at 134.
[207] *Id.* at 140.
[208] *Id.* at 141.
[209] *Id.*

from the landowner's intended use; (2) the loss of the water is permanent from the landowner's perspective; and (3) the government's allocation of the taken water is for a public purpose.[221]

Using this same analysis, the Braggs asserted "EAA's diversion of groundwater from the Braggs . . . constitutes a permanent physical taking and, therefore, a *per se* taking."[222] Furthermore, Bragg argued that should the court of appeals fail to find a taking under the *Penn Central* test, the court should still recognize "a *per se* taking by virtue of depriving the Braggs of all economically beneficial use of their property."[223]

Timing of Valuation. Next, the court examined the proper time and means of valuing the Braggs' taking. The Court viewed the Braggs' situation as an inverse condemnation, arising from a regulatory taking valued at the time the regulations in the form of the Act were implemented or applied—here either 2004 or 2005.[224] The court categorized valuation cases in two manners: "the first category involves land taken in a condemnation/eminent domain case" and in which the court must value the sub-surface estate as an aid in determining the value of the land taken;[225] the second category involves the actual taking of the sub-surface estate or a taking which interferes with it, which requires that a court must value the sub-surface estate separately from the land.[226] Besides having difficulty in defining the "property" actually taken from the Braggs, the Court felt neither category of case identical to the Braggs' takings.[227] Here, the Braggs' water is used to benefit their business and per this decision is the same as the highest and best use of the properties: commercial pecan orchards.[228]

The Braggs supported a valuation at the time of trial by pointing to Section 21.0421 of the Property Code and categorized it as an issue of first impression.[229] "The same valuation date should be utilized in this inverse condemnation case because valuation for loss of groundwater rights should not change depending on whether the landowner is a plaintiff or defendant."[230] The Braggs could not be "made whole" if valuation occurs when their permits were issued and denied, at which time Edwards groundwater rights were selling for $2,500 per acre-foot. Such rights tripled to $7,500 per acre-foot by time of trial in 2010.[231] The Braggs argued "it remains appropriate in this case to value the groundwater rights separately since only groundwater rights have been taken."[232] The Braggs then calculated the value of the takings at $7,500 per acre-foot, as the difference between the amount of water needed for the orchards less the permitted amount—for a total of $3,785,250—and any damages to the remainder of the property plus post-judgment interest.[233]

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[221] Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1294–95 (Fed. Cir. 2008).
[222] Resp'ts Glenn and JoLynn Bragg's Br. on the Merits at 45, Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118 (Tex. App.—San Antonio 2013, pet. filed).
[223] *Id.*; *see also* Day, 369 S.W.3d at 838–39; *Sheffield Dev. Co.*, 140 S.W.3d at 667.
[224] *See Bragg*, 421 S.W.3d at 148.
[225] *Id.* at 150 (citing United States v. 339.77 Acres of Land, More or Less, in Johnson and Logan Counties, Ark., 420 F.2d 324, 326 (8th Cir. 1970)).
[226] *See Bragg*, 421 S.W.3d at 150–51.
[227] *Bragg*, 421 S.W.3d at 151.
[228] *Id.*
[229] Resp'ts Glenn and JoLynn Bragg's Br. on the Merits at 24, Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118 (Tex. App.—San Antonio 2013, pet. filed).
[230] *Id.* at 18.
[231] *Id.*
[232] *Id.* at 27.
[233] *Id.* at 39.

relationship between the groundwater estate owner and the remaining surface owner estate."[241] Lubbock argued that neither the remaining surface estate nor the severed groundwater estate enjoy[ed] the status as the dominate estate."[242] The court indicated that their "research yielded no case in which a Texas court has applied the accommodation doctrine to the groundwater context."[243]

The Seventh Court of Appeals next examined the Texas Supreme Court holding in *Edwards Aquifer Authority v. Day,*[244] particularly focusing on the ownership aspects of groundwater, oil, and gas.[245] Ultimately, the Seventh Court of Appeals concluded that *Day* does not "speak to the implied rights of a severed groundwater estate owner to use the surface in production of groundwater. Nor does it define and delineate the right and duties as between owners of the severed groundwater estate and the surface estate."[246] The *City of Lubbock v. Coyote Lake Ranch* opinion does not provide any logical reason why the accommodation doctrine should not apply to severed groundwater rights.[247] The Seventh Court merely states that "we do not read *Day* to support an extension of the accommodation doctrine to the groundwater context presented in the instant case" leaving it "to the Texas Supreme Court to recognize and pronounce such . . . [doctrine] extension, especially in light of the dramatic implications it could have in the area of water law in Texas."[248]

The opinion does not address—only footnotes—the second legal argument made by Lubbock; the express, specific provisions of the deed make the accommodation doctrine inapplicable. Mineral owners have not contended in case law that the accommodation doctrine prevails over the express language in a deed granting access rights.[249]

Next Phase. On September 24, 2014, Coyote filed a petition for review with the Texas Supreme Court. Two amicus briefs were filed in support of review; the sponsoring organizations include: Texas and Southwestern Cattle Raisers Association, Texas Cattle Feeders Association, and Texas Farm Bureau. Both briefs urge the Texas Supreme Court to extend the accommodation doctrine because it is sound public policy allowing orderly development of groundwater resources in Texas, provides for a more "balanced approach" in dealing with conflicting property interests,[250] and takes advantage of an already "well-established set of statutory and common-law principals."[251]

On January 30, 2015, the Texas Supreme Court agreed to hear the controversy, docketing the case as Case No. 14-0572,[252] and asked the parties to provide full briefings on the merits in April 2015.

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[241] *See* City of Lubbock v. Coyote Lake Ranch, LLC, 440 S.W.3d 267, 273 (Tex. App.—Amarillo 2014, pet. filed).
[242] *Id.*
[243] *Id.* at 273–74.
[244] Edward Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012).
[245] *See* Edward Aquifer Auth. v. Day, 369 S.W.3d 814, 831–32 (Tex. 2012).
[246] *See* City of Lubbock v. Coyote Lake Ranch, LLC, 440 S.W.3d 267, 274 (Tex. App.—Amarillo 2014, pet. filed).
[247] *Id.* at 273–74.
[248] *Id.* at 275.
[249] *Id.* at 273.
[250] Br. for Tex & Sw. Cattle Raisers Ass'n & Tex. Cattle Feeders Ass'n as Amici Curiae Supporting Pet'rs at 14, Coyote Lake Ranch, LLC v. City of Lubbock, No. 14-0572 (Tex. filed July 24, 2014).
[251] Br. for Tex. Farm Bureau as Amici Curiae Supporting Resp'ts at 3, Coyote Lake Ranch, LLC v. City of Lubbock, No. 14-0572 (Tex. filed July 24, 2014).
[252] Coyote Lake Ranch, LLC v. City of Lubbock, No. 14-0572 (Tex. filed July 24, 2014).

The court examined the statutes cited by the City and found no grant of power to the City of Blue Mound, which lacked a city charter.[260] The court then concentrated its discussion on a 1936 Texas Supreme Court decision, *Lone State Gas Company v. City of Fort Worth*.[261] "Because a mechanism to compensate the utility owner for the taking of the going-concern aspect of the utility was required under the Texas constitution but existed neither in Texas statutes nor in the city's charter, condemnation was not authorized."[262]

The City of Blue Mound contends that *Lone Star Gas Company v. City of Fort Worth* was wrongly decided and points to two recent cases: *Barshop v. Medina County Underground Water Conservation District*[263] and *Texas Building Owners and Managers Association, Inc. v. Public Utility Commission of Texas*.[264] The court found that both cited decisions reaffirmed the *Lone Star* holding.

Barshop concerned a declaratory judgment action brought by landowners seeking to declare the Edwards Aquifer Act facially unconstitutional. The Texas Supreme Court held that "[b]ased on this provision in the Act, we must assume that the Legislature intends to compensate Plaintiffs for any takings that occurs. As long as compensation is provided, the Act does not violate [A]rticle I, [S]ection 17 [of the Texas constitution]."[265] Because this specific provision of the Act provided a mechanism for compensation, the Act was not facially unconstitutional.[266]

Texas Building Owners also involved a declaratory judgment action to declare portions of the Building Access Statutes of the Public Utility Regulatory Act facially unconstitutional by allowing a taking without just compensation.[267] However, if the building owner and the telecommunication utility "fail[ed] to reach a negotiated agreement, either party may petition the [Public Utility] Commission to resolve the dispute and to determine compensation."[268] The court in *Texas Building Owners* held that the questioned statutes provided for the adoption of detailed rules setting forth an adequate process for obtaining compensation and, thus, were facially constitutional.[269]

Holding. No statutory procedures exist which authorize the City's condemnation suit to be brought in district court. The City of Blue Mound is attempting to condemn a water and wastewater system as a going concern for which compensation would be due. However, *Lone Star Gas Company v. City of Fort Worth* remains binding precedent and establishes that the general Texas condemnation statutes provide no mechanism for the awarding of going-concern value.

Guadalupe-Blanco River Authority v. Texas Attorney General, et al.[270]

The San Antonio Water System (SAWS) filed for a bed and banks permit with the Texas Commission on Environmental Quality ("TCEQ"): the first 50,000 acre-feet of available stream flows would be dedicated to

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[260] City of Blue Mound v. Sw. Water Co., 449 S.W.3d 678, 687 n.8 (Tex. App.—Fort Worth 2014, no pet.).
[261] *See* Lone Star Gas Co. v. City of Fort Worth, 98 S.W.2d 799, 803 (Tex. 1936) (recognizing the city's proposed taking of utility system for municipal ownership and operation would constitute the taking of "a unified and vitalized 'going concern'" requiring compensation for that value).
[262] *Id.* at 803.
[263] Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996).
[264] Tex. Building Owners & Managers Ass'n, Inc. v. Pub. Util. Comm'n of Tex., 110 S.W.3d 524 (Tex. App.—Austin 2003, pet. denied).
[265] *See* Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618, 630–31 (Tex. 1996).
[266] *See id.* at 623.
[267] *See* Tex. Building Owners & Managers Ass'n, Inc. v. Pub. Util. Comm'n of Tex., 110 S.W.3d 524, 527–28 (Tex. App.—Austin 2003, pet. denied).
[268] *See id.*
[269] *Id.* at 537.
[270] Guadalupe-Blanco River Auth. v. Tex. Attorney Gen., et al., No. 03-14-00393-CV, 2015 WL 868871 (Tex. App.—Austin Feb. 26, 2015, no pet. h.) (mem. op).

jurisdiction must be shown under the applicable statute;" if "the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff's an opportunity to amend."[277]

The court phrased GBRA's contention as "if [SAWS] is allowed to proceed with its planned use, then the bond authorization by [GBRA] would be invalid 'because the $100 million expenditure cannot result in the required total' water supply necessary to cover the cost of constructing the project."[278] Further, the court "believe[s] that the Authority's reliance on the Act is misplaced"[279] and lists the limited number of topics for which a declaration is available[280] and the limited types of proceedings enjoined under the Act.[281] The court found the requested declarations did "not seek judicial approval regarding the legality and validity of [GBRA's] bonds or the procedures that were used when issuing the bonds."[282] Availability of water for the project cannot be "construed as bearing on the 'legality and validity' of the bonds . . . as those terms are used in the Act"[283] since it does "not address the effect that the activities of another party might have on the ability of the issuer to fulfill its obligations."[284] The court notes that the pledge to repay its bonds could be satisfied "regardless of whether the desired amount of water is present because [GBRA] could raise its rates to ensure that there were sufficient funds to cover the bonds."[285]

GBRA asked the Third Court of Appeals to reverse the trial court and remand the proceeding to allow the district court to construe the Edwards Aquifer Act in a manner that "ensure[s] that there is a sufficient amount of water available to finance the project through the bonds."[286] The court found that the district court did not err when it determined that GBRA's suit exceeded the scope of the Act and it "properly granted the pleas and dismissed the suit on that ground."[287] Because GBRA's pleadings affirmatively negated the existence of jurisdiction in this case, GBRA is not entitled to amend its pleadings.[288]

Guadalupe County Groundwater Conservation District v. Post Oak Clean Green, Inc.[289]

In October 2013, Post Oak Clean Green, Inc. ("Post Oak") submitted a permit application to the Texas Commission on Environmental Quality ("TCEQ") for a proposed municipal solid waste landfill to be located within the outcrop area of the Carrizo-Wilcox aquifer recharge zone. It is undisputed that the proposed landfill would be sited within the boundaries of the Guadalupe County Groundwater Conservation District (the "District"). TCEQ granted Post Oak a permit to construct and operate the proposed landfill.

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[277] *See* Guadalupe-Blanco River Auth. v. Tex. Attorney Gen., et al., No. 03-14-00393-CV, 2015 WL 868871, at *2 (Tex. App.—Austin Feb. 26, 2015, no pet. h.) (mem. op).
[278] *See id.* at *3.
[279] *See id.* at *4.
[280] *See id.* at *4–5.
[281] *See id.* at *6.
[282] *See id.* at *4.
[283] *Id.*.
[284] *See id.* at *6.
[285] *See* Act of May 21, 1975, 64th Leg., R.S., ch. 433, § 1, sec. 9, 1975 Tex. Gen. Laws, 1149,1153-54 (empowering GBRA to establish and set rates sufficient to produce revenue to cover its obligations).
[286] Br. for Appellant at 12, Guadalupe-Blanco River Auth. v. Tex. Attorney Gen., et al., No. 03-14-00393-CV (Tex. App.—Austin).
[287] *See* Guadalupe-Blanco River Auth. v. Tex. Attorney Gen., et al., No. 03-14-00393-CV, 2015 WL 868871, at *7 (Tex. App.—Austin Feb. 26, 2015, no pet. h.) (mem. op).
[288] *Id.*
[289] Guadalupe Cnty. Gw. Conserv. Dist. v. Post Oak Clean Green, Inc., No. 14-0863-CV (2nd 25th Dist. Ct., Guadalupe County, Tex., Jan. 16, 2015).

Legislature's omission was intentional."[302] The Court finds that the District "is not preempted in prohibiting the application in any manner of waste over the aquifer it manages."[303]

[302] Order on Pl.'s Am. Mot. for Partial Summ. J. 10, Guadalupe Cnty. Gw. Conserv. Dist. v. Post Oak Clean Green, Inc., No. 14-0863-CV (2nd 25th Dist. Ct., Guadalupe County, Tex., Jan. 16, 2015).
[303] *Id.* at 14.