Case Law Update

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Introduction: This case law update presents a summary of active and recently resolved cases that cover topics related to groundwater and surface water rights. The paper provides a brief explanation of each case or dispute and information about recent or ongoing dispositions. Some of the cases listed in this summary are still pending or are the subject of on-going appeals. Cases are organized by subject matter, with federal cases being presented first, followed by Texas cases.

I. Federal Surface Water Cases

A). *Texas v. New Mexico*, No. 141, Original (U.S. filed Jan. 8, 2013)

In 2013, Texas brought this dispute before the United States Supreme Court in a petition for leave to file a complaint, asserting that only the Supreme Court has original jurisdiction. On January 27, 2014, the Court granted Texas's motion and allowed New Mexico to file a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Background

In the 1910 Rio Grande Project, the federal government established an irrigation system aimed at helping agriculture and industry in the states the river flows through. But that project, which also upheld a 1906 treaty that promises Mexico 60,000 acre-feet of water annually, didn't specifically

[1] Parts of this paper were prepared by Shea Pearson in his personal capacity. The opinions expressed herein are the author's own and do not reflect the view of the Texas Commission on Environmental Quality or any other state or federal agency.

address state-by-state allocation. *Texas v. New Mexico* concerns the interpretation of the 1938 Rio Grande Compact, an agreement between Texas, New Mexico, and Colorado. Under the Compact, New Mexico delivers water into Elephant Butte Reservoir—90 miles north of the border with Texas. From there, water is allocated by the U.S. Bureau of Reclamation to the Rio Grande Project beneficiaries in both southern New Mexico and Texas. Historically, Texas has received 43 percent of the water, with New Mexico getting 57 percent. Under the terms of the Compact, signed by Congress in 1939, Elephant Butte Reservoir was designated to hold water to allow New Mexico to fulfill its obligation to deliver water.

Despite the fact that the Compact states it is intended "to remove all causes of present and future controversy among these States . . . with respect to the waters of the Rio Grande," the plain language of the Compact is unlikely to answer the question in this case, and the Court's focus is likely to be on the intent of the parties.

Texas alleges New Mexico has violated its obligations under the Rio Grande Compact by repeatedly "intercepting" water intended for use in Texas. New Mexico has allegedly done this in two ways: by allowing diversions of surface water and by allowing pumping of groundwater downstream of Elephant Butte Dam that is hydrologically connected to the Rio Grande's flow, thus reducing the amount of water released to Texas.

Texas seeks (i) declaratory relief as to its rights to the waters of the Rio Grande pursuant to the 1938 Compact; (ii) an order compelling New Mexico to 'deliver the waters of the Rio Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act' and enjoining New Mexico from interfering with or usurping the United States' authority to operate the Rio Grande Project; and (iii) an order awarding damages including pre- and post-judgment interest for injuries suffered by Texas as a result of New Mexico's actions." Compl., at 15–16. Damages have been estimated as high as $1 billion.

By leave of the Court, (*see Texas v. New Mexico*, 134 S. Ct. 1783 (2014)), the United States filed a Complaint in Intervention to protect what it termed "distinctively federal interests" concerning the effect this dispute has on the Rio Grande Project. In its Complaint in Intervention, the United States alleges "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts," in violation of federal reclamation law. The United States also alleges that New Mexico's diversions below Elephant Butte Reservoir negatively interfere with the United States' contractual obligations pursuant to the Convention of 1906 to deliver water to Mexico.

The United States seeks declaratory and injunctive relief, asking the Court (i) to declare that New Mexico, as a party to the 1938 Compact, may not permit parties not in privity with the Bureau of Reclamation, as well as Rio Grande Project beneficiaries in New Mexico, to intercept or interfere with delivery of water from the Rio Grande Project; and (ii) to enjoin New Mexico from permitting such interception and interference from junior appropriators.

New Mexico's Motions to Dismiss

New Mexico moves to dismiss Texas's Complaint and the United States' Complaint in Intervention for failure to state a claim upon which relief can be granted under the terms of the 1938 Compact. New Mexico asserts that Texas's claim that New Mexico has "allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico" fails to state a claim under the 1938 Compact because the compact does not require New Mexico to deliver or guarantee water deliveries to the New Mexico–Texas state line or "to prevent diversion of water after New Mexico has delivered it at Elephant Butte Reservoir." Mot. To Dismiss, at 28 (quoting Compl. ¶ 4). Indeed, New Mexico argues that its only duty under the 1938 Compact is to deliver

water to Elephant Butte Reservoir. *See id.* at 59 ("New Mexico's duty under the Compact is to deliver water to Elephant Butte Reservoir, and neither Texas nor the United States alleges that New Mexico breached that duty."); *id.* at 61 ("In sum, New Mexico's duty under the Compact is to deliver water to Elephant Butte."). New Mexico, therefore, argues that it has no duty under the 1938 Compact "to limit post-1938 development below Elephant Butte" within its boundaries.

Appointment of Special Master

After years of protracted litigation, including a motion to intervene filed by the U.S. Solicitor General arguing in favor of Texas, on November 3, 2014 the Court appointed Gregory Grimsal of New Orleans as Special Master to resolve the issues. On June 28, 2016, the Special Master presented his First Report (in draft form), a 273-page document that recommends the Court deny New Mexico's motion to dismiss Texas's complaint.

The Special Master found that "the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir." *See* First Report at 169. Therefore, if New Mexico truly "intercepts or diverts water it delivers to the Rio Grande Project immediately upon release from Elephant Butte Reservoir, it disregards the text of Article IV and renders the common and straightforward meanings of the terms 'obligation' and 'deliver' in Article IV void, which offends the principles of federal statutory construction as well as those of contractual interpretation." *See id.* Since under Rule 12(b)(6), the Special Master is required to assume Texas's allegations as true, New Mexico's alleged actions "would render senseless and purposeless the numerous 1938 Compact articles outlining the basic accounting structure of the deal struck among the signatory States." *Id.* at 173.

In reviewing the Compact, the Special Master determined that "in addition to its text and structure, the purpose and history of the 1938 Compact confirm the reading that the signatory States intended to use the Rio Grande Project as the vehicle to guarantee delivery of Texas's and part of

New Mexico's equitable apportionment of the stream, thereby supporting the finding that Texas has, in fact, stated a claim under the 1938 Compact." *Id.* at 175. Thus, New Mexico is prohibited from recapturing water it has delivered to the Project after such water is released from Elephant Butte.

Relying on *New Jersey v. New York*, 283 U.S. 336 (1931) and *Wyoming v. Colorado*, 259 U.S. 419 (1922), the Special Master found that Texas, New Mexico, and Colorado are each "entitled to an equitable apportionment" of the waters of the Rio Grande. Indeed, the preamble to the 1938 Compact says as much. New Mexico concedes the above points, but argues the Compact "imposes upon it no obligations to ensure that Rio Grande Project deliveries . . . arrive at the New Mexico–Texas state line." First Report at 182. It its motion to dismiss, New Mexico went as far as to say "the Compact does not prevent New Mexico from interfering with Project water." *See id.* The Special Master disagreed, finding that the doctrine of equitable apportionment commits New Mexico's water deliveries to the intended recipient as stated in the Compact: Texas. All other prior appropriations granted by state law are subjected to this agreement. Thus, "Project water leaving Elephant Butte belongs to either New Mexico or Texas by compact, or to Mexico by the Convention of 1906." *Id.* at 183. Finding that the 1938 Compact uses the Rio Grande Project as the single vehicle by which to distribute the river's water to Texas and New Mexico below Elephant Butte, as well as to Mexico in accordance with the Convention of 1906, the Special Master reported:

> New Mexico, through its agents or subdivisions, may not divert or intercept water it is required to deliver pursuant to the 1938 Compact to Elephant Butte Reservoir after that water is released from the Reservoir by Reclamation for deliveries pursuant to the administration of the Rio Grande Project.
>
> That water has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico, and that dedication takes priority over all other appropriations granted by New Mexico.

According to the Special Master, this includes diversions to water users comprising the Elephant Butte Irrigation District (EBID) situated below the reservoir. Relying on a Colorado Supreme Court case, *In re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for*

Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries, 674 P. 3d 914, 923 (Colo. 1983), the Special Master found that water which becomes subject to equitable apportionment must be delivered as mandated by compact. In *In re Rules & Regulations*, the court held that a Colorado State Engineer "had no discretion to administer the Conejos River and Rio Grande River's main stem differently in order to effect Colorado's deliveries under the 1938 Compact."

The Special Master concluded that New Mexico, like the Colorado State Engineer in *In re Rules & Regulations*, has no discretion to veer from the method of distribution of Project water after it leaves Elephant Butte Reservoir—the 1938 Compact, by incorporating the Rio Grande Project, requires the water at that point be controlled and delivered to its destinations by Reclamation. For these reasons, the Special Master recommended the United States Supreme Court deny New Mexico's motion to dismiss Texas's complaint, since Texas has stated plausible claims of New Mexico's violation of the 1938 Compact.

Motions to Intervene

Several entities filed motions to intervene, most notably Elephant Butte Irrigation District (EBID). The Special Master found EBID had not met the standard for intervention, due to procedural deficiencies in its motion to intervene, and for a failure to meet its burden to justify intervention in the original case. Since EBID's home state of New Mexico is already a party to the litigation, EBID was required to demonstrate a compelling interest in its own right, apart from its interest germane to that of other citizens of the State, which interest is not properly represented by the State. EBID's argument was that its status as the administrator of the Rio Grande Project affords it a compelling interest, but the Special Master found that the United States has the ultimate right and responsibility to administer the Project. This right cannot be transferred absent Congressional approval. Finding

that EBID failed to rebut the presumption that New Mexico adequately represented EBID's interests in the litigation, the Special Master recommended EBID's Motion to Intervene be denied.

A status conference was held via telephone on August 11, 2016. At this time, letter briefs in response to the Special Master's First Report have been solicited and received. Documents filed with the Special Master may be found on the Special Master's website at www.gordonarata.com/tvnm. The next step is for the Special Master to prepare a final version of his report, which will be filed with the Supreme Court. At this point, the Supreme Court will accept or reject the Special Master's recommendations, and then most likely set the matter for conference and make a determination whether to handle this case with or without oral argument.

As tensions rise among the parties and persons affected, it's worth remembering that this isn't the first time Texas has sued New Mexico over groundwater pumping and its effects on surface flows. In 1974, Texas sued New Mexico in the U.S. Supreme Court, claiming New Mexico had violated the 1948 Pecos River Compact and shortchanged it by 1.2 million acre-feet of water since the 1960s. The suit dragged on for almost two decades and cost both states millions of dollars.

B). *Chickasaw Nation v. Fallin*, No. CIV-11-927-W (W.D. Okla. filed Aug. 18, 2011)

In 2011, Oklahoma City decided to build a pipeline that would eventually carry water from Sardis Lake to Oklahoma City businesses and residents. In response to this, the Choctaw and Chickasaw Nations of Oklahoma (the Nations) filed a lawsuit in the U.S. District Court for the Western District of Oklahoma. In the lawsuit, the Nations sought declaratory and injunctive relief to protect their federal rights, including their present and future use water rights, regulatory authority over water resources, and the right to be immune from state law and jurisdiction. The Nations claimed that most of the water in southeastern Oklahoma belonged to them under the pre-civil war 1830 Treaty of Dancing Rabbit Creek. Article 2 of this treaty describes the lands given to the Choctaw by the United States Government in fee simple, creating almost complete sovereignty over it, that make

up the homeland set aside for the Choctaw Nation. Article 4 of the treaty guarantees tribal self-government and tribal jurisdiction over all persons and property within the treaty territory and promises no state shall interfere with those rights by passing laws for the Choctaw Nation, and no land granted to the Choctaw shall be embraced by any territory or state. However, when the Civil War occurred, the Choctaw Nation aligned with the Confederacy and when the war was over the agreements were ignored and new treaties and laws were created. The Dawes Act took large tracts of Indian land and divided them into individual plots that were given to tribe members which led to statehood. In the 1976 case *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), a federal judge declared that despite the federal government's intention to dissolve the Creek tribal government, the federal government never explicitly did so, and it never explicitly dissolved the Choctaw and Chickasaw Nations. The Nations also claim their rights under treaties are the "supreme law of the land" (*see* U.S. Const., art. VI, cl.2) and are paramount to any water rights or regulatory authority claimed by the Defendants and are protected by the disclaimer of authority over rights and property on which congress conditioned Oklahoma's statehood in the Oklahoma Enabling Act of June 16, 1906, known as the "Oklahoma Disclaimer," as well as other controlling federal law.

The "Oklahoma Disclaimer" states specifically that as a precondition to the formation of the State of Oklahoma, the residents of such state disclaim any authority to interfere with "the rights of person or property pertaining to the Indians" or "to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights . . . " (Act of Congress of June 16, 1906 § 1, 34 Stat. 267). The Nations also cite, in support of their claim, Act of Congress of April 26, 1906, §27, 34 Stat. 137, 148 which provides that the Nations' property "shall be held in trust by the United States for the use and benefit of the Indians respectively comprising of each of the said tribes . . . ." These arguments add up to the idea that the Supreme Court recognized in *Atlantic & P.R. Co. v. Mignus*, 165 U.S. 413, 435–36 (1897) that the

Nations' Indian Territory lands were for most purposes "to be considered as an independent country." These Indian Territory lands under the 1855 Treaty of Washington, 11 Stat. 611, were, despite the tribal systems being independent of one another, held in joint title with the Choctaw Nation holding an undivided 75% interest and the Chickasaw Nation holding an undivided 25% interest.

The 2011 lawsuit named as defendants Governor Mary Fallin, members and Executive Director of the Oklahoma Water Resources Board (OWRB), the City of Oklahoma City, and the Oklahoma City Water Utility Trust (OCWUT). In their lawsuit, the Nations claimed that under the aforementioned treaty, they have federally-protected rights to the water within a 22-county territory in southeastern Oklahoma, and have never consented to the proposed or actual current export of water resources from the Treaty Territory. The Nations argued that the above mentioned acts of congress preempt any attempt to obtain more water from the treaty Territory by the defendants and sought declaratory judgments against any action by the OWRB on a pending application by Oklahoma City and OCWUT for a permit to use stream water from Sardis Reservoir in southeastern Oklahoma, or any other withdrawal or export of water from the area at issue, unless and until there is initiated a general stream adjudication that satisfies the requirements of the federal law known as the McCarran Amendment. The Nations also sought permanent injunctions against any such action unless and until a general stream adjudication that satisfies the McCarran Amendment is completed. The McCarran Amendment, 43 U.S.C. § 666, provides the sole basis on which a State may seek to exercise jurisdiction over tribal rights to water resources. On March 12, 2012 the proceedings of this case were stayed while the parties continued to negotiate outside of the courtroom.

In August 2016, the state of Oklahoma and the Nations reached an agreement over the control of water in southeast Oklahoma—pending congressional approval. The agreement establishes rules over how much water can be taken from the lake without disrupting tourism, which was a primary concern of the Nations. The agreement will implement a system of lake level release restrictions based

on the Oklahoma Department of Wildlife Conservation's lake level management plan, to allow Oklahoma City's measured use of Sardis Lake for diversification of its municipal supply purposes and will all for continued support of regional recreation, fishing, and wildlife uses. Existing water rights or rights to surface or groundwater will not be affected by the agreement.

The agreement also sets up a framework for out-of-state sales or transfers of water from a 22-county region in south central and southeastern Oklahoma which remain unlawful absent state legislative approval. Under the agreement, the Settlement Commission shall be comprised of five members, appointed as follows: (i) one by the Governor of the State; (ii) one by the Attorney General of the State; (iii) one by the Chief of the Choctaw Nation; (iv) one by the Governor of the Chickasaw Nation; and (v) one by agreement of the aforementioned four members. It creates a five-person commission appointed by the State and tribal governments that will evaluate such proposals and make recommendations to the legislature, which has final say. The leaders of the Nations will be entitled to appoint two members to the commission advising the legislature on out-of-state water sales and one member of the two-member technical committee, which helps shape scientific models used to allocate water and plan projects. Rules were established governing how much water and under what conditions can water be transferred out of Sardis Lake. Under the agreement, Oklahoma City will be subject to withdrawal restrictions and will not be allowed to make drastic withdrawals from Sardis Lake, even in the worst drought conditions. If water were to be sold out-of-state, the agreement establishes the Water Preservation Infrastructure Fund, under which all monies deposited therein shall be solely and exclusively to provide grants for the construction and maintenance of public water infrastructure throughout Oklahoma, including but not limited to public infrastructure for municipal and rural water supply, irrigation supply, and wastewater projects.

Oklahoma City, under the agreement, can extend its current 100-mile-long pipeline—which currently pumps water from Atoka Lake to Oklahoma City—further to pull water from Sardis Lake.

The Choctaw and Chickasaw Nations will drop all claims of ownership and control over the water in southeastern Oklahoma, and the State of Oklahoma will retain its primary authority over water regulation through the OWRB. After the agreement is signed by all parties it must be approved by federal legislation and executed by the Secretary of the United States Department of the Interior. Parties are currently working with the Oklahoma Congressional delegation to secure the appropriate legislation.

C. *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (U.S. 2016)

The Clean Water Act (CWA) regulates the discharge of pollutants into "the waters of the United States." (33 U.S.C. §§ 1311(a), 1362(7), (12). Under the CWA there are two permit requirements. First, a permit from the Corps to discharge dredged or fill materials into "navigable waters" (i.e., Waters of the United States). This includes wetlands adjacent to the "waters of the U.S." (*US v. Riverside Bayview Homes*, *Inc.*, 474 U.S. 121, 129, 106 S. Ct. 455 (1985)) but does not include non-navigable isolated intrastate waters (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166 (2001)) or non-navigable tributaries (*Rapanos v. United States*, 547 U.S. 715, 726–727 (2006)). The second permit requirement is from the EPA (or authorized state agency) to discharge any "pollutant" into navigable waters. The U.S. Army Corps of Engineers (Corps) allows property owners to obtain a standalone "jurisdictional determination" (JD) on a case by case basis specifying whether a particular property contains "waters of the United States" (33 CFR § 331.2). A JD may be either "preliminary," advising a property owner that such waters "may" be present, or "approved," definitively "stating that the presence or absence" of such waters (33 CFR § 331.2). An approved JD is considered an administratively appealable "final agency action" under 33 CFR § 320.1(a)(6) and is binding for five years on both the Corps and the EPA.

Background

Respondents in this case were three companies, including Hawkes Co., Inc. (Hawkes) who was mining peat in Minnesota. Peat mining can have significant environmental and ecological impacts and is regulated by federal and state environmental protection agencies. In December 2010, Hawkes applied for a Section 404 permit which authorizes "the discharge of dredged or fill material into the navigable waters at specified disposal sites." In January 2011 at a meeting between Hawkes and Corps representatives, Corps representatives urged Hawkes to abandon his plans to mine peat—emphasizing delays, cost, and uncertain outcome of permitting process. In March 2011 the Corps made a preliminary determination that the wetland was a regulated "water of the U.S." and at minimum an environmental assessment would be required. Later in April 2011, Corps Representatives notified Hawkes that a permit would take years and be very costly. In June 2011 a Corps representative conducting a site visit told a Hawkes employee he should "start looking for another job." In August 2011 the Corps notified Hawkes that nine additional pieces of information, which would cost more than $100,000, were needed. In November 2011 Corps representatives met with the landowner whom Hawkes was in the process of purchasing the land for peat mining from and urged them to sell the land to a wetlands bank. In November 2011, Corps representatives met with the landowner—from whom Hawkes was in the process of purchasing the land—urged the landowner to sell the land to a wetlands bank. In November of the same year the Corps also completed a "draft" JD which concluded that the property from which Hawkes wanted to mine peat was connected by a "relatively permanent water" (series of culverts and unnamed streams) to a navigable water some 120 miles away. In February 2012, the Corps' approved JD was issued, concluding the property was a "water of the U.S." because of its "significant nexus" to the Red River.

Hawkes filed a timely administrative appeal. In October 2012, the Corps Deputy Commanding General for Civil & Emergency Operations sustained the appeal. Concluding that the

administrative record did not support the District's determination that "the subject property contains jurisdictional wetlands and waters" the appeal was remanded to the District Court for "reconsideration in light of that decision." On December 31, 2012, the Corps issued a revised JD that concluded without additional information that there was a significant nexus between the property and the Red River of the North, and advised the appellants that the revised JD was a "Final Corps permit decision in accordance with 33 C.F.R. Sec. 331.1," meaning Hawkes' administrative remedies were exhausted. Hawkes filed action seeking judicial review of the Revised JD, alleging that it did not meet either the *Rapanos* plurality's "relatively permanent" test or Justice Kennedy's "significant nexus" test for the assertion of CWA jurisdiction. The Corps moved to have the complaint dismissed on grounds that the revised JD was not a final agency action and the issue was not ripe for judicial review. The district court dismissed the complaint for lack of final agency action. Hawkes again appealed.

Appeal to the Eighth Circuit

The Eighth Circuit—applying a properly pragmatic analysis of ripeness and final agency action principles—concluded that an approved JD is subject to immediate judicial review. The court further stated that the revised JD alters and adversely affects Hawkes' right to use its property in conducting a lawful business activity. An adverse business effect is one that is caused by agency action (the Corps in this case), not simply by the existence of the CWA. Though the revised JD is not self-executing, "the APA provides for judicial review of all final agency actions, not just those that impose a self-execution sanction." *Sackett v. EPA*, 132 S. Ct. 1367 (U.S. 2012). *Sackett* reflected the concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable to challenge those assertions. The Eighth Circuit concluded that an approved JD is a final agency action and the issue is ripe for judicial review under the APA. The judgment of the district court was reversed by the Eight Circuit, and the Supreme Court granted certiorari.

Affirmed by the United States Supreme Court

The opinion of the Court was delivered by Justice Roberts, who after walking through the background information stated above applies the conditions that must be satisfied for an agency action to be final as established in *Bennett v. Spear*, 520 U.S. 154 (1997). For agency action to be "final": (1) the action must mark the consummation of the agency's decision making process—must not be tentative or interlocutory in nature and (2) the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. Justice Roberts points out that an approved JD clearly marks the consummation of the Corps' decision making process because it comes after extensive fact finding, and the fact that the Corp describes approved JDs as "final agency action" as described above. Justice Roberts goes on to state that by issuing Hawke an approved JD, the Corps for all practical purposes "has ruled definitively" that Hawke's property contains jurisdictional waters.

In satisfying the second prong of *Bennett*, Roberts looks at the "negative" JD, which in his words both narrows the field of potential plaintiffs and limits the potential liability a landowner faces for discharging pollutants without a permit. A "negative" JD (i.e., an approved JD stating that property does not contain jurisdictional waters) creates a 5-year safe harbor from civil enforcement proceedings brought by the Government and limits the potential liability a property owner faces for violating the CWA (*see* 33 U.S.C. §§ 1319, 1365(a)). Under a longstanding memorandum of agreement between the Corps and EPA, it will also be "binding on the Government and represent the Government's position in any subsequent federal action or litigation concerning that final determination" (Memorandum of Agreement §§ IV-C-2; VI-A). Justice Roberts adds that affirmative JDs, like the one issued in this case, also have legal consequences: they deprive property owners of the five-year safe harbor that "negative" JDs afford.

Justice Roberts next turned his attention to the Administrative Procedure Act (APA) which evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials and provides for judicial review of a "final agency action for which there is no other adequate remedy in a court." (*see* 5 U.S.C. § 704). The Eighth Circuit pointed out during its review that this case is similar to the holdings in *Bennett v. Spear*, 520 U.S. 154 (1997) and *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), in that the revised and later approved JD requires appellants either to incur substantial compliance costs (permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties. The Corps contends that Hawkes has two alternatives to the APA: Hawkes can discharge the fill material without a permit and risk EPA enforcement, or it can apply for a permit and, if it doesn't like the result, seek judicial review. Justice Roberts states that neither of the Corps contentions are adequate to prevent review under the APA, citing as his reasoning that the Court has long held parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of "serious criminal and civil penalties."

This is emphasized by several points which are pertinent to the permitting process but do not alter finality of a JD or affect suitability for judicial review, because the permitting process adds nothing to the JD: 1) the fact that not only is the permitting process arduous, long, and expensive, as shown by the timeline of events leading up to the suit stated above; 2) if Hawkes discharged fill material without a permit, they would be exposed to civil penalties of up to $37,500 for each day they violated the act and possibly be criminally liable under 33 U.S.C. §§ 1319(c), (d); 3) the numerous tests, assessments, and other undertakings in addition to the permit application that the Corps demanded Hawkes go through to receive a permit would cost more than $100,000. Furthermore, because the CWA makes no reference to standalone jurisdictional determinations, there is little basis for inferring anything from it concerning their reviewability. In its final argument, the Corps points out that if it

did not offer JDs on a case-by-case basis, an applicant would have to either go through the entire permitting process or have an enforcement action brought against them in order to have an opportunity for review. Justice Roberts dismisses this as a "count your blessings argument" that is insufficient to deny the right to judicial review under the APA. The Supreme Court held that an approved jurisdictional determination by the United States Army Corps of Engineers definitively stating the presence or absence of waters of the United States on a particular property is a final agency action judicially reviewable under the Administrative Procedure Act and affirmed the judgment of the Court of Appeals for the Eighth Circuit.

Concurring Opinions

The first concurring opinion was written by Justice Kennedy, joined by Justices Thomas and Alito. In his concurrence, Justice Kennedy agrees with the Court's opinion in full but points out that based on the government's representations in this case that the reach and systematic consequences of the CWA remain a cause for concern, citing Justice Alito's statement in an earlier case that the CWA's reach is "notoriously unclear" and the consequences to landowners can be crushing. Justice Kennedy also discusses that a JD gives predictability to a landowner as long as the agency's declaration can be relied on, but the Government in this case has represented that a JD has no legally binding effect on EPA enforcement decisions—which if true would leave the CWA unaffected by this decision. However, Justice Kennedy also states that the Court was right to construe a JD as binding in light of the fact that in many instances it will have a significant bearing on whether the CWA comports with due process.

The second concurrence was written by Justice Kagan, who agreed with the Court's opinion in full but disagreed with Justice Ginsburg's concurrence about the memorandum of agreement between the Corps and the EPA. Justice Kagan believes the memorandum to be central to the

disposition of the case because it establishes that JDs are binding on the government. This is further exemplified by the effect of negative JDs which create a 5-year safe harbor binding agencies in any subsequent litigation, citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997) as support.

The third concurrence was written by Justice Ginsburg, who joined the Court's opinion except for its reliance on the memorandum of agreement between the Corps and the EPA. Justice Ginsburg points out that the United States does not share the same reading of the memorandum as the Court, citing several examples. In a footnote, Justice Ginsburg states her belief that, contrary to Justice Kagan's suggestion, *Bennett* does not displace or alter the approach to finality established by *Abbot Laboratories* and *Frozen Foods Express v. United States*, 351 U.S. 40 (1956). Justice Ginsburg concludes her concurrence by agreeing with the Court that the JD is final.

D. "Waters of the U.S." Litigation Update

The Obama administration announced a rule regarding what constitutes "waters of the U.S." (WOTUS) for purpose of EPA jurisdiction and control, published June 29, 2015 in the Federal Register. The State of Texas filed two petitions seeking review of the WOTUS rule. This was due to the unresolved question of whether jurisdiction lies in the district or the circuit courts. Texas takes the position that it is the district courts, but filed a protective petition in the Fifth Circuit while also filing in the federal district court in Galveston. Many other states followed this dual-filing pattern.

All of the (many) cases filed in the circuit courts were consolidated by operation of 28 U.S. Code section 2112(a)(3) into a single circuit, the Sixth. The Sixth Circuit has ruled that jurisdiction lies in the circuit courts. The cases filed in district courts were not consolidated (the DOJ's request for consolidation and transfer was rejected by the judicial panel on multi-district litigation) but those district court cases are inactive or dismissed while the case plays out in the Sixth Circuit. Texas's Galveston case is one of the inactive ones.

Now that the Sixth Circuit has ruled that it has jurisdiction, the case is proceeding on two parallel tracks. A coalition of industry groups has filed a petition for certiorari in the U.S. Supreme Court seeking to reverse that jurisdictional ruling. The petition was filed on September 2, 2016, so it will be a while before we know whether the Court will take the case. Meanwhile, back in the Sixth Circuit, the briefing on the merits is proceeding, with the petitioners opening brief on the merits September 30.

II. Texas Surface Water Cases

A. *Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau*, 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015, pet. denied)

Background[2]

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. Afterwards, the Texas Commission on Environmental Quality (TCEQ) issued a letter to all non-municipal water rights holders in the Brazos River with priority dates newer than 1980 to suspend diversion and storage of State water. In response, the Sunset Advisory Commission recommended clarification of the TCEQ Executive Director's authority to curtail water usage during shortages or drought.[3]

The TCEQ was the subject of a sunset bill in the 82nd Legislature—House Bill (H.B.) 2694—which extended the agency's life. H.B. 2694 also addressed TCEQ's drought emergency authority to allocate water by adding Texas Water Code § 11.053 Emergency Order Concerning Water Rights.

[2] Since the details are unchanged, the procedural and factual histories of this dispute have been excerpted from the 2015 Case Law Update.

[3] *See* Douglas G. Caroom, *The Allocation of Water During Times of Drought: TCEQ's Proposed Rules Under Texas Water Code § 11.053*, 42 TEX. ENVTL. L.J. 139, 141 (2012) (discussing adoption of Senate Bill 1, which was part of a broader, more comprehensive water planning and management system).

This section allows TCEQ's executive director to suspend or adjust a water right in accordance with the priority system based on date of recognized water use, while conforming "to the greatest practicable extent" with the following order of water use preference: domestic and municipal, agricultural and industrial, mining, hydroelectric power, navigation, recreation, and "other beneficial uses."[4]

TCEQ adopted rules ("Drought Rules") to implement the drought emergency allocation as provided by H.B. 2694 and required by Texas Water Code § 11.053(c). Title 30 of the Texas Administrative Code, containing substantive provisions of the Drought Rules, became codified in Chapter 36 ("Suspension or Adjustment of Water Rights during Drought or Emergency Water Shortage"). The Drought Rules left intact the conflicting statutory references to priority date and preferential uses without providing much additional guidance. Further, "the executive director may determine not to suspend a junior water right based on public health, safety, and welfare concern."[5] Also under such circumstances, "the executive director may require the implementation of water conservation plans and drought contingency plans at more restrictive levels . . . [for] junior water rights [holders]."

Facts and Trial Court Decision

On November 14, 2012, Dow Chemical Company again made a 1942 priority call on junior water rights holders in the Brazos River Basin. Five days later, TCEQ's executive director issued a suspension order under the recently adopted Drought Rules, suspending 845 water rights issued after February 15, 1942 below Possum Kingdom. Most notably, the suspension order exempted certain municipal and power generation water rights.[6]

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[4] *See* TEX. WATER CODE § 11.023 (outlining purposes for which water may be appropriated).
[5] *See* 30 TEX. ADMIN. CODE §36.5(c).
[6] The suspension order expired when Dow rescinded its priority call on January 23, 2013. TCEQ revised the suspension order several times before its rescission. The December 12, 2012 revision tightened and also added reporting requirements for unsuspended water rights holders. The January 8, 2013, revision anticipated higher flows in the Brazos and allowed water rights holders in areas near certain gages to divert or impound water if gaged flows reached specified levels there.

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.[7] Farm Bureau contended that the emergency permit authorization procedure in Water Code § 11.139 was suitable to satisfy urgent water needs.[8] Farm Bureau further contended that § 11.139 provides compensation to senior water rights holders transferring their water rights under emergency conditions.[9]

TCEQ argued that it needed to consider water use preference under Water Code §§ 11.024 and 11.053 "to the greatest extent practicable";[10] such preferences not being based on strict priority. TCEQ further maintained that it had both a statutory and constitutional duty to ensure its actions promoted and protected public health, safety, and welfare. 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.

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. The trial court also held that TCEQ had no police power or general

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After the last revision on January 15, 2013, only four junior municipal water utilities and some junior power generation rights were still being allowed to divert. Two of the unsuspended municipalities—the City of Clifton and the City of Meridian—were adjusted downward; they had unreliable groundwater wells and limited funds to work on the wells or drill new ones, and were upstream of water stored by the Brazos River Authority.

[7] Br. of Appellee at 2, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015, pet. denied); *see also* Br. of Appellant at 7, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015, pet. denied).

[8] Br. of Appellee at 21, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015, pet. denied).

[9] *See* Br. of Appellee at 21, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015, pet. denied); *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.").

[10] Br. of Appellant at 16, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015, pet. denied).

authority to exempt junior water rights from a suspension order, but declined to rule on Farm Bureau's motion to prevent suspension.

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.[11] 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 and now the parties are briefing on the merits of the case.

Court of Appeals Opinion

The issues on appeal were (1) whether the drought curtailment of water rights must occur in reverse order of appropriation date, or if TCEQ can also consider health and safety issues and use preferences, and (2) TCEQ's expressly conferred and implied powers. Both parties and the two amicus briefs[12] argue many aspects of statutory interpretation and legislative intent in support of their respective positions. Ultimate judicial determination appears to hinge more on policy resolution, given Texas's continued population growth and expected drought conditions. TCEQ contends, among many other arguments, that ambiguity exists within Section 11.053 of the Water Code, and therefore

[11] *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).

[12] *See generally* Br. for Texas Hospital Association and Dallas-Fort Worth Hospital Council as Amici Curiae supporting Appellants at 5, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015, pet. denied); Br. for City of Abilene, et al. as Amici Curiae supporting Appellants, Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015, pet. denied).

an agency's interpretation should be given deference. Further, TCEQ is tasked with providing for the public interest and needs to weigh public health, safety and welfare. In support, TCEQ cites several different sections of the Texas Water Code as well as the Texas Constitution. Per TCEQ, the Drought Rules give effect to Section 11.053 in its entirety, since non-suspended junior rights holders can be required to report usage, conserve or seek alternate water sources.

The Corpus Christi Court of Appeals affirmed the district court's ruling in April 2015. The court found TCEQ exceeded its statutory authority when it adopted rules allowing the agency to exempt preferred junior water rights from priority calls. The court of appeals stated the goals of section 11.053 must be "accomplished in accordance with the priority of water rights" established by Texas Water Code § 11.027. Thus, the court found TCEQ's rules allowing a senior irrigation water right to be suspended prior to the suspension of a junior municipal water right are inconsistent with the plain meaning of Texas Water Code § 11.053.

In rejecting the TCEQ's arguments, the court also noted that the "mere fact that a policy seems unwise or inconsistent with other policies does not justify a departure from the plain meaning of the legislative mandate." Moreover, the court pointed out that the TCEQ's arguments fail to consider Texas Water Code § 11.139 relating to the emergency transfers of water rights based on public health and safety reasons.

With respect to the TCEQ's assertions that it has the general power to act in the public's interest, the court held that it may not infer this authority if such authority exceeds the agency's express legislative mandate. Because Sections 11.027 and 11.053 are clear regarding how priority calls should work, the appeals court concluded TCEQ's general police power does not allow TCEQ to exempt certain preferred junior rights from priority calls because of public health and safety reasons.

Texas Supreme Court Denies Petition for Review

The TCEQ appealed the decision to the Texas Supreme Court, which asked the parties to submit briefs on the merits before denying TCEQ's petition for review on February 19, 2016. Declining to take the case left the court of appeals' ruling in place, handing a victory to longstanding water rights holders. Under this holding, the TCEQ cannot afford special treatment to cities or power generators with rights junior to those of senior rights holders, even if the state declares such actions necessary to protect the public health, safety, and welfare.

As pointed out by the court of appeals, there is another, separate statutory scheme that would allow the TCEQ to suspend water rights in emergency situations based on urgent public health and safety concerns. Texas Water Code § 11.139 requires several steps taken by TCEQ and compensation be paid to those water rights holders impacted by the curtailment. TCEQ did not rely upon this statute in issuing its priority call on the Brazos.

III. Texas Groundwater Cases

A. *Coyote Lake Ranch, LLC v. City of Lubbock*, No. 14-0572, 2016 Tex. Lexis 415 (Tex. May 27, 2016)

In this case of first impression, the Texas Supreme Court held the accommodation doctrine, announced in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), applies to water rights. During the Drought of Record in the 1950s, the City of Lubbock bought groundwater rights from the 26,000-acre Coyote Lake Ranch (Ranch) situated in the Texas Panhandle on top of the Ogallala Aquifer. The extensive agreement reserved the right of the Ranch to use water for domestic, ranching, oil and gas, and agricultural purposes. The deed contains lengthy, detailed provisions regarding the City's right to use the land:

> "[Grantors convey to the City] all of the percolating and underground water in, under, and that may be produced from the hereinafter described tracts of land,

> situated in Bailey County, Texas, together with the exclusive right to take such water from said tracts of land and to use the same for disposition to cities and towns situated in Bailey, Cochran, Hockley, Lamb and Lubbock Counties, Texas, together with the **full and exclusive rights of ingress and egress in, over, and on said lands, so that the Grantee of said water rights may at any time and location drill water wells and test wells on said lands for the purpose of investigating, exploring producing, and getting access to percolating and underground water**; together with the rights to string, lay, construct, and maintain water and fuel pipe lines and trunk, collector, and distribution water lines, power lines, communication lines, air vents with barricades, observation wells with barricades, if required, not exceeding ten (10) square feet of surface area, reservoirs, booster stations, houses for employees, and access roads on, over and under said lands necessary or incidental to any of said operations, together with the right to erect necessary housing for wells, equipment and supplies, together with perpetual easements for all such purposes, together with the rights to use all that part of said lands necessary or incidental to the taking of percolating and underground water and the production, treating and transmission of water therefrom and delivery of said water to the water system of the City of Lubbock only; subject to the rights reserved in [Grantors] to such quantities of water as may be required to carry on usual and normal domestic and ranching operations and undertakings upon said lands, excluding irrigation, and such quantities of water as may be required for normal and customary operations for the production of oil and gas and other minerals . . . as are now normal and customary in the area where said land is located, and subject also to the exceptions and reservations hereinafter provided . . . . (emphasis added).

In the 58 years between 1953 and 2011, the City drilled only seven wells on the Ranch—at the north end—for the purpose of supplying water to the residents of Lubbock. But in 2012, the City announced plans to increase water-extraction efforts on the Ranch, proposing to drill as many as 20 test wells in the middle of the Ranch, followed by 60 additional wells spread across the Ranch. The Ranch objected that the proposed drilling program would increase erosion and injure the surface unnecessarily.[13] The City claimed that it was acting well within the broad rights granted by its deed.

[13] At the temporary injunction hearing, the Ranch also presented evidence that elevated power lines would allow hawks to roost and prey on the lesser prairie-chicken, a threatened species for which the Ranch is a natural habitat. On September 1, 2015, the U.S. District Court for the Western District of Texas issued an order vacating the decision to add the lesser prairie-chicken to the list of Endangered and Threatened Wildlife as a threatened species. On July 19, 2016, the U.S. Fish and Wildlife Service removed the lesser prairie-chicken from the List of Endangered and Threatened Wildlife in accordance with the ruling.

Unable to reach agreement, the City began mowing extensive paths through the native grass to prospective drill sites, and the Ranch sued to enjoin the City from proceeding.

At trial, the Ranch pleaded in part that the City "has a contractual and common law responsibility to use only that amount of surface that is reasonably necessary to its operations" and "a duty to conduct its operations with due regard for the rights of the surface owner." The City contended that it has full rights under its deed to pursue the stated plans and that the law imposes no duty on groundwater owners, as it does on mineral owners, to accommodate the surface owner.

The trial court granted the Ranch a far-reaching temporary injunction, concluding:

> [T]he Ranch will probably prevail on the trial of this cause; that pursuit of [the City's] well field plan has caused damaged to the Ranch, and further damage to the Ranch will occur absent the use of reasonable means to ameliorate that damage; that [the City's] proposed well field plan is likely accomplished through reasonable alternative means that do not unreasonably interfere with the Ranch's current uses; and that the Ranch has suffered harm caused by [the City's] activities and will likely suffer irreparable harm in the future.

On appeal, the Amarillo Court of Appeals reversed, holding that the accommodation doctrine does not apply to severed groundwater and that the City had the right to conduct its operations. On September 4, 2015, the Texas Supreme Court granted the Ranch's petition for review. In the majority opinion, the Supreme Court states:

> As we will explain, the court of appeals' refusal to extend to groundwater owners the accommodation doctrine long applicable to mineral owners is fundamentally inconsistent with our analysis in [*Edwards Aquifer Authority v. Day*] concluding that the similarities between groundwater and minerals require consistent rules of ownership. While this is in a sense a case of first impression, our decision is based on principles set out in *Day* and other cases, eliminates unnecessary uncertainty in the law, and provides direction to the parties before us and others with similar issues.

The accommodation doctrine requires the owner of the mineral estate to reasonably accommodate the surface owner's existing uses. In *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249

(Tex. 2013), the court outlined the elements a surface owner must prove to obtain relief under the doctrine:

> To obtain relief on a claim that the mineral lessee has failed to accommodate an existing use of the surface, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use.

Justice Hecht wrote the majority opinion in *Coyote Lake Ranch v. City of Lubbock*, joined by Justices Green, Johnson, Guzman, Devine and Brown. The court affirmed the judgment of the court of appeals, which reversed the trial court's judgment granting a temporary injunction and remanded the case to the trial court for further proceedings. Importantly however, the Supreme Court disagreed with the court of appeals' opinion that the accommodation doctrine is inapplicable to groundwater estates, stating "a severed groundwater estate has the same right to use the surface that a severed mineral estate does." The Supreme Court remanded the case to the trial court to apply the principles of the accommodation doctrine to the City's proposed operations on the Ranch.

The concurring opinion was written by Justice Boyd, joined by Justices Willett and Lehrmann. In his concurrence, Justice Boyd differs from the majority on the second issue in the case: whether the detailed language in the deed by which the City acquired the groundwater—specifying the City's rights with regard to use of surface estate—precluded application of the accommodation doctrine. The City used the deed to argue that the parties addressed in great detail the City's right to use the surface estate "for the purpose of investigating, exploring[,] producing, and getting access to percolating and underground water for production of groundwater," and that the parties' express

agreements on that subject precluded the application of the accommodation doctrine. Justice Hecht's opinion concludes otherwise:

> The deed gives the City the right to drill wells "at any time and location" but only "for the purpose of" conducting operations to access the groundwater. The deed then limits the City's use of the Ranch to what is "necessary or incidental" to those operations. But the deed leaves unclear whether the City can do everything necessary or incidental to drilling anywhere, as it claims, or only what is necessary or incidental to fully access the groundwater, as the Ranch argues. If the City is correct, it has an all but absolute right to use the surface heedless of avoidable injury, although it must answer for damages caused to the surface and rent incurred for the surface occupied [as required in the deed]. The City contends that it can drill wherever it chooses, even if it could drill in places less damaging to the surface and still access all the water. If the Ranch is correct, the City can drill only where the Ranch allows as long as full access to the groundwater is not impaired. The Ranch could thus severely restrict the City's drilling activities. The deed does not resolve this dispute. It is simply silent on the subject.

Justice Boyd's concurrence responds:

> [T]he key to the Court's holding is that the accommodation doctrine only applies to groundwater rights—just as it only applies to mineral rights—when the parties' dispute is "not governed by the express terms of the parties' agreement." When the parties' agreement expressly addresses the dispute, **it is unnecessary and improper for courts to imply rights and obligations through the accommodation doctrine** (emphasis added). As the Court explains, the "parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy," and this rule "applies to a mineral owner's use of land." When a lease or deed expressly describes the disputed rights, "we may neither rewrite the parties' contract nor add to its language." *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003).

Under the instant facts, Justice Boyd concluded that the disputed surface use was governed by the express terms of the deed through which the City obtained its groundwater rights. The concurring opinion agreed with the majority that the issue of road building on the Ranch should be governed by the accommodation doctrine, due to the similarity of the deed language with that found in the court's oil and gas cases such as *Merriman*, 407 S.W.3d at 309 (applying the accommodation doctrine to a lease that permitted the lessee to use the surface as necessary or useful in its operations) and *Moser v. U.S.*

Steel Corp., 676 S.W.2d 99, 100, 103 (Tex. 1984) (applying the accommodation doctrine when the deed conveyed "all necessary and convenient easements for the purpose of" the mineral estate). The concurrence concludes, "thus, to the extent the Ranch contends that the City's paths, roads, and power lines are not 'necessary or incidental' to the taking of water from the well sites the City has selected, I agree that the trial court should apply the accommodation doctrine on remand to resolve that issue. But to the extent that the Ranch seeks to require the City to select different or fewer well sites, the accommodation doctrine does not apply because the deed expressly grants the City the right to drill wells 'at any time and location.'"

Interestingly, in a footnote, the majority acknowledges that the City of Lubbock brought up the issue of "whether the accommodation doctrine is workable when both the minerals and the groundwater have been severed from the land." The court's answer was simply, "We leave that issue for another day."

B. *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118 (Tex. App.—San Antonio 2013, pet. denied)

Legal History[14]

In 1993, the Texas Legislature enacted the Edwards Aquifer Act (the "Act") to manage the Edwards Aquifer and to sustain the diverse economic and social interests dependent upon it and empowered the Edwards Aquifer Authority (EAA) to regulate groundwater withdrawals by a permit system.

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.

[14] Since the details are unchanged, the procedural and factual histories of this dispute have been excerpted from the 2015 Case Law Update.

The EAA eventually issued an annual pumping permit of 120.2 acre-feet for the Home Place and denied a permit for the D'Hanis property, since the well was drilled after the historical period ended on May 31, 1993.[15] The issued permit would not provide sufficient water for the Home Place orchard, because pecan trees need more water over time as they mature. After protracted litigation involving an initial suit, the Braggs sued the Edwards Aquifer Authority for a second time in 2006, for a taking, damaging, or destruction of their property.

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

The court of appeals remanded to the trial court to calculate compensation for the Home Place based on "the difference between the value of the land as a commercial-grade pecan orchard with unlimited access to Edwards Aquifer water immediately before implementation of the Act in 2005 and the value of the land as a commercial-grade orchard with access to Edwards Aquifer water limited to 120.2 acre-feet of water immediately after implementation of the Act in 2005."[16]

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."[17] 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."[18]

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.*

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[15] *See* Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118, 126 (Tex. App.—San Antonio 2013, pet. denied).
[16] *Id.* at 153.
[17] *See Bragg*, 421 S.W.3d at 132 (citing *Day*, 369 S.W.3d at 831).
[18] *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).

v. New York City.[19] 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. After discussing the *Penn Central* factors, the Fourth Court of Appeals held that the Act resulted in a regulatory taking of both orchards.

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. 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. The court noted that the Braggs had removed trees in order to minimize need for additional water rights. The court determined the Act forced the Braggs to buy what they already owned "prior to the regulation: an unrestricted right to the use of the water beneath their land." The court concluded this factor weighed heavily in favor of a compensable taking.

Investment-backed Expectations

Next, the appellate court noted the difficulty of applying the investment-backed expectations prong to groundwater regulation.[20] Courts have typically looked at the "existing use of the property" and the interference in its use introduced by the regulation.[21] Not only the existing property regulation but also the knowledge of those regulations should be a consideration when determining the regulatory expectations. For both orchards, the court found a reasonable investment-backed expectation where Mr. Bragg had an extensive understanding of pecan crops,

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[19] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[20] *Id.* at 142; *see also Day*, 369 S.W.3d at 840.
[21] *Bragg*, 421 S.W.3d at 142; *see also Mayhew*, 964 S.W.2d at 936; Esposito v. S.C. Coastal Council, 939 F.2d 165, 170 (4th Cir.1991) *cert. denied*, 505 U.S. 1219 (1992) ("[C]ourts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's 'primary expectation concerning the use of the parcel.'") (quoting *Penn Central*, 438 U.S. at 136).

no regulations existed at the time of purchase, no permit was required when they drilled the first well, and the Braggs understood that they owned the groundwater. Although the Braggs knew about the Act before drilling the well on the D'Hanis property, the Act was not implemented until 1996. The court found this factor weighed heavily in favor of a compensable taking as well.

Nature of the Regulation

The last *Penn Central* factor is the least fact-dependent, and focuses on the regulation itself. The court reviewed the need for groundwater regulation articulated in *Day* and the express purpose of the Act. However, here the court concluded that "given the importance of protecting terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state, we conclude this factor weighs against a finding of a compensable taking."

Supreme Court Denies Petition for Review

The EAA filed a petition for review with the Texas Supreme Court on March 3, 2014, as did the Braggs on May 2, 2014. Both parties submitted briefs on the merits on January 16, 2015. The Texas Supreme Court denied both petitions on May 1, 2015, despite argument from the EAA that the appellate court had erred in its takings analysis and that the Braggs' claims were time-barred, setting up a new trial on damages.

Jury Trial and Damages

On May 17, 2016—after closing arguments at trial—a Medina County District Court jury found, by 10–2 vote, that the Braggs are owed $2.55 million in just compensation. Pre-judgment interest on the Braggs' claim brings their recovery to more than $4 million. The jury instructions were as follows:

> Prior to the Edwards Aquifer Act, Glenn and JoLynn Bragg owned the groundwater underneath their properties, including groundwater in the Edwards

Aquifer, and had the right to beneficially use as much water as they needed from the Edwards Aquifer.

After the Edwards Aquifer Act was enacted, Glenn and JoLynn Bragg timely filed applications with the Edwards Aquifer Authority in 1996 for the right to continue using Edwards Aquifer groundwater on both properties. On September 21, 2004, the Edwards Aquifer Authority fully denied Glenn and JoLynn Bragg's permit application for access to Edwards Aquifer water on the D'Hanis Property. On February 8, 2005, the Edwards Aquifer Authority ruled on Glenn and JoLynn Bragg's permit application for access to Edwards Aquifer Water on the Home Place Property, limiting the annual withdrawal to 120.2 acre-feet.

It has been determined by the Fourth Court of Appeals that the Edwards Aquifer Authority's decisions regarding Glenn and JoLynn Bragg's applications for access to Edwards Aquifer water constituted a compensable taking on each property, meaning that the Edwards Aquifer Authority is required under the Texas Constitution and the EAA Act to pay Glenn and JoLynn Bragg just compensation for the takings.

Following the court's instructions, jurors were asked to answer the following questions:

Question 1: What was the value of the Home Place Property as a commercial-grade pecan orchard, with unlimited access to Edwards Aquifer water, immediately before February 8, 2005? Do not add any amount for interest.

The jury answered: $1,670,396.00

Question 2: What was the value of the Home Place Property as a commercial-grade pecan orchard, with access to Edwards Aquifer water limited to 120.2 acre-feet of water per year, immediately after February 8, 2005? Do not add any amount for interest.

The jury answered: $300,000.00

Question 3: What was the value of the D'Hanis Property as a commercial-grade pecan orchard, with unlimited access to Edwards Aquifer water, immediately before September 21, 2004? Do not add any amount for interest.

The jury answered: $1,180,653.60

Question 4: What was the value of the D'Hanis Property as a commercial-grade pecan orchard, with no access to Edwards Aquifer water, immediately after September 21, 2004? Do not add any amount for interest.

The jury answered: $00.00

Ten jurors agreed on every answer and signed their names to the verdict. In a statement made the next day, EAA board chair Luana Buckner announced, "Regardless of whether we agree or disagree with the jury's decision, the EAA board of directors has great respect for this process.

Accordingly, we will discuss the outcome and evaluate all options at our next board meeting." On August 5, 2016, a Notice of Satisfaction of Judgment was entered by the court.

C. *Rep. Water Co. of Tex., LLC v. Middle Pecos Groundwater Conservation Dist.*, No. P-11956-112-CV (112th Dist. Court, Pecos County, Tex. filed Aug. 17, 2016)

Republic Water Company of Texas, LLC (Republic) submitted an application to the Middle Pecos Groundwater Conservation District (Middle Pecos) requesting a permit for about 28,500-acre-feet of water per year for 50 years, or about 25 million gallons of water per day. Republic is a private company that would deliver the water from the owner of the water, Fort Stockton Holdings (FSH), to the city of Odessa and other buyers. Middle Pecos decided to abate its consideration of Republic's application for a permit which would allow it to send the aforementioned groundwater out of Pecos County. Seven of the eleven Middle Pecos Board members were present for the vote to abate consideration of the permit application, voting unanimously to do so. The Middle Pecos Board cited, as their reason for abating the application, a previous suit by FSH against Middle Pecos contesting the groundwater district's denial of a similar request in 2011, which was upheld by a district court on September 21, 2015 and is currently on appeal in the Eighth Court of Appeals in El Paso (*Fort Stockton Holdings, LP v. Middle Pecos Groundwater Conservation Dist.*, No. P-7047-83-CV (83rd Dist. Court, Pecos County, Tex. filed Dec. 27, 2011). Fort Stockton Holdings, LP applied to Middle Pecos for groundwater permits to allow it to pump 47,418 acre-feet of groundwater from the Edwards-Trinity aquifer to sell to Midland-Odessa customers.

Middle Pecos believes that a continued review of Republic's permit application is not possible because of conflicts with the FSH suit currently in appellate court. The FSH suit involves the same wells, property, water rights, and historic use permits that appear on Republic's current application. Republic argues that they are not a party named in the FSH suit and their permit application should be considered separately. Following the Middle Pecos Board's decision, Republic filed suit in both

state and federal courts. Republic is currently pursuing the federal case filed on May 20, 2016 in the Texas Western District Court, Pecos Office, and seeking a hearing before the Middle Pecos Board.

On August 19, 2016, state judge Stephen Ables of the Sixth Administrative Judicial Region, sitting by appointment, ruled that the court did not have jurisdiction to hear a Republic mandamus suit against Middle Pecos to force a hearing on its permit request. Judge Ables granted Middle Pecos's motion to dismiss on the basis that RWC has not yet exhausted its administrative remedies through the Middle Pecos Board to get a hearing, because Republic has not completed its permit application. State law allows groundwater districts to require specific hydrogeological studies, used to project the effect of pumping the water on the aquifer, as part of applications for export permits. Groundwater district rules set no deadlines for the board to make its decision as to the administrative completeness of the permit application.

Republic completed a hydrogeological study prior to filing suit—however it was not performed using a model developed by the U.S. Geological Survey, as requested by Middle Pecos. Because Republic's application was not administratively complete, Ables did not rule on Republic's argument against the Middle Pecos Board's decision to indefinitely table the permit application. Judge Ables suggested that Middle Pecos's requirements for an administratively complete application before review would be met if Republic submits the hydrogeological study developed by the U.S. Geological Survey as requested by Middle Pecos.

Although submitting the hydrogeological study requested by Middle Pecos would make Republic's application administratively complete and would qualify Republic for a hearing before the Middle Pecos Board, the Board would still have to approve or deny the permit application. Once the requested information has been submitted by Republic, the Middle Pecos Board has several options: (1) dismiss the permit application since it is requesting use of the same water, wells, etc., as the

previously denied FSH permit; (2) grant a hearing before the Middle Pecos Board; (3) send the case to an administrative law judge; or (4) uphold its original decision to abate the permit application.

If the permit is approved by Middle Pecos, the water Republic would be supplying is of higher quality than the water currently being supplied to Odessa by the Colorado River Municipal Water District. Because of this, Odessa has extended its original letter of intent to purchase 16 million gallons of water per day at a rate of $3.50 per thousand gallons, or about $20 million per year —signed in February for six months, to two years.

D. *Save Our Springs Alliance, Inc. v. Cen. Tex. Regional Water Supply Corp.*, No. D-1-GN-16-001106 (353rd Dist. Court, Travis County, Tex. filed Mar. 11, 2016)

In November 2014, in what has become known as the "Vista Ridge Project," Abengoa Vista Ridge (Abengoa) signed a contract to supply San Antonio Water Systems (SAWS) with up to 16.3 billion gallons per year of water using a proposed 142-mile pipeline from Burleson County. In order to construct the pipeline, right-of-entry and right-of-way agreements must be signed with landowners in Burleson, Lee, Bastrop, Caldwell, Guadalupe, Comal, and Bexar Counties. In September 2014, Abengoa created the Central Texas Regional Water Supply Corporation (Central Texas WSC) to deliver water to SAWS and its customers, as well as the central Texas region. Under the November 2014 Vista Ridge Transmission Purchase Agreement, Central Texas WSC's purpose is to acquire right-of-entry and right-of-way agreements with landowners in all of the above-mentioned counties. Once this is accomplished, Austin-based Blue Water Systems will deliver the water using the proposed pipeline.

Save Our Springs Alliance, Inc. (SOS) is a non-profit, charitable organization dedicated to the preservation of the Edwards Aquifer ecosystem and the natural and cultural heritage of the Texas Hill Country region. SOS has two major claims against the Vista Ridge Project. First, SOS argues that the vista Ridge Project pipeline, as currently designed, would be built over approximately nineteen miles

of the sensitive environmental terrain that is part of the SOS's core mission to protect from degradation. Second, SOS alleges the Vista Ridge Project pipeline will fuel development in the Hill Country, over the Edwards Aquifer.

Through two public information requests, filed November 12, 2015 and December 17, 2015, SOS requested disclosure of sixteen total categories of information, five of which were not produced: 1) correspondence between Central Texas WSC and certain Consortium members; 2) information related to the current or potential route of the pipeline; 3) information related to the current or potential location of any pump stations; 4) correspondence and information related to right-of-entry and right-of-way agreements; and 5) copies of meeting minutes of the Central Texas WSC Board of Directors.

SOS argues that the Central Texas WSC must abide by the Texas Public Information Act (TPIA) because it is providing a water supply service as a non-profit water supply corporation, created under the authority of chapters 67 and 49 of the Texas Water Code and chapter 22 of the Texas Business Organizations Code. The TPIA defines "governmental body" to include "the governing body of a nonprofit corporation organized under Chapter 67, Water Code, which provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation." Central Texas WSC argues that it is exempt from the TPIA because it is not a governmental body. Central Texas WSC states that it currently does not provide a water supply or wastewater service and it currently is not exempt from ad valorem taxation because it has acquired no land from which to be exempt. Central Texas WSC further argues that even if the TPIA were to apply, it is exempt under one of the several exceptions listed in the TPIA. On December 21 and 30, 2015, Central Texas WSC submitted requests for Open Records Decisions to the Office of the Attorney General (AG) regarding the SOS

information requests. On March 1, 2016, the AG issued a letter ruling (OR2016-04911),[22] which was limited to the facts presented by Central Texas WSC, concluding that Central Texas WSC is not a governmental body under the TPIA at this time. The AG did not reach Central Texas WSC's alternate arguments involving the TPIA exceptions. Pursuant to this letter, Central Texas WSC has continued to withhold the remaining information sought by SOS.

SOS argues that Central Texas WSC violated SOS's right under the TPIA by failing to provide full disclosure of public information requested in the two SOS open records requests. SOS now seeks a mandamus, authorized by TPIA § 552.321, to provide public information from the district court, directed to Central Texas WSC, requiring it to disclose the documents covered by the two SOS open records requests—specifically the information not previously provided by Central Texas WSC.

IV. Miscellaneous Texas Water Cases

A. *Tex. Comm'n on Envtl. Quality v. Guadalupe Cnty. Groundwater Conversation Dist.*, No. 04-15-00433-CV, 2016 Tex. App. Lexis 3491 (Tex. App.—San Antonio Apr. 6, 2016, no pet.) (mem. op.)

Pending Permit Applications Are Not Justiciable Controversies

In December 2011, Post Oak Clean Green, Inc. (Post Oak) submitted an application to TCEQ seeking a determination of land use compatibility for its proposed solid waste landfill. The proposed landfill site is located within the territory of the Guadalupe County Groundwater Conservation District (the District), inside the Carrizo-Wilcox Aquifer recharge zone.

After becoming aware of the application in February 2012, the District instructed its consulting geologist to prepare a report regarding the proposed landfill and its location in relation to the Carrizo-Wilcox aquifer. In the report—submitted to TCEQ—the geologist explained Post Oak's landfill is proposed to be located within the boundaries of the District and over the outcrop of the upper Wilcox,

[22] https://www.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2016/pdf/or201604911.pdf.

which is in violation of the District's Rule 8.1, titled "Solid, Hazardous or Radioactive Waste." The rule provides, in relevant part:

> In the event that applicable statutes, requirements, or regulations require that the person generating, transporting, applying, disposing or otherwise managing a waste or a sludge obtain a permit from an agency, and where those activities occur within the boundaries of the District, notice of the application must be provided to the District by the applicant within ten days of the date of application. In no event may waste or sludge be permitted to be applied in any manner in any outcrop area of any aquifer within the Guadalupe County Groundwater Conservation District.

In October 2013, Post Oak filed a permit application with the TCEQ for a municipal solid waste landfill. In April 2014, the district filed suit, seeking "a declaration that the District's Rule 8.1 prohibits the Landfill Applicant from operating a waste disposal facility at the proposed site, which is on the outcrop of the upper Wilcox aquifer; a judgment that Landfill Applicant has violated the District rules, including the requirement that a landfill permit applicant provide notice to the District of its application for a landfill permit, and penalties for violation of District rules." In response, Post Oak countersued for inverse condemnation, claiming the District's action was a collateral attack on the TCEQ's authority before the TCEQ has issued a final order subject to judicial review, and filed a plea to the jurisdiction—arguing that the District's claim was not ripe, there was no controversy, and the District had failed to exhaust its administrative remedies.

TCEQ filed a Petition in Intervention followed by a Plea to the Jurisdiction arguing that it has exclusive (and in the alternative, primary) jurisdiction over landfill permitting under the Texas Solid Waste Disposal Act.[23] The TCEQ argued that the district's rule and its declaratory judgment action were an indirect attempt to stop TCEQ from issuing a solid waste disposal permit to Post Oak.

In January 2015, the trial court denied Post Oak's Plea to the Jurisdiction reasoning that the District is not seeking to challenge TCEQ's jurisdiction, but enforcing its own rules. The court granted

[23] *See* TEX. HEALTH & SAFETY CODE ANN. § 361.011 (West 2016) (affording TCEQ jurisdiction over the management of municipal solid waste).

the District's motion for partial summary judgment, finding that the district "is not preempted in prohibiting the application in any manner the waste over the aquifer it manages." Following this, the District amended its petition, dropping its claim regarding whether Post Oak violated Rule 8.1 by failing to provide the District notice of its permit application.

In April 2015, while the lawsuit was still pending in district court, the permit application was referred to the State Office of Administrative Hearings (SOAH) for a contested case evidentiary hearing. On June 23, the trial court denied TCEQ's plea to the jurisdiction. On June 30, 2015, TCEQ's executive director responded to a public comment that the "Commission is not authorized to determine whether the landfill would violate the [District's] rule." The executive director also recommended the permit be issued to Post Oak.

Both Post Oak and TCEQ appealed the trial court's ruling. The court of appeals began by discussing ripeness. Both TCEQ and Post Oak argued that the District's suit was not ripe because the permit application was still pending. The ripeness doctrine "protects state agencies form judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging party." 2016 Tex. App. Lexis 3491 at 4. The appeals court relied on *Save Our Springs Alliance v. City of Austin*, 149 S.W.3d 674 (Tex. App.—Austin 2004, no pet.) in holding that jurisdiction to grant a declaratory judgment does not exist when a permit has yet to be issued. Addressing the Uniform Declaratory Judgments Act component of the case, the court of appeals held that "seeking a declaration of rights under the Uniform Declaratory Judgments Act is not sufficient to avoid the ripeness doctrine. This act is merely a procedural device for deciding cases already within a court's jurisdiction rather than a legislative enlargement of a court's power, permitting the rendition of advisory opinions" (internal citation omitted).

The court's holding was clear: declaratory judgments are proper only when a justiciable controversy exists "as to the rights and status of the parties and the controversy will be resolved by

the declaration sought." 2016 Tex. App. Lexis 3491 at 4. Theoretical disputes, such as pending permit applications, do not constitute justiciable controversies. The court clarified that even though the TCEQ's executive director recommended Post Oak's permit be granted, this decision was not binding on the TCEQ. Finally, the court pointed to the fact that TCEQ may choose to deny Post Oak's permit application, or may grant the permit in such a way as to satisfy the District. Since the permit application is still pending, the court held the District had not suffered a concrete injury or faced immediate harm.

Because the ripeness issue was dispositive, the court did not address appellants' additional challenges. The San Antonio Court of Appeals reversed the decision of the trial court, and rendered judgment dismissing the District's claim for lack of jurisdiction. As of September 11, 2016, Post Oak Clean Green's application is still pending before the TCEQ.

B. Wasson Interests, Ltd. v. City of Jacksonville, 489 S.W.3d 427 (2016)

Cities Do Not Have Immunity with Regard to Proprietary Contracts

This case, involving a municipality's lease of real property to a private party, required the court to address the issue of the proprietary–governmental dichotomy as applied to contract claims. The Texas Tort Claims Act Sec. 101.0215(a) defines governmental functions as those "that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public." Proprietary functions are defined in Section 101.0125(b) as "those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality . . . ."

In the 1990s, the Wassons assumed an existing ninety-nine-year lease of lakefront property owned by the City of Jacksonville. The lease, which specified among other things that the property was to be used for residential purposes only, was conveyed from the Wassons to Wasson Interests, Ltd. (Wasson Interests). Wasson Interests began renting the property for terms of less than one week,

which the City of Jacksonville viewed as a violation of the lease terms, and as a result, sent Wasson Interests an eviction notice. Following the notice, the city of Jacksonville and Wasson Interests entered into a reinstatement agreement that required Wasson Interests to cease and desist all commercial activity in violation of the lease but allowed Wasson Interests to lease to families and small groups, so long as the lease term was for thirty days or more. In 2011 the City sent Wasson Interests another eviction notice, claiming their use of the property had again violated the reinstatement agreement.

Wasson Interests sued for breach of contract and the City filed a combined motion for traditional and no-evidence summary judgment on several grounds—including governmental immunity—which the trial court granted. The court of appeals affirmed based on governmental immunity, citing *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied) as support for its decision.

In holding that immunity is the "default position" in contract cases, the court of appeals accepted the City of Jacksonville's argument that a city is never subject to suit for contract claims unless there is a legislative waiver, which in this case there was none. Wasson Interests appealed, arguing that the proprietary–governmental dichotomy extends to the contract-claims context and is not restricted to only tort cases. Wasson Interests, Ltd.'s review was granted by the Texas Supreme Court.

The Texas Supreme Court discusses a two-step process in its analysis for addressing the applicability of immunity. First, the judiciary determines the applicability of immunity and delineates its boundaries. If immunity is applicable, then the judiciary defers to the legislature to waive such immunity. In discussing the first step, the Court states its disagreement with the court of appeals' interpretation of the holding in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006). The *Tooke* Court

addressed a municipality's lack of immunity for torts committed in performance of its proprietary functions, but stated that there has never been a holding in regards to immunity for a contracts claim. The court of appeals interpreted the *Tooke* holding as establishing a new default rule of immunity. The Texas Supreme Court viewed *Tooke* as simply declining to address the dichotomy because it was unnecessary to do so under the facts of that case; the *Tooke* Court did not intend to instruct whether the dichotomy applies to contract cases.

Addressing the second step, the Texas Supreme Court views case law showing that a municipality's immunity extends only as far as the State's but no further. Political subdivisions such as municipalities and cities represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them (*see Payne v. Massey*, 196 S.W.2d 493, 495 (Tex. 1946)). Because there is no sovereignty distinct and separate from the state, when it comes to governmental immunity the court has distinguished between those acts performed as a branch of the state and those acts performed in a proprietary, non-governmental capacity (*see Dilley v. City of Houston*, 222 S.W.2d 992, 993 (Tex. 1949); *City of Galveston v. Posnainsky*, 62 Tex. 188, 127 (1884)). A city's "proprietary functions" are defined in *Dilley* as those conducted in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government. When a government officer acts *ultra vires* (Latin for "beyond the powers"), immunity does not protect his acts because acts done "without legal authority" are not done as a branch of the State; they fail to derive their authority from the root of the State's immunity, the sovereign will. Like *ultra vires* acts, acts performed as part of a city's proprietary function do not implicate the State's immunity for the simple reason that they are not performed under the authority, or for the benefit, of the sovereign. The Court points out that it has repeatedly held that a city has no immunity of its own, but is afforded the State's immunity when acting as the State's agent and performing governmental functions for public benefit. This point is illustrated by the courts in *Posnainsky* and *City of Houston v.*

Shilling, who stated that a city obtains sovereign immunity by exercising its powers for a public purpose, as an agent of the state, in furtherance of the general law for the interest of the public at large.

The Texas Supreme Court held that the common-law distinction between governmental and proprietary acts, known as the proprietary–governmental dichotomy, applies in the contract claims context just as it does in the tort claims context. Because the court of appeals held otherwise, the Supreme Court reversed the lower court's decision. The case was remanded to address whether the contract at issue was proprietary or governmental.

Following the court's ruling in Wasson Interests—that cities do not have immunity with respect to claims arising from proprietary function contracts—the burden will be on cities to show that they were acting in a governmental capacity in order to invoke the protections of governmental immunity in breach of contract actions. Notably listed as governmental functions under § 101.0215(a) of the TTCA are (11) waterworks, (19) dams and reservoirs, (23) recreational facilities, including but not limited to swimming pools, beaches, and marinas, and (32) water and sewer services. Section 101.0215(b) of the TTCA identifies some proprietary functions, including operating a public utility, but the list is non-exclusive. This issue is likely to lead to litigation over what is governmental and what is proprietary in breach of contract cases, which may contain water rights contracts currently existing or that are entered into in the future.