

KEMPSMITH_{LAW}



Case Law Update

Milam & Burleson Counties' Groundwater Summit

August 12, 2015

DEBORAH C. TREJO

KEMP SMITH LLP

The Aransas Project v. Shaw, 775 F. 3d 641 (5th Cir. 2014), cert. denied by No. 14-1138 (U.S. June 22, 2015)

- TAP sued TCEQ officials violation of the Endangered Species Act alleging TCEQ's water diversion permits limited freshwater into the San Antonio-Aransas Bay systems and caused taking of whooping cranes.

The Aransas Project v. Shaw, 775 F. 3d 641 (5th Cir. 2014), cert. denied by No. 14-1138 (U.S. June 22, 2015)



The Aransas Project v. Shaw, 775 F. 3d 641 (5th Cir. 2014), cert. denied by No. 14-1138 (U.S. June 22, 2015)

Trial Court

- In March of 2013, the trial court ruled that TCEQ was responsible for violating the ESA through their water management practices including by not monitoring water use by domestic and livestock users and by not exercising emergency powers regarding diversions.

The Aransas Project v. Shaw, 775 F. 3d 641 (5th Cir. 2014), cert. denied by No. 14-1138 (U.S. June 22, 2015)

Fifth Circuit

- June 2014 - Fifth Circuit reversed trial court.
- TAP did not show TCEQ issuing water rights was proximate cause of whooping crane deaths.
- December 2014 – petition for rehearing and rehearing en banc denied; modified opinion issued.

The Aransas Project v. Shaw, 775 F. 3d 641 (5th Cir. 2014), cert. denied by No. 14-1138 (U.S. June 22, 2015)

U.S. Supreme Court

- March 2015 – Petition for certiorari filed by plaintiffs.
- Issues raised in petition:
 - Whether the 5th Circuit inappropriately conducted de novo rather than clear error review of the district court’s finding of fact?
 - Whether a foreseeable chain of events, even if it involves intervening factors, satisfies the proximate cause standard, or whether the presence of other factors means that proximate cause is lacking as a matter of law?
- June 2015 – Supreme Court denied petition for cert.

Envtl. Processing Sys., L.C. v. FPL Farming LTD., No. 12-0905, 2015 WL 496336 (Tex. 2015)



- Landowner that owned tracts of land near nonhazardous wastewater injection well operator filed suit against operator alleging trespass, unjust enrichment, and negligence, based on allegations that wastewater injected into subsurface by operator had migrated at those deep levels to landowner's tracts.

Envtl. Processing Sys., L.C. v. FPL Farming LTD., No. 12-0905, 2015 WL 496336 (Tex. 2015)



- Issue raised: Whether there is a cause of action for trespass due to lateral migration of wastewater deep below the earth's subsurface; and if there is such a cause of action, whether the burden is properly placed on the claimant to show lack of consent.

Envtl. Processing Sys., L.C. v. FPL Farming LTD., No. 12-0905, 2015 WL 496336 (Tex. 2015)



- After a trial, the trial court entered a take-nothing judgment judgment for the defendant wastewater injection well operator based on the jury finding for the operator on all claims.
- Initially, the court of appeals affirmed the take-nothing judgment and held FPL could not recover for trespass *because EPS's well was authorized by a TCEQ permit.*
- That decision was appealed to the Texas Supreme Court, which reversed and remanded, finding that holders of wastewater injection well permits issued by TCEQ are *not immune from civil liability.*

Envtl. Processing Sys., L.C. v. FPL Farming LTD., No. 12-0905, 2015 WL 496336 (Tex. 2015)



- On remand, the Supreme Court reversed the court of appeals' finding that the defendant had the burden of establishing an affirmative defense that it had the landowner's consent, and that Texas recognizes a common law trespass cause of action for deep subsurface water migration. The Supreme Court then reinstated the trial court's judgment that the plaintiff take nothing holding that lack of consent is a required element of a trespass cause of action that the plaintiff must prove.

Envtl. Processing Sys., L.C. v. FPL Farming LTD., No. 12-0905, 2015 WL 496336 (Tex. 2015)



- The Supreme Court thus, declined to address whether Texas law recognizes a trespass cause of action for deep subsurface wastewater migration.

Guadalupe-Blanco River Auth. v. Tex. Attorney Gen., No. 15-0255 (Tex. May 13, 2015, pet. filed)



- GBRA seeks to use bond validation lawsuit to prevent TCEQ from granting two applications by SAWS for “bed and banks” permits under Tex. Water Code § 11.042(b) to reuse return flows derived from Edwards groundwater after the water is discharged into the Guadalupe River
- Parties intervened and argued that the declarations requested by GBRA go beyond the scope of the bond validation statute.
- Trial court dismissed GBRA claims on jurisdictional grounds.

Guadalupe-Blanco River Auth. v. Tex. Attorney Gen., No. 15-0255 (Tex. May 13, 2015, pet. filed)

- The court of appeals affirmed the district court's ruling that GBRA's suit exceeded the scope of the Expedited Declaratory Judgment Act, and, therefore, that the district court properly granted pleas to jurisdiction and dismissed the suit. GBRA improperly used the attack on a "bed and banks" permit application of SAWS pending before the TCEQ, claiming that such a permit, if issued, would cloud GBRA's bonds related to the Lower Guadalupe River Basin Project and interfere with GBRA's ability to obtain the revenue needed for that project.

Guadalupe-Blanco River Auth. v. Tex. Attorney Gen., No. 15-0255 (Tex. May 13, 2015, pet. filed)



- Having determined that the district court properly dismissed the suit on that basis, the Austin Court of Appeals decided it need not address the remaining jurisdictional 15 arguments presented to the district court. Moreover, because GBRA's pleadings affirmatively negated the existence of jurisdiction in this case, GBRA is not entitled to an opportunity to amend its pleadings.
- GBRA has filed a petition for review with the Texas Supreme Court.

City of Lubbock v. Coyote Lake Ranch LLC,
440 S.W. 3d 267 (Tex. App.—Amarillo 2014, pet. filed)



The 1953 Deed

- conveyed all groundwater and . . .
- exclusive rights to take such groundwater
- “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”
- extensive rights to construct facilities that are necessary or incidental to the taking of such water.

City of Lubbock v. Coyote Lake Ranch LLC,
440 S.W. 3d 267 (Tex. App.—Amarillo 2014, pet. filed)



- Landowner: Argues that “accommodation doctrine” from oil and gas law should require groundwater estate owner and water developer (City of Lubbock) to accommodate existing surface use.
- City of Lubbock: deed governs and severance of groundwater does not create dominant estate subject to accommodation doctrine.
- Appeals court held accommodation doctrine does not apply.
- Petition for Review filed with Texas Supreme Court.

League of United Latin American Citizens (LULAC) v. Edwards Aquifer Authority, No. 5:12-CV-620 (W.D. Tex., filed June 21, 2012)

- LULAC alleges that EAA Director Districts violates one person/ one vote. Alleges that districts are disproportionately weighted towards rural districts in violation of the Fourteenth Amendment instead of being based strictly on population.
- Intervenors: SAWS (Plaintiff); City of San Marcos (Defendant); Uvalde County (Defendant); New Braunfels Utilities (Defendant); City of Uvalde (Defendant); Guadalupe-Blanco River Authority (Defendant)
- Amicus briefs in favor of EAA filed by: City of Victoria, Texas Farm Bureau and Past and Current Directors of the EAA (incl. Bexar Co.)
- Summary Judgment argued June 2014
- Case remains pending.

Envtl. Stewardship v. Tex. Water Dev. Bd., D-1-GN-12-002201 (98th Dist. Ct., Travis Cnty., Tex. June 19, 2015)



- An environmental group filed an administrative appeal of its petition challenging the Texas Water Development Board's approval of the Desired Future Conditions for the Carrizo-Wilcox Aquifer in GMA 12, claiming that the TWDB failed to consider the hydrological connections between that aquifer and the Colorado and Brazos Rivers and the impact on surface water users.

Envtl. Stewardship v. Tex. Water Dev. Bd., D-1-GN-12-002201 (98th Dist. Ct., Travis Cnty., Tex. June 19, 2015)



- The environmental group is comprised of landowners who depend on groundwater and connected surface water in the Brazos and Colorado River Basins. The group is concerned that the adopted DFC will threaten their water supply and negatively impact wildlife. The group contends that the DFCs are unreasonable and were adopted in violation of TWDB's own rules. TWDB filed a plea to the jurisdiction arguing that the TWDB's recommendation to GCDs as part of the DFC process was not a reviewable final order. TWDB also filed a motion to dismiss for want of prosecution.
- The case nonsuited so no issues were resolved.

Meyer v. Lost Pines Groundwater Conservation Dist.,
No. 29,696 (21st Dist. Ct., Bastrop Cnty., Tex., filed Nov.
7, 2014)

- The landowners have sued the Lost Pines GCD, seeking judicial review from the District's decision to exclude them from participating in the hearing on End Op's applications.
- The landowners' claim of a right to party status is based their ownership of land and their ownership of the groundwater situated beneath it under the *Day* case. They say that have a justiciable interest based on an allegation that proposed pumping will cause a drawdown of their groundwater.
- The District's position, on the other hand, is a person seeking to participate as a party to a hearing on a groundwater permit application must demonstrate an actual or intended use of the groundwater in order to show an interest that can be protected via party status.
- Case pending.

Guadalupe Cnty. Groundwater Conservation Dist. v. Post Oak Clean Green Inc., No. 14-0863-CV (25th Dist. Ct., Guadalupe Cnty., Tex. Jan. 16, 2015) (slip op.)

- GCD brought enforcement suit against landfill operator for violation of district rule prohibiting disposal of solid waste on aquifer outcrop. Landfill operator countersued for inverse condemnation. The TCEQ filed a motion to intervene against the GCD, arguing that the GCD's rules and the suit are improper attempts to appropriate TCEQ's power over landfills.
- Court granted defendant's motion for partial summary judgment and upheld the GCD's rules barring the construction of the landfill, and holding that the GCD's use of the UDJA was proper, the Texas Solid Waste Disposal Act does not expressly or impliedly preempt the GCD's regulations of landfills on the recharge zone, that the suit is not about TCEQ powers to permit landfills, but, instead, is about the GCD enforcing its own rules, and the GCD's rule is not void for vagueness.

Weaks v. Tex. Comm'n on Env'tl. Quality, No. D-1-GN-15-000810 (53rd Dist. Ct., Travis Cnty., Tex. Feb. 27, 2015)



- Landowners seek to reverse the TCEQ's order recommending that land be added to the High Plains Underground Water Conservation District as TCEQ lacks jurisdiction or authority to force private property owners into a groundwater conservation district without compensation.
- The case is an administrative appeal of TCEQ decision to recommend adding land in Briscoe County to High Plains Underground Water Conservation District and raises issues related to the scope of TCEQ's jurisdiction to create GCDs.
- Case is pending.

Trinity Edwards Springs Prot. Ass'n v. Electro Purification L.L.C., No. 15-0598 (22nd Dist. Ct., Hays Cnty., Tex. )

- Citizen suit seeking injunctive relief to require defendants to obtain a permit from the Hays Trinity Groundwater Conservation District, although the district had not asserted jurisdiction over the area where proposed wells are to be located, and alternatively, seeking injunctive relief to require defendants to comply with the reasonable use rule as the rule of capture is inconsistent with the Texas Constitution and Texas statutes.
- Following the Texas Legislature's expansion of the territory of the Barton-Springs Edwards Aquifer Conservation District to include this area in Hays County, Plaintiffs dismissed the suit.



Takings Law and Groundwater Regulation

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



EAA's Actions on Braggs' Permit Applications

1. D'Hanis Orchard - complete denial – no historic use
 2. Home Place Order – permit granted with amount based on two AF/acre x number of acres irrigated
- both actions compelled by EAA Act based on historic use requirements in *statute*

Trial Judgment

- Implementation of the EAA Act constituted a regulatory taking upon application of the factors set forth in *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978).

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



Fourth Court of Appeals Opinion:

EAA permitting decision based on the Act was not a physical or per se regulatory taking under *Lucas* as no physical interference with property and Braggs' orchards retained value but court sustained trial court finding that a taking occurred under *Penn Central* analysis and remanded to trial court to determine the impact of regulation on the before and after value of Braggs' pecan orchards as a whole in order to calculate damages.

Court also held that the statute of limitations ran from time of decision by agency, not from the date the Act became effective or common law withdrawals prohibited for these timely applicants.

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



Both the Braggs and the EAA filed petitions for review, with the EAA seeking dismissal of the case under the statute of limitations and because the State mandated the EAA's actions in the EAA Act and seeking a remand to determine the extent of impact to the Braggs' properties in order to determine whether or not a taking had occurred.

The Texas Supreme Court denied review and the case is now pending in state district court.

The parties are obtaining appraisals of the value of the Braggs' pecan orchards before and after the EAA's permitting decisions.

GG Ranch, Ltd. v. Edwards Aquifer Auth., No. 15-50505 (5th Cir. appeal dismissed Aug. 5, 2015)

- Plaintiff landowners sued the EAA for a taking and seek compensation based on the EAA's denial of their five initial regular permit applications filed in 2012, because they were filed after the filing deadline of Dec. 30, 1996, and also sue for the violation of their right to due process and equal protection under the U.S. Constitution for which they seek damages and attorney's fees under 42 U.S.C. § 1983.
- The San Antonio Water System intervened as a Defendant.
- Based on the federal claims, the EAA removed the case to federal district court.

GG Ranch, Ltd. v. Edwards Aquifer Auth., No. 15-50505 (5th Cir. appeal dismissed Aug. 5, 2015)

- The district court granted the EAA's federal rule 12(b)(6) motion to dismiss all claims. The court held that Plaintiffs failed to state a claim for an equal protection or due process violation as no disparate treatment of similarly-situated persons was alleged, the EAA had performed no actions that shocked the conscience and the EAA Act's permitting scheme and the EAA's implementation of the scheme is rational. The court also held that Plaintiffs' takings claim was barred by the statute of limitations, which began to run on December 30, 1996, when the EAA Act's restrictions impacted the Aquifer use of persons who had not timely filed permit applications.

GG Ranch, Ltd. v. Edwards Aquifer Auth., No. 15-50505 (5th Cir. appeal dismissed Aug. 5, 2015)



- Plaintiffs filed an appeal with the 5th Circuit Court of Appeals and identified the following trial court findings as errors on appeal: that the statute of limitations accrued on December 30, 1996 and Plaintiffs' takings claims were barred; that there was no civil rights violations under 42 USC § 1983; that there was no taking (not found); and that the EAA was compelled to deny Plaintiffs' permits as untimely.
- Plaintiffs missed the deadline to file their appellants' brief and the court dismissed their appeal.

*Fort Stockton Holdings L.P. v. Middle Pecos
Groundwater Conservation Dist., No. 7047 (83rd Dist.
Ct., Pecos Cnty., Tex.)* filed Dec. 27, 2011

- Landowners seek to reverse district's denial of permit application on the grounds that the district incorrectly relied on the *Guitar* opinion, the decision is not supported by substantial evidence, the district improperly granted party status to the Brewster County Groundwater Conservation District and to Pecos County, the district relied on amended rules in violation of Chapter 245, Local Government Code, the district violated constitutional and statutory provisions and the denial constitutes a taking.
- The trial court denied defendants' pleas to the jurisdiction in which they asserted that plaintiffs had not timely filed their administrative appeal.
- The court of appeals affirmed that interlocutory ruling and case is pending.

*Forestar Real Estate Group, Inc. v. Lost Pines
Groundwater Conservation Dist., No. 15,369 (335th
Dist. Ct., Lee Cnty., Tex, filed Mar. 4, 2014)*

Water supplier sued GCD and its directors for partial denial of production and export applications alleging:

- a takings claim from the partial grant of the application,
- no substantial evidence to support GCD's finding and conclusions,
- no unreasonable impact on other surface or groundwater rights,
- findings and conclusions contradict the undisputed evidence in the record,
- finding and conclusions as to water availability are arbitrary and capricious

*Forestar Real Estate Group, Inc. v. Lost Pines
Groundwater Conservation Dist., No. 15,369 (335th
Dist. Ct., Lee Cnty., Tex, filed Mar. 4, 2014)*

- findings as to “speculation” are irrelevant and immaterial and have no basis in law,
- procedural due process is violated as findings/conclusions contravene undisputed evidence,
- substantive due process is violated as applicants are denied an opportunity to produce a meaningful quantity of groundwater from their property,
- equal protection is violated because other uncontested applications have been granted in full, and
- the board’s and directors’ actions constitute a violation of civil rights under the federal Civil Rights Act.

Claims against individual directors were nonsuited.

Landowners' property rights to groundwater



- Under state and federal law, one's rights to property include ownership and possession and the unrestricted use, enjoyment, and disposal of one's property, *subject only to the police power*.
- In *Edwards Aquifer Authority v. Day* (2012), the Texas Supreme Court held for the first time that landowners have a constitutionally-protected interest in groundwater under the common law rule of capture, giving landowners standing to *raise* constitutional takings claims. *Day* did not decide whether or not a taking had occurred but only considered the questions the lower court would need to address to make that determination.

Police Power



- Generally speaking, governments enjoy police power, under which they may regulate a variety of aspects of the lives of their subjects in order to safeguard their health, comfort and general welfare.
- This power does not extend however, to the outright or de facto divestiture of title to private property.

Eminent Domain/Condemnation



- Many governments also possess the power of eminent domain, which allows them to divest a property owner of title to property for public use, after paying just compensation.

Takings clause limits the power of eminent domain



- The takings clauses of the U.S. Constitution and the Texas Constitution impose limitations on the exercise of eminent domain and on government's taking of property through actions other than eminent domain: the taking must be for public use and just or adequate compensation must be paid.

U.S. Constitution, 5th Amendment - Federal Takings Clause



- U.S. Constitution, amend. V: “nor shall private property be taken for public use, without just compensation.”

Texas Constitution, art. I, § 17 - Texas' Takings Clause



- Texas Constitution, Article I, Section 17 provides: “No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made.”

Texas courts rely on federal courts' takings case law



- Although the Texas Constitution prohibits the “damaging” of property, as well as the “taking” of property, unless a claim is only for damaging property, not taking it, the similar language in the federal and state constitutional prohibitions against takings has led Texas courts to generally rely on the U.S. Supreme Court’s interpretation of the federal takings clause when construing Texas’ takings provision.

Takings claims presume valid governmental action



- In a takings case, courts generally assume that the underlying governmental action was lawful and decide only whether the action at issue resulted in a taking for which compensation is due.

What is a taking?



- The paradigmatic governmental taking is a direct appropriation or physical invasion of private property. This is the classic “physical taking.”
- However, even where no direct appropriation or invasion occurs, where regulation is so onerous that it is akin to a direct appropriation or ouster, such a “regulatory taking” may be compensable. Thus, a taking can occur where regulation goes “too far.”
- Where a property owner sues the government, rather than the reverse as in a condemnation action, it is called an “inverse condemnation” claim.

Physical takings claims



- A **physical taking** involves the physical occupation or invasion of property – when the property itself is taken.
- Physical taking examples:
 - ✦ Government runs a cable, pipe, line across land.
 - ✦ Government builds an airport next to property and then the property is directly in the flight path such that planes fly within a few hundred feet of the land.

Physical takings arguments involving GCD regulation - *Day*



- The Texas Supreme Court in the *Day* case opined that there was no physical taking in the case because there was no physical invasion. The court said that it was “an interesting question,” which they had no need to decide in *Day*, “whether regulations depriving a landowner of all access to groundwater – confiscating it, in effect – would fall into the category.”

Physical takings arguments involving GCD regulation - *Bragg*



- The Braggs argued that the EAA's actions in denying their initial regular permit application for their D'Hanis Orchard, and in partially denying their application for their Home Place Orchard, resulted in a dispossession of their right to the groundwater they own under those properties and constituted a physical taking.
- The district court held that no physical invasion or occupation occurred, therefore, there was no physical taking.
- The San Antonio Court of Appeals affirmed that there was no physical taking.

Physical takings arguments involving GCD regulation – generally



- GCD regulation is unlikely to involve any physical occupation of or ouster from land and thus, is unlikely to be evaluated as a physical taking.
- Although there are some outlier cases that apply physical takings law to claims involving the denial of water rights in other states, and *Day* leaves the door open to such claims where a plaintiff has no rights to withdraw groundwater, courts now seem to require some physical action, invasion or occupation by the governmental entity to find a physical taking.
- While a physical taking claim has *some limited* chance of success in a trial court, it is highly unlikely to succeed on appeal.

Regulatory takings



- Regulatory takings arise in situations where a regulation:
 - (1) denies the property owner of all economically beneficial or productive use of his or her land - known as a *Lucas, per se* or categorical taking; or
 - (2) even without depriving the landowner of all economically beneficial or productive use, so interferes with the landowner's right to use and enjoy his or her property as to constitute a taking. Cases falling under the latter situation are analyzed on a case-by-case or *ad hoc* basis in accordance with the principles set forth in *Penn Central*.

Regulatory takings – categorical, *Lucas* or *per se*



- *Lucas* taking occurs if regulation completely destroys the economic use and value of property.
- If landowner has only a “token interest” in her property remaining after governmental regulation, she may be able to assert a *Lucas* taking.
- *Lucas* takings are “extraordinary” and “relatively rare.”
- Evaluation of whether a taking has occurred, requires valuation of plaintiff’s property before and after regulation. \$\$\$

Regulatory takings - categorical or *per se* in cases against GCDs



- Plaintiffs in *Bragg* argued that the EAA's actions in denying their initial regular permit application for the D'Hanis Orchard resulted in a complete deprivation of the value of the orchard.
- The district court and San Antonio Court of Appeals held that no categorical taking of their D'Hanis Orchard had occurred as they had not been denied "all economically beneficial or productive use" of that property and the property still had value.
- The *Day* court noted that "it may be doubted whether [the denial of the permit application] denied him all economically beneficial use of his property."

Regulatory takings - categorical or *per se* in cases against GCDs - generally



- Where landowner's groundwater rights are based on ownership of land, courts should evaluate the impact of GCD regulation on the landowner's parcel as a whole – the land they own, including groundwater and other rights. It is unlikely that GCD regulation will have denied a landowner of all economic or beneficial use of her property.

Regulatory takings - analysis under *Penn Central*



- Where there is no complete deprivation of use or value, to determine whether the government has so unreasonably interfered with a landowner's right to use and enjoy property under *Penn Central* as to constitute a taking requires an *ad hoc*, factual inquiry into:
 1. the character of the governmental action;
 2. the extent to which the regulation interferes with reasonable investment-backed expectations of the landowner; and
 3. the economic impact of the regulation.

Regulatory takings analysis under *Penn Central* for GCDs



- GCD regulation alleged to have caused a taking is likely to be evaluated under the *Penn Central* analysis.
- The courts will be asking whether GCD regulation has gone so far as to be equivalent to taking the property through eminent domain.

Penn Central – character of the governmental action



- In evaluating this factor, courts look to:
 - ✦ the purpose of the regulation and the effects produced;
 - ✦ the importance of the public interest served by the regulation and the advantages and disadvantages to all affected parties; and
 - ✦ the degree of harm and the ease with which harm from the regulation could have been prevented
- *Day* noted the importance of regulation to Texas groundwater supplies but also of affording all landowners a “fair share” to their groundwater. *Day* criticized the EAA Act’s historical use-based permitting. *Day* reached no conclusions about this factor.
- *Bragg* looked to *Day*’s discussion and held that given the importance of protecting groundwater, the character of the EAA Act weighed *against* finding a taking.

Penn Central – extent of interference with reasonable investment-backed expectations



- Landowners must have actual, objectively reasonable investment-backed expectations to groundwater use with which groundwater regulation interferes.
- Because the evaluation of this factor is from the time of the purchase of property, if groundwater regulation is already in place, a landowner's expectations to use groundwater may not have been reasonable.
- A landowner may not have actually made any investments based on desired groundwater use.
- Where water can otherwise be purchased or leased, including groundwater rights, groundwater regulation may only marginally increase landowner's costs.

Penn Central – economic impact to property



- Courts determine the economic impact to property by comparing the value of the property before being impacted by a regulation with the value of the property after being impacted by a regulation.

Determining the relevant parcel affected



- To measure economic impact, a court compares what was taken from owner with what the owner still has. To do so, the court must define the plaintiff's property to include in the analysis. This is called the “parcel as a whole,” “relevant parcel” or “denominator” issue.
- The pattern has been to include in the relevant parcel all contiguous, same-ownership land unless there is good reason to exclude.
- This was an issue in the *Bragg* case as the Braggs have unsuccessfully argued that only the groundwater estate may be considered in determining economic impact and compensation.

Formula for determining economic impact



$$\frac{\text{Bundle of property rights taken}}{\text{Bundle of property rights from which taken}} = \text{Economic Impact}$$

- As the numerator grows, or as the denominator decreases, it is much more likely that courts will find that an unconstitutional taking has occurred.

Economic impact must generally be substantial



- To support a taking, government interference with an owner's use and enjoyment of property must cause a direct, immediate, and substantial impact on the property, making it unusable for its intended purpose.
- Governmental action which results in only some loss of rights or value is insufficient for finding a taking.
- Where significant economic value remains in a property, courts will not find a taking.
- *But see Bragg* - The San Antonio Court of Appeals failed to determine the extent of economic impact to the landowners and instead held that because there was *some* economic impact, this factor supported finding a taking.

If taking found, adequate compensation



- In a regulatory takings claim, the measure of adequate compensation is the difference between the value of the property, immediately before and after the date of the regulation that caused the taking. Accord *Bragg*.
- The value is taken at the time of the taking, rather than at the time of trial. Accord *Bragg*.

What are GCDs to do?



- Tread carefully but recognize takings claims are hard to prove.
- Every governmental regulation is not a taking.
- Encourage transfers between users for the same purpose of use.
- Be fair and be transparent.
- If you are involved in a taking claim, bring in a good lawyer experienced at litigating takings claims. 😊 Let me know if I can help you.

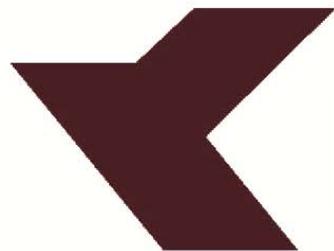
THE END



Deborah Trejo

dtrejo@kempsmith.com

512-226-0005



KEMPSMITH LAW