

Edwards Aquifer Authority v. Bragg: A Summary for Non-Attorneys

On Wednesday, August 28, 2013 the Fourth Circuit Court of Appeals issued its decision in *Edwards Aquifer Authority v. Bragg*. The decision makes clear that permitting limitations imposed by a groundwater conservation district can reach the level to be considered a regulatory taking. The 50-page opinion is lengthy and complex, but the core issues have been broken down and summarized in hopes of being useful to allow non-attorneys to understand the decision.

The Braggs own property that sits above the Edwards Aquifer on which they have two pecan orchards: The Home Place orchard and the D'Hanis orchard. Beginning in the late 1970's, the Braggs irrigated the Home Place orchard from a well drawing from the Edwards Aquifer. The D'Hanis Orchard was irrigated through other means. In 1993, the Legislature passed the Edwards Aquifer Act ("the Act") that created the Edwards Aquifer Authority ("EAA"). The Act charged the EAA with permitting and regulation groundwater withdrawals in the area where the Bragg orchards are located. The Act creating the EAA requires that the EAA create a permitting system for groundwater use that gives preference to historic and existing users. Generally, the Act allows a historic user to withdraw the maximum amount of water that was previously put to beneficial use during any one-year period.

The Braggs applied for water permits for both of their orchards. The EAA denied the permit for the D'Hanis orchard because there was no evidence of historical use of water, and granted a permit of only 120 acre feet/year for the Home Place orchard (about half of the amount sought by their permit application) based on historic water use. The Braggs filed a takings claim. The trial court found that the permit denials constituted regulatory takings for both orchards, and awarded damages of \$134,918.40 for the D'Hanis orchard and \$597,575.00 for the Home Place orchard. Both parties appealed to the Fourth Circuit Court of Appeals.



In its 50 page opinion, the Court of Appeals addressed several issues.

First, the EAA argued that because the permitting system that the Braggs complained of in the Act was created by Legislature, the Braggs should have sued the State of Texas, rather than the EAA. The court rejected this argument, finding that while the State of Texas may also have been a proper party, the EAA was a proper defendant as well since it was a state agency enforcing the Act.

Second, the court held that a claim for a regulatory taking results in inverse condemnation (a claim like the one here filed by the Braggs alleging that the regulations constituted a taking without just compensation) is governed by a 10-year statute of limitations. In this case, where the Braggs brought an as-applied challenge to the denials of the permit, the statute of limitations began running in 2004 and 2005 when the permit applications were acted upon by the board, rather than when the Act was passed in 1993. Thus, the Braggs' claim was timely filed.

Third, the court found that the denial of the D'Hanis permit and limitation of the Home Place permit constituted regulatory takings. The court applied the *Penn Central* factors (set forth by the United States Supreme Court *Penn Central* case) and found that the economic impact of the denial/limitation of the permits and the investment-backed expectations of the Braggs both weighed in favor of finding that a taking occurred. On the other hand, the nature of the regulation weighed in favor of the EAA given the need for water planning and conservation. The court also considered "other factors" including the fact that pecan farming requires the use of water and that given the ongoing drought in Texas, irrigation was the only real option for the Braggs. In light of these factors, the court found that a regulatory taking occurred when the permits were denied and limited.

Next, the court turned to the issue of adequate compensation. Under both the Texas and federal constitutions, private property may not be taken for a public use without adequate compensation being made to the private property owner. The court made two rulings that address the issue of adequate compensation.

First, the court found that the value of the property for adequate compensation purposes in an inverse condemnation suit should be its value at the time of the taking. This differs from the rule for a condemnation proceeding filed by the State, for which the property is valued at the time of the condemnation hearing. Thus, the Braggs' property should be valued from the time of the regulatory taking, which occurred when the permits were denied/limited.

Second, the court determined how adequate compensation should be calculated. The trial court calculated compensation differently for each of the orchards. For the Home Place, the trial court calculated compensation by looking at the water limitation imposed. The trial court reasoned that because the Braggs requested 228.85 acre feet, but were granted a permit for only 120.2, the measure of compensation should be the number of acre feet of water withheld (228.85 minus 120.2) multiplied by a market value for water (\$5,500/AF). For the D'Hanis Orchard, however, the court looked at the impact on the value of the land, comparing the market value per acre of land with no water rights and the value per acre of land with water rights and awarding the difference as just compensation. The Court of Appeals held that because the highest and best use of the property was for pecan orchards, the proper valuation method in this case was to compare the value of the pecan orchards before and after the permit denial/limitation. Thus, the court remanded the case back to the trial court to calculate the applicable

damages by comparing the value of the orchards before and after the permit denial/limitation and to award the difference in value to the Braggs.

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