# Texas Supreme Court Will Not Weigh In On Major Water Law Case

**Tiffany Dowell Lashmet, Texas A&M Agrilife Extension**

On Friday, May 1, 2015, the Texas Supreme Court denied petitions to consider appeals from both sides in *Bragg v. Edwards Aquifer Authority*. This result is surprising to many legal scholars who have been watching this high-profile case for years. In light of the Court's refusal to consider the case, the opinion of the San Antonio Court of Appeals will stand.

## Background

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. For the Home Place orchard, the Braggs requested about twice the amount of water they had historically used. For the D'Hanis orchard, the Braggs sought water despite having no historic use as defined and required by the Act.

The EAA denied the permit for the D'Hanis orchard entirely 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 suit claiming that the permit denials constituted a taking of their private property, for which the EAA was required to pay just compensation. 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.

In their opinion, the trial court reached these damage amounts by applying two different calculation methods. For the Home Place, the court reasoned that the market value of water in the area was $5,500 per acre feet and multiplied that value by the 108.65 acre feet that was requested by the Braggs but denied by the EAA. For the D'Hanis orchard, the trial court looked at the difference between the value of a farm without irrigation rights ($1,800 per acre) and one with irrigation rights ($5,000 per acre). The court then took the difference between the two multiplied by the size of the D'Hanis orchard (42.162 acres).

Both parties appealed to the San Antonio Court of Appeals. The EAA primarily argued that the trial court erred in finding that a taking occurred and that the court erred in calculating adequate compensation. The Braggs argued that the trial court improperly calculated the compensation for the D'Hanis orchard, which they believe should have been calculated the same way as the Home Place.

## Court of Appeals Opinion

The San Antonio Court of Appeals issued its decision on this case back in August 2013. The Court considered numerous issues on appeal.

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, which were set forth by the United States Supreme Court *Penn Central Transportation Co. v. New York City* opinion. Specifically, the *Penn Central* factors require courts to consider the following in determining whether a taking occurred: (1) the nature of the taking; (2) the economic impact of the denial; and (3) the investment backed expectations of the landowner. Additionally, the test allows for other factors to be considered as well.

In applying these factors, the court 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 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.

## Supreme Court Petitions

After the San Antonio Court of Appeals' decision, both parties appealed again, this time to the Texas Supreme Court. Both made arguments similar to those made to the Court of Appeals. In addition, numerous interested parties filed amicus briefs in support of both sides. These groups included brief filed in support of the Braggs by a group of livestock organizations including Texas Farm Bureau, Texas and Southwestern Cattle Raisers Association, Texas Forestry Association, Texas Association of Dairymen, Texas Wildlife Association, and Texas Cattle Feeders Associations.

After receiving full briefing on the petitions, the Texas Supreme Court issued its denial of all petitions.

This means that the Court of Appeals opinion stands and the case will be remanded to the trial court for it to reconsider adequate compensation based upon the proper method articulated by the Court of Appeals.

## Why Do We Care?

As I previously indicated, this case has been watched closely across the country by those interested in property rights and water law. It makes clear that under Texas law, at least in these factual circumstances, the denial of a permit to pump groundwater may constitute a regulatory taking for which compensation may be owed to a landowner.

Questions remain about the breadth of the opinion. For example, will it apply to Groundwater Conservation Districts permit denials? Will it apply to claims where the property was not purchased until after the EAA was created? Will a flood of lawsuits be coming to a courthouse near you? Time will tell.