



Texas Groundwater Case Opens New Front in Regulatory Takings Claims

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Water rights lawsuits are not new. But a recent ruling in Texas sets new precedent in the fight for groundwater. There, a Texas trial court recently awarded pecan farmers Glenn and JoLynn Bragg \$2.5 million for their lost use of groundwater from the Edwards Aquifer in South Texas.

The Braggs own two commercial pecan orchards that are irrigated using two wells, one drilled in 1980 without a permit and one drilled in 1995 with a permit from the former Medina Groundwater Conservation District. Both wells withdraw groundwater from the Edwards Aquifer. In 1993, Texas passed the Edwards Aquifer Act (the "Act") and formed the Edwards Aquifer Authority (EAA) to manage competing uses for the aquifer. In early 2000, the Braggs applied for permits from EAA to use groundwater from the aquifer to irrigate the same two pecan orchards. EAA denied the request for one orchard, and gave only limited access to groundwater for the other. In 2006, the Braggs sued the EAA for taking their right to the use and enjoyment of both properties without adequate compensation in violation of the Texas State Constitution. The trial court held the Braggs were entitled to damages for the takings claims and calculated the damages based on the market value of the groundwater they were denied, not the lost value of the properties.

Both sides appealed the trial court's ruling, and on August 28, 2013, the Texas Fourth Court of Appeals affirmed the Braggs right to damages, holding the regulatory scheme imposed by the Act resulted in a regulatory taking of both orchards. However, the court remanded the case to the trial court to recalculate damages based on the diminution in the values of their properties, not the market value of the groundwater they were denied. It said:

[W]e conclude the "property" actually taken is the unlimited use of water to irrigate a commercial-grade pecan orchard, and that "property" should be valued with reference to the value of the commercial-grade pecan orchards immediately before and immediately after the provisions of the Act were implemented or applied [to the orchards].

EAA appealed the decision to the Texas Supreme Court, but the court denied its request. On remand, the trial court jury awarded the Braggs \$2.5 million plus pre-judgment interest, bringing the total award to over \$4 million.

In most instances, water users on the east coast have ready access to sufficient quantities of surface and groundwater to meet their needs. That's not the case in the southwest and west where access to water can mean the difference between commercial success and failure. Whether this case will set precedent elsewhere is hard to say, but the Texas plaintiffs certainly had an advantage that plaintiffs in other states may not have: The Act explicitly states that the Texas legislature intended "just compensation be paid" if implementation of the Act causes a taking of private property or impairment of a contract. Considering that our nation's aquifers are subjected to increasing demands, it won't be surprising if other groundwater-dependent industries sue to test the waters in their jurisdiction and request compensation for groundwater permit denials.

Bragg vs. Edwards Aquifer Authority, No. 06-11-18170-CV (Tex. Dist. Ct., Medina Cty., Feb. 22, 2016);
Edwards Aquifer Authority v. Bragg, No. 04-11-00018-CV (Tex. Ct. App. Nov. 13, 2013).

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