

WORLD'S WORST GAME OF TELEPHONE: ATTEMPTING TO UNDERSTAND THE CONVERSATION BETWEEN TEXAS'S LEGISLATURE AND COURTS ON GROUNDWATER

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I.	Introduction	258
II.	Texas Groundwater	261
III.	Establishing the Right of Capture	264
	A. Starting with <i>East</i>	264
	B. Capturing <i>Sipriano</i>	266
IV.	The Legislature Speaks	268
	A. The Growth of Districts	269
	B. GCDs and the Groundwater Planning Process	273
V.	The Edwards Aquifer: A Special Case	277
	A. <i>Sierra Club v. Lujan</i>	278
	B. Creating the EAA	279
	C. <i>Barshop v. Medina County Underground Water Conservation District</i>	281
VI.	Moving from Capture to Ownership	282
	A. <i>Guitar Holding Co. v. Hudspeth County Underground Water Conservation District</i>	282
	B. <i>Del Rio and Bragg</i>	284
	C. The <i>Day</i> Departure	286
	1. SB 332	286
	2. <i>Edwards Aquifer Authority v. Day</i>	288
VII.	Why the Change?	291
	A. Courts v. Legislature	293
	B. Private Property Rights	296
	C. A Move Towards More Regulation: The Oil and Gas Model	299
VIII.	Conclusion	303

I. INTRODUCTION

Oil may have put Texas on the map,¹ but water is what it needs to stay there. While other states struggled economically in recent years, Texas flourished.² Since 1995, the number of jobs in Texas increased 31.5% as compared to the national average of just 12%.³ The majority of the job growth occurred in Texas cities.⁴ In fact, four of 2013's ten fastest growing cities are located in Texas.⁵ Although many industries expanded, the mining and logging sector, which includes the oil and natural gas industries, was notably strong.⁶ Population projections reflect the same growth trend. Texas's population is forecasted to increase 82% in the next fifty years.⁷ This growth is predicated on access to water resources.⁸ The future of Texas is not definite; however, it is certain that none of this growth can continue without water.

Groundwater is a critical component of Texas water resources. According to the most recent statistics, groundwater accounts for 60% of all water withdrawn in the state.⁹ Historically, the largest groundwater user was the agricultural sector; however, Texas cities are also increasingly reliant on these water sources.¹⁰ State water demands are projected to increase 22% in the next fifty years.¹¹ Many of these demands will be in the groundwater sector. In addition to increasing demand, periodic and sometimes severe droughts challenge an already stressed system.¹² Texas's ability to provide sufficient resources depends in large part on their effective management.

The laws governing Texas groundwater have followed a long and complicated path consisting of case law and legislation.¹³ The common law of groundwater allocation was first established by the Texas Supreme Court in 1904, which held that Texas should

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- 1 See generally Mary G. Ramos, *Oil and Texas: A Cultural History*, TEXAS ALMANAC, <http://www.texasalmanac.com/topics/business/oil-and-texas-cultural-history> (last visited May 25, 2013).
 - 2 Wendell Cox, *The Texas Growth Machine*, CITY J., Winter 2013, http://www.city-journal.org/2013/23_1_texas-growth.html.
 - 3 *Id.*
 - 4 *Id.*
 - 5 Morgan Brennan, *America's Fastest Growing Cities*, FORBES (Jan. 23, 2013, 6:00am), <http://www.forbes.com/sites/morganbrennan/2013/01/23/americas-fastest-growing-cities/>.
 - 6 *Comptroller's Weekly Economic Outlook*, TEX. ECON., <http://www.thetexasconomy.org/economic-outlook/> (last updated May 24, 2013). Those industries alone added an estimated 40,000 jobs in 2011. *Id.*
 - 7 TEX. WATER DEV. BD., WATER FOR TEXAS: 2012 STATE WATER PLAN 1 (2012) [hereinafter 2012 STATE WATER PLAN], available at http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf.
 - 8 *Id.*
 - 9 *Id.* at 163 (citing the 2008 Texas Water Development Board Water Use Survey).
 - 10 *Id.*; 2010 Texas Water Use Estimates, TEX. WATER DEV. BOARD, <http://www.twdb.state.tx.us/waterplanning/waterusesurvey/estimates/2010/index.asp> (follow "2010 Water Use Survey Summary Estimates – Regional & State Totals" hyperlink) (last visited April 14, 2013).
 - 11 2012 STATE WATER PLAN, *supra* note 7, at 3.
 - 12 Jake Silverstein, *Life by the Drop*, TEX. MONTHLY, July 2012, at 101.
 - 13 See *infra* Parts III–VI.

follow the English common law right of capture.¹⁴ Under right of capture, one landowner can drain the water from under his neighbor's property without liability with few exceptions.¹⁵ The Court reasoned that this rule was preferable because of the scientific complications associated with trying to regulate groundwater and the impacts regulation may have on commerce.¹⁶

Rule of capture has been upheld by subsequent cases; however, on several occasions the Court has been critical of this allocation scheme and indicated that this rule should be changed by the legislature.¹⁷ Those opinions recognized the need for greater management based on changing circumstances in the state.¹⁸ Most notably, in *Sipriano v. Great Spring Waters of America, Inc.*, the Court went so far as to indicate that if the legislature did not change the law, the Court would.¹⁹

A state constitutional amendment vested the authority to manage and conserve natural resources with the legislature.²⁰ Pursuant to this authority, the state created Groundwater Conservation Districts (GCDs) instead of forming a statewide regulatory agency.²¹ The state preferred districts because they provided a regional, bottom-up approach to planning that is more suitable for managing individual aquifers.²² These legislatively created districts have the authority to permit groundwater wells based on well spacing to minimize interference between wells and set production limits based on tract size or production capacity.²³ There are currently one hundred GCDs, but there are still areas of the state outside district authority.²⁴ In these areas, rule of capture continues unfettered.²⁵

Another significant regulatory initiative was the creation and expansion of the regional planning process. Through two omnibus state water bills and other supporting legislation, state lawmakers created a statewide water-planning program.²⁶ As part of this initiative, the state was divided into sixteen groundwater management areas

14 *Houston & T. C. Ry. Co. v. East*, 81 S.W. 279, 280–82 (Tex. 1904).

15 *Id.*

16 *Id.* at 281.

17 *See, e.g., Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 78–80 (Tex. 1999) (discussing at length the courts' continuing refusal to abandon the common law rule of capture, though some aspects were considered "harsh and outmoded," and the recognition that water regulation in Texas is a legislative prerogative).

18 *Id.*

19 *See id.* at 80.

20 TEX. CONST. art. XVI, § 59(a).

21 TEX. WATER CODE ANN. § 36.0015 (West 2012).

22 *See Sipriano*, 1 S.W.3d at 80.

23 TEX. WATER CODE ANN. § 36.116 (West 2012).

24 *Groundwater Conservation District (GCD) FAQs*, TEX. WATER DEVELOPMENT BOARD, <http://www.twdb.state.tx.us/groundwater/faq/> (last visited April 14, 2013) (follow "GCD map" hyperlink to see areas of the state outside district authority).

25 45 Douglas G. Caroom, Susan M. Maxwell, & Celina Romero, *Texas Practice Series: Environmental Law* § 14.2 (2d ed. 2005 & Supp. 2012).

26 *See infra* Part IV.A–B.

(GMAs), which roughly parallel aquifer boundaries.²⁷ These areas were then tasked with selecting desired future conditions for the aquifer, which is essentially a decision regarding the preferred aquifer conditions in fifty years.²⁸ Based on that decision, individual GCDs within a GMA were tasked with permitting water withdrawals mindful of that goal.²⁹ Implementation of permitting rules to attain these future targets heralded a level of regulation that had never before occurred.

Over the years, as capture was maintained by the courts and additional regulations were promulgated, questions arose regarding the specifics of the property right created by the common law rule.³⁰ Although the Court stated on multiple occasions that capture was the law, neither the court nor lawmakers ever specified if ownership in that water vested in place or upon capture.³¹ While the answer to this question did not have a significant impact when there was enough water for all users, the need for an answer increased as water supplies became scarcer. The specific question of ownership was finally brought before the Court in *Edwards Aquifer Authority v. Day*. In its ruling, the Court stated unequivocally that ownership rights vest in place. Defining the right in place limits the extent to which districts can regulate groundwater before it becomes a regulatory taking. Unfortunately for regulators, the Court did not define where that limit is.

The *Day* ruling was extremely controversial and led to many conversations about how much regulation was acceptable, but the ruling was compelling for another reason. The *Day* opinion denoted a departure from previous groundwater cases.³² While previous cases criticized capture and deferred to legislative initiatives to regulate, often encouraging more limits, this decision did not.³³ Instead, the opinion focused on oil and gas law and private property rights.³⁴ This article seeks to explain this shift by evaluating the historic conversation between the Texas Supreme Court and the Texas Legislature on groundwater.

This paper evaluates the *Day* decision through the lens of past court decisions and legislation in an effort to understand the Court's ruling. Part II introduces Texas's groundwater resources, current uses of that water, and present concerns regarding sustainability.³⁵ Part III chronicles the line of cases that established capture as the common law rule in Texas.³⁶ Part IV traces the history of groundwater legislation after courts

27 See, e.g., *Groundwater Management Areas*, TEX. WATER DEV. BOARD, http://www.twdb.state.tx.us/groundwater/management_areas/ (last visited Apr. 14, 2013) (displaying a map of the 16 Groundwater Management Areas).

28 Robert E. Mace et al., *A Streetcar Named Desired Future Conditions: The New Groundwater Availability for Texas (Revised)*, in *THE CHANGING FACE OF WATER RIGHTS IN TEXAS* ch. 2.1, at 2–3 (State Bar of Texas eds., 2008), available at <http://www.twdb.state.tx.us/groundwater/docs/Streetcar.pdf>.

29 TEX. WATER CODE ANN. § 36.1132.

30 See *infra* Part VI.A–B.

31 See *infra* Part VI.A–B.

32 See *infra* Part VII.

33 *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 831–32 (Tex. 2012).

34 *Id.*

35 See *infra* Part II.

36 See *infra* Part III.A–B.

established rule of capture.³⁷ This legislation created a regulatory overlay on the common law rule of capture through localized groundwater conservation districts and the statewide planning process.³⁸ Part V describes the process through which the Edwards Aquifer Authority came into existence and how its pumping cap immediately raised property rights concerns.³⁹ Part VI explains how groundwater litigation shifted from right of capture limitations to questions of when ownership vests.⁴⁰ This change was a product of increased pressure on groundwater resources caused by additional regulations and growing population demands.⁴¹

Finally, Part VII presents three hypotheses regarding why the Court came to its decision in the *Day* case, despite the case law history.⁴² The first theory is that delineation of property interests is an issue reserved for courts' authority.⁴³ Another alternative is that the holding in *Day* was a result of a statewide shift towards the protection of private property rights above other concerns.⁴⁴ The final proposed alternative is that the *Day* holding was actually an effort to define the property right in such a way as to encourage more regulation, or at least limit takings claims, through the extension of correlative rights to groundwater.⁴⁵

II. TEXAS GROUNDWATER

Texans have a long-standing dependence on groundwater.⁴⁶ Its usage has steadily increased throughout the state's history.⁴⁷ From early in the state's history, farmers required groundwater for their livelihoods. In the 1930s, groundwater was an essential tool in stopping the seemingly endless Dust Bowl in the Texas Panhandle and returning the

37 See *infra* Part IV.A–B.

38 See *infra* Part IV.A–B.

39 See *infra* Part V.A–C.

40 See *infra* Part VI.A–C.

41 See *infra* Part VI.A–C.

42 See *infra* Part VII.A–C.

43 See *infra* Part VII.A.

44 See *infra* Part VII.B.

45 See *infra* Part VII.C.

46 Groundwater is defined by the Texas Water Code as “water percolating below the surface of the earth.” TEX. WATER CODE ANN. § 36.001(5) (West 2012). This definition can be misleading, as underflow of a stream is actually considered surface water and therefore under state control. *Id.* § 11.021(a). Implementing regulations of Texas water rights supply additional details to the definition. Groundwater is “[w]ater under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving.” 30 TEX. ADMIN. CODE § 297.1(21) (2012). Once groundwater leaves the ground in the form of springs or discharges into a river, its legal character changes and it becomes surface water. *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 236 (Tex. App.—Austin 1989, writ denied).

47 PETER G. GEORGE ET AL., TEX. WATER DEV. BD., AQUIFERS OF TEXAS, REPORT 380, at 10 (2011), available at http://www.twdb.state.tx.us/publications/reports/numbered_reports/doc/R380_AquifersofTexas.pdf.

area from a wasteland to a thriving agricultural economy.⁴⁸ The majority of rivers that start in Central Texas and flow across the state to the bays and estuaries find their headwaters in groundwater-fed springs, without which the state could not provide sufficient surface water for many users.⁴⁹ In addition, the seventh largest city in the United States, San Antonio, relies almost entirely on the Edwards Aquifer for its survival.⁵⁰

Texas has nine major aquifers and twenty-one minor aquifers.⁵¹ In 2008, groundwater provided nearly 60% of the water used throughout the state.⁵² This amounted to 9.66 million acre-feet per year.⁵³ The vast majority, 80%, of this water was used for irrigation.⁵⁴ 35% of municipal demands are met by groundwater, although this percentage may increase in the future, as surface water is increasingly unavailable.⁵⁵ State water demands are projected to increase 22% in the next fifty years.⁵⁶ Even with a projected decrease in irrigation demand, the demand for groundwater will continue to increase.⁵⁷ This ever-growing, intensifying dependence on groundwater coupled with legal questions regarding regulation threatens the viability of many of these resources.⁵⁸ Some of these impacts are already visible.

While droughts are not new to Texas, additional stressors can turn a temporary inconvenience into a sustainability threat.⁵⁹ The state's population is predicted to increase 82% between 2010 and 2060.⁶⁰ The vast majority of these citizens will live in urban areas, stressing cities' current water supplies.⁶¹ New water supply plans for municipal areas often include desalination of brackish aquifers or pumping and long-haul transport of groundwater from one region of the state to another.⁶² In other areas, where drought

48 Jon Mark Beilue, *Methods Prevent Another Dust Bowl*, AMARILLO GLOBE-NEWS, Apr. 11, 2010, http://amarillo.com/stories/041110/new_news7.shtml.

49 See generally GEORGE ET AL., *supra* note 47 (providing summaries of all major and minor Texas aquifers, including the springs associated with each aquifer).

50 Texas: San Antonio, *San Antonio Protects Edwards Aquifer*, U.S. ENVTL. PROTECTION AGENCY (Jan. 2010), <http://water.epa.gov/infrastructure/drinkingwater/sourcewater/protection/casestudies/upload/Source-Water-Case-Study-TX-SanAntonio.pdf>.

51 GEORGE ET AL., *supra* note 47, at 3.

52 2012 STATE WATER PLAN, *supra* note 7, at 163.

53 An acre-foot is equal to 325,851 gallons of water.

54 2012 STATE WATER PLAN, *supra* note 7, at 163.

55 *Id.* at 163–64. Municipal uses accounted for fifteen percent of total groundwater withdrawals. *Id.* at 163.

56 *Id.* at 3, 136.

57 *Id.* at 3.

58 *Id.* at 164–65.

59 Silverstein, *supra* note 12, at 101; Chris Tomlinson, *Water Percolates Up Texas Legislature's Agenda*, Lubbock Avalanche-J., Dec. 9, 2012, <http://lubbockonline.com/filed-online/2012-12-09/water-percolates-texas-legislatures-agenda#.UMdiFJK3I3t>.

60 2012 STATE WATER PLAN, *supra* note 7, at 1.

61 See *id.* at 3 (stating that demand for municipal water will increase from 4.9 million acre-feet in 2010 to 8.4 million acre-feet in 2060).

62 Kate Galbraith, *Industrial Evolution*, TEX. MONTHLY 130 (July 2012) [hereinafter Galbraith, *Industrial Evolution*]; Kate Galbraith, *Texas' Water Woes Spark Interest in Desalination*, TEX. TRIB. (June 10, 2012), <http://www.texastribune.org/texas-environmental-news/water-supply/texas-water-woes-spark-interest-desalination/> [hereinafter Galbraith, *Water Woes*]; 2012 STATE WATER PLAN, *supra* note 7, at 193–95. There are currently forty-four brackish water

and over-allocation have reduced surface water resources, some citizens have starting drilling personal groundwater wells.⁶³ Unfortunately, in regions where the groundwater is hydrologically connected to nearby surface water sources, withdrawal of the groundwater reduces the available surface water.⁶⁴ These realities, viewed in light of climate change predictions for the region, paint a bleak picture and raise questions about how the state's aquifers will survive.⁶⁵

The same region of Texas that suffered from the Dust Bowl is again under threat.⁶⁶ The Ogallala Aquifer located in the Texas Panhandle recently experienced the largest one-year decline in twenty-five years.⁶⁷ In 2011, Texas suffered a drought that exceeded the dryness experienced in any single year during the severe drought of the fifties.⁶⁸ The 2011 drought greatly depleted surface and groundwater resources and wildfires raged throughout the state.⁶⁹ Even before the 2011 drought, the Ogallala Aquifer was declining at an average of $\frac{3}{4}$ of a foot per year.⁷⁰ Because the Ogallala is a non-recharging

desalination plants in Texas used for public water supplies, and ten additional units have been approved for construction. Galbraith, *Water Woes*, *supra*.

63 Kate Galbraith, *Texas Drought Sparks Water Well Drilling Frenzy*, TEX. TRIB. (Feb. 17, 2012), <http://www.texastribune.org/2012/02/17/texas-drought-sparks-water-well-drilling-frenzy/>.

64 Thomas C. Winter et al., U.S Geological Survey, Circular 1139, *Ground Water and Surface Water: A Singular Resource 2–5* (1998), available at <http://pubs.usgs.gov/circ/circ1139/pdf/circ1139.pdf>.

65 Galbraith, *Industrial Evolution*, *supra* note 62, at 132.

66 See Peter Miller, *The New Dust Bowl*, NAT'L GEOGRAPHIC, Sept. 2012, at 58; Kate Galbraith, *Drought Caused Big Drop in Texas Portion of Ogallala*, TEX. TRIB. (July 3, 2012), <http://www.texastribune.org/2012/07/03/drought-caused-huge-drop-texas-portion-ogallala/> [hereinafter Galbraith, *Drought Caused Big Drop*].

67 Galbraith, *Drought Caused Big Drop*, *supra* note 66. Monitoring wells in the southern panhandle dropped an average of two and a half feet in just over a year. *Id.* Northernmost areas of the panhandle, near the Oklahoma border, measured almost a three-foot drop in water levels as the drought raged on. *Id.* Rainfall in Lubbock measured only 5.86 inches for 2011. Sandra Postel, *That Sinking Feeling About Groundwater in Texas*, NAT'L GEOGRAPHIC (July 19, 2012), <http://newswatch.nationalgeographic.com/2012/07/19/that-sinking-feeling-about-groundwater-in-texas/>.

68 Silverstein, *supra* note 12, at 100; John Burnett, *When the Sky Ran Dry*, TEX. MONTHLY, July 2012, at 107 (chronicling the impact of the drought of the fifties on Texans). The drought of the 1950s, which lasted from 1947 and 1957, is often referred to as the "drought of record" because it is the benchmark to which all other droughts in Texas are compared. Farzad Mashhood, *Current Drought Pales in Comparison with 1950s "Drought of Record"*, AUSTIN AM.-STATESMAN, Aug. 4, 2011, <http://www.statesman.com/news/news/local/current-drought-pales-in-comparison-with-1950s-d-1/nRdC5/>; see 2012 STATE WATER PLAN, *supra* note 7, at 1.

69 Craig Kanalley, *Texas Wildfires 2011: Season Among Worst In State History*, HUFFINGTON POST (Apr. 11, 2011), http://www.huffingtonpost.com/2011/04/11/texas-wildfires-2011-video_n_847776.html.

70 Kate Galbraith, *Texas Farmers Battle Ogallala Pumping Limits*, TEX. TRIB. (Mar. 18, 2012), <http://www.texastribune.org/2012/03/18/texas-farmers-regulators-battle-over-ogallala/> [hereinafter Galbraith, *Texas Farmers Battle*].

aquifer, these declines will eventually force a permanent shift in the High Plains economy unless considerable changes are implemented.⁷¹

The Ogallala is not alone. Recent monitoring of wells in aquifers across the state revealed significant water level declines ranging in severity from fifty feet to more than one thousand feet.⁷² Dewatering is not the only reason to limit pumping. For example, access to water in the Gulf Coast Aquifer is restricted despite sufficient water availability because extraction created problematic subsidence.⁷³ In the next fifty years, available groundwater supplies are projected to decrease 30%, primarily due to the depletion of the Ogallala Aquifer and reduced supply from the Gulf Coast Aquifer as a result of mandatory subsidence reductions.⁷⁴

Despite these prognostics, many landowners remain opposed to increased groundwater regulation, seeing it as an invasion of private property rights.⁷⁵ To understand this seemingly illogical viewpoint, it is important to understand the evolution of groundwater rights in Texas—any discussion of which must begin with the rule of capture established by the Texas Supreme Court in *Houston & T. C. Railway Co. v. East*.⁷⁶

III. ESTABLISHING THE RIGHT OF CAPTURE

The legal road to groundwater in Texas is paved by a series of legal and legislative decisions made somewhat in tandem with, or at least in recognition of, one another. When considered this way—viewing each court and legislative decision as one in a series—the progression in groundwater regulation becomes clearer. Sometimes there appears to be a direct concert between the legislature and the judiciary, each one respecting and deferring to the other. Other times, legislative deference is replaced with the subtleties of persuasion that courts often provide to legislators.⁷⁷ While the common law clearly established the rule of capture, several subsequent decisions and a series of legislative efforts added asterisks to the Court's *East* decision and modified it.

A. STARTING WITH *EAST*

Any discussion of groundwater law in Texas must begin with the Texas Supreme Court's 1904 ruling in *East*.⁷⁸ This case established the rule of capture as the law for Texas groundwater.⁷⁹

71 *Id.*

72 GEORGE ET AL., *supra* note 47, at 8; 2012 STATE WATER PLAN, *supra* note 7, at 8.

73 2012 STATE WATER PLAN, *supra* note 7, at 165.

74 *Id.* at 164.

75 See e.g., Galbraith, *Texas Farmers Battle*, *supra* note 70 (describing farmers' resentment towards the new rules promulgated by High Plains Underground Water Conservation District).

76 See *Houston & T. C. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904).

77 See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 164 (1982).

78 See *East*, 81 S.W. at 279.

79 *Id.* at 280–82.

In *East*, the Houston Railroad Company had several lots upon which it built a large groundwater well and attached it to a steam pump.⁸⁰ The pump withdrew 25,000 gallons of water each day, which caused East's much smaller, neighboring residential well to go dry.⁸¹ Despite East's injury, the Court held that Houston Railroad Company's use was reasonable and not actionable.⁸² The Court explained that the landowner has equal ownership of the soil and the water held therein.⁸³ The Court reached this conclusion for two reasons: first, the Court stated that groundwater was too complicated to govern any other way; and second, requiring correlative rights would interfere with economic development.⁸⁴ The only exception to this rule appeared to be that groundwater use must be absent evidence of malice or willful waste.⁸⁵

East was a case of first impression for the Court and Texas had no laws governing groundwater at the time of its disposition. Without other guidance, the Court relied on the experiences of other jurisdictions and English common law to reach its conclusion.⁸⁶ In particular, the Court cited *Acton v. Lundell*, a case from 1843.⁸⁷ Despite its reliance on common law, the Court posited that legislation would have guided its decision had the legislature previously created any regulations for groundwater.⁸⁸

Since 1904, many things in Texas have changed, including increased water demand and scarcity. Some argued that the need for water created a conflict between the right of capture as outlined in *East* and lasting groundwater sustainability. These concerns have resurfaced many times since the *East* decision. In the years after the *East* decision, several cases involving groundwater trickled into Texas courts. Although allocation regulatory regimes were not the primary question, the Texas Supreme Court confirmed that rule of capture was still the law.

Texas Company v. Burkett involved a contract for the sale and transport of water from several sources, including groundwater.⁸⁹ The focus of the opinion was on the validity of the contract; however, the Court made clear that any percolating water would

80 *Id.* at 280.

81 *Id.*

82 *Id.* at 280–81.

83 *Id.* (“That the person who owns the surface may dig therein and apply all that is there found to his own purposes . . . and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this . . . falls within the description of *damnum absque injuria*, which cannot become the ground of an action.” (quoting *Acton v. Blundell*, 12 Mees. & W. 324, 152 Eng. Rep. 1233 (1843))).

84 *East*, 81 S.W. at 281. Correlative rights limit a landowner's right to a resource, such as groundwater, to his or her reasonable share. RESTATEMENT (SECOND) OF TORTS § 858 (1979). This share is often based on the amount of land owned by each on the surface. *Id.* The El Paso Court of Appeals specifically stated that correlative rights were not a part of Texas law and that the current rule of capture actually precludes its application. *Pecos Co. Water Control & Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503, 505–06 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

85 *East*, 81 S.W. at 281–82.

86 *Id.*

87 *Id.* at 280–82 (citing *Acton*, 12 Mees. & W. 324, 152 Eng. Rep. 1233)).

88 *Id.* at 280 (citing *Frazier v. Brown*, 12 Ohio St. 294 (1861)).

89 *Texas Co. v. Burkett*, 296 S.W. 273, 273–74 (Tex. 1927).

be the “exclusive property of the owner of the surface of the soil.”⁹⁰ The Court distinguished this property right from that created in surface water, which was only a right of use.⁹¹ The transport of water was again the principal topic in *City of Corpus Christi v. City of Pleasanton*.⁹² This case concerned an effort to enjoin the Lower Nueces River Supply District and Corpus Christi from routing flow from an artesian well into a riverbed and transporting it over 118 miles to Corpus Christi.⁹³ Plaintiff’s issue was the large amount of waste that occurred along the journey through evaporation, transpiration, and seepage.⁹⁴ Citing *Acton* and *East*, the Court stated the surface owner has absolute ownership of the water held within, encumbered only by the common law limitations of waste and malicious intent.⁹⁵ The Court did not, however, endorse waste.⁹⁶ It simply stated that the determination of what constitutes waste was within the jurisdiction of the legislature.⁹⁷ In its more recent opinion in *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, the Court again upheld the right of capture, but added subsidence caused by negligent groundwater removal as a limitation on permissible capture.⁹⁸

Although these cases indirectly confirmed the rule of capture, Texas courts did not directly address the question of whether the rule of capture should remain the law for groundwater for almost one hundred years after *East*. Meanwhile, the state was growing along with its water needs, which continued to raise questions and concerns about the wisdom of this common law doctrine.

B. CAPTURING SIPRIANO

In 1999, the Texas Supreme Court had its first modern opportunity to directly confront the question of whether the rule of capture remained the appropriate method of groundwater allocation for Texas.⁹⁹ In *Sipriano v. Great Spring Waters of America*, the defendant, Ozarka Natural Spring Water, began pumping nearly 90,000 gallons of groundwater every day for bottling and sale.¹⁰⁰ The pumping quickly depleted Sipriano’s nearby wells.¹⁰¹ Among other requests, Sipriano asked the Court to abandon the rule of capture and replace it with the rule of reasonable use.¹⁰² The court refused to do so.¹⁰³ Deferring to its ruling in *East*, the Court maintained the rule of capture as the law in Texas.¹⁰⁴

90 *Id.* at 278.

91 *Id.*

92 *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 799 (Tex. 1955).

93 *Id.* at 799–800.

94 *Id.* Evidence showed that 63 to 74% of the water placed into the river for transport was lost through evaporation, transpiration, and seepage. *Id.* at 800.

95 *Id.* at 800–01.

96 *Id.*

97 *Id.*

98 *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 22, 25–26 (Tex. 1978).

99 *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75 (Tex. 1999).

100 *Id.* at 75–76.

101 *Id.* at 76.

102 *Id.*

103 *Id.*

104 *Id.* at 79.

Although the Court upheld *East*, its opinion indicated that capture may not be appropriate in the future or even at the time of the opinion.¹⁰⁵ The Court relied heavily on legislative deference to avoid deviation from the common law.¹⁰⁶ Citing several legislative initiatives pertaining to groundwater, the Court made it clear that the capitol should be the source of any changes to allocation principles.¹⁰⁷ Specifically, the Court deferred heavily to the recently passed Senate Bill 1's (SB 1) initiative to increase the authority of groundwater districts.¹⁰⁸ The ruling did not endorse the wisdom of the rule of capture. Instead, the Court stated such a decision was not yet within its authority.¹⁰⁹ Throughout the opinion, the Court qualified its ruling by stating that, while it was not appropriate for the court to take action on right of capture "at this time," it was not outside the court's bounds to do so at a later date, should the circumstances necessitate it.¹¹⁰

Courts often change the rule of law in response to changed circumstances.¹¹¹ In *Sipriano*, the Court acknowledged this practice, stating, "We do not shy away from change when it is appropriate."¹¹² The Court recognized that one of the primary conditions upon which it relied in *East* was no longer present.¹¹³ In particular, the Court rejected *East's* characterization of groundwater as "occult" and thus unable to be regulated.¹¹⁴ Moreover, the Court specifically stated that facts such as those presented in *Sipriano* provided compelling reasons to regulate groundwater.¹¹⁵ Still, no change was made.¹¹⁶

Some of the strongest language against the wisdom of maintaining capture came from Justice Hecht's concurrence. Justice Hecht stated that, "[w]hat really hampers groundwater management is the established alternative, the common law rule of capture,

105 *Id.* at 79. Other states faced with the same question decided to overrule capture. See e.g., Lawrence J. Wolfe & Jennifer G. Hager, *Wyoming's Groundwater Laws: Quantity and Quality Regulation*, 24 LAND & WATER L. REV. 39, 42–45 (1989). In Wyoming, like in Texas, the state supreme court first adopted rule of capture near the turn of the century when pumping was minimal. *Hunt v. City of Laramie*, 181 P. 137 (Wyo. 1919). However, within a couple of decades, rapidly increasing groundwater use for irrigation raised questions regarding the wisdom of capture. Wolfe & Hager, *supra*, at 43. In the early 1940s, the state engineer urged the legislature to replace capture with prior appropriation, which the state did for the first time in 1947, adding more details in 1957. Wolfe & Hager, *supra*, at 43–45.

106 *Sipriano*, 1 S.W.3d at 76–83.

107 *Id.* at 79–80; see discussion *infra* Part IV.A. The court also cited the 1917 constitutional amendment tasking the legislature with the responsibility of resource management. *Sipriano*, 1 S.W.3d at 79–80.

108 *Sipriano*, 1 S.W.3d at 79–80.

109 *Id.*

110 *Id.* at 75, 80–81.

111 See CALABRESI, *supra* note 77, at 166 ("[T]he judicial common law would attach to statutory rules that are out of phase just as much as to common law precedents or doctrines.").

112 *Sipriano*, 1 S.W.3d at 80.

113 *Id.* at 77 (citing *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 801 (Tex. 1955)).

114 *Sipriano*, 1 S.W.3d at 80.

115 *Id.*

116 *Id.*

which entitles a landowner to withdraw an unlimited amount of groundwater.”¹¹⁷ He further noted that all of the western states cited in *East* that followed the rule of capture replaced the rule with other regimes.¹¹⁸ He pointed to oil and gas law to debunk the concept that underground materials cannot be effectively regulated, and went on to say that it is “not regulation that threatens progress, but the lack of it.”¹¹⁹

Justice Hecht noted the parties’ failure to put forth any effective reason to maintain capture as the preferred method of management.¹²⁰ Simply arguing that capture has been the rule for many years, or that change would be disruptive, was not an acceptable rationale.¹²¹ Reviewing the Second Restatement of Torts, Justice Hecht explained that, “[w]hile neither [the Restatement] nor any other common law rule of water regulation is preferable to almost any legislative solution, absent a solution, [the Restatement] is preferable to the rule of capture.”¹²² Despite this strong language, Justice Hecht remained with the majority in maintaining *East* “for now” to provide SB 1, and its efforts to empower district regulations, time to play out.¹²³ As the case law pertaining to the common law rule of capture continued to develop, so did legislative regulations.

IV. THE LEGISLATURE SPEAKS

While Texas courts consistently upheld the rule of capture, the legislature was simultaneously limiting groundwater rights through regulation. This began just six years after the Texas Supreme Court’s decision in *East*, when the droughts of 1910 and 1917 motivated the legislature to amend the state constitution to explicitly extend the legislature’s obligations to include the duty to protect the state’s natural resources.¹²⁴ This amendment was not self-enacting, but, through its passage, the duty to implement public policy relating to groundwater was placed squarely with the legislature.¹²⁵

Unlike surface water, groundwater was not enumerated as a natural resource in the article, but the article did contain a general reference to water under which groundwater would likely be included.¹²⁶ Courts have cited this amendment to support the argument that the judiciary is not the appropriate authority to implement laws limiting groundwater production.¹²⁷ However, because the amendment passed after *East*, the Court had already established a common law regulation. A common law rule of capture evolving

117 *Id.* at 81 (Hecht, J., concurring).

118 *Id.* at 81–82.

119 *Sipriano*, 1 S.W.3d at 82.

120 *Id.*

121 *Id.*

122 *Id.* at 83.

123 *Id.* at 83; see discussion *infra* Part IV.A.

124 *Sipriano*, 1 S.W.3d at 77; see TEX. CONST. art. XVI, § 59(a) (“The conservation and development of all of the natural resources of this State . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.”).

125 See TEX. CONST. art. XVI, § 59(a).

126 *Id.*

127 See *e.g.*, *Sipriano*, 1 S.W.3d at 79–80.

contemporaneously with a regulatory structure seeking to regulate groundwater rights created a bifurcated system that continues to create confusion regarding how far the legislature can go in limiting the common law right.

Potential conflicts aside, the legislature took on the responsibility of governing groundwater primarily through Groundwater Conservation Districts (GCDs). A GCD's purpose is "to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and to control subsidence caused by withdrawal of water from those groundwater reservoirs or their subdivisions, consistent with the objectives of Section 59, Article XVI, [of the] Texas Constitution."¹²⁸ Texas's legislature first provided for GCDs in 1949 pursuant to the constitutional authority it received through the conservation amendment.¹²⁹

Districts are Texas's preferred method of groundwater management because they authorize local control by those most familiar with the resource and most affected by any regulation.¹³⁰ Subsequent regulations have increased the authority of GCDs and strengthened the state's regional planning process.¹³¹ This has led to increased pumping limits in some areas.¹³² In other special circumstances, such as in the Edwards Aquifer, a firm pumping cap was established.¹³³

A. THE GROWTH OF DISTRICTS

The Article 59 constitutional amendment authorized the creation of GCDs in 1917; however, by 1996, only thirty-four districts had been created.¹³⁴ Although water issues would commonly surface after dry years, the state had enough resources to meet most needs, which avoided the demand for additional districts or statewide regulation. The lack of districts changed in 1997 with Texas's first historic omnibus water bill: SB 1.¹³⁵ SB 1 marked the first attempt to shift from water development to statewide regional

128 TEX. WATER CODE ANN. § 36.0015 (West 2012).

129 *Sipriano*, 1 S.W.3d at 79; TEX. CONST. art. XVI, § 59(b) ("There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.").

130 TEX. WATER DEV. BD., AQUIFERS OF THE GULF COAST OF TEXAS 299–301(2006), available at http://www.twdb.texas.gov/publications/reports/numbered_reports/doc/R365/R365_Composite.pdf.

131 See discussion *infra* Part IV.A.

132 See discussion *infra* Part IV.B.

133 See discussion *infra* Part IV.C.2.

134 See *Groundwater Conservation Districts*, TEX. WATER DEV. BD. (Jan. 2013), http://www.twdb.state.tx.us/mapping/doc/maps/gcd_only_8x11.pdf.

135 See Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (codified in various sections of TEX. WATER CODE). There have been two other omnibus water bills: Senate Bills 2 and 3. Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991; Acts 2007, 80th Leg., R.S., ch. 1430, 2007 Tex. Gen. Laws 5848.

planning.¹³⁶ As with most water legislation in Texas, SB 1 came on the heels of a three-year drought.¹³⁷ That harsh reality, coupled with Texas's growth rate projections and a realization that the state water plan was not being properly implemented, created a leadership moment in Texas water history in which the legislature sought to invigorate the planning process and provide more effective management.¹³⁸

Although SB 1 dealt with a host of water issues, it had profound consequences on groundwater. Prior to its passage, groundwater management did not exist in many areas of the state except for the few locations where GCDs existed. SB 1 sought to change this and explicitly stated that “[g]roundwater conservation districts . . . are the state’s preferred method of groundwater management.”¹³⁹ GCDs “embody a central premise of this legislation—local control—and represent the idea that those closest to the resource are those most capable of managing it.”¹⁴⁰ After SB 1, the number of groundwater districts grew quickly.¹⁴¹

In addition to its goal of expanding the regulatory power of individual districts, SB 1 sought to treat the state as a whole and set up a system of regional planning groups, which looked at both surface and groundwater resources.¹⁴² The bill directed these areas to examine water resources, needs, and projections.¹⁴³ Each regional planning group was required to consider all of the included GCDs’ management plans.¹⁴⁴ Additionally, SB 1 provided for data collection to close data gaps, which had previously made planning difficult, if not impossible.¹⁴⁵ The bill also provided for the creation of Priority Ground-

136 Chris Lehman, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas’s Most Precious Resource*, 35 TEX. TECH L. REV. 101, 107–108 (2004). State planning, as defined by SB 1, included dividing the state into sixteen regional planning groups, separate and apart from the groundwater management areas, for the purposes of forecasting and management of both surface water and groundwater resources for inclusion in the State Water Plan. TEX. WATER DEV. BD., *Water for Texas: Regional Water Planning in Texas* (2013), <http://www.twdb.texas.gov/publications/shells/RegionalWaterPlanning.pdf> (This article focuses solely on the groundwater portion of the planning process).

137 Martin Hubert & Bob Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas’s Future Water Needs*, 30 TEX. TECH L. REV. 53, 55 (1999).

138 *Id.* at 55–56. SB 1 passed just two years before the Texas Supreme Court’s decision in *Sipriano*, and is the primary recipient of legislative deference in the court’s opinion. See discussion *supra* Part III.B.

139 Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 4.21, 1997 Tex. Gen. Laws 3610, 3642–43 (codified in TEX. WATER CODE ANN. § 36.0015).

140 Hubert & Bullock, *supra* note 137, at 66.

141 Lehman, *supra* note 136, at 104.

142 See Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 1.02, 1997 Tex. Gen. Laws 3610, 3611–14 (codified in TEX. WATER CODE ANN. § 16.053).

143 *Id.*

144 *Id.*

145 *Id.* § 1.05, 1997 Tex. Gen. Laws 3610, 3617 (amending TEX. WATER CODE ANN. § 15.404).

water Management Areas (PGMAs).¹⁴⁶ PGMAs are areas identified as potentially having significant problems within twenty-five years of the bill passing.¹⁴⁷

SB 1 consolidated the laws governing GCDs into Chapter 36 of the Texas Water Code.¹⁴⁸ This chapter provides for the creation of GCDs, means of governance, powers, and duties.¹⁴⁹ In addition to emphasizing a preference for GCDs, the bill increased their statutory authority to manage withdrawals.¹⁵⁰ The bill also provided extensive guidance for the creation of management plans.¹⁵¹ Perhaps most importantly, the bill required landowners to obtain permits for any newly drilled water wells.¹⁵² Permit applications required users to report their use and submit statements of purpose when applying for well permits.¹⁵³ Districts could also issue or deny permits for out-of-basin water transfers.¹⁵⁴ Overall, the purpose of SB 1 was to implement groundwater management where previously absent, but the bill did not attempt to change the common law regarding statewide groundwater allocation.

Although SB 1 did not change the rule of capture, commentary suggests it did not endorse it either. A law review, coauthored by the bill's champion, Lt. Governor Bob Bullock, stated:

Early in the process, the sponsors of the bill decided that the timing was not right for considering such provisions and that groundwater districts were the appropriate entity to manage the resource. However, as urban and industrial water demand continues to grow, these users will be looking for alternate sources of water to satisfy their needs. When this happens, and property owners are faced with the prospect of a large water pumper depleting their groundwater supplies, property owners may begin considering additional ways to protect their right to use the groundwater.¹⁵⁵

146 *Id.* § 4.11, 1997 Tex. Gen. Laws 3610, 3636 (amending TEX. WATER CODE ANN. § 35.007(a)).

147 *Id.*

148 Russell Johnson, *Groundwater Law and Regulation*, in *ESSENTIALS OF TEXAS WATER RESOURCES* 4-12 (2nd ed. 2012).

149 *See* TEX. WATER CODE ANN. §§ 36.001–36.419 (West 2012). Although districts can be formed several ways, the most common is through legislative action. Johnson, *supra* note 148, at 114.

150 Act of June 1, 1997, § 4.21 et. seq., 1997 Tex. Gen. Laws 3610, 3642–43 (codified in various sections of TEX. WATER CODE ANN.).

151 *Id.* § 4.28, 1997 Tex. Gen. Laws 3610, 3644 (codified in TEX. WATER CODE ANN. § 36.1071).

152 *Id.* § 4.30, 1997 Tex. Gen. Laws 3610, 3646–47 (amending TEX. WATER CODE ANN. § 36.113). Districts were given permission to exempt certain types of wells from obtaining a permit. *Id.* § 4.32, 1997 Tex. Gen. Laws 3610, 3647–48 (amending TEX. WATER CODE ANN. § 36.117) (These included domestic and livestock wells and wells used for hydrocarbon production, among others).

153 *Id.* § 4.30, 1997 Tex. Gen. Laws 3610, 3646–47 (codified in TEX. WATER CODE ANN. § 36.1071(c)(3)).

154 *Id.* § 4.33, 1997 Tex. Gen. Laws 3610, 3648–49 (codified in TEX. WATER CODE ANN. § 36.112).

155 Hubert & Bullock, *supra* note 137, at 66.

This sentiment is particularly striking considering groundwater's precarious status seventeen years later, coupled with the continued presence of capture.

The legislature did not replace the rule of capture, but groundwater legislation limiting its reach continued to evolve. SB 1 was followed by another omnibus water bill in 2001: Senate Bill 2 (SB 2).¹⁵⁶ SB 2 was intended to update and fortify the initiatives commenced in SB 1.¹⁵⁷ "The legislation also reflected a continuation of disputes that arose in the 1999 session about the establishment of single-county groundwater districts and a growing interest in the issue of transporting groundwater outside district boundaries to provide water for thirsty cities."¹⁵⁸ As with many water issues, SB 2 was contentious and required extensive negotiations to gain passage.¹⁵⁹

The bill enhanced the regulatory powers of GCDs by expanding their permitting and enforcement powers.¹⁶⁰ Most importantly, the bill provided for increased regulation of well spacing to minimize interference between wells.¹⁶¹ Districts were also allowed to set production limits based on tract size or production capacity by dictating acre-feet per acre or gallons per minute.¹⁶² These terms were a direct response to the Seventh Court of Appeals's decision in *South Plains LaMesa Railroad, Ltd. v. High Plains Underground Water Conservation District No. 1*, in which the court held that Chapter 36 did not give districts the authority to deny a permit based on tract size.¹⁶³

While allowing increased regulations in many ways, SB 2 also did the opposite by prohibiting a district from rejecting a proposed permit specifically for export of groundwater out of the district.¹⁶⁴ In exchange, the district received the ability to levy an export fee on that water.¹⁶⁵ The bill also streamlined the process for designation of GMAs and PGMAs, which were originally described in SB 1, and set deadlines for their designations.¹⁶⁶ Although districts are generally restricted from purchasing groundwater rights, they could do so for conservation purposes if the rights were permanently held in trust.¹⁶⁷

156 Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991.

157 Lehman, *supra* note 136, at 110.

158 Ken Kramer, *Senate Bill 2—Omnibus Water Legislation*, SIERRA CLUB, <http://texas.sierraclub.org/texaslegislature/EIS/sb2.html> (last visited June 11, 2013).

159 See Gregory M. Ellis & Jace A. Houston, *Senate Bill 2: 'Step Two' Towards Effective Water Resource Management and Development for Texas*, 32 ST. B. TEX. ENVTL. L.J. 53, 53 (2002).

160 See Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991.

161 *Id.* § 2.50, 2001 Tex. Gen. Laws 1991, 2015–16 (amending TEX. WATER CODE ANN. § 36.116).

162 *Id.*

163 See *South Plains LaMesa R.R., Ltd. v. High Plains Underground Water Conservation Dist. 1*, 52 S.W.3d 770, 778–79 (Tex. App.—Amarillo 2001, no pet. h.).

164 Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.52, 2001 Tex. Gen. Laws 1991, 2018 (amending TEX. WATER CODE ANN. § 36.116).

165 *Id.* § 2.52, 2001 Tex. Gen. Laws 1991, 2018–19 (amending TEX. WATER CODE ANN. § 36.122).

166 *Id.* § 2.22, 2001 Tex. Gen. Laws 1991, 2003–04 (amending TEX. WATER CODE ANN. § 36.004).

167 *Id.* § 2.54, 2001 Tex. Gen. Laws 1991, 2020 (amending TEX. WATER CODE ANN. § 36.206). One of the enforcement mechanisms that was added was the ability to levy civil

One existing issue that was compounded after SB 1 was continued proliferation of single-county GCDs, which increased the number of districts overlaying the same aquifer.¹⁶⁸ This created a potential source of conflict and confusion because each district could create conflicting management plans for essentially the same water. SB 2 sought to remedy this by establishing procedures for joint management of the shared aquifer by groundwater districts.¹⁶⁹

Perhaps foreseeing future conflicts between the established common law created by the courts and the increasing power given to groundwater districts by the legislature, SB 2 attempted to clarify the relationship. The bill amended the statute codifying groundwater ownership and added that ownership rights “may be limited or altered by” district rules.¹⁷⁰ Like the inclusion of tract-specific considerations for permitting, this modification was a response to the *South Plains* case.¹⁷¹ In its *South Plains* opinion, the court stated that district permitting rules could contravene the common law rule of capture.¹⁷² The legislature wanted to clarify that the rule of capture could be limited by district rules. Unfortunately, the language added by SB 2 drafters was not sufficient to circumvent future conflict between property owners and regulatory management. This became particularly apparent with the continued development of the groundwater planning process.

B. GCDs AND THE GROUNDWATER PLANNING PROCESS

The number of districts grew quickly after the passage of SB 1.¹⁷³ Currently, there are ninety-seven confirmed districts and three additional districts pending.¹⁷⁴ “Over half of the total land areas of Texas is within a groundwater conservation district . . . [and] almost ninety percent of groundwater produced in Texas comes from counties with such a district.”¹⁷⁵

SB 1 and SB 2 gave GCDs broad regulatory authority. As mentioned, a GCD can create a permitting system or promulgate other rules to

limit[] groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the ground-

penalties for breach of district rules. *Id.* § 2.45, 2001 Tex. Gen. Laws 1991, 2012 (amending TEX. WATER CODE ANN. § 36.102).

168 Compare AQUIFERS OF THE GULF COAST OF TEXAS, *supra* note 130, at 301, with GEORGE ET AL., *supra* note 47, at 27.

169 Act of May 27, 2001, § 2.48, 2001 Tex. Gen. Laws 1991, 2013–15 (amending TEX. WATER CODE ANN. § 36.108).

170 *Id.* § 2.31, 2001 Tex. Gen. Laws 1991, 2009 (amending TEX. WATER CODE ANN. § 36.002).

171 *Ellis & Houston*, *supra* note 159, at 56; see *South Plains LaMesa R.R., Ltd. v. High Plains Underground Water Conservation Dist. 1*, 52 S.W.3d 770 (Tex. App.—Amarillo 2001, no pet. h.).

172 See *South Plains LaMesa R.R.*, 52 S.W.3d at 779.

173 *Lehman*, *supra* note 136, at 104.

174 *Groundwater Conservation Districts*, *supra* note 134.

175 45 Douglas G. Caroom, Susan M. Maxwell, & Celina Romero, *Texas Practice Series: Environmental Law* § 14.2 (2d ed. 2005 & Supp. 2012).

water or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater.¹⁷⁶

Unless it falls into a recognized exemption, a well located in a GCD cannot be drilled or completed without a permit.¹⁷⁷ Examples of rules that individual GCDs have passed include requiring the installation of well meters and mandatory reporting of pumping quantities.¹⁷⁸

Even with the proliferation of GCDs after SB 1 and their increased permitting authority imparted by SB 2, there was little immediate conflict between regulators and users regarding a perceived invasion of property rights. This tension began to increase, however, when the regional planning process brought harbingers of greater regulation, which could affect an unfettered property right in water. This regulatory process, combined with a steady increase in demand, created the perfect storm between owners and regulators.

The regional planning process as it stands today evolved through a series of legislative efforts, each subsequently responding to deficiencies or challenges that arose. GCDs were first required to create comprehensive management plans in 1989; however, there was no interface with other districts or the region as a whole.¹⁷⁹ SB 1 was the first effort to evaluate statewide water supply needs and consider how those needs could be met by introducing regional planning.¹⁸⁰ In addition to creating the process, the bill required certain information be included in all groundwater management plans to ensure uniformity.¹⁸¹ Currently, all plans must specify objectives and performance standards, and must include detailed procedures that demonstrate how the goals of the plan will be achieved.¹⁸²

In addition to GCDs, GMAs have existed since the 1950s.¹⁸³ A GMA is defined as an area suitable for the management of groundwater resources.¹⁸⁴ Although they now play a large role in statewide planning, before 2001, their primary purpose was to enable the creation of GCDs by petition.¹⁸⁵ SB 2 repurposed GMAs as planning tools. The bill required the Texas Water Development Board (TWDB) to designate GMAs to include all major and minor aquifers within two years of the bill's effective date of September, 2001.¹⁸⁶ The TWDB was directed to use aquifer boundaries or subdivisions of aquifer

176 TEX. WATER CODE ANN. § 36.101 (West 2012).

177 *Id.* §§ 36.113, 36.1131. Although exempt wells do not require a permit, a GCD can require landowner to register an exempt well with the district. *Id.* § 36.117(h)(1), (2).

178 See e.g., *District Rules*, HIGH PLAINS WATER DIST., <http://www.hpwd.com/rules-and-management-plan/district-rules/> (last visited June 12, 2013).

179 Mace et al., *supra* note 28, at 1.

180 Hubert & Bullock, *supra* note 137, at 54, 57–58.

181 *Id.* at 57–58.

182 See TEX. WATER CODE ANN. § 36.1071(e) (West 2012).

183 Mace et al., *supra* note 28, at 1. The name “groundwater management area” has changed over the years, but will be referred to throughout with this current moniker. See *id.*

184 TEX. WATER CODE ANN. § 35.002(11).

185 Act of May 19, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559; Mace et al., *supra* note 28, at 1.

186 Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.22, 2001 Tex. Gen. Laws 1991, 2003 (amending TEX. WATER CODE ANN. § 35.004). Designating GMAs was originally tasked

boundaries to establish GMA boundaries.¹⁸⁷ This is very different than the construct of most GCDs, which usually follow political boundaries such as county borders.¹⁸⁸ The purpose of GMAs was to create administrative boundaries. Planning within a GMA is done by the GCDs.

There are currently sixteen GMAs in Texas.¹⁸⁹ The number of GCDs within each GMA varies.¹⁹⁰ SB 2 commenced the process of linking a GCD's planning with all other GCDs in a GMA.¹⁹¹ Recognizing the potential for conflict among GCDs regarding the appropriate management of groundwater, the bill directed GCDs within the same GMA to share their groundwater management plans with each other.¹⁹² A GCD's management plan to preserve historical or existing use must be consistent with its comprehensive management plan.¹⁹³ A district in the area could also call for joint planning; however, it was not required.¹⁹⁴

Policymakers have also attempted to link regional and district planning with the statewide plan. For example, SB 2 created additional consideration requirements in the regional water plans, including impacts of the plan on unique river or stream segments on water quality.¹⁹⁵ Also, the TWDB would approve regional water plans only if the plans included water conservation practices and drought management measures and were consistent with the long-term protection of the state's water, agricultural, and natural resources embodied in the guidance principles for the state plan.¹⁹⁶

Although SB 1 and SB 2 contemplated an integrated planning process, they did not require it. It was not until 2005 that the planning process really took shape with the passage of House Bill 1763 (HB 1763).¹⁹⁷ HB 1763 made three major changes to the planning process. First, it regionalized decisions on groundwater availability.¹⁹⁸ Second, it required statewide regional planning groups to use availability numbers generated from

to the Texas Commission on Environmental Quality (formerly Texas Natural Resource Conservation Commission). *Id.*

187 *Id.*

188 See *Groundwater Conservation Districts*, *supra* note 134.

189 *Groundwater Management Areas*, *supra* note 27. By 2001, predecessor agencies had designated nineteen groundwater management areas, which were dissolved when TWDB adopted the current scheme of management areas covering the whole state. Mace et al., *supra* note 28, at n.9.

190 See *Groundwater Conservation Districts*, *supra* note 134.

191 See Act of May 27, 2001 § 2.48, 2001 Tex. Gen. Laws 1991, 2013–15 (amending TEX. WATER CODE ANN. § 36.108).

192 *Id.*

193 TEX. WATER CODE ANN. § 36.116(b) (West 2012). Protection of existing wells must be tied to amount and purpose of prior use. See discussion *infra* Part V.A.

194 Act of May 27, 2001 § 2.48, 2001 Tex. Gen. Laws 1991, 2013–15 (amending TEX. WATER CODE ANN. § 36.108(b)).

195 *Id.* § 2.17, 2001 Tex. Gen. Laws 1991, 2000–01 (amending TEX. WATER CODE ANN. § 16.053).

196 *Id.* § 2.18, 2001 Tex. Gen. Laws 1991, 2001 (amending TEX. WATER CODE ANN. § 16.053).

197 Act of May 30, 2005, 79th Leg., R.S. ch. 970, 2005 Tex. Gen. Laws 3247.

198 *Id.* § 8, 2005 Tex. Gen. Laws 3247, 3254–56 (amending TEX. WATER CODE ANN. § 36.108).

the GMA process in their statewide water forecasting.¹⁹⁹ Lastly, the bill seemed to authorize, but did not explicitly require, a cap on groundwater permitting.²⁰⁰

Before 2005, GCDs and GMAs were permitted to plan jointly, but HB 1763 required that the GCDs with each GMA actually coordinate.²⁰¹ This was a tall order considering there are numerous GCDs in each GMA—many with different theories of management and sustainability.²⁰² GCDs had previously been allowed to define their own groundwater availability for their individual management plans, which made little sense geologically because many of the GCDs' plans applied to the same water source.²⁰³ HB 1763 sought to remedy this through joint planning intended to generate desired future conditions (DFCs) for an entire management area.²⁰⁴ DFCs were then used to calculate managed available groundwater (MAG), which was estimated to be the amount of water available for removal while still maintaining the DFC.²⁰⁵ Districts could use MAGs to structure pumping limits and other regulatory measures to be implemented to ensure that the DFC is met.²⁰⁶ Planning was meant to maintain the bottom-up procedures created by past legislatures while also creating a big picture for Texas groundwater sustainability.

The first step in the new planning process was for the GCDs within each GMA to determine their DFCs for the water resource.²⁰⁷ A DFC is a way to determine what the region wants the resource to look like in the future.²⁰⁸ Management plans will flow from this goal.²⁰⁹ The districts were required to use scientific data including TWDB's groundwater availability models to create their DFCs.²¹⁰ If a GMA covered more than one aquifer or geographic area, individual DFCs could be established for each.²¹¹

Once a DFC was established, the TWDB prepared final models to translate that goal into a quantity of water, or MAG, that could be extracted annually and over a fifty-year period and still meet the DFC.²¹² Then, “[a] district, to the extent possible, shall issue permits up to the point that the total volume of groundwater permitted equals the man-

199 *Id.*

200 *Id.* § 11, 2005 Tex. Gen. Laws 3247, 3258 (amending TEX. WATER CODE ANN. § 36.1132).

201 *Id.* § 8, 2005 Tex. Gen. Laws 3247, 3254–56 (amending TEX. WATER CODE ANN. § 36.108(c)).

202 Mace et al., *supra* note 28, at 2.

203 *Id.*

204 *Id.* at 3.

205 *Id.*

206 *Id.*

207 Act of May 30, 2005, § 8, 2005 Tex. Gen. Laws 3247, 3254–56 (amending TEX. WATER CODE ANN. § 36.108).

208 Mace et al., *supra* note 28, at 3.

209 Act of May 30, 2005, § 8, 2005 Tex. Gen. Laws 3247, 3254–56 (amending TEX. WATER CODE ANN. § 36.108(d-2)).

210 *Id.* § 5, 2005, Tex. Gen. Laws 3247, 3251–52 (amending TEX. WATER CODE ANN. § 36.1071(a)(8)).

211 *Id.* § 2, 2005 Tex. Gen. Laws 3247, 3249–50 (amending TEX. WATER CODE ANN. § 36.001(25)).

212 Mace et al., *supra* note 29, at 3; Act of May 30, 2005, § 8, 2005 Tex. Gen. Laws 3247, 3254–56 (amending TEX. WATER CODE ANN. § 36.108(d)).

aged available groundwater.”²¹³ A possible cap on permitting bestowed significant regulatory power that was previously unauthorized except in certain special districts.²¹⁴

The most recent changes to the planning process came in 2011 with Senate Bill 660 (SB 660).²¹⁵ Like the others before it, this legislation attempted to clarify outstanding issues. For example, although the term DFC had been used for years, the legislation had never defined it. SB 660 defined it to mean “a quantitative description . . . of the desired condition of the groundwater resources in a management area at one or more specified future times.”²¹⁶ To provide additional guidance, the bill also explains that DFCs “must provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste or groundwater and control of subsidence in the management area.”²¹⁷

In addition to clarifying the definition of DFC, the bill changed the term “Managed Available Groundwater” to “Modeled Available Groundwater.”²¹⁸ The legislature made this modification to more accurately reflect the term’s meaning and demonstrate that the numbers were based on the best data available and subject to data changes. Finally, the bill added nine new factors that GCDs must consider when renewing or establishing DFCs and required that management plan goals and objectives be consistent with achieving applicable DFCs.²¹⁹

The continued development of the regional planning process and the apparent authorization of pumping caps to meet MAGs allowed districts to control withdrawals in a way that created legal conflicts between limitations on pumping and the common law rule of capture. While this friction was new to most GCDs, special districts were already managing these conflicts.

V. THE EDWARDS AQUIFER: A SPECIAL CASE

While districts grappled with the ever-changing planning process and how and whether to implement a cap on pumping, the Edwards Aquifer Authority (EAA) was already very familiar with this concept. The EAA is a legislatively-created special district formed in response to a federal court ruling on a federal Endangered Species Act (ESA) claim brought by the Sierra Club.²²⁰ Because the court found that excessive pumping of the Edwards Aquifer was threatening several endangered species, the state was obligated to create a firm pumping cap in this region long before it was a statewide discussion.

213 Act of May 30, 2005, § 11, 2005 Tex. Gen. Laws 3247, 3258 (amending TEX. WATER CODE ANN. § 36.1132).

214 Mace et al., *supra* note 28, at 3.

215 Act of May 29, 2011, 82d Leg., R.S. ch. 1233, § 1, 2011 Tex. Gen. Laws 3287, 3287 (amending various sections TEX. WATER CODE ANN.).

216 *Id.* § 14, 2011 Tex. Gen. Laws 3287, 3294 (amending TEX. WATER CODE ANN. § 36.001).

217 *Id.* § 17, 2011 Tex. Gen. Laws 3287, 3297 (amending TEX. WATER CODE ANN. § 36.108).

218 *Id.* § 16, 2011 Tex. Gen. Laws 3287, 3295 (amending TEX. WATER CODE ANN. § 36.1071).

219 *Id.* § 17, 2011 Tex. Gen. Laws at 3296 (amending TEX. WATER CODE ANN. § 36.108).

220 See Act of June 11, 1993, 73d Leg., R.S., ch. 626, § 1.02, 1993 Tex. Gen. Laws 2350, 2351.

A. *SIERRA CLUB V. LUJAN*

The Edwards Aquifer is a karst aquifer located in Central Texas covering approximately 3,600 square miles.²²¹ The majority of water enters the aquifer along surface streams in an area referred to as the “recharge zone.”²²² The aquifer discharges naturally into several springs including Comal and San Marcos Springs.²²³ These springs are headwater tributaries for the Guadalupe River, which flows from Central Texas to the Gulf of Mexico.²²⁴ Water is withdrawn from the aquifer primarily through groundwater wells.²²⁵ Many interests depend on the aquifer, but the largest user is the City of San Antonio, which depends on the aquifer as its primary water source.²²⁶

Several endangered species also depend on the flow of these headwater springs for their own survival. Among them are the Texas Blind Salamander and the Fountain Darter.²²⁷ These and others threatened species were at the heart of the Sierra Club lawsuit.²²⁸ During the 1950s drought of record, Comal Springs completely dried up, which would not have happened without the additional depletion created by pumping.²²⁹ Although San Marcos Springs did not totally dry up during the same time period, its flow was considerably diminished due to pumping.²³⁰

Data presented at trial showed that, but for human withdrawals, the springs’ natural discharge would be stable.²³¹ Evidence showed that continued pumping would result in extended no-flow periods for the springs in drought conditions.²³² These dry periods would threaten the survival of the species that live there.²³³ Despite these known connections between the aquifers and the springs, neither the state nor the GCDs had established pumping limits at the time of the litigation.

Section nine of ESA makes it illegal to “take” an endangered species.²³⁴ “Take” is broadly defined and includes anything that kills, harms, or harasses even a single individual animal designated as an endangered species, including harm or harassment of the endangered species’ habitat.²³⁵ Section 4 of the ESA creates a nondiscretionary duty for federal agencies to develop and implement a recovery plan for each endangered species,

221 Karst is a geologic landscape created by the dissolution of soluble rocks including limestone, dolomite and gypsum characterized by sinkholes, caves, and underground drainage systems.

222 *Hydrogeology of the Edwards Aquifer*, EDWARDS AQUIFER AUTHORITY, http://www.edwardsaquifer.org/index.php/science_and_research/hydrogeology/ (last visited June 15, 2013).

223 *Id.*

224 Vivian Elizabeth Smyrl, *Guadalupe River*, TEX. ST. HIST. ASS’N <http://www.tshaonline.org/handbook/online/articles/mng01> (last visited June 15, 2013).

225 *Sierra Club v. Lujan*, No. MO-91-CA-069, 1993 WL 151353, at *3 (W.D. Tex. Feb. 1, 1993).

226 Darcy Alan Frownfelter, *Edwards Aquifer Authority*, in *ESSENTIALS OF TEXAS WATER RESOURCES* 17-9 (2nd ed. 2012).

227 *Sierra Club*, 1993 WL 151353, at *9–10.

228 *Id.*

229 *Id.* at *6.

230 *Id.*

231 *Id.*

232 *Sierra Club*, 1993 WL 151353, at *9–10.

233 *Id.* at *6.

234 16 U.S.C. § 1538(a) (2012).

235 16 U.S.C. § 1532(19).

unless it is found that it would not promote the conservation of the species.²³⁶ Sierra Club brought a lawsuit against the Department of the Interior and Fish and Wildlife Service, one of the federal agencies tasked with species protection under the ESA, to compel the Fish and Wildlife Service to take action based on its statutory obligation to complete a recovery plan.²³⁷ The judge agreed that the federal government failed to implement the recovery plans or identify the springflow requirements for the survival of the species.²³⁸

As a result, the judge ordered Fish and Wildlife Service to determine the minimum springflow for each of the springs needed to protect listed species.²³⁹ More importantly, Judge Bunton directed the Texas Legislature to provide the appropriate management of the aquifer in such a way that the springflow would be maintained to protect the species. "If the State of Texas fails or refuse[d] to regulate withdrawals from the Edwards Aquifer," his court would implement management.²⁴⁰ This threat paved the way for the Edwards Aquifer Authority Act (EAAA), enrolled just four months after the *Sierra Club* judgment was rendered.²⁴¹

B. CREATING THE EAA

At the time of the *Sierra Club* lawsuit, two existing groundwater districts managed Edwards Aquifer water.²⁴² These were the Edwards Underground Water District and the Medina Country Underground Water District.²⁴³ These districts had all the requirements and authorities as other GCDs described above, which was minimal because they preceded SB 1 and its progeny. Pumping from the Edwards Aquifer had increased from 30,000 acre-feet per year at the turn of the century to 500,000 acre-feet per year at the time of litigation.²⁴⁴

In response to the court's decision in *Sierra Club*, the Texas Legislature passed the EAAA, which created the EAA as a special district.²⁴⁵ While authorized by the same constitutional amendment as other districts, this GCD was granted additional authority and regulations that others did not.²⁴⁶ Although the primary concern of the *Sierra Club* ruling was species protection in the springs, the EAA does not have the authority to regulate springflow because surface water is within the jurisdiction of the state.²⁴⁷ However, the EAA is required to manage the aquifer in such a way that springflow is protected.²⁴⁸

236 *Sierra Club*, 1993 WL 151353, at *10–11.

237 *Id.* at *11.

238 *Id.* at *10.

239 *Id.* at *33.

240 *Id.* at *34 (emphasis omitted).

241 Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 4.03, 1993 Tex. Gen. Laws 2350, 2372.

242 *Sierra Club*, 1993 WL 151353, at *4.

243 *Id.*

244 *Id.* at *6.

245 Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.02, 1993 Tex. Gen. Laws 2350, 2351.

246 *Id.* §§ 1.02, 1.14, 1993 Tex. Gen. Laws 2350, 2351, 2360.

247 *Id.* § 1.08(b), 1993 Tex. Gen. Laws 2350, 2356.

248 *Id.* § 1.14, 1993 Tex. Gen. Laws 2350, 2360.

The biggest difference between the EAA and other districts was the establishment of a firm total pumping limit on the Edwards Aquifer.²⁴⁹ The enabling legislation instructed the EAA to permit withdrawals not to exceed 450,000 acre-feet for each calendar year until December 31, 2007.²⁵⁰ For the period beginning January 1, 2008, permitted withdrawals cannot exceed 400,000 acre-feet per year.²⁵¹ This number was later increased to the current amount of 572,000 acre-feet per year.²⁵² Texas state law mandates an exemption from permitting requirements for livestock or domestic wells across the state.²⁵³ The EAAA provided a similar exemption but required that all such wells be registered.²⁵⁴ Neither Chapter 36 nor the EAAA specifically restricts the district from limiting withdrawals from such wells.

The legislation also created a rubric for how permits were to be allocated. Permits were primarily issued to those who could show they had used Edwards Aquifer water in a beneficial way during the historic period.²⁵⁵ If an irrigator used unmetered Edwards Aquifer water, a permit would be issued for two acre-feet a year per acre irrigated during one year of the historic period, assuming all other permit requirements were met.²⁵⁶ Historic permit applications had to be received by March 1, 1994.²⁵⁷ Other than the stated exceptions, it is illegal to pump water from the Edwards Aquifer without an EAA permit.

The EAAA recognized the potential conflict between the EAA permitting scheme and common law concepts of groundwater ownership. It stated,

[A]ction taken pursuant to this Act may not be construed as depriving or divesting the owner or the land, or these ownership rights or as impairing the contract rights of any person who purchases water The legislature intends that just compensation be paid if implementation of this article causes a taking of private property²⁵⁸

The drafters seemed to acknowledge that there was a limit on how much a regulatory authority could restrain property rights, but the EAAA explicitly stated that this permitting initiative did not exceed that limit. Some were not convinced.

249 *See id.*

250 *Id.* § 1.14(b), 1993 Tex. Gen. Laws 2350, 2360.

251 *Id.* § 1.14(c), 1993 Tex. Gen. Laws 2350, 2360.

252 Act of May 28, 2007, 80th Leg., R.S., ch. 1430, § 12.02, 2007 Tex. Gen. Laws 5848, 5901–02 (amending Section 1.11, Chapter 626, Acts of the 73d Legislature, Regular Session, 1993). At the time SB 3 was passed, the law still required the 400,000 acre-feet per year provision; however, based on the rules in the EAAA, the EAA was required to permit 571,6000 acre-feet per year. Frownfelter, *supra* note 226, at 17-43. This change was an effort to match the legislation to actual permits issued. *Id.*

253 TEX. WATER CODE ANN. § 36.117(b) (West 2012). A domestic and livestock well is allowed to produce up to 25,000 gallons of water a day. *Id.*

254 Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.33, 1993 Tex. Gen. Laws 2350, 2366.

255 *Id.* § 1.16, 1993 Tex. Gen. Laws 2350, 2361 (“An existing user may apply for an initial regular permit by filing a declaration of use of underground water withdrawn from the aquifer during the historical period from June 1, 1972, through May 31, 1993.”)

256 *Id.* § 1.16(e), 1993 Tex. Gen. Laws 2350, 2361.

257 *Id.* § 1.16(b), 1993 Tex. Gen. Laws 2350, 2361.

258 *Id.* § 1.07, 1993 Tex. Gen. Laws 2350, 2356.

C. *BARSHOP V. MEDINA COUNTY UNDERGROUND WATER CONSERVATION DISTRICT*

The EAA has generated conflict since its inception. One of the first of these conflicts appeared in the *Barshop* case.²⁵⁹ In *Barshop v. Medina County Underground Water Conservation District*, plaintiffs argued that the permitting system created by the EAAA and implemented by the EAA violated their vested property right to withdraw water.²⁶⁰ The plaintiffs complained “that the Act violates the takings clause in two ways.”²⁶¹ First, they asserted that certain provisions of the EAAA would operate automatically upon its effective date amounting to a taking.²⁶² Second, they claimed the EAA’s application of the EAAA was unconstitutional.²⁶³

As written, the EAAA was to become effective September 1, 1993.²⁶⁴ Declarations of historic use, which were required to receive a historic use permit, were due six months later on March 1, 1994.²⁶⁵ However, a voting rights challenge delayed the effective date of the EAAA beyond the historic use declaration deadline.²⁶⁶ Plaintiffs argued that all existing users would be forced to immediately cease water withdrawals because the deadline for them to apply for a permit based on past use had passed.²⁶⁷

The Texas Supreme Court held that the legislation creating the EAA was not a facially unconstitutional infringement or taking of landowner’s groundwater property rights.²⁶⁸ It reasoned that the legislative intent behind the date was for the historic application deadline to be six months after the EAA’s enactment date.²⁶⁹ Because the enactment delay was unforeseen, the historic use deadline should also be postponed.²⁷⁰ Regarding when property rights vest, the court recognized the dichotomy between the case law and the state’s constitutional obligation to regulate groundwater withdrawals.²⁷¹ Recognizing the future challenge, the court stated, “[t]he issue of when a particular regulation becomes an invasion of property rights in underground water is complex and multi-faceted”;²⁷² however, Texas had to wait another sixteen years before the state supreme court ruled on that issue.

259 See *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996).

260 *Id.* at 625.

261 *Id.* at 628.

262 *Id.*

263 *Id.*

264 Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 4.02, 1993 Tex. Gen. Laws 2350, 2371.

265 *Id.*

266 *Barshop*, 925 S.W.2d at 625, 629.

267 *Id.* at 629.

268 *Id.* at 623.

269 *Id.* at 629.

270 *Id.* at 629–30.

271 *Barshop*, 925 S.W. at 626.

272 *Id.* at 626.

VI. MOVING FROM CAPTURE TO OWNERSHIP

Although capture had been maintained in Texas for over 100 years, the addition of regulations and increased demand for water created many questions about the property interest capture created.²⁷³ One of the issues that persisted was determining when ownership actually began. Did rule of capture only give a landowner the right to use with ownership commencing at the point of capture, or did a landowner have an ownership interest in the water prior to production? As the court stated in *Barshop*, “parties fundamentally disagree on the nature of the property rights.”²⁷⁴ The answer to this question became critical in defining regulatory opportunities and constitutional limitations.²⁷⁵ Although a few cases danced around the issue, the Texas Supreme Court took the issue up directly in *Edwards Aquifer Authority v. Day*.²⁷⁶ The *Day* case framed the question of ownership; however, an understanding of the cases that came before this landmark opinion is necessary to fully grasp how the courts previously discussed capture in light of ownership.²⁷⁷

A. GUITAR HOLDING CO. v. HUDSPETH COUNTY UNDERGROUND WATER CONSERVATION DISTRICT

As groundwater regulation increased, so did questions regarding the authority of GCDs to regulate in light of the common law right of capture. The question of property rights and regulatory limitations reached the Texas Supreme Court in *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District*.²⁷⁸ The case involved a large landowner’s challenge to a permitting scheme promulgated by a GCD.²⁷⁹ The Hudspeth County Underground Water Conservation District No. 1,²⁸⁰ which was established in the 1950s, adopted a new management plan in 2002 in an attempt to sustain the Bone Springs–Victorio Peak Aquifer at historically-optimal levels through regulation of groundwater withdrawals.²⁸¹

273 Johnson, *supra* note 148 at 4-8.

274 *Barshop*, 925 S.W.2d at 625.

275 See Marvin W. Jones & Andrew Little, *The Ownership of Groundwater in Texas: A Contrived Battle for State Control of Groundwater*, 61 BAYLOR L. REV. 578, 579–80, 592 (2009) (“[B]ecause ownership of the water in place is not clear, it would occur to me that in the future, there is a lot of opportunity for central control of that water.” (Sen. Robert Duncan)).

276 See *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012).

277 See *id.*

278 *Guitar Holding Co. v. Hudspeth Cnty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 915–16 (Tex. 2008).

279 *Id.* at 910.

280 This groundwater district is located in far West Texas, less than 100 miles east of El Paso. This area is extremely dry with very little precipitation to provide surface watering or recharge opportunities. Despite annual rainfall of only eight to ten inches, this region had a historic agricultural economy made possible by groundwater irrigation. *Id.* at 913.

281 *Id.* at 913–14. In 2000, prior to these new rules, the state auditor questioned whether the district was appropriately managing the aquifer. *Id.* at 913.

This plan included a permitting program “recogniz[ing] three types of permits: 1) validation permits, 2) operating permits, and 3) transfer permits.”²⁸² Existing wells that produced water during a defined period were entitled to validation permits.²⁸³ The system relied on historic use to allocated water permits.²⁸⁴ The user was obligated to show usage during the requisite time period.²⁸⁵ Irrigating landowners were entitled to a validation permit of four acre-feet of water per acre irrigated, subject to a district reduction to three acre-feet.²⁸⁶ Non-irrigating owners were entitled to a validation permit equal to “the maximum amount of water beneficially used in any one year during the [historic] period.”²⁸⁷ With this system, the district issued permits based on past types of use without consideration of the landowner’s intent as to future use.²⁸⁸ Therefore, an irrigator could gain a permit based on historic irrigation even if her future intent was sale and transport of the water out of the district.²⁸⁹

Unfortunately, this system pitted different types of users against one another because the ability to obtain and then transfer water was predicated on past use.²⁹⁰ For transfer permits, those applying for completely new permits received fewer transfer rights than those holding validation permits.²⁹¹ Guitar Holding Company, a large landowner, only irrigated a small portion of land during the historic period and was therefore eligible for fewer water permits than a group of permitted irrigators.²⁹² Guitar Holding Company brought suit challenging the validity of the permitting rules.²⁹³

The Texas Supreme Court ruled that the protection of historic use authorized by Chapter 36 was “tied both to the amount and purpose of the prior use.”²⁹⁴ If either of those changed, the permit holder had to be treated like any other new applicant.²⁹⁵ Since no one had ever transferred water out of the basin, all transfers should be treated as new uses and not attached to prior use validation permits.²⁹⁶ In reaching this conclusion, the court took issue with the Texas Water Code’s definition of “use” and applied

282 *Id.* at 914. Operating permits, although authorized, had limited value because they could not be used unless water rose above pre-irrigation levels.

283 *Guitar Holding Co.* 263 S.W. 3d at 914.

284 *Id.* at 914.

285 *Id.*

286 *Id.*

287 *Id.*

288 *Guitar Holding Co.* 263 S.W. 3d at 912.

289 *Id.* To obtain a transfer permit, a landowner must first have a validation permit. *Id.* at 914.

290 *See id.* at 914 (recognizing the “substantially greater” transfer rights that are granted to some landowners through the rules of allocation that are based upon historic use).

291 *Id.* at 914–15.

292 *Id.*

293 *Guitar Holding Co.* 263 S.W. 3d at 915.

294 *Id.* at 916. Historic use is a statutorily allowable factor for a district to consider in limiting groundwater production within the district. *See* TEX. WATER CODE ANN. § 36.116(b) (West 2008).

295 *Id.* at 916.

296 *Id.* at 917.

this to the district rules.²⁹⁷ Some commentators criticized that this application may have constituted legislating from the bench.²⁹⁸

While this case may not, on its surface, involve ownership, it does directly relate to the potential property right created by law. If a large landowner, such as Guitar Holding Company, is only eligible to pump a very small portion of water from underneath its land, does such restriction violate the right created by *East* and subsequent cases? It is hard to imagine that this issue did not play into the court's analysis, even if it was not the precise question before it. In fact, the opinion mentioned potential disparity between land ownership and water rights.²⁹⁹ The ability to have water for sale and transfer is a potential economic boon for the rights holder. Ultimately, it was perceived unfairness in the loss of this income through lost transfer earnings that may have driven the decision.³⁰⁰

This case may have been the first hint of a lack of deference to the regulatory bodies created by the legislature. The heavy emphasis on the constitutional amendment in many of the previous cases, which gives all the power to regulate to the legislature, was not even mentioned. The *Guitar* opinion may also provide a window into the court's thoughts on the role of private property rights as they relate to state regulatory authority. While the Court recognized that the Texas Water Code delegated management of groundwater to the GCDs and vested them with broad regulatory powers, some view the Court's action as a willingness to involve itself in the details of management.³⁰¹ Conflicts between property rights and regulatory authority continued to arise as regulation increased, eventually forcing courts to face the dispute directly.

B. DEL RIO AND BRAGG

As groundwater litigation continued, the question of ownership was destined to reappear. In *City of Del Rio v. Clayton Sam Colt Hamilton Trust (City of Del Rio)*, litigants asked the court to resolve the nature of groundwater ownership.³⁰² Unlike other cases, this case did not involve a groundwater district—it was actually a contract claim.³⁰³

Clayton Sam Colt Hamilton Trust (Trust) sold the City of Del Rio (Del Rio) a 15-acre plot of land located within its 3,200-acre tract.³⁰⁴ The conveyance deed reserved “all water rights associated with said tract,” but did not reserve a right of entry to produce the water.³⁰⁵ Later, Del Rio installed a pumping well and began withdrawing groundwater.³⁰⁶ The Trust brought suit against the city claiming Del Rio violated the

297 *See id.* at 918.

298 *See* Stuart R. White, *Guitar Holding: A Judicial re-Write of Chapter 36 of the Texas Water Code?* 62 BAYLOR L. REV. 313, 331–38 (2010).

299 *See Guitar Holding Co.*, 263 S.W.3d at 914.

300 *See id.* at 918.

301 *See* White, *supra* note 298, at 335–38.

302 *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied).

303 *See id.* at 614–15.

304 *Id.* at 614.

305 *Id.* at 615.

306 *Id.*

deed and that the Trust owned the groundwater.³⁰⁷ Del Rio argued that the Trust could not legally retain ownership of the water when it deeded the property because the surface owner did not have absolute ownership.³⁰⁸

San Antonio's Fourth Court of Appeals held that the rule of capture was a corollary to absolute ownership.³⁰⁹ The Trust argued that, if ownership could only be perfected by capture, an owner's water rights would be limited by the size of her "bucket."³¹⁰ The court agreed with the Trust that the water could be reserved before it was captured and that to rule otherwise would essentially bring all water rights conveyances to a halt.³¹¹ Water, once produced, could be transferred. Since reservation of the groundwater was possible, the Trust had the legal right to bifurcate the water from the surface and exempt it from the transfer, which was evidenced in the language of the deed.³¹²

Another ownership case that is still moving through the courts is *Bragg v. Edwards Aquifer Authority*.³¹³ Unlike *Del Rio*, this case is a more typical case of a permit applicant suing a permitting authority. The Braggs requested groundwater permits from the EAA for two pecan farms, totaling about 625 acre-feet per year.³¹⁴ The EAA denied one permit because there had been no pumping within the statutory historical use period.³¹⁵ For the other property, the EAA limited the permit to 120 acre-feet per year, based on the two acre-feet per year standard provided in its rules.³¹⁶

Using the severe economic impact test set out by *Penn Central Transportation Co. v. New York City*, the Medina County district court held EAA's failure to issue the requested permits was a takings and that the Braggs were entitled to compensation of \$732,493.³¹⁷ San Antonio's Fourth Court of Appeals affirmed the trial court. Citing the recently *Day* case regarding ownership, which was released while *Bragg* was pending, the Fourth Court agreed that the requested permit denials were unconstitutional.³¹⁸ Although the appellate court agreed with the trial court regarding the *Penn Central* analy-

307 *City of Del Rio*, 269 S.W. 3d at 615.

308 *Id.* at 615–16.

309 *Id.*

310 *Id.* at 617.

311 *Id.*

312 *City of Del Rio*, 269 S.W. 3d at 618.

313 *Bragg v. Edwards Aquifer Auth.*, No. 06-11-18170-CV (38th Jud. Dist., Medina County, Tex., filed May 7, 2010).

314 *Id.* The Braggs also filed a federal civil rights suit against the EAA. *Bragg v. Edwards Aquifer Auth.*, 342 F. App'x 43, 45 (5th Cir. 2009).

315 *Bragg v. Edwards Aquifer Auth.*, No. 06-11-18170-CV (38th Jud. Dist., Medina County, Tex., filed May 7, 2010); *Bragg v. Edwards Aquifer Auth.*, 342 F. App'x 43, 45 (5th Cir. 2009).

316 *Bragg v. Edwards Aquifer Auth.*, No. 06-11-18170-CV (38th Jud. Dist., Medina County, Tex., filed May 7, 2010); *Bragg v. Edwards Aquifer Auth.*, 342 F. App'x 43, 45 (5th Cir. 2009).

317 *Bragg v. Edwards Aquifer Auth.*, No. 06-11-18170-CV (38th Jud. Dist., Medina County, Tex., filed May 7, 2010).

318 *Bragg v. Edwards Aquifer Auth.*, 2013 WL 4535935, at *1 (Tex. App.—San Antonio 2013).

sis, they differed on the methodology for calculating damages.³¹⁹ The case will likely be appealed to the state supreme court so, although the final outcome of this case is still unknown, it immediately highlights the importance of the *Day* decision and its intrinsic regulatory limitations.

C. THE *DAY* DEPARTURE

It took over 100 years, but the Texas Supreme Court finally faced the question of when ownership in groundwater begins and what, if any, are the constitutional limitations of GCD regulations. Although *Day* was heard in February of 2010, the Court's written opinion took another two years.³²⁰ In anticipation of the Court's decision, and perhaps in an effort to circumvent it, the Texas Legislature passed Senate Bill 332 (SB 332), which attempted to clarify the relationship between districts and ownership rights before the Court ruled.³²¹ Although SB 332 was freshly promulgated when the Court issued its decision, the ruling went beyond the language in the bill with regard to defining a groundwater right. Despite the fact that the Court had been critical of right of capture in its past rulings, the *Day* decision made little mention of the wisdom of the system as it proceeded to create a vested right in groundwater in place.

1. SB 332

When the 2011 legislative session commenced, the Court had been contemplating the *Day* case for a year. As the state awaited a ruling, there were growing concerns on both sides regarding the possible outcome. With SB 322, the legislature attempted to settle the question pending before the Court in advance of the ruling by amending the Texas Water Code groundwater ownership section.³²² The first draft of the bill, submitted by Senator Fraser, proposed to modify the existing language by adding the phrase "a landowner, or the landowner's lessee or assign, has a vested ownership interest."³²³ The bill went on to provide that nothing in the code could "be construed as granting the authority to deprive or divest a landowner" of that interest except through reasonable rules promulgated by a district.³²⁴

319 *Bragg v. Edwards Aquifer Auth.*, 2013 WL 4535935, at *21-22 (Tex. App.—San Antonio 2013). Interestingly, despite the fact that the legislature strictly dictated the terms by which the EAA could issue permits, the court held that the agency, not the state, was responsible for any compensatory resulting in a constitutional infringement. *Id.* at *3-8.

320 *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012).

321 *See* Act of May 27, 2011, 82nd Leg., R.S., ch. 1207, 2011 Tex. Gen. Laws 3224. The Texas Legislature meets on odd numbered years for 140 days.

322 Senate Comm. on Natural Resources, Bill Analysis, Tex. S.B. 332, 82d Leg., R.S. (2011). Before the change, the code read, "The ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized and nothing in this code shall be construed as depriving or divesting the owners . . . of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a district." TEX. WATER CODE ANN. § 36.002(a) (West 2010).

323 Senate Comm. on Natural Resources, Bill Analysis, Tex. S.B. 332, 82d Leg., R.S. (2011).

324 *Id.*

Throughout session, the bill was negotiated and ultimately the final version was stripped of the word “vested.”³²⁵ Although private property interest groups heavily promoted the explicit inclusion of “vested,” the pertinent part of the final bill read: “the legislature recognizes that the landowner owns the groundwater below the surface of the landowner’s land as real property.”³²⁶ This interest does not provide an owner the right to capture a specific amount of groundwater below the surface of that landowner’s land.³²⁷

Unlike the Fraser original, which provided little recognition of the districts’ authority, the final version amended Texas Water Code section 36.002, giving it considerably more detail. The final version of the bill stated that an owner’s ability to drill and pump water does not “affect the ability of a district to regulate groundwater production as authorized under Section 36.113, 36.116, or 36.112 or otherwise” under Chapter 36.³²⁸ The newly amended statute also recognized the ability of districts to limit drilling based on well spacing or tract size as adopted by the district, echoing the Chapter 36 additions in response to the *South Plains* case.³²⁹ These terms explicitly clarified that this bill did not change the districts’ authority created by SB 2.³³⁰

Finally, the bill specified that districts are not required to adopt a rule that “allocate[s] a proportionate share of available groundwater for production from the aquifer based on the number of acres owned by the landowner.”³³¹ Districts are instructed to consider ownership and rights during their creation and enforcement of rules.³³² The bill also contained a special provision for the EAA and other special districts, stating that the “ownership” of groundwater as described in the first part of the bill “does not affect the ability [of the EAA] to regulate” as authorized by the legislature.³³³

The enrolled bill attempted to codify the complicated history of both common law and legislative initiatives to regulate groundwater. It did not seek to limit districts’ authority and the efforts made over the years to empower them. Although the bill analysis for the original version reflected that the bill’s purpose was to define the owner’s vested right in groundwater, the word “vested” did not appear in the bill as promulgated. Further, it is telling that the final version provided considerably more recognition of groundwater districts’ authority than its predecessor.³³⁴ It seemed as though the issue

325 See Act of May 27, 2011, 82nd Leg., R.S., ch. 1207, § 1, 2011 Tex. Gen. Laws 3224, 3224 (amending TEX. WATER CODE ANN. § 36.002(a)).

326 *Id.*

327 See *id.* (amending TEX. WATER CODE ANN. § 36.002(d)(3)).

328 *Id.* (amending TEX. WATER CODE ANN. § 36.002(d)(2)).

329 *Id.* (amending TEX. WATER CODE ANN. § 36.002(d)(1)).

330 See Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.50, 2001 Tex. Gen. Laws 1991, 2015–16 (amending TEX. WATER CODE ANN. § 36.116).

331 Act of May 27, 2011, 82nd Leg., R.S., ch. 1207, § 1, 2011 Tex. Gen. Laws 3224, 3224 (amending TEX. WATER CODE ANN. § 36.002(d)(3)).

332 *Id.* § 2, 2011 Tex. Gen. Laws 3224, 3225 (amending TEX. WATER CODE ANN. § 36.101(a)(3)).

333 *Id.* § 1, 2011 Tex. Gen. Laws 3224, 3225 (amending TEX. WATER CODE ANN. § 36.002(e)(1)).

334 See Senate Comm. on Natural Resources, Bill Analysis, Tex. S.B. 332, 82d Leg., R.S. (2011).

had been solved, but the Court was still mulling over *Day* and it was unclear how the decision would be handled in light of SB 332.

2. EDWARDS AQUIFER AUTHORITY V. DAY

Previous case law and legislative efforts to regulate groundwater culminated in the *Day* case. On February 24, 2012, the Texas Supreme Court finally weighed in on groundwater ownership in a way it never had before.³³⁵ The Court ruled that landowners have a vested ownership right in groundwater below their land even before it is captured.³³⁶ While many of the impacts of the *Day* decision have yet to be seen, the opinion can be evaluated within the context of what came before it.³³⁷

In 1994, R. Burrell Day and Joel McDaniel (*Day*) purchased land within the EAA's jurisdiction.³³⁸ Their intent was to grow oats and peanuts as well as graze cattle on the land.³³⁹ Although the land did not contain a working well, there was a lake used for irrigation that was filled by an intermittent creek, overland flow, and some artesian groundwater flow.³⁴⁰ *Day* applied for a permit to allow pumping of 700 acre-feet of water a year based on evidentiary statements that 300 acres were irrigated during the historic period as well fifty acre-feet for recreational use in the lake.³⁴¹ As instructed by the enabling legislation, initial regular permits were based on beneficial use of water during the historic period.³⁴²

In 1997, *Day* received information from the EAA that there was a preliminary finding that he was entitled to the 600 acre-feet of water based on their showing of previously irrigated land.³⁴³ In 1999, after receiving approval from the EAA to change the diversion location, *Day* drilled a new well even though the EAA had not yet officially ruled on his permit.³⁴⁴ In November 2000, the EAA denied the application because well "withdrawals . . . were not placed to a beneficial use."³⁴⁵

Day protested the EAA decision to the State Office of Administrative Hearing (SOAH).³⁴⁶ During discovery at SOAH, a previous landowner testified that 150 acres were irrigated during the historic period using a sprinkler, which drew water from the

335 See *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012).

336 *Id.* at 831.

337 The first permit challenge ruling to be issued since the *Day* opinion found in favor of the landowners, which raises concerns about possible limitations on regulation. *Bragg v. Edwards Aquifer Auth.*, 2013 WL 4535935, at *1 (Tex. App.—San Antonio 2013).

338 *Day*, 369 S.W. 3d at 818.

339 *Id.*

340 *Id.* There was a well drilled on the land in the mid 1950s, which was used for irrigation until the early 1970s when it collapsed and the pump was subsequently removed. The well was under sufficient pressure that continued to flow. The previous owner constructed a ditch to convey the artesian flow to the creek, which fed the lake. *Id.*

341 *Id.* at 820. Existing irrigation was allowed a permit for no less than two acre-feet a year for each acre of land irrigated in one calendar year during the historical period. *Id.*

342 *Id.* at 820 (Tex. 2012).

343 *Day*, 369 S.W. 3d at 820.

344 *Id.* The well cost \$95,000. *Id.*

345 *Id.* at 820–21.

346 *Id.* at 821.

lake and was therefore surface water.³⁴⁷ Only seven acres were irrigated using exclusively well water.³⁴⁸ The administrative law judge determined that water from the lake, which included some overland flow from the artesian well, was surface water and not under EAA authority.³⁴⁹ Based on the testimony, the administrative law judge determined that the maximum beneficial use of groundwater to earn a permit was fourteen acre-feet, calculated from the seven acres that used groundwater directly from the well for irrigation.³⁵⁰ The EAA agreed and issued a permit in that amount.³⁵¹

Day appealed this finding, claiming, in part, that the decision amounted to a taking in violation of the Texas Constitution.³⁵² The trial court granted summary judgment for Day regarding the characterization of the 150 acres of irrigated land. However, the EAA prevailed on summary judgment on all constitutional claims, including the takings claim, based on the argument that landowners have no vested, protectable property right in groundwater prior to capture.³⁵³ The court of appeals agreed with the EAA and affirmed the determination of fourteen acre-feet, but remanded the case on the takings claim, stating that “landowners have some ownership rights in the groundwater beneath their property . . . entitled to constitutional protection.”³⁵⁴

The EAA, Day, and the State of Texas—whom the EAA impleaded as a third-party defendant—filed petitions for discretionary review with the Texas Supreme Court.³⁵⁵ The Court granted the petitions, and concluded, in accordance with SOAH and the appellate court’s finding, that the EAA did not err by limiting Day’s permit to fourteen acre-feet.³⁵⁶ This decision was based in part, as it had been in previous forums, on the fact that the character of the water changed from groundwater to surface water as it flowed into and was contained by the surface lake.³⁵⁷ In addition, there was no evidence provided to show that the 150 acres were irrigated on a consistent basis.³⁵⁸ The primary use of the lake appeared to be for recreational purposes.³⁵⁹

The issue that garnered the most attention was whether Day had a constitutionally-protected interest in the groundwater in place.³⁶⁰ The court ultimately held that he did.³⁶¹ However, it remanded to determine whether a taking had occurred in this case.³⁶² Despite what many parties claimed before the opinion was issued, the Court was

347 *Id.*

348 *Day*, 369 S.W.3d at 821.

349 *Id.*

350 *Id.*

351 *Id.*

352 *Id.*

353 *Day*, 369 S.W.3d at 821.

354 *Id.* at 821 (quoting *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742, 756 (Tex. App.—San Antonio 2008), *aff’d*, 369 S.W.3d 814 (Tex. 2012)).

355 *Id.* at 822.

356 *Id.* at 822, 823.

357 *Id.* at 822. The explicit exception to this is when a bed and banks permit has been issued for the downstream transport of groundwater using a natural watercourse. *Id.*

358 *Id.* at 823.

359 *Day*, 369 S.W.3d at 823.

360 *See id.* at 823–43.

361 *Id.* at 833.

362 *Id.* at 843.

clear in stating that, although ownership in place had long been the rule for oil and gas in Texas, the determination of when groundwater ownership began was a question of first impression.³⁶³ Although the Court acknowledged that rule of capture could exist without ownership in place, it held that, in Texas, the two are one and the same.³⁶⁴

The court continued to recognize the role of GCDs and the constitutional amendment that allowed for their creation.³⁶⁵ The opinion also reiterated the regulations that dictate a district's authority to regulate wells.³⁶⁶ The Court referred to recently-promulgated SB 332 to show that the legislature had recognized this relationship between owners and regulators.³⁶⁷ However, the Court could not say with certainty that SB 332 created a vested ownership right in groundwater. Instead, the opinion stated "the Legislature appears to mean ownership in place."³⁶⁸ It made no mention of the conspicuous absence of the word "vested," which, although present in previous drafts, was ultimately removed.³⁶⁹ The opinion also reiterated the court's thoughts in *Bragg* regarding recognized the EAAA provision requiring "just compensation be paid if implementation of [the Act] causes a taking of private property."³⁷⁰ The Court read this to mean that the legislature recognized that limiting water rights for a public use might be a taking; however, the court did not say that the permitting system as written in EAAA would require compensation.³⁷¹ Instead, despite the attempted carve-out for the EAA in SB 332, the court directed standard takings analysis on any pumping regulations created by a GCD, including those implemented by the EAA.³⁷²

Notably missing in the opinion, in stark contrast to previous cases, was any criticism of capture as a management system or any recommendations that the legislature should change it. This becomes more conspicuous considering that the author of the majority opinion in *Day* was Justice Hecht—the same Justice who wrote the concurring opinion in *Sipriano*. In *Sipriano*, Justice Hecht strongly advocated for the replacement of capture with a more reasonable system such as the Restatement.³⁷³

Much of the briefing from the EAA and some amicus briefs focused on the importance of protecting the EAA's ability to permit without fear of an onslaught of takings claims.³⁷⁴ It was argued that any threat to the permitting scheme would violate the

363 *See id.* at 828.

364 *Day*, 369 S.W.3d at 823, 828, 832.

365 *Id.* at 833–43.

366 *Id.* at 814, 833–43.

367 *Id.* at 832.

368 *Id.*

369 *Compare* Senate Comm. on Natural Resources, Bill Analysis, Tex. S.B. 332, 82d Leg., R.S. (2011), with Act of May 27, 2011, 82nd Leg., R.S., ch. 1207, § 1, 2011 Tex. Gen. Laws 3224, 3224 (amending TEX. WATER CODE ANN. § 36.002(a)).

370 *Day*, 369 S.W.3d at 843.

371 *See id.*

372 *See id.*

373 *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 83 (Tex. 1999) (Hecht, J., concurring); *see discussion supra* Part III.B.

374 *See, e.g.,* Brief of Angela Garcia and Environmental Defense Fund, Inc. as Amici Curiae Supporting Petitioner and Cross-Respondent Edwards Aquifer Authority, *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012) (No. 08-0964), 2010 WL 591444.

intention of the state legislature when it created the EAA.³⁷⁵ Some amicus briefs attempted to extrapolate the consequences that a takings finding would have on other GCDs.³⁷⁶ The amicus brief of Angela Garcia and the Environmental Defense Fund listed the long history of legislative actions created to limit groundwater mining, including district creation and the regional planning process.³⁷⁷ These briefs argued that recognition of a landowner's constitutionally vested right in groundwater would threaten the ability of the EAA and other GCDs to manage groundwater in a sustainable way.³⁷⁸

The Court disagreed with these arguments, stating that during its existence, there had only been a handful of takings claims against the EAA.³⁷⁹ While the holding in *Day* was certainly important to groundwater advocates and property owners alike, it represented a significant change in the Court's tone with regard to its deference to the legislature and its willingness to weigh in regarding groundwater regulation. Although the Court had criticized capture in past decisions, no criticisms appeared in this opinion, and it is unclear what caused this shift.

VII. WHY THE CHANGE?

To many, the *Day* decision was a logical evolution of the Court's protection of the rule of capture first established in *East*. However, when evaluating the judicial and legislative history as a whole, the *Day* decision marked a departure from the previous trend of court decisions. Throughout history, although the Court respected the *East* decision in name, it regularly deferred to the increased regulation created by the legislature and often encouraged it. Dicta from several decisions indicates that previous courts felt that right of capture might not be a wise allocation scheme for a growing state and that more regulation was needed.³⁸⁰ This was particularly true in *Sipriano*, where the concurrence noted that the *East* court's concerns were no longer valid.³⁸¹ Although *Day* does not technically overturn previous case law because the specific issue of ownership was one of first impression, the direction of the opinion varies significantly from previous groundwater cases, thus creating implications for future water and environmental issues.

The *East* court chose rule of capture in part because it did not have any legislative direction and did not understand groundwater characteristics.³⁸² The opinion indicated that, had the legislature previously acted on groundwater, the court would have deferred to that action.³⁸³ Just a few years after the *East* case, the legislature did act by passing

375 See, e.g., *id.*

376 See, e.g., *id.*

377 *Id.* at *1–2.

378 *Id.* at *9.

379 *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 843 (Tex. 2012).

380 See *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 22, 29 (Tex. 1978).

381 See *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 82 (Tex. 1999) (Hecht, J., concurring).

382 See *Houston & T. C. Ry. Co. v. East*, 81 S.W. 279, 280–81 (Tex. 1904).

383 See *id.* at 280.

the conservation amendment placing the role of groundwater regulation with the legislature even though a common law precedent was already set.³⁸⁴

For a period of time, the courts deferred to the legislature regarding the allocation of Texas's groundwater. Subsequent cases leaned heavily on legislative efforts to regulate use and plan for the future. This is even true of cases that did not involve direct challenges to the rule of capture. In *City of Corpus Christi*, the Texas Supreme Court recognized that groundwater was no longer "occult" as it was described in *East*; however, the court maintained deference to the role of the legislature established by the constitutional amendment and clarified the relationship between the court and lawmaker by stating, "[t]he power certainly does not lie with the courts to usurp the legislative function."³⁸⁵ The Court noted that, because the legislature had not limited transportation of groundwater based on excessive water loss, the Court could not create such a rule.³⁸⁶ The Court did state, perhaps encouragingly, that the legislature was currently in session so state legislators would have the chance to create such a law if they were so inclined.³⁸⁷

Similarly, in *Friendswood Development*, the Court stated, "We agree that some aspects of the English or common law rule as to underground waters are harsh and outmoded, and the rule has been severely criticized since its reaffirmation by this Court in [*City of Corpus Christi*]."³⁸⁸ However, feeling bound by *stare decisis*, the Court maintained capture, but used recent legislative action as an "opportunity to discard an objectionable aspect of the court-made English rule" and included subsidence through negligent pumping as a limit to capture.³⁸⁹ Both of these cases reflect the court's recognition of its obligation to abide by *East* while still supporting increased regulation and indicating that a change to capture might be necessary.

Sipriano was the Court's first modern opportunity to change the common law rule of capture. Although the Court ultimately upheld capture, language hinting at opposition to the system itself was prominent throughout the *Sipriano* opinion.³⁹⁰ The court warned that while groundwater allocation was the responsibility of the legislature, if the legislature was not willing to do its job, the court would have no trouble stepping in.³⁹¹ All indications were that the court was encouraging the legislature to move away from right of capture, "or else." *Sipriano* was argued before the court shortly after SB 1—Texas's first omnibus water bill—was passed, which gave additional authority to GCDs.³⁹² The Court felt it important to allow such landmark legislation time to take effect.³⁹³ This deference to SB 1 can be interpreted as an affirmation of increased groundwater regula-

384 See TEX. CONST. art. XVI, § 59(a); see also *Sipriano*, 1 S.W.3d at 77.

385 *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955).

386 *Id.* ("The power certainly does not lie with the courts to usurp the legislative function and say what types of conduits and reservoirs may be used for the transportation and storage of water, lawfully obtained and lawfully used.")

387 *Id.*

388 *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 28–29 (Tex. 1978).

389 *Id.* at 30.

390 See *Sipriano*, 1 S.W.3d at 80.

391 See *id.*

392 *Id.* at 79–80; see also Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 4.30, 1997 Tex. Gen. Laws 3610, 3646–47 (amending TEX. WATER CODE ANN. § 36.113).

393 *Sipriano*, 1 S.W.3d at 79–80.

tion from the court.³⁹⁴ In addition to the majority opinion, Justice Hecht's concurrence was particularly critical of capture and advocated for its replacement.³⁹⁵ He stated that "it has become clear, if it was not before, that it is not regulation that threatens progress, but the lack of it."³⁹⁶ It is an interesting statement to consider when reading the *Day* opinion, which Justice Hecht also authored.

Finally, the Court reached the *Day* case. As in previous cases, the Court upheld the right of capture; however, unlike those decisions, *Day* contained no discussion of the constitutional amendment or the importance of legislative authority, nor mention that capture may need to change in the future.³⁹⁷ While it recognized SB 332 and GCDs, the Court appeared to want to reign in the power that was previously encouraged, even reading "vesting" into SB 332.³⁹⁸ There was no discussion of changed circumstances, as was seen in *Sipriano*, which is particularly notable because the frequency of water issues has only increased since that ruling. Instead, the Court's holding in *Day* could arguably inhibit the legislatively created districts from doing their job as defined in their promulgating directives.³⁹⁹ In particular, the ruling could endanger the EAA, which was a legislatively-created special district that issued permits based on legislative direction. This outcome is particularly ironic considering that the motivation behind the EAA's creation was a desire to remedy the lack of regulation that had led to damaging over pumping.

It is a challenge to understand the shift from the language of the previous cases to the Court's decision in *Day*. There are several possible reasons why the Court ruled as it did in *Day*. First, the *Day* decision could have been based on a determination that the courts are the appropriate source for property law clarifications. Despite the presence of legislatively-created districts' rulemaking, some common law considerations may continue to lay with the courts. The decision may also be a testament to the current importance placed on private property in Texas, as evidenced by legislative initiatives and other court rulings. Finally, perhaps the Court was simply trying to align Texas's groundwater regime with that of oil and gas. If this is true, it raises significant questions about whether the Court also intended other aspects of oil and gas law, such as correlative rights, to extend to groundwater. Understanding the motivation of the *Day* opinion is an important step in predicting how the Court may rule in future cases involving upcoming water and other environmental issues.

A. COURTS V. LEGISLATURE

Over the last hundred years, American law has shifted from a system dominated by common law to one that is primarily statute driven.⁴⁰⁰ A major driver of this shift was

394 *See id.*

395 *Id.* at 82 (Hecht, J., concurring).

396 *Id.*

397 *See generally* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012).

398 *See id.* at 832.

399 *See* Brief of Angela Garcia and Environmental Defense Fund, Inc. as Amici Curiae Supporting Petitioner and Cross-Respondent Edwards Aquifer Authority, Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012) (No. 08-0964), 2010 WL 591444 at*1-2.

400 CALABRESI, *supra* note 77, at 44.

the proliferation of agencies and other regulatory authorities tasked with rulemaking.⁴⁰¹ Agencies were usually given broad powers to apply the laws of the day, add specificity to legislative goals, and adjust regulations to the changing times; however, increased statutorification of this kind can create questions of jurisdiction.⁴⁰² This is the conflict in Texas groundwater. Here, the constitutional amendment extends jurisdiction of the police power over natural resources to the legislature.⁴⁰³ Pursuant to the amendment, GCDs were created to be the regulators.⁴⁰⁴ However, this system was enacted after a common law rule was already present and continued contemporaneously with litigation concerning similar issues. These dual tracks raised questions about which entity – GCDs or the courts – had the authority to define and enforce groundwater and associated property rights.

The creation of an administrative body with regulatory authority does not divest the courts from all jurisdiction over the body's actions.⁴⁰⁵ Concurrent jurisdiction between courts and agencies has always been allowed by the judicial system.⁴⁰⁶ Courts may still have authority in some common law areas in addition to common law expressly retained by the judiciary.⁴⁰⁷ Constitutional adjudications remain with courts.⁴⁰⁸ For example, all property is held subject to the valid exercise of the state's police power.⁴⁰⁹ It is settled that, when regulations go beyond the valid exercise of police power, it is an unconstitutional taking of private property.⁴¹⁰ This constitutional question creates judicial authority over the regulatory body to interpret if a taking occurred; however, this evaluation can only occur once a vested right has been established.⁴¹¹

This is distinguishable from the *Day* case. Certainly, Texas courts have the right to determine if a regulation exceeds the police power, but the court in *Day* actually defined the property right itself, which must be determined before a takings analysis can take place.⁴¹² The current focus is whether this was proper based on precedent or whether the court should have deferred to legislative efforts to define and regulate groundwater

401 *Id.* at 45.

402 *Id.* at 44-45, 52.

403 TEX. CONST. art. XVI, § 59(a).

404 TEX. WATER CODE ANN. § 36.0015 (West 2012).

405 CALABRESI, *supra* note 77, at 52; Israel Gonvisser, *Primary Jurisdiction: The Rule And Its Rationalizations*, 65 YALE L. J. 315, 329 (1956) (“The trouble is that if the primary jurisdiction rule is to apply whenever there is an expert adjudicating body available, then the rule must have unlimited applicability in the regulated industries. Logically, this leaves the courts no jurisdiction in that area at all.”)

406 Michael Botein, “*Primary Jurisdiction: The Need for Better Court/Agency Interaction*,” 29 RUTGERS L. R. 867, 876 (1975).

407 CALABRESI, *supra* note 77, at 163–64.

408 Botein, *supra* note 406, at 871; CALABRESI, *supra* note 77, at 163–64.

409 *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 670 (Tex. 2004).

410 *See Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 838–39 (Tex. 2012).

411 *See Stone v. Tex. Liquor Control Bd.*, 417 S.W.2d 385, 385–86 (Tex. 1967) (holding that there is no right to judicial review of an administrative order unless a statute violates a vested right).

412 The subsequent *Bragg* decision provides a clear example of a more typical property rights interpretation. Based on the decision that groundwater was vested, the court attempted to determine if existing regulation ran afoul of existing property rights. *Bragg v. Edwards Aquifer*

rights as it had in the past. To answer that question, one must first determine if the right in question was once reserved by the courts or delegated exclusively to the legislature.

The Texas Supreme Court stated that, “[w]here the issue is one inherently judicial in nature . . . the courts are not ousted from jurisdiction *unless* the Legislature, by a valid statute, has explicitly granted exclusive jurisdiction to the administrative body.”⁴¹³ The same court repeatedly stated that the conservation amendment placed groundwater regulation exclusively with the legislature and, by proxy, with GCDs.⁴¹⁴ Previous groundwater decisions deferred to legislative regulations for that reason.⁴¹⁵ In contrast, *Day* did not. It could be argued that maintaining right of capture constituted deference; however, Justice Hecht’s own words in *Sipriano* counter that notion. “It is hard to see how maintaining the rule of capture can be justified as deference to the Legislature’s constitutional province when the rule is contrary to the local regulation that is the Legislature’s preferred method of groundwater management.”⁴¹⁶ In contrast, the *Day* opinion included no reference to the amendment or the concerns regarding capture voiced in *Sipriano*.

It is arguable that *Day* did not implicate deference because the Court felt that determining a property right was a common law principle reserved for the judiciary.⁴¹⁷ Texas oil and gas law serves as a good guidepost regarding the differentiation between the court’s authority and other regulatory bodies in assigning or amending property rights. Although the Texas Railroad Commission (RRC) is vested with broad powers, it has no power to determine property rights.⁴¹⁸ Authority to resolve title disputes or determinations of subsurface trespasses is maintained by the judiciary.⁴¹⁹ The RRC is allowed to manage where or whether a well can be drilled, but is not permitted to determine ownership of oil and gas or how proceeds from sales can be apportioned between owners.⁴²⁰ The holdings in these cases explain that the authority of the legislatively-created Texas Railroad Commission is limited to the state’s goals of “preventing waste and conserving natural resources.”⁴²¹

fer Auth., 2013 WL 4535935, at *1 (Tex. App.—San Antonio 2013). This would not have been possible, had the Day court not decided to extend those rights.

413 A.W. Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411, 415 (Tex. 1961) (emphasis added).

414 See, e.g., City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798, 800–01 (Tex. 1955).

415 See, e.g., *id.* at 803, 805 (refusing to limit bed and banks allowances based on waste because the Texas Constitution placed the authority to do so with the legislature).

416 Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 83 (Tex. 1999) (Hecht, J., concurring).

417 See CALABRESI, *supra* note 77, at 163–64; Mary A. Keeney, *Primary and Exclusive Agency Jurisdiction: Impact on Court Litigation*, 10 TEX. TECH. ADMIN. L.J. 471, 495 (2009).

418 Jones v. Killingsworth, 403 S.W.2d 325, 328 (Tex. 1965).

419 A.W. Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411, 415 (Tex. 1961).

420 56 TEX. JUR. 3D Oil and Gas § 737.

421 Seagull Energy E & P, Inc., v. R.R. Comm’n of Tex., 226 S.W.3d 383, 389 (Tex. 2007); see TEX. NAT. RES. CODE ANN. § 85.201 (2011). Determining what issue belongs to which entity is not always a straightforward analysis. For example, in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, the court held that, although law of trespass was a property claim for

While it is true that some legal power lies with the courts and not with the legislature, the legislative precedent and the court's language contradict the premise that this issue was maintained by the courts in the context of groundwater. First, the legislature was vested with management. Then, on several occasions, the Court specifically called on the legislature to increase groundwater regulations. In his *Sipriano* concurrence, Justice Hecht, then an advocate for more regulation, evaluated reasonable use as a potential alternative to capture.⁴²² Although he remarked that reasonable use was not a perfect solution, he thought it preferable to the current regime.⁴²³ Since the *Sipriano* ruling, the legislature has increased regulatory authority through a series of bills and GCD-promulgated regulations.⁴²⁴ If the *Day* court had followed its own precedent, it would have deferred to the legislature citing the absence of the word "vested" in SB 332 and the special exception the bill included for the EAA, which was clearly meant to offer them additional protection in a regulatory review.

B. PRIVATE PROPERTY RIGHTS

Many hailed the *Day* decision as another victory for private property owners. Celebrants included Texas state officials as well as special interest groups.⁴²⁵ Each of these factions viewed the ruling as a welcomed constraint on the unfettered growth of regulations limiting property rights.⁴²⁶ The State Comptroller's Office stated, "[t]he court's opinion . . . provides a capstone for decades of efforts by the Texas Legislature to defend and protect private real property rights."⁴²⁷ Although Texas has a history of property

the courts, determining the value of oil and gas drained by hydraulic fracturing is more appropriate at the agency level. 268 S.W.3d 1, 14–16 (Tex. 2008).

422 *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 80 (Tex. 1999) (Hecht, J., concurring).

423 *Id.*

424 See discussion *supra* Part IV.B.

425 See e.g., Bruce Wright, *A Victory for Private Property Rights: Texas Court Decision Affirms Right to Water*, TEX. COMPTROLLER OF PUB. ACCOUNTS, WINDOW ON ST. GOV'T (May 7, 2012), <http://www.window.state.tx.us/comptrol/fnotes/fn1204/water-rights.php>; Regan Beck, *Texas Groundwater Rights Continue to Take Center Stage*, TEX. FARM BUREAU (May 24, 2012), <http://txagtalks.texasfarmbureau.org/texas-groundwater-rights-continue-to-take-center-stage/>.

426 Wright, *supra* note 425; George Grimes Jr., *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L.J. 557, 557–78 (1996). The recent ruling in *Bragg* reiterates courts' focus on private property rights. *Bragg v. Edwards Aquifer Auth.*, 2013 WL 4535935, at *1 (Tex. App.—San Antonio 2013). Although the *Penn Central* test requires an examination of the nature of the government action, the court of appeals placed little importance on this prong in comparison to the attention given to the reasonably back expectations of the individual plaintiff. *Bragg v. Edwards Aquifer Auth.*, 2013 WL 4535935, at *17-22 (Tex. App.—San Antonio 2013). In fact, the former only warranted two paragraphs of the opinion. *Id.* at *21-22. This preference of protecting the rights of one over the good of the whole embodies concerns that were expressed during the *Day* debate. See e.g., Brief of Angela Garcia and Environmental Defense Fund, Inc. as Amici Curiae Supporting Petitioner and Cross-Respondent Edwards Aquifer Authority, *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012) (No. 08-0964), 2010 WL 591444.

427 Wright, *supra* note 425.

rights legislation, individual rights have not been the focus of groundwater regulations. At the very least, there was an attempt to balance individual rights with the sustainability of the resource in a way that benefitted the whole state.

Private property rights have always been important to Texans.⁴²⁸ Perhaps it is because the state has a higher percentage of privately-held land than any other state.⁴²⁹ It may also stem from the independent nature of Texans. Whatever the reason, Texas's lawmakers and courts have attempted to protect property rights since early in the state's history. Article I of the Texas Constitution established the sanctity of private rights stating, "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made."⁴³⁰ In addition to this overarching protection, Texas continued to promulgate legislation to protect property rights. Most of these bills were passed in reaction to regulatory changes or court decisions that were interpreted as threats to private rights. At times, Texas's deference to private property rights has been criticized because it valued those rights higher than the public good.⁴³¹

In 1995, the legislature passed the Texas Private Real Property Rights Preservation Act.⁴³² The bill was motivated by increased regulations in many sectors, including the environment.⁴³³ "The Act represents the Texas legislature's acknowledgment of the importance of protecting private real property interests."⁴³⁴ The bill required governmental entities to consider whether takings of private real property may result from their actions.⁴³⁵ Failure to do so could lead to litigation or invalidation of the governmental action.⁴³⁶ Under the Act, a property owner can sue the government entity that issued a regulation if the regulation diminished property value by at least 25%.⁴³⁷

While Texas has always valued private property rights, recent legislation demonstrated that their protection has never been so paramount. After the landmark 2005 Supreme Court *Kelo* opinion, in which eminent domain was permitted for a "public use," Texas was one of the first states that attempted to enact response legislation.⁴³⁸ In 2011,

428 See e.g., Kate Galbraith, *Property Owners Seek to Block Wind Power Lines*, TEX. TRIB. (Apr. 13, 2010), <http://www.texastribune.org/texas-environmental-news/environmental-problems-and-policies/property-owners-seek-to-block-wind-power-lines/>.

429 Susan Combs *Column on Property Rights*, TEX. COMPTROLLER SUSAN COMBS, (Sept, 4, 2012), <http://www.susancombs.com/media/susan-combs-column-property-rights>.

430 TEX. CONST. art. 1, § 17.

431 Jacqueline Lang Weaver, *The Federal Government as a Useful Enemy: Perspectives on the Bush Energy/Environmental Agenda From the Texas Oilfields*, 19 PACE ENVTL. L. REV. 1, 39 (2001) ("[T]he secular religion of private property rights has become so strong in Texas that [the oil industry advocacy group] itself is not powerful enough to sway legislative opinion in support of the public good . . ."). See *supra* note 425.

432 Private Real Property Rights Preservation Act, 74th Leg., R.S., ch. 517, § 1, 1995 Tex. Gen. Laws 3266. (codified in TEX. GOV'T CODE ANN. (West 2004)).

433 Grimes, *supra* note 426, at 557.

434 Tex. Att'y Gen., Private Real Property Rights Preservation Act Guidelines, § 1.11 (2011).

435 *Id.* § 1.12.

436 *Id.* § 1.14.

437 Grimes, *supra* note 426, at 560.

438 See Tex. H.B. 2006, 80th Leg., R.S. (2007); Veto Message of Gov. Perry, Tex. H.B. 2006, Tex. 80th Leg., R.S. (2007).

Texas passed a law to further protect private property interests.⁴³⁹ Senate Bill 18 (SB 18) limited what could qualify for the “public use” for the purposes of eminent domain.⁴⁴⁰ The bill also sought to protect the landowner from underpriced compensation and included protections for circumstances if the project, which necessitated the eminent domain proceeding, was not completed.⁴⁴¹

Property rights have also seen increased protection in the Texas courts.⁴⁴² With an elected judiciary, concerns often arise that political sentiments can find their way into court rulings.⁴⁴³ *Day* may be just another example of the rise in property rights interests held by Texas citizens along with the general rejection of additional regulations. Again, this was a shift in tone from previous case law. Although, previous groundwater cases involved property rights, they also mentioned the importance of a management system that benefitted the greater good of the state as well as protection of the individual.⁴⁴⁴

Both *East* and *Sipriano* involved conflicts between landowners, so the Court attempted to balance the interests by giving each landowner an equal right to capture the water under his or her property.⁴⁴⁵ Even in *Sipriano*, which did not involve a regulatory body, the Court seemed concerned about the continuation of protecting individual property rights in light of growing demand and controversy.⁴⁴⁶ The court qualified its protection of the right by indicating that it might be appropriate for change at a later date.⁴⁴⁷ In fact, a primary reason for not changing common law was deference to the regulatory changes added by SB1, not protection the individual rights. Again, this consideration was not reflected in the *Day* opinion.

If the *Day* decision was, in fact, a victory for private rights, it is worth noting what the Court did not say. The Court did not say that the facts presented in *Day* constituted

439 Act of May 5, 2011, 82d Leg., R.S. ch. 81, § 1, 2011 Tex. Gen. Laws 354 (codified in TEX. GOV'T CODE ANN.).

440 *Id.* § 2, 2011 Tex. Gen. Laws 354 (amending TEX. GOV'T CODE ANN. § 2206.001).

441 *Id.* §§ 8 & 19, 2011 Tex. Gen. Laws 351, 358, 361 (amending TEX. GOV'T CODE ANN. §§ 21.0113, 21.101).

442 See Val Perkins, *The Texas Supreme Court's Emphasis on Private Property Continues*, THE HOUS. LAW. 42 (May/June 2012) (chronicling recent Texas Supreme Court decisions confirming private property rights at the expense of state or local regulations); Jennifer Hiller, *Supreme Court Won't Hear Pipeline Case*, SAN ANTONIO EXPRESS-NEWS, Feb. 24, 2013, <http://www.mysanantonio.com/business/article/Supreme-Court-won-t-hear-pipeline-case-4303191.php>.

443 See *Justice for Sale*, Synopsis, FRONTLINE, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/synopsis.html> (last visited Mar. 18, 2013).

444 See *Houston & T. C. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904); *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75 (Tex. 1999). In keeping with *Day's* limited discussion on the need to manage groundwater, the subsequent *Bragg* opinion gives little attention to the importance of sustaining water resources although the court acknowledged that Plaintiffs were growing a water intensive crop in a drought ridden area. *Bragg v. Edwards Aquifer Auth.*, 2013 WL 4535935, at *21 (Tex. App.—San Antonio 2013).

445 See discussion *supra* Part III.A–B.

446 See *Sipriano*, 1 S.W.3d at 80.

447 See *id.*

a taking.⁴⁴⁸ Texas courts have followed federal case history for takings claims.⁴⁴⁹ Neither the Texas courts nor the United States Supreme Court has established a bright line test for a taking analysis when there is not a loss of total economic value; however, the general rule is that state government conduct constitutes a taking when it invades or physically appropriates property, or when it unreasonably interferes with the right to use and enjoy property.⁴⁵⁰ In *Day*, the court applied the facts to the *Penn Central* test and held that there was not enough evidence to warrant summary judgment for *Day* on the takings claim.⁴⁵¹ Although the case was remanded on that issue, the Court's analysis indicated that the permit would not meet the takings standard based on their application of the facts to the *Penn Central* factors.⁴⁵² While there are some signals that the *Day* decision might have been motivated by private property protections there is another interpretation. It is possible that the court was just trying to simplify an already complicated system.

C. A MOVE TOWARDS MORE REGULATION: THE OIL AND GAS MODEL

The motivation for the *Day* decision may be found in the Court's own words. The vesting of rights in place could have been an effort to align the groundwater process with oil and gas law and thus provide additional regulations. Texas established the right of capture for oil and gas many years ago.⁴⁵³ However, unlike in the groundwater context, the parameters of the right of capture in the oil and gas arena are well defined.

Texas courts long ago established that a landowner holds a vested interest in the minerals in the ground. This right is subject to the same constitutional amendment discussed in previous sections.⁴⁵⁴ Instead of regionalized GCDs, the legislature created a statewide authority, the RRC, to manage minerals through the promulgation of rules and regulations.⁴⁵⁵ The RRC is specifically authorized to conserve the natural resources by determining whether wells may be drilled and how much oil or gas may be produced from permitted wells, as well as promulgating and enforcing density and spacing rules.⁴⁵⁶ Although the RRC is tasked with securing "the state's goals of preventing waste and conserving natural resources," it also limits production to protect similar rights held by neighboring property owners.⁴⁵⁷ These are called correlative rights.⁴⁵⁸

448 *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 843 (Tex. 2012). Compare *Bragg v. Edwards Aquifer Auth.*, 2013 WL 4535935, at *21 (Tex. App.—San Antonio 2013).

449 *Grimes*, *supra* note 426, at 575–76.

450 *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992).

451 *Day*, 369 S.W.3d at 839–43.

452 *See id.* at 843.

453 *See Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (Tex. 1915).

454 *See* TEX. CONST. art. XVI, § 59(a); *Brown v. Humble Oil Co.*, 83 S.W.2d 935, (Tex. 1935).

455 TEX. NAT. RES. CODE ANN. § 85.201 (West 2012).

456 56 TEX. JUR. 3D *Oil and Gas* § 737.

457 *About the Oil & Gas Division*, R.R. COMM'N OF TEX., <http://www.rrc.state.tx.us/about/divisions/aboutog.php> (last updated Aug. 2, 2007).

458 "The term 'correlative rights' is merely a convenient method of indicating that each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil or gas therefrom by lawful operations conducted on his own land; that each such owner has duties to the other owners not to exercise his privileges of taking so as to injure the common source of supply; and that each such owner has rights

The doctrine of correlative rights was established as a means to prevent waste and confiscation. The doctrine gives every property owner the opportunity to recover the oil and gas in or under his land.⁴⁵⁹ The owner's right of capture is subject to correlative rights.⁴⁶⁰ While early oil and gas precedent allowed unfettered pumping without liability for drainage of a neighbor's property, this was eventually found to be at odds with a right of capture doctrine.⁴⁶¹ If there is no remedy for a landowner who is harmed by losing their minerals to another, the property right becomes illusory.⁴⁶² The Texas Supreme Court approved correlative rights in the right of capture for minerals and it is currently enumerated as one of the RRC's statutory goals; therefore, regulation to protect correlative rights is not a taking.⁴⁶³ One of the reasons correlative rights were extended to property owners was because experts can now approximate the amount of oil and gas in place in a common pool, and determine what is recoverable by each tract owner under certain operating conditions.⁴⁶⁴ This was essential in a harm determination and was not always possible in the early years of the doctrine.⁴⁶⁵

Language throughout the *Day* opinion demonstrated the Court's attempt to align groundwater allocation with the statewide treatment of oil and gas. Because ownership of groundwater was an issue of first impression, the court turned to well-established oil and gas law to guide its analysis.⁴⁶⁶ The opinion identifies similarities between the two resources.⁴⁶⁷ Using its reasoning in *Texas Co.*, the *Day* court supported the decision to own groundwater in place in spite of its fugacious nature.⁴⁶⁸ In the end, the language used to describe the current state of groundwater ownership came directly from an oil and gas holding.⁴⁶⁹

In contrast to oil and gas jurisprudence, past groundwater cases did not address correlative rights and these rights have not been explicitly added by the legislature.⁴⁷⁰

that other owners not exercise their privileges of taking so as to injure the common source of supply.'" *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 583 (Tex. 1947) (citing 1 *Summers*, Oil and Gas, Perm. Ed., § 63).

459 Susana Elena Canseco, *Landowners' Rights in Texas Groundwater: How and Why Texas Courts Should Determine Landowners Do Not Own Groundwater in Place*, 60 BAYLOR L. REV. 491, 515 (2008).

460 *Elliff*, 210 S.W.2d at 583.

461 Canseco, *supra* note 459, at 515.

462 *Id.*

463 *Elliff*, 210 S.W.2d at 582; *About the Oil & Gas Division*, R.R. COMM'N OF TEX., <http://www.rrc.state.tx.us/about/divisions/aboutog.php> (last updated Aug. 2, 2007). Regulations promulgated to protect correlative rights do not constitute a taking of property. *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 209–10 (1900).

464 *Elliff*, 210 S.W.2d at 561.

465 *Id.* at 581.

466 *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 828–32 (Tex. 2012).

467 *Id.*

468 *Id.*

469 *Id.* at 831–32 (quoting *Elliff*, 210 S.W.2d at 561).

470 See *Houston & T. C. Ry. Co. v. East*, 81 S.W. 279, 281 (Tex. 1904) (linking the denial of correlative rights in part to the secret and occult nature of groundwater making enforcement of such rights difficult). An additional difference between water and minerals is Texas's oil and gas interests are also subject to taxation. *Texas Co. v. Daugherty*, 107 Tex.

Therefore, before *Day*, there was no remedy for a landowner whose water was drained by another user if the water was used for legitimate purposes.⁴⁷¹ The Court in *Day*, however, argued that the very limited rules established in *East*, which disallow malice or wanton conduct, imply that some form of correlative rights are available for groundwater.⁴⁷² The Court stated that this limitation is comparable to the oil and gas prohibition on waste, although the term “waste” has been used differently in the oil and gas context than the word “malice” has been interpreted in water cases. In fact, groundwater cases have allowed significant amounts of waste under rule of capture despite any impact on neighboring owners.⁴⁷³ In addition, previous interpretations of capture concluded that correlative rights did not exist in Texas groundwater law.⁴⁷⁴

The Court in *Day* also attempted to equate the RRC goal of protecting correlative rights with EAAA provisions by arguing that the permitting plan provides an applicant with a “fair share” of water.⁴⁷⁵ However, in making that argument, the Court did not cite to the EAAA promulgating regulations, and a review of that legislation reveals no reference to the words “fair share” or “correlative rights.” Even if the EAAA permitting system is read broadly to provide a fair share to applicants, that is really only true as to those who can show a historic, beneficial use, unless the Court is referring to the domestic and livestock exemption. It is difficult to parallel either the domestic exception or a limited historic use right to what is meant by “fair share” in an oil and gas context. Unlike situations where new permits are tied to historic use, in oil and gas, any leaseholder is entitled to a fair share of the minerals regardless of whether previous development occurred.

Courts defining oil and gas property rights did not view drainage or correlative rights to be “at odds” with the rule of capture.⁴⁷⁶ Instead, they redefined the parameters of the rule by clarifying that it did not sanction negligent or wasteful practices and included the fair share or correlative rights principal.⁴⁷⁷ Relying on this definition of the oil and gas property right, courts rejected owners’ claims that regulations signed to prevent waste or protect correlative rights constituted a “taking” of their property.⁴⁷⁸

By invoking the oil and gas law analogy in *Day*, the Court has potentially provided an answer to future takings challenges aimed at groundwater regulation.⁴⁷⁹ Specifically,

226, 176 S.W. 717 (Tex. 1915). Based on the *Day* court’s recognition of the behavioral similarities between groundwater and oil and gas, it is possible that taxation should also be considered in the groundwater context. Certainly, as in oil and gas, the presence of a valuable resource below the surface would increase the value of the land above it.

471 See *East*, 81 S.W. at 281.

472 *Day*, 369 S.W.3d at 825–26.

473 See *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803, 805 (Tex. 1955) (refusing to define the actions presented in the case as waste because the court felt that determination of that definition was the duty of the legislature).

474 See Dylan O. Drummond et al., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 70 (2004); *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 22, 24 (Tex. 1978) (citing *East*, 81 S.W. 279).

475 *Day*, 369 S.W.3d at 830–31.

476 See *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 583 (Tex. 1947).

477 See *id.*

478 See *id.*

479 See *Day*, 369 S.W.3d at 832.

if water rights are defined as vested but subject to the rule of capture, which includes waste prevention and correlative rights, then regulations based on those parameters are not, in general, a taking of that property right.⁴⁸⁰ When looking at the court's reasoning in *Day*, it seems as though the Court is not opposed to an expanded application of correlative rights and appears to believe that some currently exist.⁴⁸¹ By equating the regulations of the RRC with what can be imposed on groundwater, it is possible that the Court intended for damages related to waste to be extended to groundwater in the same way they are used in oil and gas.⁴⁸² Judging from Justice Hecht's language in *Sipriano*, increased regulation is a more effective way to protect a resource than less regulation.⁴⁸³ Perhaps *Day* is the Court's avenue to allow additional regulation, just as it had threatened to do in previous cases.

While additional constraints on capture may be wise, simply extending correlative rights to groundwater by overlaying the definitions used in oil and gas creates challenges. The oil and gas regulatory regime has been well established since the early 1900s.⁴⁸⁴ Meanwhile, the full suite of laws that govern groundwater were established through a piecemeal evolution beginning in 1904.⁴⁸⁵ While application of oil and gas rules in the groundwater context may have been a workable solution a hundred years ago, attempting to do it now only generates more questions than answers.

In addition to legal challenges, there are many geologic and social differences as well, which the Court recognized.⁴⁸⁶ Although both oil and water are located and move underground, unlike oil and gas deposits, most groundwater aquifers recharge, which can both help and hinder attempts to align regulations between the sectors.⁴⁸⁷ Perhaps the most important distinctions are the social differences between the two substances. Oil and gas, while definitely important economically, cannot match the social value of water. Because of the constant and growing need for water, long-term goals will be different for each. Existing legislation in both sectors reflects these varying objectives.⁴⁸⁸ Throughout case law, the court has recognized the need for water sustainability and stated that additional regulations were necessary, yet *Day* seemed to ignore those concerns.⁴⁸⁹ Despite the reasoning, both obvious and discreet, that led to the *Day* decision, courts will continue to answer questions as they arise, and the legislature will be forced to conform its regulations to this new definition of capture in hopes that Texas's groundwater resources can be sustained into the future.

480 See *id.* at 825–26.

481 See *id.*

482 See *id.*

483 See *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 82 (Tex. 1999) (Hecht, J., concurring).

484 See *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 583 (Tex. 1947).

485 See discussion *supra* Parts II–III.

486 See *Day*, 369 S.W.3d at 840–41.

487 See *id.* at 841.

488 See discussion *supra* Part IV.

489 See discussion *supra* Part III.B.

VIII. CONCLUSION

Texas groundwater management has a long history of intertwined court decisions and legislation. Although the common law rule of right of capture was established over 100 years ago, the rule has been modified based on the conservation amendment to the Texas Constitution, which authorized the legislature to manage groundwater. Court decisions regarding groundwater issues deferred to both the conservation amendment and subsequent legislative efforts to plan and manage groundwater.

The growth of the regional planning process paired with increased demand raised questions regarding when ownership began. Courts never stated whether ownership was vested in place or if the water must first be captured. The answer to this question was critical to understanding the extent to which regulations would be appropriate without a constitutional violation. The Texas Supreme Court's decision in *Day* provided the answer. In that regulatory challenge, the Court clearly stated that, like oil and gas, right of capture was synonymous with absolute ownership. Consequently, regulations that exceeded the police power would be an unconstitutional taking.

The *Day* opinion marked a divergence from previous groundwater case law. Although upholding capture was consistent, the Court's treatment of capture and deference to the legislative efforts to cap pumping was distinctly different from prior opinions. While past cases indicated that capture should be changed due to changing circumstances in the state, the *Day* court did not address this issue and instead aligned groundwater law with oil and gas.

There are three possible reasons why the *Day* court departed from precedent. First, the court may have been determining a property right, which was still within the authority of the court despite the constitutional amendment. Even in instances when primary authority is placed with lawmakers, determination of certain common law principles are reserved to the court. Second, the *Day* decision may have been another in a list of cases prioritizing private property rights. Finally, by aligning groundwater with Texas oil and gas law, the court may have been attempting to extend correlative rights where they were not previously present. In oil and gas law, absolute ownership of the minerals includes consideration of conservation and neighboring rights. By defining the right in this way, regulations that seek to protect either or these are protected from a takings claim in most circumstances. Although, correlative rights have not previously been present in groundwater law, perhaps they will be now.

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MANAGING ENVIRONMENTAL RISKS IN TRANSACTIONS¹

BY MARY SIMMONS MENDOZA

I.	Overview of Environmental Programs	306
A.	Types of Environmental Laws	306
B.	Superfund	307
C.	Practical Effects of Environmental Laws on Transactions	308
II.	Drafting Environmental Provisions for Stock Purchase Transactions	310
A.	Definitions	310
B.	Representations and Warranties	313
1.	Common Issues	313
2.	Compliance	313
3.	Superfund-type Liabilities	314
4.	Notice of Environmental Liability	314
C.	Remedies	315
1.	Knowledge of Indemnified Party	317
2.	Other Limitations	317
3.	Exclusive Remedies	317
4.	Express Negligence	318
D.	Other Terms	318
1.	Access	318
2.	Post-closing Cooperation	318
III.	Conclusion	319

Environmental laws regulate a wide range of business activities. The obligations and liabilities they create affect not only ongoing businesses, but also business transactions, including real estate transactions, stock transactions, financings and leases. This article seeks to provide a broad understanding of environmental concerns and some ideas on how to address them, using a hypothetical stock purchase transaction. Similar principles apply, however, to other types of business transactions. This paper uses provisions from the ABA's Model Stock Purchase Agreement (with various revisions) as the starting point for discussion.

There is no single correct or perfect provision. The structure of the deal, the business considerations and the particular factual circumstances of each transaction must be taken into account in drafting appropriate provisions. The provisions below are not suggested to serve as "form" provisions. Instead, these provisions are used as examples that serve as a good starting point for a discussion of common issues.

1 The substance of this article was presented at the Tex. State Bar Environmental Superconference on Aug. 2-3, 2013 in Austin, Texas. This paper borrows heavily from a prior paper co-authored by Jeff Civins and Mary Mendoza, "Drafting Real Estate Contracts to Address Environmental Concerns" which was presented at the 23rd Annual Advanced Real Estate Drafting Course, Texas Bar CLE, March 1-2, 2012.

I. OVERVIEW OF ENVIRONMENTAL PROGRAMS

A. TYPES OF ENVIRONMENTAL LAWS

Environmental laws regulate business activities because of the effects or potential effects of those activities on the environment or on human health via the environment.² Environmental statutes generally fall into three categories.

The first category of environmental statutes comprises those that deal with wastes and their disposition. These so-called pollution statutes include the Clean Water Act (“CWA”),³ the Clean Air Act (“CAA”),⁴ the Resource Conservation and Recovery Act (“RCRA”),⁵ the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA” or “Superfund”),⁶ and the Underground Injection Control (“UIC”) Program of the Safe Drinking Water Act (“SDWA”).⁷ Each of these statutes is administered by the United States Environmental Protection Agency (“EPA”) and, with the exception of CERCLA, by its state counterparts. Because of its impact on business transactions, CERCLA is discussed separately below.

A second category of environmental statutes comprises those that deal with the use of raw materials and the manufacture, importation, and distribution of products, *e.g.*, the Toxic Substances Control Act (“TSCA”),⁸ the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”),⁹ the Emergency Planning and Community Right-to-Know Act (“EPCRA”) of Superfund, as amended by the Superfund Amendments and Reauthorization Act (“SARA”),¹⁰ and the drinking water program of the SDWA.¹¹ The Occupational Safety and Health Act (“OSHA”)¹² sometimes is included in this category.

The third category of environmental statutes—so-called conservation statutes—requires review and possibly mitigation of effects of proposed activities based on their potential impact on the environment or various segments of it, including animals and plants. Examples include the National Environmental Policy Act (“NEPA”),¹³ the En-

2 Our discussion focuses on federal programs, but many of these programs have state counterparts, which may contain substantive differences. States may also have unique programs with no federal counterpart, *e.g.* New Jersey’s Industrial Site Recovery Act. State programs should be considered in evaluating environmental concerns and drafting provisions to address them.

3 33 U.S.C. §§ 1251–1387 (2012).

4 42 U.S.C. §§ 7401–7671q (2012).

5 *Id.* §§ 6901–6992k.

6 *Id.* §§ 9601–9675.

7 *Id.* §§ 300f–300j–26.

8 15 U.S.C. §§ 2601–2697 (2012).

9 7 U.S.C. §§ 136–136y (2012).

10 42 U.S.C. §§ 11001–11050 (2012).

11 *Id.* §§ 300f–300j–26.

12 29 U.S.C. §§ 651–678 (2012).

13 42 U.S.C. §§ 4321–4370h (2012).

dangered Species Act,¹⁴ the Wild and Scenic Rivers Act,¹⁵ and the National Historic Preservation Act.¹⁶

Environmental statutes generally prescribe standards—by statute, rule, permit, or order. The federal pollution statutes, for example, provide for the establishment of technology-based limits on pollutant-emitting activities and for further ratcheting down of those limits if necessary to protect the environment.¹⁷ They also prescribe administrative requirements, such as permitting, monitoring, recordkeeping, and the reporting of routine and emergency releases.

States may assume responsibility for various federal pollution programs,¹⁸ and Texas, through the Texas Commission on Environmental Quality (“TCEQ”), generally has.¹⁹ States may also have their own independent programs that parallel or supplement federal programs; for example, Texas regulates the management of industrial wastes, in addition to hazardous solid wastes regulated under the delegated federal program.²⁰ As a consequence, parties to transactions must be knowledgeable about state as well as federal law.

Environmental statutes contain substantial sanctions for non-compliance. These sanctions may take the form of administrative, civil, and criminal penalties.²¹ Many environmental statutes specifically authorize citizens, as well as governmental agencies, to bring suit to enforce compliance and, in some instances, to abate imminent threats to public health or the environment.²²

B. SUPERFUND

Because the federal pollution statutes generally were prescriptive in nature and did not deal with problems of the past,²³ Congress enacted Superfund in 1980.²⁴ Superfund imposes on so-called potentially responsible parties, or PRPs, strict and generally joint and several liability for the cost of investigation and remediation of sites that contain “hazardous substances,” as well as for natural resource damages.²⁵ The term “hazardous

14 16 U.S.C. §§ 1531–1544 (2012).

15 *Id.* §§ 1271–1287.

16 *Id.* § 470–470x–6.

17 *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7411, 7475, 7502, 7503 (2012).

18 *See, e.g.*, 33 U.S.C. § 1342 (National Pollution Discharge Elimination Program); 42 U.S.C. § 7410 (Clean Air Act).

19 There are a few notable exceptions. For example, Texas has not assumed responsibility for the greenhouse gas permitting program under the federal Clean Air Act. *See* 75 Fed. Reg. 82,430 (Dec. 30, 2010). The TCEQ does not regulate wastes from the exploration for and production of oil and gas. *See* TEX. NAT. RES. CODE ANN § 91.101 (West 2012) (providing the Railroad Commission of Texas with the authority to regulate waste from oil and gas exploration and production).

20 *See* 30 TEX. ADMIN. CODE Ch. 335.

21 *See e.g.*, 33 U.S.C. § 1319.

22 *See e.g.*, 33 U.S.C. § 1365; 42 U.S.C. § 7604.

23 Exceptions include sections 7002 and 7003 of RCRA that authorize suits to address imminent hazards.

24 *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96–510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675).

25 42 U.S.C. § 9607(a).

substance” is broadly defined to include a range of materials regulated under other environmental statutes, but expressly excludes petroleum, which is addressed by other statutory programs.²⁶

PRPs include present owners and operators and certain past owners and operators (*i.e.*, those who owned or operated at the time of disposal) of contaminated properties, as well as those who arranged for disposal of their wastes at such properties and transporters who selected those properties for disposal.²⁷ Because liability is strict,²⁸ the fact that a PRP acted in compliance with the law is not a defense.²⁹ There are Superfund defenses, but they are limited and do not protect against liability under other statutes and the common law.³⁰

When Superfund was enacted, it contained three defenses—act of god, act of war, and act of a third party.³¹ Subsequent amendments added others—innocent land owner—in 1986,³² and bona fide prospective purchaser and contiguous land owner—in 2002.³³ These three defenses require pre-acquisition “all appropriate inquiry,”³⁴ post-acquisition caretaking by complying with specified continuing obligations,³⁵ and “no affiliation” with a PRP.³⁶ They apply only to purchasers (or lessees) of real estate and not to those who acquire stock.³⁷

Many states have their own version of CERCLA but the state version may differ in significant ways.³⁸ For example, the Texas superfund-equivalent statute is broader than its federal counterpart; it applies to solid waste rather than hazardous substances, but it does not contain all the defenses as are found in CERCLA.³⁹

C. PRACTICAL EFFECTS OF ENVIRONMENTAL LAWS ON TRANSACTIONS

As noted, the presence of hazardous substances on real property may give rise to substantial liabilities under Superfund. The presence of hazardous substances, asbestos, lead paint, underground storage tanks or USTs, and/or PCBs also may give rise to liabil-

26 *Id.* § 9601(14).

27 *Id.* § 9607(a).

28 *See id.*

29 *Id.* § 9607(b).

30 *Id.*

31 *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, §107, 94 Stat. 2767, 2781 (1980) (codified as amended at 42 U.S.C. § 9607(b)).

32 Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 101, 100 Stat. 1613, 1616 (1986) (codified as amended at 42 U.S.C. § 9601(35)(A)).

33 Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, §§ 221-22, 115 Stat. 2356, 2368-71 (2002) (codified as amended at 42 U.S.C. §§ 9601(40), 9607(q)).

34 42 U.S.C. § 9601(35)(B)(i)(I), (40)(B)(i).

35 *Id.* § 9601(35)(B)(i)(II), (40)(D).

36 *Id.* § 9601(40)(H).

37 *See id.* § 9607(35)(A).

38 *See, e.g.*, Texas’s Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE ANN. §§ 361.001-.992 (West 2012)).

39 *See id.*; *see also* Mehron Azarmehr & Ramon Dasch, *Texas State Superfund Update*, 32 ST. B. TEX. ENVTL. L.J. 5 (2001).

ity under various environmental regulatory programs.⁴⁰ OSHA also creates obligations for employers to create working conditions that prevent exposure of employees to hazardous substances, including special requirements relating to asbestos.⁴¹

The presence of regulated substances, together with radon and indoor air pollution including the presence of mold,⁴² may give rise to liability under contract and tort theories. Common law actions may involve third parties, such as toxic tort litigation—brought by adjacent residents or property owners, invitees, or employees—or property damage or diminution in value claims—brought by adjacent or possibly successive landowners.

Environmental regulatory programs may result in land use restrictions relating either to property that is a part of a stock transaction or the operations of the company that is involved in the transaction. Some of these programs directly restrict land use, e.g., section 404 of the CWA, which requires permitting as a prerequisite to the placement of dredged or fill materials in waters of the United States,⁴³ and the ESA, which may prohibit development that adversely affects endangered species.⁴⁴ Other programs may indirectly restrict land use or directly restrict operations. Under the CAA, for example, certain types of construction of new sources or the modification of existing sources of air contaminants may be restricted or made more difficult based on the air quality of the region in which the property is located.⁴⁵ Similarly, under the CWA, discharges into watercourses may be restricted because of water quality limitations.⁴⁶

Superfund and other programs relating to on-site conditions may also create legal and practical restrictions on land use or operations, e.g., prohibitions on the use of ground water or continuing obligations to monitor its quality.⁴⁷ In addition, federal and many state Superfund programs empower the government to impose a lien on remediated sites to secure payment of governmental costs in dealing with the site.⁴⁸

Environmental liabilities created by environmental statutes and the common law take a number of forms. They include, for example, costs of compliance, such as capital and operating expenses for required pollution control equipment and the time and expense for acquiring necessary permits, and costs of non-compliance, *i.e.*, administrative, civil, and criminal sanctions, which include fines, injunctive relief, (e.g., to compel compliance or prohibit non-compliant operations), and, for criminal violations, imprisonment. They also include costs of investigation and remediation and natural resource

40 See Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k; Toxic Substances Control Act, 15 U.S.C. §§ 2601–2697; Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001–11050.

41 See Occupational Safety and Health Act, 29 U.S.C. §§ 651–678; 29 C.F.R. § 1910.1001 (2012).

42 Radon and indoor air pollution, though subject to study, currently are not subject to environmental regulation. These substances, however, may be subject to regulation under OSHA. See 29 C.F.R. § 1910.1096.

43 See 33 U.S.C. § 1344.

44 See 16 U.S.C. §§ 1531–1544.

45 See 42 U.S.C. §§ 7475, 7502–03.

46 33 U.S.C. §§ 1311–14, 1342.

47 See, e.g., 30 TEX. ADMIN. CODE §§ 350.31, .33, .37.

48 See 42 U.S.C. § 9607(1); TEX. HEALTH & SAFETY CODE ANN. § 361.194.

damages under Superfund and state analogs, which often are substantial.⁴⁹ Under the common law, liabilities include those arising from toxic tort, for damages to people, and from property damage as well as those attributable to contract claims involving contaminated property.⁵⁰

In any transaction involving real property, those acquiring property must be concerned with land use limitations arising under environmental laws as well as to potential liability for on site conditions based upon a party's ownership or operation of the property.⁵¹ In addition, when planning to change property use, environmental laws may require an assessment of new compliance obligations and the costs to meet those new standards.⁵²

In a transaction involving the acquisition of an on-going business, potential liabilities include liabilities for activities that created environmental concerns at off site or formerly owned or operated properties.⁵³ Superfund imposes liability both on current owners and operators of property and on those who owned or operated a property at the time of the disposal; Superfund also imposes liability on those who arrange for disposal such as at third party to which wastes were sent for treatment, storage, or disposal.⁵⁴ These concerns arise even when a transaction is structured as an asset purchase (as opposed to a merger or stock purchase) if the asset purchase creates the potential for successor liability.⁵⁵

II. DRAFTING ENVIRONMENTAL PROVISIONS FOR STOCK PURCHASE TRANSACTIONS

The environmental provisions of a stock purchase transaction should be guided by the specifics of the actual transaction. Pertinent considerations include: the type of business – is it heavily regulated (such as a refinery) or fairly unlikely to have environmental concerns (such as a software company); the types of properties involved – owned or leased, developed or to be developed; and the amount of due diligence that is available or will be performed.

The discussion below focuses on selected common environmental provisions; the provisions presented below are drawn from ABA Model Stock Purchase Agreement, and are for discussion purposes only. Particular provisions may not be appropriate for a specific situation or transaction.

A. DEFINITIONS

The definitions are a critical part of the agreement. The definitions may be too narrow, making subsequent terms of little practical value, or may be so expansive and

49 See 42 U.S.C. § 9607.

50 Jeff Civins, *Environmental Law Concerns in Real Estate Transactions*, 43 Sw. L.J. 819, 828 (1990).

51 See *id.* at 823.

52 *Id.*

53 *Id.*

54 See 42 U.S.C. § 9607; see also Civins, *supra* note 50, at 824–825.

55 Civins, *supra* note 50, at 823.

overly broad as to make the environmental terms almost impossible to understand in terms of what is being agreed to and what liabilities are being allocated. The goal should be to draft terms in clear and concise language.

Most agreements will define Environmental Law. The ABA defines “Environmental Law” as

any Legal Requirement that provides for or relates to:

(a) advising appropriate authorities, employees, or the public with respect to the use of any Hazardous Material, the Release or Threat of Release of Hazardous Material, violation of discharge or emission limits or other prohibitions, or any Hazardous Activity or any activity, such as resource extraction or construction, that could have a significant effect on the Environment;

(b) preventing or reducing to acceptable levels the Release of Hazardous Material into the Environment;

(c) reducing the quantities, or minimizing or controlling the hazardous characteristics, of Hazardous Material that are generated;

(d) assuring that products are designed, formulated, packaged, and used so that they do not present an unreasonable risk to human health or the Environment when used or disposed of;

(e) protecting the Environment;

(f) reducing the risks involved in the transportation of Hazardous Material;

(g) the cleanup of Hazardous Material that has been Released, preventing its Release, or addressing the Threat of Release, or paying the costs of such actions; or

(h) making a Person compensate any other Person for damage done to its health or property or the Environment or permitting self-appointed representatives of the public interest to recover for injuries done to public assets or resources.⁵⁶

The ABA definition set forth above falls on the side of an overly lengthy and complicated definition, with multiple cross references to other defined terms. In general, it is preferable to have the environmental definitions be somewhat self contained, so that, as other changes to the document are made, the environmental definitions remain unchanged.

A key consideration is whether to include common law in the definition of Environmental Law. The ABA definition does so through the reference to “Legal Requirement,”⁵⁷ but it can be problematic for sellers in the context of making representations regarding compliance with Environmental Laws. Another consideration is whether indoor air quality considerations will be included in the definition. The ABA form does so by defining “Environment” to include indoor air.⁵⁸ A separate negotiating point is whether OSHA/worker safety considerations are included in the definition; that determination is often handled as a point of negotiation based on the coverage of other non-environmental portions of the agreement.

56 Model Stock Purchase Agreement (2010).

57 *Id.*

58 *Id.*

One common issue is the breadth of the definition when concepts of human health are introduced into the definition. In the example above, concepts of human health are introduced in several places. In clause (h), for example, the definition of Environmental Law now would cover any common law obligation to make a person pay for damage to another person's health.⁵⁹ Clearly, this definition reaches far beyond the likely intent of the drafters. While the concept of protecting public health is often a key underpinning for environmental laws, when drafting, this issue is often addressed by specifying that the protection of human health relates to exposure to hazardous materials or other similarly defined items.

The ABA model suggests a definition of Hazardous Material:

"Hazardous Material"—any substance, material, or waste that is or will foreseeably be regulated by any Governmental Body, including any material, substance, or waste that is defined or classified as a "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "pollutant," "restricted hazardous waste," "contaminant," "toxic waste," "pollutant," or "toxic substance" under any provision of Environmental Law, including petroleum, petroleum products, asbestos, presumed asbestos-containing material or asbestos-containing material, urea formaldehyde, or polychlorinated biphenyls.⁶⁰

A common concern is that the definition of Hazardous Materials and Environmental Laws are circular: Environmental Laws references the definition of Hazardous Materials that in turn is defined with reference to Environmental Law.⁶¹ We often see that in a well-crafted definition of Hazardous Material, the more general definition of Legal Requirement or Law can be substituted to cure the issue of circular definitions.

The example provision, when read literally, is extremely broad: Hazardous Material is, in essence, any material regulated by any Governmental Body. Clearly this reaches well beyond what most environmental practitioners would intend to be included in the universe of hazardous materials. Often, similar definitions will reference Environmental Law or the concept that it is a material regulated because of its effects on human health through environmental exposure. The example provision also raises issues about clarity when it incorporates materials "foreseeably" regulated. This aspect introduces ambiguity into the definition. However, it is a valid consideration regarding materials that are on the cusp of regulation. Counsel familiar with environmental laws and pending developments can evaluate a particular transaction and can include specific terms to address pending developments.

Another area where the definition should be tailored is to account for variability in state law. For example, Texas regulates "solid waste," a term which is not included in the laundry list of the example.⁶² Other states may define their universe of regulated materials with reference to different terms.

59 *Id.*

60 *Id.*

61 *See id.*

62 *See* TEX. HEALTH & SAFETY CODE ANN. §§ 361.001–.992.

B. REPRESENTATIONS AND WARRANTIES

In most stock purchase agreements, the key liability allocation terms are the representations and warranties. Indemnities are often tied to breaches of the representations. In drafting representations, it is critical that the drafter understand how the representations will play into other liability transfer provisions, which may be more general in nature.

1. COMMON ISSUES

Representations present some common issues that are not unique to a single environmental representation.

Schedules. Scheduling is commonly provided for in the agreement. The scheduling provisions may be found specifically in the environmental representation section or in a more general section. Often the language providing for schedules or for exceptions to the representation may be very general, such as “except as disclosed in the reports provided to Purchaser.” Purchasers will generally want more specific information so that carve outs are clearly identified. Drafters need to understand how scheduled exceptions impact, for instance, indemnifications. Scheduled items may need to be specifically addressed in the transaction, perhaps through purchase price reductions, specific post-closing obligations or specific indemnification obligations.

Knowledge. Knowledge qualifiers on representations are often another area of contention and are usually highly negotiated. If a knowledge qualifier is to be used, it is important to understand whether it is confined to particular individuals and whether those individuals have involvement in the businesses environmental operations. It is also important to understand how a knowledge-qualified representation impacts the risk transfer contemplated by an indemnity for breaches of representations.

Materiality. In general, sellers will find it beneficial to qualify representations to items that are material. However, the drafter needs to understand how a materiality limitation will impact indemnification obligations as well as any threshold or “basket” limitations on the indemnity.

Overlapping Provisions. Many of the environmental representations may overlap with other representations in the agreement. For example, a representation about environmental compliance will likely overlap with the more general compliance representations. The provisions are often reconciled by specifically excluding environmental matters from other more general representations or by including a provision indicating that the environmental representation section is the sole representation on environmental matters. However, such exclusions should be used with caution as they could result in environmental matters inadvertently being excluded from representations where they should be included.

2. COMPLIANCE

Most agreements will contain some compliance representation:

Each Acquired Company has at all times complied with all Environmental Laws.

From the perspective of the purchaser, a compliance representation is a key point. Purchasers are interested not only in current compliance but also in past compliance, especially where the possibility of repetition exists. Past compliance is a much more significant issue in a stock transaction, where liabilities for past non-compliance remain

with the target company. Sellers often push to limit the representation to a particular time frame or place materiality limits on the representation.

Agreements often contain separate representations about permits required under environmental laws. Although a representation on compliance will encompass a representation about having and being in compliance with all required permits, it may be useful to break out environmental permits or to have a schedule of environmental permits. Additionally, consideration should be given to including representations about pending modifications or renewals. Stock purchasers may also seek representations that the permits will not need to be transferred as a result of the transaction. If seller is making a representation on permit transfers, an experienced environmental practitioner should review the requirements to transfer permits to assure that the transaction structure does not trigger a transfer requirement.

Further, it is worth noting that Superfund liability is not premised upon a violation of environmental law; rather, it arises from the release of a hazardous substance.⁶³ As a consequence, the compliance representation does not cover Superfund-type liabilities.

3. SUPERFUND-TYPE LIABILITIES

Agreements will generally have some representation regarding the condition of any real property association with the transaction:

There is no Hazardous Material present on or under the Facilities or, to the Knowledge of Sellers, any geographically, geologically, hydraulically or hydro-geologically adjoining property ("Adjoining Property").

Many agreements will use the term "release" of Hazardous Materials, rather than the mere presence of Hazardous Materials. It is possible, however, for Hazardous Materials to be present without a release, *e.g.*, naturally occurring radon and asbestos in buildings, so the addition of the term "present" may be worthwhile to be sure those circumstances are covered.

Of particular importance is the scope of which property – *i.e.*, the Facilities – will be covered by the representation. If the potential exists for acquiring the liabilities of the seller, as would be the case in a stock purchase or merger, the purchaser would want to obtain a representation concerning conditions at both currently and formerly owned or operated properties as well as releases at facilities used to manage wastes generated from present or formerly owned or operated properties. As noted, generators of hazardous substances that have disposed of their wastes off-site may have liability under Superfund.⁶⁴

Sellers, in giving this representation, would want to be cautious about the representations they are making about nearby facilities, and about facilities with which they have no current involvement. Sellers often attempt to limit representations about former facilities and off site disposal to whether they have received notices of releases or contamination.

4. NOTICE OF ENVIRONMENTAL LIABILITY

Agreements will usually address pending claims and notices:

63 See 42 U.S.C. § 9607.

64 *Id.* § 9607(a)(3).

No Seller or Acquired Company or any other Person for whose conduct any of them is or could be held responsible has received any Order, notice, or other communication (written or oral) relating to any actual, alleged, or potential violation of or failure to comply with any Environmental Law, or any actual or potential claim of liability under Environmental Law.

There are no pending or, to the Knowledge of Sellers, threatened claims arising under or pursuant to any Environmental Law, with respect to or affecting any of the Facilities or any other asset owned or used by any Acquired Company or in which it has or had an interest.

From the perspective of the purchaser, it is useful to have a representation stating that there are no pending claims or litigation. The representation might go further and assert that seller is not aware of any facts that could give rise to a claim or litigation. Sellers would need to be mindful of limitations on their ability to determine if they have received “oral” communications; many sellers will want to qualify any representation about oral communications to seller’s knowledge.

As noted above, the definition of Environmental Law may or may not include the common law. However that definition may be drafted, it would be important from a purchaser’s perspective that a representation about notices or pending matters encompass common law causes of action associated with Hazardous Materials.

C. REMEDIES

Most agreements will include provisions, usually indemnity provisions, allocating responsibility for environmental liabilities, whether those are known or unknown. Generally, this allocation is made in the context of the general indemnities. In appropriate cases, environmental matters may be dealt with specifically in the general indemnity or with a stand alone environmental indemnity. Risk allocation provisions are often the most heavily negotiated provisions in a transaction and are very transaction specific. Below are two different versions of indemnity – a general indemnity and a specific environmental indemnity – followed by a discussion of key points in the indemnities.

Sellers, jointly and severally, shall indemnify and hold harmless Buyer, the Acquired Companies, and their respective Representatives, shareholders, Subsidiaries, and Related Persons (collectively, the “Buyer Indemnified Persons”) from, and shall pay to Buyer Indemnified Persons the amount of, or reimburse Buyer Indemnified Persons for, any Loss that Buyer Indemnified Persons or any of them may suffer, sustain, or become subject to, as a result of, in connection with, or relating to:

(a) any Breach of any representation or warranty made by Sellers in this Agreement;. . .

An alternative:

Sellers, jointly and severally, shall indemnify and hold harmless Buyer Indemnified Persons from, and shall pay to Buyer Indemnified Persons the amount of, or reimburse Buyer Indemnified Persons for, any Loss (including costs of any Cleanup) that Buyer Indemnified Persons or any of them may suffer, sustain, or become subject to, as a result of, in connection with, or relating to:

(a) any liability under Environmental Law arising out of or relating to:

(i) (A) the ownership, operation, or condition at any time on or prior to the Closing Date of the Facilities, or (B) any Hazardous Material that was present on or at the Facilities at any time on or prior to the Closing Date; or

(ii) any Hazardous Material, wherever located, that was generated, transported, stored, treated, Released, or otherwise handled by any Acquired Company at any time on or prior to the Closing Date; or

(b) any bodily injury, property damage, or other damage of or to any Person, in any way arising from or allegedly arising from any activity related to Hazardous Materials conducted with respect to the Facilities or the operation of the Acquired Companies on or prior to the Closing Date or from Hazardous Material that was:

(i) present on or prior to the Closing Date on or at the Facilities, or

(ii) Released by Sellers or any Acquired Company or any other Person for whose conduct they are or may be held responsible, at any time on or prior to the Closing Date.

In analyzing any indemnity, there are three key components: the trigger, the scope and the resulting indemnity obligation. For example, in both examples, the trigger is a loss by the Buyer. Some indemnities will try to limit the trigger to a third party claim. When the limitation of indemnity to third party claims is generally a business point, but we often see some form of third party trigger when there is a known condition that the parties have been unable to quantify but for that they are not terminating the transaction.

In terms of scope of the indemnity, many factors discussed elsewhere in the paper come back into play. In the first alternative, only a breach of a representation, with whatever limitations may have been negotiated, will be covered. It is important to note, however, that many agreements will contain provisions in the indemnity provisions that eliminate various limitations in the representations purely for the purposes of the indemnity provisions. Thus, while the compliance representation may have been materiality qualified, the indemnity provisions may allow the indemnified party to claim an indemnity for noncompliance even if immaterial.

In the second alternative, for example, the scope is broad, covering all types of claims, and an array of environmental related liabilities. But this second alternative may also cover former facilities, off site disposal, and common law claims associated with Hazardous Materials. The second example is clearly broader in terms of scope and reflects a different approach to indemnity. One item to note about the second example is that it is independent of the representations, making limits (such as knowledge and materiality) on those representations or items scheduled against the representations of lesser importance to a purchaser because they would not be carried over into the exclusions or limitations on the indemnity.

The resulting indemnity obligation is also subject to significant negotiation. Most indemnities will include obligations to indemnify and defend the indemnified party, not only for damages but also for other expenses such as attorney fees. It is also important to identify who receives the benefit of the indemnity. If the indemnified party is a corporation, the parties should consider if the indemnification should extend to directors, officers, managers, and shareholders. Equally important is the entity giving the indemnification; the indemnified parties should consider whether the indemnifying party is sufficiently viable to make the indemnity.

1. KNOWLEDGE OF INDEMNIFIED PARTY

The right to indemnification, payment, reimbursement, or other remedy based upon any such representation, warranty, covenant, or obligation will not be affected by any investigation (including any environmental investigation or assessment) conducted or any Knowledge acquired at any time, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy or inaccuracy of, or compliance with, such representation, warranty, covenant, or obligation.

The parties should consider whether the knowledge of the Purchaser impacts the purchaser's right to an indemnity claim. In cases where the purchaser has conducted extensive due diligence, the purchaser may have knowledge of items that would form the bases of an indemnity claim. The example provision is a purchaser friendly provision, and does not penalize purchaser for items it may discover during due diligence. Sellers would likely want the exact opposite provision, thus forcing purchasers to come forward with any information prior to closing so that the parties can negotiate a resolution.

2. OTHER LIMITATIONS

Survival. Most agreements will contain some specific time limit addressing the survival of representations or survival of indemnity obligations. Often those survival provisions reference the statute of limitations. In the context of environmental matters, there are many types of matters that have no effective statute of limitations. For example, some remediation statutes have no statute of limitations; others will delay the commencement of the running of limitations until a condition is discovered or until a remediation begins or is completed. Thus, for sellers seeking a definite time frame to the indemnity obligations, the wording of the survival provisions must be carefully considered.

Cleanup standard. When an indemnity will cover remediation of contamination, the parties need to consider whether the agreement should specify a standard for the remediation. In many remediation programs, the remediation programs are risk-based programs, providing for a range of potential cleanup standards depending upon the restrictions, both physical and institutional, that a party is willing to place on the property being remediated. Sellers will often want to limit the indemnity to the least stringent standard permitted under law and consistent with the use of the property as of the closing.

Control. Similarly, many sellers will want to maintain control of a remediation that is covered by an indemnity. For buyers, allowing the seller to control a remediation raises issues about access to the buyer's facility and interference with Buyer's ongoing operations.

3. EXCLUSIVE REMEDIES

At the end of a transaction, it is likely that after the pricing terms, the indemnity obligation and limitations have received the most time and attention. Seller's intent usually is that if there is a problem post-closing, the buyer's remedy is found within the transaction documents. Most agreements will have a general clause saying in essence that the buyer's sole remedy for matters arising from the transaction is the indemnity. In the context of environmental law, this type of general provision does not clearly limit the buyer to the indemnity in the agreement. For many types of remediation claims, environmental law provides a statutory cause of action, which would be independent of

“matters arising from the transaction.” Sellers should consider sole remedy language that specifically addresses (and waives claims for) environmental matters.

4. EXPRESS NEGLIGENCE

Texas is an “express negligence” state.⁶⁵ The Texas courts have held that:

[T]he express negligence doctrine provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms. Under the doctrine of express negligence, the intent of the parties must be specifically stated within the four corners of the contract.⁶⁶

This holding has been extended to the allocation of strict liability of an indemnified party.⁶⁷ Thus, parties should consider language specifying that the indemnity is allocating this type of liability. Texas is not unique in its express negligence doctrine.

D. OTHER TERMS

1. ACCESS

Where Purchasers are performing due diligence, access will need to be addressed.

Prior to the Closing Date, and upon reasonable notice from Buyer, each Seller shall, and shall cause each Acquired Company to, (a) afford Buyer and its Representatives and prospective lenders and their Representatives (collectively, “Buyer Group”) full and free access, during regular business hours, to each Acquired Company’s personnel, assets, Contracts, and Records, In addition, Buyer shall have the right to have the Real Property and the tangible personal property of each Acquired Company inspected by Buyer Group, at Buyer’s sole cost and expense, including the performance of subsurface or other intrusive testing.

The ability to conduct wide ranging due diligence is critical for a purchaser to be able to indentify potential liabilities. And obviously the parties need to be able to take the results of the investigation into account, as discussed above. Key considerations in drafting is whether intrusive sampling will be freely allowed or whether seller must consent to the sampling, what conditions will be placed on access, how will damages caused during access (including exacerbation of existing conditions) be handled, and how will wastes generated from the investigation (soil cuttings, purge water) be handled.

2. POST-CLOSING COOPERATION

The buyer will likely want to include some provision in the agreement addressing seller’s post closing cooperation with the seller. For example, the buyer may need to have seller’s cooperation in transferring permits after closing or in making required filings.

65 Ethyl Corp. v. Daniel Construction Co., 725 S.W.2d 705 (Tex. 1987).

66 *Id.*

67 Fina Ins. v. Arco, 200 F.3d 266 (5 Cir. 2000).

III. CONCLUSION

Environmental laws are complex, far-reaching and potentially very significant to many types of business transactions. Those drafting environmental provisions in transaction documents should be able to both identify the particular environmental risks applicable to the transaction and to address those risks in the transaction documents.

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TIERRA Y VIDA: HOW ENVIRONMENTAL INJUSTICE HAS ADVERSELY IMPACTED THE PUBLIC HEALTH OF RURAL BROWN POPULATIONS IN SOUTH TEXAS

BY ANIETIE MAUREEN-ANN AKPAN

I.	Introduction	321
II.	The Development of Texas <i>Colonias</i>	322
	A. Poverty’s Integral Role in Sustaining the Subordinate Collective Health of Colonia Residents	323
	B. How “Natural” Environment Also Creates Obstacles for South Texas Residents to Maintain Good Health	324
III.	The Texas Health & Safety Code—Examining an Existing Remedy Not Stringently Enforced.....	327
IV.	Poison in the Farm Lands: How Exposure to Pesticides Has Impacted the Health of Farm Workers	328
	A. Racist Practices that Perpetuate the Expendability of Latino Farm Workers and the Environmental Health of their Residential Communities.....	329
	B. The Inefficiencies of the Texas Agriculture Code.....	330
V.	The Constitutional Right to a Clean, Green Living Environment	332
VI.	Environmental Racism’s Legacy Beyond <i>Colonias</i>	334

I. INTRODUCTION

*“The woman screams at the windy day;
Her children play in the acid rain.
The water is green and the sky is brown;
the cars and buildings, all broken down.”¹*

You look outside your window and your eyes fall upon a dismal panorama. Piles of burning garbage, erected like proud mountains across the yard.² Cockroaches scuttle across the dirt-packed roads.³ Mosquitoes hover over pooling sewage.⁴ It is a sight that is

1 ADRIAN BELEW, *Only A Dream, on INNER REVOLUTION* (Atlantic 1992).

2 See Emily Ramshaw, *Major Health Problems Linked to Poverty*, N.Y. TIMES, July 10, 2011, at A21A.

3 See *id.*

4 *Id.*

not uncommon for you; you do not live in white-picket-fence suburbia and you do not live in an urban metropolis. You live in a *colonia*,⁵ an impoverished community sitting on the U.S.-Mexico border in South Texas.

A unique ecology exists in *colonias* that links environmental health to poverty and race. This distinctive intersection has placed rural Latinos at the bottom of the public health hierarchy in the United States. This essay addresses the interplay between racial identity, class, and environmental racism that has caused rural working-class Latinos to be especially vulnerable to environmental hazards and thus adversely impact their population's general public health.

By examining the collective public health of *colonia* residents, the unjust working conditions of Latino migrant farm workers, and the lax regulatory government provisions that have failed to protect these communities, this essay contends that rural working class Latinos should be branded as a suspect class due to their unique experience of being marginalized by environmental racism.

II. THE DEVELOPMENT OF TEXAS COLONIAS

Texas *colonias* were first established in the 1950s, when developers converted agriculturally useless land into unincorporated subdivisions.⁶ The majority of *colonia* residents are low-income or working-class individuals where the "limited supply of adequate, affordable housing in the cities" make it difficult for them to find a place to reside.⁷ The low cost of property, coupled with the lack of administrative supervision of the property by developers, make the *colonias* a feasible and attractive housing alternative.⁸ When individuals purchase property in the *colonias*, they are merely procuring land,⁹ with no proper sewage system, electric wiring, or any other basic amenities.¹⁰ As a

5 "Colonias are usually characterized as rural or semirural slums inhabited mostly by Mexican-origin immigrants and Mexican Americans." THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION 205 (Robert D. Bullard ed., 2005). "Colonias are rural communities located within 150 miles of the US-Mexican Border. They often lack the basic necessities most Americans take for granted—running water, electricity, and paved roads. These mostly unincorporated communities began to be developed in the 1950s and continue to exist for a variety of reasons, such as poor land use regulations. Without safe, sanitary and affordable housing, drinkable water, sewer and drainage systems, colonias struggle with issues often associated with 'Third World' countries." *Facts About Farmworkers and Colonias*, U.S. DEPT. OF HOUS. AND URBAN DEV., <http://www.hud.gov/groups/farmwkercolonia.cfm>, (last updated Mar. 6, 2008).

6 *Colonias FAQs (Frequently Asked Questions)*, TEX. SEC'Y OF STATE, <http://www.sos.state.tx.us/border/colonias/faqs.shtml> (last visited Apr. 11, 2013).

7 *Id.*

8 *See id.*

9 Land for *colonias* is mostly acquired by "contracts for deed." *Colonias Contracts*, UT LAW: THE MAGAZINE OF THE UNIVERSITY OF TEXAS SCHOOL OF LAW (DEC. 2012), available at <http://www.utexas.edu/law/magazine/2012/12/10/colonias-contracts/>; see also *Contracts for Deed Alive and Well in Texas, New Study Shows*, UNIV. OF TEXAS AT AUSTIN (Oct. 16, 2012), <http://www.utexas.edu/news/2012/10/16/contracts-for-deed-alive-and-well-in-texas->

result, homes in *colonias* often resemble shantytowns¹¹ in various stages of development, some “with no foundations, no floors, no windows, doors or walls”¹² that are dangerous or inadequately operated.

A. POVERTY’S INTEGRAL ROLE IN SUSTAINING THE SUBORDINATE COLLECTIVE HEALTH OF COLONIA RESIDENTS

The factors that attract these individuals to *colonias* are the very same factors that have created a third-world public health epidemic for its residents. Cheap housing on undeveloped property unfortunately equates to lack of access to basic infrastructure that would otherwise shield individuals from health risks that are less present in suburban, developed communities.¹³

Individuals who live in *colonias* have been classified by the state of Texas, for example, as having a much higher health risk.¹⁴ This diagnosis is prevalent in all border states where *colonias* are present.¹⁵ Such health risks yield from a composite of environmental challenges existing in *colonias*;¹⁶ the biggest cause of these health problems, however, are caused primarily by the lack of proper sanitation systems or waste management programs.¹⁷ Consequently, *colonia* residents have had a high rate of ailments such as asthma, lice infestations, and even leprosy.¹⁸ Studies show that diseases “such as salmonellosis, dysentery, [and] cholera . . .” are also common.¹⁹ The adverse impact of the public health of *colonia* residents stems from an origin that is multi-pronged: first, from the structures of their households and, second, from the outside surroundings.

As mentioned, housing in *colonias* is severely substandard, and is, in fact, analogous to those of third-world shantytowns. This is due primarily to the economic hardships

new-study-shows/. This acquiring of land is often informal and unrecorded, hindering formal title to the property to be transferred to *colonia* residents. *Id.*

10 *Colonias FAQs*, *supra* note 6.

11 *See Facts About Farmworkers*, *supra* note 5 (asserting that “colonias struggle with issues often associated with ‘Third World’ countries”).

12 Emanuella Grinberg, *Impoverished border town grows from shacks into community*, CNN U.S. (July 9, 2011, 3:57 PM), http://www.cnn.com/2011/US/07/05/texas.colonias/index.html?hpt=hp_c1.

13 *See id.* (discussing the slow process of incorporating basic infrastructure in many Texas *colonias*).

14 FED. RESERVE BANK OF DALLAS, TEXAS COLONIAS: A THUMBNAIL SKETCH OF CONDITIONS, ISSUES, CHALLENGES AND OPPORTUNITIES 12, *available at* <http://www.dallasfed.org/assets/documents/cd/pubs/colonias.pdf>.

15 *See* HOUSING ASSISTANCE COUNCIL, BORDER COLONIAS OVERVIEW 4 (1998), *available at* <http://www.ruralhome.org/storage/documents/bordercoloniascs.pdf> (stating that *colonias* are located in California, Arizona, New Mexico and Texas and all are characterized by the same qualities of “high poverty rates and substandard living conditions.”).

16 Environmental challenges in *colonias* include, “lack of access to potable drinking water.” *Id.* at 1. Unpaved roads, the absence of flood control and other types of basic infrastructure, could also be characterized as environmental hazards. *See id.* at 11-20.

17 *See id.* at 1-3.

18 Ramshaw, *supra* note 2.

19 BORDER COLONIAS, BORDER COLONIAS OVERVIEW 43, *available at* <http://www.ruralhome.org/storage/documents/coloniasoverview.pdf>.

that are highly prevalent in these communities.²⁰ Poverty has played an integral role in the lack of housing development in *colonias*. Most of the homes are built from substandard materials, thus creating homes that “rang[e] from used trailers to cinderblock and plywood structures.”²¹ The use of such materials creates significant health hazards, Although state and federal agencies have established specific standards to enforce safety and sanity in the households,²² these agencies ignore the fact that the majority of *colonia* residents are severely poor and cannot afford the materials needed to construct a proper home.²³ Lack of proper electrical wiring systems to sustain an air-conditioning system, for example, force residents to keep their doors and windows open. This has resulted in ailments such as Dengue fever and Lyme disease that are carried by insects who fly in through these open windows.²⁴

B. HOW “NATURAL” ENVIRONMENT ALSO CREATES OBSTACLES FOR SOUTH TEXAS RESIDENTS TO MAINTAIN GOOD HEALTH

The environment itself, although “natural,” has a disparate impact on certain communities as opposed to others due to the social vulnerabilities of those individuals.²⁵ Although a proper environmental infrastructure is necessary to mitigate public health issues in the *colonias*, the natural environment also poses significant health problems for these individuals standing on its own.

Colonias are primarily located on the U.S.-Mexico border, a desert-like, arid region where frequent summer rains cause flooding²⁶ and daytime temperatures can reach to

20 See THE COLONIAS READER: ECONOMY, HOUSING, AND PUBLIC HEALTH IN U.S.-MEXICO BORDER COLONIAS 17 (Angela J. Donelson & Adrian X. Esparza eds., 2010) (“[M]edian household income in border counties lags well behind the country as a whole. On average, residents in these counties earned \$14,458 less than across the country . . .”).

21 *Id.*

22 *Colonia Housing Standards*, TEXAS DEP’T OF HOUSING & COMMUNITY AFFAIRS, <http://www.tdhca.state.tx.us/oci/chs.jsp> (last visited Feb. 24, 2013).

23 “Low-income residents, attracted by low prices, have purchased these small lots and constructed their own homes, using available materials and adding to them when possible.” BORDER COLONIAS, *supra* note 19, at 41.

24 Ramshaw, *supra* note 2.

25 Guillermina G. Núñez-Mchiri, *The Political Ecology of the Colonias on the U.S.-Mexico Border: Human-Environmental Challenges and Community Responses in Southern New Mexico*, 24 S. RURAL SOCIOLOGY 67 (2009), available at <http://www.ag.auburn.edu/auxiliary/srsa/pages/Articles/SRS%202009%2024%201%2067-91.pdf>.

26 Flooding in the Texas-Mexico border for example, has been so severe as to place some communities underwater. See Scott Nicol, *New Border Walls Designed to Flood Texas Towns*, TEXAS OBSERVER (July 11, 2012, 9:31 AM), <http://www.texasobserver.org/new-border-walls-designed-to-flood-texas-towns/>; *Major Rio Grande Flooding in Starr, Hidalgo*, NAT’L WEATHER SERVICE WEATHER FORECAST OFFICE, http://www.srh.noaa.gov/bro/?n=2010_event_julyriograndeflood (last modified Aug. 16, 2010, 6:08 PM) (discussing incidents in flooding in Rio Grande Valley, Texas); Veronica M. Cruz, *Storms head toward Tucson, Flood Nogales*, ARIZONA DAILY STAR, Aug. 17, 2012, http://azstarnet.com/news/local/storms-head-toward-tucson-flood-nogales/article_84b61356-e894-11e1-ba4a-001a4bcf887a.html (discussing flash floods in Nogales, AZ, a town on the border U.S.-Mexico border that houses a *colonia* community).

triple digits.²⁷ Therefore, for the *colonia* community, local climate is tied intrinsically to the way individuals conduct their everyday lives.²⁸ It not only impacts their behavior and labor opportunities, it has an immensely strong link to health concerns as well.²⁹ Asthma and bronchitis are frequent ailments in *colonias* due to agricultural dust that invades homes from various farming fields.³⁰ Even casual activity such as taking a leisurely walk can be hindered due to fear of “the health impacts of the intense desert heat, the high winds, and even the possibility of being bitten by a rattlesnake.”³¹ This latter example illustrates a unique conception of not only how the local natural environment (here, climate) can influence one’s outlook on health, but also how local natural environmental influences one’s ability to *maintain* good health.

Although housing and housing materials have caused a significant effect on the public health of rural Latinos living on the border, the disparities in public health are rooted primarily in an inadequate environmental infrastructure, more specifically, by lack of adequate proper sanitation and waste management systems.³²

C. THE ABSENCE OF ENVIRONMENTAL INFRASTRUCTURE IN SOUTH TEXAS

Colonias, as mentioned, have unfortunately become a cesspool of waste due to no waste management programming. As a result, garbage lays freely in the street and in piles on residents’ property. Highly littered property creates a barrier for individuals, especially children, to going out and being physically active,³³ which thus hinders their ability to maintain a proper healthy lifestyle. The rates of obesity in *colonias* among both children and adults are exceedingly high,³⁴ due largely in part to the prominence of garbage and waste in their communities.

Because garbage collection is not available for many *colonias*,³⁵ residents must create ways to rid their neighborhoods of the waste. This is mostly done by the residents burn-

27 See *Border Patrol and Rescue Teams Worry About Hot Temps.*, FOX 2 NEWS AT 9 (Apr. 21, 2011, 7:59 AM), <http://www.foxrio2.com/38858/hot-temperatures-worry-border-patrol-and-rescue-teams/> (noting triple-digit heat index at the U.S.-Mexico border); Hannah Rappleye & Lisa Seville, *Deadly crossing: Death tolls rises among those desperate for the American Dream*, NBC NEWS (Oct. 9, 2012, 5:42 AM), http://openchannel.nbcnews.com/_news/2012/10/09/14300178-deadly-crossing-death-toll-rises-among-those-desperate-for-the-american-dream?lite (pointing out the prevalence of triple-digit temperatures on the border).

28 See Núñez-Mchiri, *supra* note 25, at 84.

29 See *id.* at 83-84.

30 Ramshaw, *supra* note 2.

31 Núñez-Mchiri, *supra* note 25, at 84.

32 See Ramshaw, *supra* note 2.

33 Sandra Lilley, *Building sidewalks to combat childhood obesity*, NBC LATINO (Apr. 4, 2012, 8:36 AM), <http://nbclatino.com/2012/04/19/building-sidewalks-to-combat-childhood-obesity/>.

34 See Ramshaw, *supra* note 2; TEX. NUTRITION & OBESITY POLICY RESEARCH NETWORK COLLABORATING CTR., PROJECT SUMMARY 1, available at <http://srph.tamhsc.edu/centers/cchd/linked-files/currentprojects/noprn.pdf>.

35 See John Quinones, *Hidden America: ‘Forgotten Ones’ Struggle to Survive in Texas’ Barren ‘Colonias,’* ABC NEWS (Apr. 25, 2012), <http://abcnews.go.com/US/hidden-america-forgotten-struggle-survive-texas-barren-colonias/story?id=16213828#.UMqmSm9jquA>.

ing the waste.³⁶ Trash burning has long been studied as a cause of several health (especially respiratory) problems:

[T]rash burning is especially harmful because it releases chemicals that are persistent in the environment, polluting our air, food, lakes and streams. A recent study found that residential trash burning from a single home could release more dioxin into the air than an industrial incinerator. . . . The gases released by trash [] burning can cause breathing irritation. Some of these gases are called aldehydes, which cause strong irritation when they contact the eyes, nose, and throat. Smoke from [] trash contains [] small particles that can be breathed deep into the lungs. Once trapped in the lungs, these particles can cause cell damage. The cell damage can eventually make breathing difficult. . . . However, smoke from burning trash [] can still be harmful if the smoke accumulates near homes.³⁷

Frequent trash burning thus creates a hazardous environment for *colonia* residents, exposing them to various toxins³⁸ that could cause irreversible damage to their health.³⁹ Children and the elderly are most vulnerable to these dangers; children in their youth are still forming their lungs⁴⁰ and weak immune systems coupled with pre-existing respiratory ailments make the elderly especially susceptible to these health risks.⁴¹

Without any local recycling or waste pick-up services, residents have little choice but to burn their wastes. This presents an unfair paradox for *colonia* residents—either leave the waste on their land and be hindered from outdoor physical activity, or burn the waste and be exposed to the various health issues such activity poses.

The problem of waste management does not only encompass the need for garbage pick-up and recycling services. Lack of basic infrastructure means that sewage systems are few and far between. Of the *colonias* in Texas, for example, few communities have water systems, and even fewer have a functioning sewage system.⁴² Exposure to sewage also has health consequences that vary from mild (*i.e.*, aching muscles) to severe (*i.e.*,

36 See *id.*; Ramshaw, *supra* note 2.

37 *Trash and Wood Burning*, WISCONSIN DEP'T OF HEALTH SERVS., <http://www.dhs.wisconsin.gov/eh/hlthhaz/fs/woodbrn.htm> (last updated Sept. 10, 2012).

38 See ENVTL. PROT. AGENCY, THE HIDDEN HAZARDS OF BACKYARD BURNING, available at <http://www.epa.gov/osw/nonhaz/municipal/backyard/pubs/residents.pdf>; *Outdoor Residential Waste Burning*, CAL. ENVTL. PROT. AGENCY, <http://www.arb.ca.gov/smp/resburn/resburn.htm> (last updated Jan. 10, 2013).

39 HIDDEN HAZARDS, *supra* note 38 (stating that such pollutants can have effects on health such as, “asthma, emphysema, or other respiratory illness.” Other effects also include damage to the “nervous system, kidney, or liver damage.” Reproductive and developmental disorders also yield to exposure to burning waste.); see also BROOME CNTY, BACKYARD BURNING AND ITS HEALTH EFFECTS: A FACT SHEET 2 (2002) [hereinafter BACKYARD BURNING], available at http://gobroomecounty.com/files/planning/_pdf/BackyardBurningFactSheet.pdf.

40 BACKYARD BURNING, *supra* note 39, at 2.

41 *Id.*

42 DIANNE C. BETTS, ET. AL, CRISIS ON THE RIO GRANDE: POVERTY, UNEMPLOYMENT, AND ECONOMIC DEVELOPMENT ON THE TEXAS-MEXICO BORDER 69 (1994).

hepatitis).⁴³ In this way, varying illnesses among *colonia* residents are common⁴⁴ and are easily spread in their communities. Although there have been several legislative proposals addressing other needs of *colonias*,⁴⁵ none of them have addressed the need for a waste/sewage management program.

III. THE TEXAS HEALTH & SAFETY CODE—EXAMINING AN EXISTING REMEDY NOT STRINGENTLY ENFORCED

Colonias unfortunately, are *unincorporated* entities within the state. They are not recognized as a municipality and are therefore invisible to state and local government entities. Administration of *colonias* defaults to the counties. Although Texas counties by law are required to provide certain amenities to their constituents, such as properly-licensed hospital facilities,⁴⁶ and are supposed to ensure residents' safety from dangerous infrastructure,⁴⁷ counties are not required to provide waste management and waste control services.

The Texas Health and Safety Code establishes how Texas municipalities should regulate waste control. Section 364 of the Code also discusses Texas counties' role in waste management.⁴⁸ Section 364.012 specifically addresses prohibiting waste disposal in the county if it has a threat to the public safety and welfare of its community.⁴⁹ This, however, demonstrates a cruel irony: the Code clearly delineates in its language that any behavior that would adversely affect a community's welfare is proscribed; yet there is nothing in the Code that states how *lack* of waste disposal programming could *also* pose a threat to the public safety and welfare of its constituents. Until this is acknowledged, the environmental challenges that *colonia* residents face will remain invisible to their political leaders.

For this statute to truly be effective, the Code cannot be under-inclusive. By its language, the Code assumes that most Texans can dispose of their garbage anywhere. *Colonia* residents do not have that privilege.

Section 364.011 of the Code states that a county can indeed regulate solid waste collection and disposal in areas of a county that are *not* in a municipality.⁵⁰ *Colonias* fall

43 *The Hazards of Sewage Backup*, RESTORATION SOS, <http://www.restorationsos.com/education/sewage-backup/the-hazards-of-sewage-backup.asp> (last visited Apr. 13, 2013); see also U. OF KENTUCKY, COLLEGE OF AGRICULTURE, WATER POLLUTION FROM SEWAGE—HOW CAN IT AFFECT MY HEALTH?, available at <http://www.ca.uky.edu/enri/KWAM2007/enri404revised.pdf>.

44 Ramshaw, *supra* note 2.

45 See *Colonia Legislation in Texas*, TEXAS SEC'Y OF STATE, <http://www.sos.state.tx.us/border/colonias/legislation.shtml> (last visited Apr. 18, 2013) (listing several legislative proposals addressing the infrastructural needs of *colonias*).

46 TEX. HEALTH & SAFETY CODE ANN. § 241.021 (West 2011).

47 See *id.* § 752.005 (discussing safety from high voltage power lines).

48 See *id.* § 364 (addressing Texas counties' power to regulate waste control).

49 *Id.* § 364.012.

50 See *Id.* § 364.011.

into the definition of an “extraterritorial jurisdiction of a municipality”⁵¹ and therefore should be protected under the Texas Health and Safety Code.

However, it is not enough to simply enforce the provisions of the Code. There must also be legislation to ensure the program is executed in a way that would not cause additional sanitation and environmental damage to the communities. The concern of the negative effects of constructing landfills, for example, has been substantiated in previous cases.⁵² Texas counties, however, must be cognizant of how a new waste control program is executed to ensure that by doing so, they do not worsen the problem that they are attempting to mitigate.

IV. POISON IN THE FARM LANDS: HOW EXPOSURE TO PESTICIDES HAS IMPACTED THE HEALTH OF FARM WORKERS

“Mom and Dad have worked the fields;
I don’t know how many years . . .
Abuelita talks of sins of man;
Of dust that’s in our hands.”⁵³

Prevalent health issues that many rural Texas Latinos face are endured by those who work as migrant farmers.⁵⁴ Noted as the “second most dangerous occupation in the United States,”⁵⁵ farm workers must endure working conditions that are highly hazardous to their health.⁵⁶ Farm workers come from predominantly Latino⁵⁷ and poverty-stricken communities,⁵⁸ thus sharing the most integral characteristics with residents of *colonias*.

Although there are several health risks for farm workers, including respiratory illnesses,⁵⁹ exposure to water-borne ailments⁶⁰ and even cancer,⁶¹ pesticide-related ill-

51 *Id.*

52 See *Joab Inc. v. Espinosa*, 865 P.2d 1198 (N.M. Ct. App. 1993) (discussing a case in which residents brought to their state’s attention how the construction of a solid waste landfill would harm the living conditions of their neighborhood); Tonya Brown, *Court Ruling Pending in Marlboro County Landfill Fight*, CAROLINALIVE.COM (Oct. 17, 2012, 5:56 PM), <http://www.carolinalive.com/news/story.aspx?id=814247#.UNKvjG9juA> (addressing South Carolina residents’ protest against having a landfill built in their community).

53 TISH HINOJOSA, *Something in the Rain*, on CULTURE SWING (Rounder Records 1990).

54 *The Migrant/Seasonal Farmworker*, MIGRANT CLINICIANS NETWORK, <http://www.migrantclinician.org/issues/migrant-info/migrant.html> (last visited Apr. 16, 2013) (“[M]igrant farm workers . . . suffer mortality and morbidity rates greater than the vast majority of the American population. . .”).

55 See *id.*

56 *About America’s Farmworkers: Occupational Safety and Health*, NAT’L CTR. FOR FARMWORKER HEALTH, <http://www.ncfh.org/?pid=4&page=6> (last visited Apr. 16, 2013).

57 *The Nat’l Agricultural Workers Survey*, U.S. DEP’T OF LABOR, <http://www.doleta.gov/agworker/report/ch1.cfm> (last updated Jan. 11, 2010).

58 Marc D. Stanley, Note, *Rodents for Roommates: Liability Under the Migrant and Seasonal Agricultural Worker Protection Act’s Housing Provision*, 15 DRAKE J. AGRIC. L. 341, 364 (2010).

59 *About America’s Farmworkers: Occupational Safety and Health*, *supra* note 56.

nesses in particular affect rural Latinos disproportionately compared to other Texans.⁶² The problem predominantly lies in a disparate training of how to properly handle pesticides between Anglo and Latino farm workers.

To further explain, studies show that only fifty-six percent of farm workers in Texas have ever received any proper training on safe use of pesticides.⁶³ This data, however, does not reflect any training provided for Latino farm workers, thus showing again how the lack of environmental regulation impacts rural Texas Latinos disparately against other racial communities, as explained below in Part IV.A.

A. RACIST PRACTICES THAT PERPETUATE THE EXPENDABILITY OF LATINO FARM WORKERS AND THE ENVIRONMENTAL HEALTH OF THEIR RESIDENTIAL COMMUNITIES

As emphasized before, pesticides are the most prominent cause of illnesses among farm workers.⁶⁴ As with any hazardous material, proper handling is necessary to ensure safety and protection. Among migrant workers along the border, however, these safety precautions are not enforced as stringently.⁶⁵

Safety labeling, for instance, illustrates this problem. Pesticide warning labels are not required to be in Spanish⁶⁶ and, for many Latino migrant workers, there are no warnings provided at the work site at all.⁶⁷ Therefore, even for those workers who might speak English, they are unable to protect themselves from any hazards accumulating in their workspace. Although the Environmental Protection Agency (EPA) provides safety manuals in Spanish for agricultural workers,⁶⁸ there is no evidence that the EPA monitors provision of these manuals to workers or whether workers conform to its guide-

60 *Id.*

61 Thomas A. Arcury et al., *Pesticide Safety Among Farmworkers: Perceived Risk and Perceived Control as Factors Reflecting Environmental Justice*, 110 ENVIRONMENTAL HEALTH PERSPECTIVES 233 (2002) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1241168/pdf/ehp110s-000233.pdf>.

62 See THE INSTITUTE FOR HEALTH PROMOTION RESEARCH, PESTICIDE POISONING 124, available at http://ihpr.uthscsa.edu/sites/ihpr-drupal/themes/ihpr2/files/So_tx_review/Pesticide_Poisoning.pdf (“South Texas [has] a slightly higher incidence of pesticide-related illness than the rest of Texas, and South Texas Hispanics had an incidence rate that [is] nearly two times higher than that of Hispanics in the rest of Texas.”).

63 *About America’s Farmworkers: Occupational Safety and Health*, *supra* note 56.

64 See generally, *Acute Pesticide Poisoning Among Agricultural Workers in the United States, 1998-2005*, AM. J. INDUSTRIAL MEDICINE (2008), available at http://www.beyondpesticides.org/AJIM_final.pdf (describing pesticide injuries among agricultural workers in the U.S.).

65 See *About America’s Farmworkers: Occupational Safety and Health*, *supra* note 56.

66 Ronnie Greene, *Farmworkers Plagued by Pesticides, Red Tape*, THE CTR. FOR PUB. INTEGRITY, <http://www.publicintegrity.org/2012/06/25/9159/farmworkers-plagued-pesticides-red-tape> (last updated Aug. 17, 2012).

67 Michelle Chen, *Pesticide Threat Looms Large Over Farmworker Families*, IN THESE TIMES (Oct. 20, 2012, 2:50 PM), http://www.inthesetimes.com/working/entry/14055/pesticide-threats_loom_large_over_farmworker_families/.

68 See *Pesticides: Health and Safety*, ENVTL. PROT. AGENCY, <http://www.epa.gov/oppfead1/safety/resource.htm> (last updated May 9, 2012) (showing “*Protejas De Los Pesticidas: Guía Para Los Trabajadores*” as a manual printed in 1993 in Spanish for farm workers).

lines. Nor is there evidence of whether or not these manuals are updated, which is important as new pesticides are frequently developed.⁶⁹ As a result, rural Latino farm workers are not equipped to properly protect themselves from environmental hazards, which perpetuates the disparity of the quality of their collective public health compared to those of other communities.

Pesticide “chemical drift”⁷⁰ is another prominent issue that has impacted the public health of South Texas communities. This phenomenon manifests in the particle or vapor drift from the spraying of pesticides in farming communities.⁷¹ Pesticide drift has the ability to “volatilize into [a] gaseous state and be transported over long distances”⁷² As a result, not only are farm workers exposed to the hazards in pesticides while working, but the mobility of pesticides can adversely impact their families by drifting into their communities and settling into their drinking water and clinging onto their clothes.⁷³ Many residents living in South Texas *colonias* along the border live within a quarter mile of crop fields⁷⁴ with pesticide use frequent in those crop fields.⁷⁵

B. THE INEFFICIENCIES OF THE TEXAS AGRICULTURE CODE

Resolving this problem lies in the statutory protections that are already in place. Chapter 76 of the Texas Agriculture Code serves as the primary statutory provision that addresses the use and regulation of pesticides.⁷⁶ Analogizing to the Texas Health and Safety Code and waste management in *colonias* to the Texas Agriculture Code and pesticide safety management illustrates the inherent inefficiencies of the Texas Agriculture Code in lifting rural Latinos out of the wasteland they have unfortunately become accustomed to living in.

Section 76.184 of the Texas Agriculture Code, for instance, discusses how individuals can visit designated agencies to report injuries or ailments caused by pesticide exposure.⁷⁷ The Code specifically states “[a] person claiming adverse effects from an application of a pesticide may file with the appropriate regulatory agency a complaint report.”⁷⁸ The Code does not explicitly state where or who these agencies are, but the

69 U.S. GEOLOGICAL SURVEY, *Measuring Pesticides and How They Transform in the Environment*, http://toxics.usgs.gov/highlights/pest_deg_methods.html (last updated Jan. 10, 2013, 3:38 PM) (“New and innovative pesticides are being developed . . . every year.”).

70 See generally Kagan Owens & Jay Feldman, *Getting the Drift on Chemical Trespass*, 24 BEYOND PESTICIDES 2, 16 (2004) available at <http://www.beyondpesticides.org/infoservices/pesticidesandyou/Summer%2004/Getting%20the%20Drift%20on%20Chemical%20Trespass.pdf>.

71 *Id.*

72 *Id.*

73 *Hidden Danger: Environmental Health Threats in the Latino Community*, NATURAL RESOURCES DEFENSE COUNCIL, <http://www.nrdc.org/health/effects/latino/english/execsum.asp> (last visited Feb. 24, 2013).

74 Martin Belson et al., *Childhood Pesticide Exposures on the Texas-Mexico Border: Clinical Manifestations and Poison Center Use*, 93 AM. J. PUB. HEALTH 1310, 1313 (Aug. 2003).

75 *Id.*

76 See generally TEX. AGRIC. CODE ANN. § 76.001 (West 2011) (outlining the general provisions of the Texas Agricultural Code).

77 *Id.* § 76.184.

78 *Id.* § 76.184(a).

various regional offices under the Texas Department of Agriculture have served as primary response centers.⁷⁹ There are only *two* of these offices in South Texas,⁸⁰ the very region that needs such resources to adequately protect a community with a predominant farm worker base.⁸¹ Scarcity in proper response centers for pesticide-related illnesses—particularly in a rural community that would benefit from such a resource⁸²—reflects an immense lack of awareness of the living and working conditions of rural Latinos in South Texas.

To be truly efficient in providing environmental protection for rural South Texans, the Texas Agriculture Code should be amended to have an impact on the communities it must protect. First, the Code should require the number of resources mitigating pesticide-related illnesses (*e.g.*, regional offices regulated through Texas Department of Agriculture) to be made available to communities in proportion to a community's *need* for such resources. South Texas, a highly rural region of the state,⁸³ has the fewest of these pesticide-report centers, even though it would seem that this predominant farming land would be the most in need. The Code mandates that the regional offices properly file complaints and reports of pesticide adverse effects;⁸⁴ it does not, however, mandate *the number* of these offices in the state. By implementing such an amendment, the Code would address the disparate lack of environmental regulation in South Texas among its constituents.

Another necessary amendment to the Code correlates to the need for bilingual labeling on pesticides. Amending the Code to require bilingual labeling would properly equip primarily Spanish-speaking farm workers⁸⁵ to protect themselves from exposure to hazardous materials. Section 76.021 of the Code specifically addresses labeling information, discussing the guidelines manufacturers must adhere to as required by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) of what should be placed on the labels, including: the chemical breakdown of the pesticide, the name of the manufac-

79 *Ag Pesticide Complaint Investigation Procedures*, TEX. DEP'T OF AGRIC., <http://www.texasagriculture.gov/regulatoryprograms/pesticides/agriculturalapplicators/agpesticidecomplaintinvestigationprocedures.aspx> (last visited Apr. 19, 2013).

80 *TDA Locations*, TEX. DEP'T OF AGRIC., *TDA Locations*, <http://texasagriculture.gov/Home/ContactUs/TDALocations.aspx> (last visited Feb. 24, 2010); see *The Cities of The Rio Grande Valley*, RIO GRANDE VALLEY COMPLETE, <http://rgvaff.com/RGVcities.html> (last visited Feb. 24, 2013) (listing prominent cities located in the Rio Grande Valley in South Texas).

81 See *Industry Profiles, Texas in Focus: South Texas*, WINDOW ON ST. GOV'T, <http://www.window.state.tx.us/specialrpt/tif/southtexas/sidebars/agriculture.html> (last visited Apr. 20, 2013).

82 See *TDA Locations*, *supra* note 80 (showing TDA locations in Austin, Houston, Dallas, San Antonio and Fort Worth).

83 See U.S. CENSUS BUREAU *2010 Census: Texas Profile*, http://txsdc.utsa.edu/Data/Decennial/2010/SF1/2010_Profile_Map_Texas.pdf (last visited Apr. 20, 2013) (showing that south Texas is one of the less populated areas of the state).

84 See Tex. Agric. Code Ann. § 76.184(a) (West 2011) (providing that “the appropriate regulatory agency” should handle complaint reports).

85 See *About America's Farmworkers: Population Demographics*, NAT'L CENTER FOR FARMWORKER HEALTH, INC., <http://www.ncfh.org/?pid=4&page=3>. (“The predominant language spoken by farmworkers is Spanish (81%) . . .”).

turer, and so on.⁸⁶ There is no discussion under these provisions, however, that addresses the need for these labels to be printed bilingually to meet the needs of a predominantly Spanish-speaking farm labor force. This illustrates yet another glaring omission in the statute that, if addressed, would place rural Latinos on equal footing for environmental protection. *Not* having bilingual labeling perpetuates the institutionalized marginalization of rural Latinos' environmental health.

Although existing regulations generally address the need for pesticide safety, none of them appear to be strictly enforced within *colonia* communities. In this way, governmental protections are not properly extended to this specific class of individuals. Until these bureaucratic entities formulate a better assessment of how communities in South Texas are impacted disproportionately regarding environmental regulations, exposure to pollution, waste and hazardous elements will continue to impact *colonia* residents unjustifiably against other Texans.

V. THE CONSTITUTIONAL RIGHT TO A CLEAN, GREEN LIVING ENVIRONMENT

Although there have been responses to the public health epidemic in South Texas, varying from grassroots social activists⁸⁷ to Texas's members of Congress,⁸⁸ there is still much work to be done. To truly mitigate this issue, one must examine whether there is a fundamental right to live in an environment free of pollutants. The Declaration of Independence states that all individuals have the right to "[l]ife, [l]iberty and the pursuit of [h]appiness."⁸⁹ While this right to life does not include the right to a *high-quality* life, *colonia* residents are owed the benefit of living in a waste-free environment and farm workers are owed working conditions that do not disparately impact their health more than that of other working communities.⁹⁰ Evaluating whether there are any constitu-

86 TEX. AGRIC. CODE ANN. § 76.021 (West 2011).

87 See *Adults and Youth United Development Association (AYUDA)*, MARGUERITE CASEY FOUNDATION, <http://caseygrants.org/grantees/adults-and-youth-united-development-association/> (last visited Apr. 20, 2013) (discussing the objectives of AYUDA, a grassroots organization that "advocate[s] for colonia infrastructure investment"); *Annual Environmental Summit Returns to Valley*, BROWNSVILLE HERALD, Oct. 3, 2012, http://www.brownsvilleherald.com/sports/south_texas_outdoors/article_65abd958-0d7b-11e2-8473-0019bb30f31a.html (describing an annual gathering of community leaders and nonprofit organizations to discuss "health and ecologies" in the Valley).

88 E.g., S.B. 1816, 2011 Leg., 82nd Sess. (Tex. 2011) (showcasing a state bill authored by Senator Judith Zaffirini to enhance the quality of border communities); see *Senator Zaffirini Passes 72 Bills During 2007 Session*, SENATE OF TEX. (June 8, 2007), http://www.senate.gov/judith_zaffirini_summary_of_legislation_passed_by_sen_judith_zaffirini_2_2007.pdf (listing various bills relating to border communities as introduced by Senator Judith Zaffirini).

89 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

90 See Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 459 (2011) (observing that "many people view 'life, liberty, and the pursuit of happiness' as

tional claims that could be used to increase living conditions in *colonias* is one way to address unfair and inadequate living conditions in South Texas.

Living conditions in *colonias* could possibly trigger an equal protection claim. There is an institutionalized bias against this particular community, intentional or not, that has yielded their health as a class to become disparately lower than their Anglo and middle-to-upper class counterparts. Access to a clean environment should be universally accessible by all individuals regardless of class, race or any other social identity.

The constitutional issue presented is two-pronged: first, identifying rural Texas Latinos as a “suspect class” and second, establishing that strict scrutiny should be applied to their case. The Equal Protection Clause under the Fourteenth Amendment states that individuals cannot be deprived of any right secured by the U.S. Constitution, particularly the right to “life, liberty, or property”⁹¹ American constitutionalism has developed legal protection for “suspect classes.” Suspect classes are identified as individuals who have had their constitutional liberties deprived based on their race, religious identity, national origin or alienage.⁹² Renowned cases involving suspect classes include *Brown v. Board of Education*,⁹³ *Loving v. Virginia*⁹⁴ and *Hernandez v. Texas*.⁹⁵

Migrant farmworkers and *colonia* residents should be classified as a suspect class. The lack of waste management services coupled with their identity as a racial minority, a class identified by the U.S. Supreme Court as one that should be afforded the protection as a suspect class, supports a conclusion that they should be afforded additional protection under the law.

If *colonia* residents are established as a suspect class, strict scrutiny would be applied to determine their constitutional protections. The test to meet if a case falls under strict scrutiny is three-pronged. The law or policy must be: 1) justified by a compelling govern-

protecting broad natural rights in addition to the enumerated rights guaranteed by the Bill of Rights”).

91 U.S. CONST. amend. XIV.

92 See *Loving v. Virginia*, 388 U.S. 1 (1967) (discussing race); *Graham v. Richardson*, 403 U.S. 365 (1971) (discussing national origin/alienage); see also Marcy Strauss, *Reevaluating Suspect Classifications*, SEATTLE U. L. REV. 135, 146 (2011).

93 See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (noting the Supreme Court’s holding that the “separate but equal” doctrine is inherently unconstitutional).

94 See *Loving*, 388 U.S. at 12 (stating that “marriage is one of the ‘basic civil rights of man’ and therefore the dismissal of the Lovings’ [interracial] marriage was deprivation of their fundamental liberties).

95 See *Hernandez v. Texas*, 347 U.S. 475 (1954) (addressing the Supreme Court’s holding that the petitioner, an individual of Mexican descent, was entitled to be tried by a jury “from which all members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent.”).

ment interest;⁹⁶ 2) narrowly tailored;⁹⁷ and 3) administered in the least restrictive means.⁹⁸

Requiring counties to implement a waste management program in *colonias* definitely adheres to a compelling government interest, as providing a safe and hazard-free living environment for constituents conforms to maintaining the concept of maintaining their safety and health. Implementing a waste management program is an action taken by the government that is indeed very narrowly-tailored, conforming to the second prong of the strict scrutiny test. The proposed remedy is not elaborate or highly complicated; although reallocation of some state and local resources would be necessary to implement such a program, it is hardly complicated when compared to other governmental programs. In this way, the second prong is fulfilled.

Finally, a waste management program is the least restrictive avenue to mitigate the pollution problem in the *colonias*. Doing so would not interfere with the lives of *colonia* residents; in fact, it would improve their lives. It also wouldn't be a large interference for the government entity administering the program, as counties are already responsible for administering several programs. After establishing an existing suspect class, the next step would be proving discrimination.⁹⁹ The latter is evident through the constitutional contentions already discussed. For the foregoing reasons, the right to reside in a community free of any hazardous elements that may adversely impact a population's public health qualifies as a constitutional fundamental liberty that *colonia* residents as a qualified suspect class have yet to be afforded.

VI. ENVIRONMENTAL RACISM'S LEGACY BEYOND COLONIAS

Environmental justice issues do not only arise along the U.S.-Mexico border. They are also present on American Indian reservations¹⁰⁰ and in urban inner cities with pre-

96 Plyer v. Doe, 457 U.S. 202, 215-17 (1982) (stating that if a fundamental right of a suspect class is impinged upon, then the court will apply strict scrutiny unless the government can show that the classification was narrowly tailored to serve a compelling government interest).

97 Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) ("Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.").

98 See Sherbert v. Verner, 374 U.S. 398, 407 (1963); Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501 541(2005) (noting that the least restrictive means test demands that the government proves that "no alternative forms of regulation" exist that would counter the government's compelling interests or encroach on that fundamental right in contention).

99 See *Hernandez*, 347 U.S. at 480 ("Having established the existence of a class, petitioner was then charged with the burden of proving discrimination.").

100 See Jeffrey R. Cluett, *Two Sides of the Same Coin Hazardous Waste Sitting on Indian Reservations and in Minority Communities*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 191, 197-98 (1999) ("Like many minority communities, Indian reservations have been prime targets of the hazardous waste industry. . ."); Kevin Kamps, *Environmental Racism, Tribal Sovereignty and Nuclear Waste*, NUCLEAR INFO. AND RESOURCE SERV., <http://www.nirs.org/factsheets/pfsejfactsheet.htm> (last visited Feb. 24, 2013).

dominant African-American populations.¹⁰¹ People of color have historically been perceived as more expendable than their Anglo counterparts; lack of environmental regulation in their communities is a clever guise of a racialized form of institutionalized oppression, which only further bolsters that historical narrative. No one likes the word “racism”; however, when fundamental liberties of a marginalized class of individuals are denied, it exemplifies institutionalized discrimination in its purest form.

Have these conditions been allowed because *colonia* residents are poor? Is it because they are Latino? Is it because of both? Either way, the intersection between poverty, race, environmental hazards and substandard health for *colonia* residents appears more than coincidental. Their experiences exemplify how one’s living environment is so closely intertwined to one’s human dignity. Environmental warfare has emerged against the Latino community living on the border. Until their constitutional right against such inaction is recognized, environmental inequality will continue, thus sustaining institutionalized racist parameters that hinder rural working-class Latinos from being afforded the environmental protections they are fundamentally owed.

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Anietie also thanks her parents, Boni and Imoh Akpan and her sisters, Mayen Akpan and Idara Akpan, for their encouragement and love. Anietie wishes to especially recognize her mother, Imoh, and dedicate this piece to her, as she has always encouraged Anietie to use writing as a means to express herself and her passions.

101 See Michelle Chen, *In Our Backyard: Environmental Racism in Dickson*, COLORLINES (Sept. 4, 2009, 4:18 PM), http://colorlines.com/archives/2009/09/in_our_backyard_environmental_1.html; see also M. Patrice Benford, *Life, Liberty, & Pursuit of Clean Air—Fight for Environmental Equality*, 20 T. MARSHALL L. REV. 269, 272–75 (1995); see *Environmental Racism Plagues Black Communities*, BLACK WORKERS FOR JUSTICE, <http://bwfj.live.radicaldesigns.org/article.php?id=99> (addressing the contamination of the water supply of Black communities in North Carolina from animal waste and spray fields); Kai Wright, *Beyond Environmental Justice*, THE ROOT (Apr. 22, 2009, 6:21 AM), <http://www.theroot.com/views/beyond-environmental-justice> (discussing how environmental concerns have become an integral part of the “[B]lack political agenda”).

RECONSIDERING *TAHOE-SIERRA*: TEMPORARY TAKINGS UNDER THE NUISANCE EXCEPTION

BY CASSANDRA R. McCRAE

I.	Introduction	337
II.	Current Jurisprudence on Regulatory Takings	339
	A. Regulatory Takings under <i>Penn Central</i> and <i>Lucas</i>	339
	B. Temporary Regulatory Takings under <i>First English</i> and <i>Tahoe-Sierra</i> ...	342
III.	The Troubled Fit between <i>Tahoe-Sierra</i> and <i>First English</i>	346
	A. The Reasoning and Holding of <i>First English</i> Should be Understood to Apply to the Question Presented by <i>Tahoe-Sierra</i>	346
	B. As a Category, “Temporariness” is Too Manipulable to Credibly Judge Takings Against.....	348
	C. Adding the Temporal Dimension to Consideration of Parcel as a Whole Impermissibly Distracts from Fairness and Justice Concerns ...	350
IV.	Temporary Moratoria and the Nuisance Exception.....	354
	A. Guiding Principles and Limitations.....	354
	1. Uncertainty or Emergency	355
	2. Threatening Risk of Harm	356
	3. Insufficiency of Correct Regulation.....	357
	4. Importance of Maintaining the Status Quo	357
	5. Additional Limitations	357
	B. Reconsidering <i>Tahoe-Sierra</i> Under the Nuisance Exception	358
	C. Considering Future Scenarios: Unconventional Gas Drilling.....	362
V.	Conclusion	366

I. INTRODUCTION

The enactment of laws necessary to protect the public safety and welfare is a fundamental authority entrusted to our governing bodies. This power includes the development of regulation designed to protect the public from harmful uses of private property, an authority long recognized by the courts and expected by the public.¹ This power to regulate is importantly checked by the Fifth Amendment’s requirement to pay compensation for the taking of private property for a public purpose, a requirement that applies whether the taking is accomplished through physical occupation and appropriation or through regulations so restrictive that they have a comparable effect.² As a result of this

1 See *Mugler v. Kansas*, 123 U.S. 623 (1887); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

2 *Pennsylvania Coal*, 260 U.S. at 415.

requirement, governing bodies must recognize before passing regulations that those regulations may come at significant costs. This creates a persistent tension between the perceived need for protective regulations and the ability of the government to fairly pay affected property owners.

There are at least two circumstances that make this tension considerably more difficult to navigate, both for regulators and for courts charged with determining whether a regulation goes so far as to effect a taking. First, where the potential need to regulate is uncertain or undetermined, decisionmakers have difficulty weighing the benefits of regulation against the potential costs of any required compensation. Second, if the regulation in question is a common and generally-accepted exercise of government authority, the practical motivations for passing regulations may distort our willingness to recognize and enforce Fifth Amendment protections. Both of these conditions were present in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,³ where the Supreme Court was asked to consider whether temporary planning moratoria depriving property owners of any economic use of their property amounted to a compensable taking.

This paper revisits *Tahoe-Sierra* to explore the analytical inconsistencies between that relatively practical decision and other regulatory takings jurisprudence, particularly the Court's earlier decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.⁴ In *Tahoe-Sierra*, the Court protected the important practical need to allow the state to avoid compensation requirements for reasonable planning activities by declining to allow categorical regulatory takings when the challenged regulation is a temporary restriction.⁵ Beyond the difficulty of distinguishing between "temporary" and "permanent," as well as the potential for intentional manipulation of these labels, the approach taken in *Tahoe-Sierra* significantly expanded the relevance of the temporal dimension of property rights in a regulatory takings analysis. In so doing, the reasoning in *Tahoe-Sierra* represents a departure from precedents and arguably allows too much latitude to regulators at the expense of property owners.

Rather than avoiding the categorical rule established by *Lucas v. South Carolina Coastal Council*,⁶ that compensation is required where regulation deprives a property owner of all economic use of her property, that categorical rule should apply to temporary and permanent regulations alike. As with most categorical rules, application to temporary takings would be subject to exceptions—most notably *Lucas*' nuisance exception. In circumstances like that presented by *Tahoe-Sierra*, relying instead on the nuisance exception would carry the benefit of avoiding artificial distinctions between prospectively and retrospectively temporary takings, strengthening consistency across regulatory takings decisions and providing a more analytically solid approach sensitive to concerns for fairness and justice.

To illustrate the issue, consider the distinct analysis afforded regulations based on a decision to enact prospectively temporary or permanent regulations in a field with uncertain impacts. If an activity is a known nuisance, or transgresses some other background property principle, then restrictive regulations—even regulations going so far as to ban the activity—could be defended under *Lucas* as an exception to the categorical rule. But

3 535 U.S. 302 (2002).

4 482 U.S. 304 (1987).

5 *Tahoe-Sierra*, 535 U.S. at 321.

6 505 U.S. 1003 (1992).

what if the effects of the activity are too uncertain to assess whether a nuisance would result? In that circumstance, imagine that two jurisdictions pass identical regulations save one distinction: the first jurisdiction enacts a temporary two-year planning moratorium banning the activity and the second enacts an indefinite, or permanent, moratorium. Under existing jurisprudence, if challenged, the first would be analyzed under the multi-factored balancing test developed in *Penn Central Transp. Co. v. New York City*,⁷ yet the second could be analyzed under *Lucas*.

Perhaps this difference is not immediately disconcerting, but of course, as political creations, temporary regulations could be indefinitely extended and permanent regulations may be subsequently repealed or invalidated. Thus, if the second jurisdiction lifts the “permanent” moratorium after two years—rendering its burden on property owners identical to that under the prospectively temporary moratorium in the first jurisdiction—it would nonetheless be subject to a distinct takings analysis. By declining to extend *Lucas* to temporary takings, the Court in *Tahoe-Sierra* opened the door for enactment of equally restrictive, but “temporary” regulations. The impact to property owners during that time is identical, yet the likelihood of requiring compensation as a taking is considerably diminished under *Penn Central*.

This paper explores this inconsistency by first reviewing the existing framework of regulatory takings jurisprudence, with particular attention to *Lucas*, *Tahoe-Sierra*, and *First English*. Next, a closer analysis of *Tahoe-Sierra* and *First English* draws out the principle analytical and theoretical inconsistencies between the two decisions. From this foundation, a theory of how the *Lucas* nuisance exception can be practically applied to temporary takings is developed and applied to two circumstances: first, a reconsideration of *Tahoe-Sierra*; and second, temporary moratoria enacted to restrict unconventional gas drilling. As these arguments seek to demonstrate, rather than rely on temporal components of ownership or regulation, temporary moratoria enacted in response to conditions of uncertainty or emergency can be defended more effectively through reliance on *Lucas*' nuisance exception.

II. CURRENT JURISPRUDENCE ON REGULATORY TAKINGS

A. REGULATORY TAKINGS UNDER *PENN CENTRAL* AND *LUCAS*

The Fifth Amendment to the Constitution, applicable to the states through the Fourteenth Amendment, provides “nor shall private property be taken for public use, without just compensation.”⁸ A physical invasion of private property has long been recognized as a taking under the Fifth Amendment,⁹ and relatively more recently, courts have recognized takings where government regulation so substantially interferes with private property as to essentially affect an appropriation of the property.¹⁰

7 438 U.S. 107 (1978).

8 U.S. CONST. amend. V.; U.S. CONST. amend. XIV.

9 See *Mugler v. Kansas*, 123 U.S. 623 (1887).

10 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (establishing that a regulation may amount to a taking where it “goes too far” in interfering with the rights of private property).

The distinction between physical and regulatory takings has grown from Holmes' famed explanation that, "[t]he general rule at least is that while property may be regulated to a certain extent, *if the regulation goes too far it will be recognized as a taking.*"¹¹ Generally speaking, government action can effect a compensable taking under the Fifth Amendment whether it either appropriates private property directly or enacts such severe restrictions that appropriation essentially, though indirectly, results.¹² However, even with the recognition of regulatory takings, the government maintains the authority to prevent harmful or unsafe uses of property under its police powers.¹³ These restrictions are to be expected under an "implied limitation" coincident to private ownership.¹⁴ As observed in *Pennsylvania Coal Co. v. Mahon*,

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.¹⁵

In the late 1970s, the Supreme Court introduced a multi-factored, fact-intensive balancing test to analyze whether or not a given regulation in fact goes too far, thus requiring compensation.¹⁶ The *Penn Central* factors include the economic impact to the property owner, the degree to which the restriction interferes with reasonable investment backed expectations, and the character of the governmental action.¹⁷ These factors allow a court to consider the balance between the burden(s) a regulation places on a property owner against benefits to the public—a balance that, in most instances, will likely favor upholding the challenged regulations.¹⁸ Though the Supreme Court has repeatedly expressed a preference for a fact-intensive, ad hoc analysis of whether a compensable regulatory taking has occurred,¹⁹ this has not prevented the introduction of a categorical rule avoiding the balance-oriented analysis of *Penn Central*.

In *Lucas v. South Carolina Coastal Council*, the Supreme Court introduced a categorical rule to regulatory takings jurisprudence.²⁰ *Lucas* provided the court with a unique opportunity to consider the question of regulatory taking in light of a lower court finding that the relevant regulation had deprived the property owner of "any reasonable economic use," thus rendering the property "valueless."²¹ Writing for the majority, Justice

11 *Id.* at 415 (emphasis added).

12 *Tahoe-Sierra*, 535 U.S. at 314.

13 *Pennsylvania Coal*, 260 U.S. at 417.

14 *Id.* at 413.

15 *Id.*

16 *Penn Central Transp. v. N.Y.C.*, 438 U.S. 104 (1978).

17 *Id.* at 124.

18 James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After Lucas*, 35 *Ecology L.Q.* 1, 14-15 (2008).

19 See *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) ("As before, the salience of these facts cannot be reduced to any 'set formula.' [] The temptation to adopt what amount to *per se* rules in either direction must be resisted." (citing *Penn Central*, 438 U.S. at 124)).

20 *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

21 *Id.* at 1009.

Scalia used the opportunity to introduce a categorical rule to regulatory takings jurisprudence: “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”²²

The categorical rule in *Lucas* was justified by explaining that, where regulation goes so far as to deprive an owner of all economic use of private property, it can no longer be assumed that “the legislature is simply ‘adjusting the benefits and burdens of economic life’ in a manner that secures an ‘average reciprocity of advantage’ to everyone concerned.”²³ Further, the categorical rule is intended to guard against unfairly pushing private property into “public service under the guise of mitigating serious public harm.”²⁴

Also among the reasons justifying the categorical rule, Justice Scalia raised the impossibility of distinguishing between “harm-preventing” and “benefit-conferring” regulation, describing the distinction as a subjective valuation of competing uses or interests.²⁵ Rather than relying on this subjective valuation, Justice Scalia preferred to turn attention to the burden suffered by private owners, requiring compensation where their rights are so substantially impaired that even purported legitimacy of regulation should not relieve the government of the constitutional duty to pay compensation.²⁶

Not surprisingly, the categorical rule was accompanied by an exception:

Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, *in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership*. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.²⁷

This exception practically requires that a taking analysis begin by determining what rights were included in the property interest prior to the challenged regulation and what uses were already prohibited under background principles of property law and nuisance.²⁸

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with. . . . It seems to us

22 *Id.* at 1019.

23 *Id.* at 1017-18 (internal citations omitted).

24 *Id.* at 1018.

25 *Lucas*, 505 U.S. at 1024-25 (supporting the Court’s departure from inquiring as to whether regulation prevented “noxious” uses—and therefore would not require compensation as legitimate exercises of the police power—on the argument that whether a regulation prevents some harm or confers some benefit is a relative and subjective label).

26 *Id.* at 1028-29.

27 *Id.* at 1029 (emphasis added).

28 *Id.* at 1027-29; see also Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 325 (2005).

that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police power; '[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.'²⁹

The introduction of *Lucas's* so-called nuisance exception has changed the landscape of regulatory takings challenges by creating an opportunity to defeat takings challenges early in litigation and initially engaging the courts in a question of law rather than the murkier task of the multi-factor balancing required under the *Penn Central* takings analysis.³⁰ While the categorical rule in *Lucas* was intended to have only "rare" applicability,³¹ the exception created under that categorical rule has been applied less narrowly than perhaps anticipated. As background principles of property law are largely creatures of state law, the exception has provided an opportunity for States to expand the exception outside the discipline of the Supreme Court.³² States have significantly expanded the background principles defense to include sources such as state statutory law, nuisance, public trust doctrine, natural use doctrine, navigational servitude, customary rights, water rights, and wildlife trusts.³³

B. TEMPORARY REGULATORY TAKINGS UNDER *FIRST ENGLISH* AND *TAHOE-SIERRA*

The analytical approaches to regulatory takings provided by *Penn Central* and *Lucas* were developed as the Supreme Court addressed regulations that were enacted as prospectively permanent regulations.³⁴ How takings should be analyzed where permanent regulatory restrictions are later repealed remained an open question.

29 *Lucas*, 505 U.S. at 1027.

30 Blumm, *supra* note 28, at 367-68.

31 *Lucas*, 505 U.S. at 1018 (explaining that "the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,'—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.") (internal citations omitted) (emphasis in original); see also Lise Johnson, Note, *After Tahoe Sierra, One Thing is Clearer: There is Still a Fundamental Lack of Clarity*, 46 ARIZ. L. REV. 353, 362 (2004).

32 Blumm, *supra* note 28, at 341-58; see also *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972) (Wisconsin Supreme Court rejected a takings challenge relying on the Natural Use Doctrine and concluding that the landowner had no pre-existing property right to change the character of his land by filling in a wetland); *Donnell v. United States*, 834 F. Supp. 19 (D. Me. 1993) (Maine district court rejected a takings challenge relying on navigational servitude under the federal common law explaining that property ownership is subject to "the federal government's control for purposes of navigation and commerce"); *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993) (Oregon Supreme Court rejected a takings challenge relying on the customary public access to dry sand beaches to conclude that plaintiffs had no right to build on the dry sand areas of their property).

33 Blumm, *supra* note 28, at 341-58.

34 The Court in *Penn Central* was asked to consider whether New York City's Landmarks Preservation Law amounted to a regulatory taking. *Penn Central Transp. v. N.Y.C.*, 438 U.S. 104, 107 (1978). Originally enacted in 1965, the Act did not include any temporal

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles presented the Supreme Court with the question of whether the Takings clause requires compensation to be paid for regulatory takings that are temporary in effect.³⁵ In *First English*, the County of Los Angeles had implemented Interim Ordinance No. 11,855 in January 1979 providing that, “[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon”³⁶

The Church owned a 21-acre parcel of land along the Middle Fork of Mill Creek that it operated as a retreat center and recreational area.³⁷ The Church had several buildings in the flat lands along the Creek that were damaged or destroyed during a flood in early 1978, and the Ordinance effectively prevented the Church from replacing any of the structures.³⁸ The Church brought a claim for inverse condemnation and asserted that the Ordinance had deprived it of all use of the property.³⁹ Ultimately, however, the Ordinance was invalidated and the restriction on the property thereby relieved.⁴⁰

Speaking for the majority, Chief Justice Rehnquist explained that “temporary” regulatory takings are not different in kind from their permanent counterparts.⁴¹ In either case, the Fifth Amendment provides a self-executing right for a land owner to bring an action for inverse condemnation where the government allegedly fails to compensate for a taking as provided in the Constitution.⁴² Thus the relevant question was whether the rights of the property owner were so infringed upon that she has been made to unfairly bear a public burden.⁴³ This emphasis on the burden suffered by an individual property owner is comparable to the view of property rights under the Fifth Amendment later relied upon by Justice Scalia in his opinion in *Lucas*.⁴⁴

In *First English*, the court considers “temporary” in terms of the practical effects of the Ordinance.⁴⁵ Thus, although the Ordinance as enacted was open-ended (i.e., enacted without a set expiration), as a result of its eventual invalidation, it only tempora-

limits on its applicability and expressed purposes and intentions that suggested a long-term commitment to preserve the historic character of designated buildings and areas within the city. N.Y.C. ADMIN. CODE § 25-301 (2012). The Beachfront Management Act challenged in *Lucas* similarly did not include any language suggesting only a temporary effect, while expressing a long-term commitment to prevent the continued degradation of the South Carolina’s beach and dune system. S.C. CODE ANN. § 48-39-250 *et seq.* (Supp. 1990).

35 *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 307 (1987).

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.* at 308 (The Church also brought claims alleging that the county was liable for damages from the flood for having created dangerous upstream conditions).

40 *First English*, 482 U.S. at 319.

41 *Id.*

42 *Id.* at 315.

43 *Id.* at 318-19.

44 See Laura S. Underkuffler, *Tahoe’s Requiem: The Death of the Scalian View of Property and Justice*, 21 Const. Comment 727, 731 (2004).

45 *First English*, 482 U.S. at 313.

rily restricted the use of the Church's property.⁴⁶ As already mentioned, however, practical temporariness was not viewed by the court as a meaningful distinction for purposes of determining whether the regulation at hand had imposed on individual property owners "public burdens which, in all fairness and justice, should be borne by the public as a whole."⁴⁷ Where regulation goes so far as to have the effect of appropriating property, whether it did so for two years or an indefinite time period may determine the amount of compensation owed, but not the judgment that some compensation is due:

We merely hold that where the government's activities *have already worked a taking* of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.⁴⁸

Nonetheless, the court did go on to identify two instances where regulation that temporarily deprived an owner of all economically beneficial use might not require compensation: 1) where the government actor is able to establish that "the denial of all use was insulated as a part of the State's authority to enact safety regulations"⁴⁹; and 2) where such temporary burdens are the result of "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like. . . ."⁵⁰ These limitations answered some of the practical concerns that arose with the recognition of a requirement to pay just compensation for even temporary regulatory takings.

While it is also a case on temporary takings, the Supreme Court in *Tahoe-Sierra* was faced with a taking that was "temporary" in a different sense. In *Tahoe-Sierra*, the court was asked to discern whether a temporary development moratorium—a regulation that was fundamentally designed not to be permanent in effect—could, under *Lucas*, amount to a compensable taking.⁵¹

Concerned over the continuing decline of environmental quality at Lake Tahoe, the Tahoe Regional Planning Agency (TRPA) implemented two temporary moratoriums restricting all development around the lake while the effects of development on Lake Tahoe were studied and a plan for responsible development designed.⁵² The two moratoriums effectively halted any construction in specified areas for 32 months in California and for 8 months in Nevada.⁵³ In litigation that ultimately spanned three decades, property owners challenged the development moratoria as takings requiring compensa-

46 See Bryan J. Pack, *Regulatory Takings: Correcting the Supreme Court's Wrong Turn in Tahoe Regional Planning Agency*, 17 *BYU J. PUB. L.* 391, 400 (2003) (explaining that "temporary" can be used either to describe the intended effect of a given regulation or the actual effect of a given regulation).

47 *First English*, 482 U.S. at 319 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

48 *Id.* at 321 (emphasis added).

49 *Id.* at 313.

50 *Id.* at 321.

51 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 (2002).

52 *Id.*

53 *Id.* at 312.

tion.⁵⁴ The varied reasoning relied on by the courts called on to consider the case effectively demonstrates competing applications of regulatory takings jurisprudence.

The District Court in *Tahoe-Sierra* found that, while property owners had retained some value of their property under the regulation, thus making a taking under the *Penn Central* factors unlikely, the property owners had been “temporarily deprived of ‘all economically viable use of their land’” during the moratorium.⁵⁵ Thus, under the Supreme Court’s decisions in *Lucas* and *First English*, the District Court held that even though only intended to be temporary, the development moratoria amounted to a categorical regulatory taking requiring compensation.⁵⁶ This decision by the District Court, while perhaps paying too little attention to the nature of the governmental action in relation to the public interest, ensured that the individual property rights of owners of undeveloped parcels were adequately compensated for burdens endured during the moratorium.

In contrast, the Ninth Circuit determined on appeal that, because only a temporal slice of a fee interest was lost, the categorical rule from *Lucas* did not apply.⁵⁷ Left with only *Penn Central*, the court held that the petitioners had not demonstrated a taking requiring compensation.⁵⁸

On appeal to the Supreme Court, the petitioners did not challenge the outcome under *Penn Central*, instead arguing that any deprivation—even a temporary deprivation—completely stripping the owner of all economically beneficial uses is a *per se* taking under *Lucas* and *First English*.⁵⁹ Ultimately, the argument was unsuccessful, and the Court declined to extend the categorical rule to temporary takings, noting that:

In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither ‘yes, always’ nor ‘no, never’; the answer depends upon the particular circumstances of the case. Resisting ‘[t]he temptation to adopt what amount to *per se* rules in either direction,’ we conclude that the circumstances in this case are best analyzed within the *Penn Central* framework.⁶⁰

The Supreme Court—like the Ninth Circuit—quickly distinguished *First English* by highlighting that the question presented there had not been whether a taking had occurred, but more narrowly whether compensation was a constitutionally required remedy.⁶¹ Distinguishing *Lucas* was another matter. To do so, the Court first looked to the nature of the regulation, asserting that *Lucas* addressed a regulatory taking that “was unconditional and permanent.”⁶² Further, the categorical rule from *Lucas* reached only those rare instances where the entire economic use of the property was lost; otherwise

54 *Id.*

55 *Id.* at 316.

56 *Tahoe-Sierra*, 535 U.S. at 316.

57 *Id.* at 319 (explaining that “regulation that affects only a portion of the parcel—whether limited by time, use, or space—does not deprive the owner of all economically beneficial use.”).

58 *Id.* at 319-20.

59 *Id.* at 320-21.

60 *Id.* at 321 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001)(internal citations omitted)).

61 *Tahoe-Sierra*, 535 U.S. at 328-29.

62 *Id.* at 329 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 (1992)).

determination of whether a regulation affected a taking would require analysis under *Penn Central*.⁶³

Because the moratoria only affected a temporary burden on the property owners, the court reasoned that it could not possibly affect a taking because only a fraction of the owner's total temporal interest would be burdened:

Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' 'conceptual severance' argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'⁶⁴

This discussion of temporal conceptual severance is admittedly satisfying as applied to temporary moratoria and fee simple interests: "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because that property will recover value as soon as the prohibition is lifted."⁶⁵ However, as applied to property interests that do not extend into the future so far as fee simple interests—for example, leaseholds—this analytical approach is less satisfying.

III. THE TROUBLED FIT BETWEEN *TAHOE-SIERRA* AND *FIRST ENGLISH*

Having introduced these cases on regulatory takings, the task remains to reconcile the glaring inconsistencies between the two decisions, most especially with respect to temporariness and treatment of a parcel as a whole. These inconsistencies contribute to a growing doctrinal hodgepodge of regulatory takings. Inconsistency alone might be a concern, but more disconcerting is the realization that the discordant approach taken in *Tahoe-Sierra* turns attention away from the fundamental values underpinning the takings clause.⁶⁶

A. THE REASONING AND HOLDING OF *FIRST ENGLISH* SHOULD APPLY TO THE QUESTION PRESENTED BY *TAHOE-SIERRA*.

Reading the plain language of the decision in *First English*, it is quite possible to follow in the footsteps of the Ninth Circuit and Supreme Court in their respective *Tahoe-Sierra* decisions and conclude that *First English* simply does not apply to the question of whether a temporary taking that deprives a property owner of all economic use amounts to a categorical regulatory taking. As mentioned, *First English* was a procedurally unique opportunity because it allowed the court to examine the constitutionally required remedy without first having to wrangle with the question of whether or not a

63 *Tahoe-Sierra*, 535 U.S. at 330.

64 *Id.* at 331 (quoting *Penn Central Transp. v. N.Y.C.*, 438 U.S. 104, 130, 131 (1978)).

65 *Tahoe-Sierra*, 535 U.S. at 332.

66 See *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

regulatory taking had, in fact, occurred.⁶⁷ Additionally, one might follow the argument made by the United States' Amicus Curiae Brief supporting the TRPA in *Tahoe-Sierra* that *First-English* should be distinguished in part by pointing to language narrowing its ruling to regulation that is temporary in the sense that it is invalidated after enactment: "its decision 'd[id] not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.'"⁶⁸

While it may be simple to rest on these distinguishing characteristics, doing so ignores the broader implications of the *First English* decision and results in the scattered and unfocused regulatory takings jurisprudence we have inherited from the Court. Refocusing this jurisprudence might begin by first boiling *First English* down to a simple proposition: where a regulatory taking has occurred, the government cannot avoid the constitutional obligation to provide just compensation by instead withdrawing the regulation.⁶⁹ When the government is free to withdraw the regulation, it must still compensate the affected property owner for that period of time during which the regulation was active and effectively appropriated that individual's property.⁷⁰ In this first step, we have not yet departed from the Court's reasoning in *Tahoe-Sierra*; our departure begins with the implications of this simple proposition.

While it is formally correct that this holding does not reach the question of how to divine whether a regulation has gone too far, *First English* does plainly signal that it is possible for a regulation that only temporarily interferes with property to be recognized as a taking. The Supreme Court accepted this possibility even when the affected property interest was a fee simple interest notably characterized as having an indefinite temporal dimension. That the regulation had only burdened a mere fraction of the Church's temporal property interest did not absolve the government of the constitutional requirement to pay just compensation for that temporary appropriation.⁷¹

The simple proposition drawn from *First English* also tells us something about the focus of the inquiry commanded by the Fifth Amendment. Fundamentally, the government is not restricted from taking private property by the Fifth Amendment through physical occupation or restrictive regulation.⁷² Instead, the Fifth Amendment provides modest conditions on that legitimate exercise of government authority: public use and

67 *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304, 311-12 (1987) (Noting that the unique posture of the case on appeal allowed the Court to "squarely" confront the constitutional question raised by the *Agins* decision of whether a state could avoid compensation pursuant to the 5th and 14th amendments for temporary regulatory takings); see also *Tahoe-Sierra*, 535 U.S. at 328 ("*First English* was certainly a significant decision, and nothing that we say today qualifies its holding. Nonetheless, it is important to recognize that we did not address in that case the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking.").

68 Brief for the United States as Amicus Curiae Supporting Respondents at *25-26, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (No. 00-1167) (quoting *First English*, 482 U.S. at 321) (emphasis in original).

69 *First English*, 482 U.S. at 321-22.

70 *Id.* at 322.

71 *Id.*

72 U.S. CONST. amend. V.

payment of just compensation.⁷³ The compensation provision, in particular, is understood as being “designed to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole.”⁷⁴ Accordingly, the focus of a taking inquiry is on the burden imposed on the impacted private property owner.⁷⁵ As will be discussed below, *Tahoe-Sierra’s* reliance on the often practically indistinguishable notions of “temporary” and “permanent” as well as the introduction of the temporal dimension into the denominator problem dangerously turn our analytical focus in a direction that is not only inconsistent with *First English*, but is also arguably inconsistent with broader takings jurisprudence.

Granted, *First English* does not supply controlling precedent on the question of how we might recognize a regulation has gone too far, for instance, through application of *Penn Central* factors or *Lucas’s* categorical rule. Nonetheless, it would seem that if abandonment of regulation that effects a taking does not relieve the government of an obligation to compensate the land owner for the taking before its abandonment nor should a prospective legislative intent to abandon a regulatory burden within a period of time relieve the government of an obligation to pay just compensation. Viewed from the perspective of an affected property owner, the burden in either case is quite comparable.

B. AS A CATEGORY, TAKINGS SHOULD NOT BE JUDGED BASED ON “TEMPORARINESS”

Accepting that *First English* bears some relevance to the question in *Tahoe-Sierra*, there are two fundamental frictions between the reasoning in the two decisions. The first is found by considering the practical challenges to determining the appropriate takings analysis on the basis of whether a challenged regulation is either “permanent” or “temporary.” Permanent and temporary, for all their assumed descriptive value, nonetheless remain speculative and imaginative words in many instances. In *First English*, for instance, the challenged regulation was only rendered “temporary” upon its eventual invalidation.⁷⁶ The same can be said of the circumstances in *Lucas*, though the eventual regulatory relief in *Lucas* was not timely enough to shift the court’s characterization from one of permanence to temporariness.

As descriptors, “permanent” and “temporary” may tell us very little about the actual practical impact of a given regulation. This, in turn, gives rise to at least two problems with relying on temporal distinctions to determine whether or not a regulation has effected a taking. The first relates generally to the nature of regulation, while the second more narrowly applies to circumstances where there are a mix of property interests at stake, as for instance, there often would be in takings challenges related to gas drilling.

First, while formal distinctions between forward-looking expectations as to the effect of a regulation offer appealing simplicity, such a formal distinction threatens to miss the substantive effects of regulation. For example, the treatment of the regulations in *Lucas* and *First English* as permanent and the regulation in *Tahoe-Sierra* as temporary amounts

73 *Id.*

74 *First English*, 482 U.S. at 318-19 (quoting *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960)).

75 *First English*, 482 U.S. at 319; see also *United States v. Causby*, 328 U.S. 256, 261 (1946) (“It is the owner’s loss, not the taker’s gain, which is the measure of the value of the property taken.”).

76 *First English*, 482 U.S. at 319.

to something of a fiction. This fiction is not dissimilar from the difficulty of distinguishing temporary as opposed to permanent physical occupations as warned by the dissent in *Loretto*.⁷⁷ In *Loretto*, the “permanence” of the installation of cable boxes was assumed, despite nothing in the statute requiring the cable installation be present “forever.”⁷⁸ In part, this fictional assumption is appropriate as potential indefiniteness will determine the depreciation of property value, if any.⁷⁹ Thus, whether or not indefinite or permanent occupation actually results, the private property interest will be harmed as though that will occur.⁸⁰

That said, it must not be forgotten that one critical feature of legislation is that it can be undone. Regulation enacted today without any embedded sunset date may nonetheless be undone through our administrative, legislative, and judicial processes. As noted above, the regulation in *Lucas* that prevented the owner from receiving any building permit was, in fact, later amended to allow some economic uses, yet the court proceeded to treat the regulation as permanent.

Even more troublesome, legislation is not only malleable after adoption, it is manipulable before adoption. Applying a distinct takings analysis on the basis of how a regulation is characterized may well provide a perverse incentive for decisionmakers to artificially characterize regulations as temporary, even when an indefinite regulatory burden is desired.

A recent New York decision invalidating a two-year law banning natural gas drilling in the City of Binghamton, while not a takings challenge, is nonetheless instructive on this point.⁸¹ In *Jeffrey v. Ryan*, the City of Binghamton passed a law banning natural gas drilling.⁸² The law included an expiration date 24 months after its enactment, hence rendering it temporary.⁸³ Though the City Council understood the law to operate as a moratorium on drilling, it was nonetheless passed as a general law thus avoiding the local process requirements for the enactment of a moratorium, namely that the action be:

1. In response to a dire necessity;
2. Reasonably calculated to alleviate or prevent a crisis condition; and
3. That the municipality is presently taking steps to rectify the problem.⁸⁴

The ban used language asserting that “gas exploration and extraction are incapable of protecting the health and safety of the residents,” suggesting to the court that the City did not expect to ever be able to address the threat and lift the ban.⁸⁵ The court’s assessment was further supported by the fact that the City was “not engaging in any investigation, studies or other activities in the interim in order to determine if there is a way to alleviate any harm to the people of the city from this future activity.”⁸⁶ Ultimately, the

77 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982) (Blackmun, J., dissenting).

78 *Id.* at 448.

79 *Id.* at 452.

80 *Id.*

81 *Jeffrey v. Ryan*, 37 Misc.3d 1204(A), *7 (N.Y. Sup. Ct. Oct. 2, 2012).

82 *Id.* at *3.

83 *Id.*

84 *Id.* at *6.

85 *Id.*

86 *Jeffrey*, 37 Misc.3d 1204(A), *6.

court reasoned that the City could not avoid the requirements of passing a moratorium merely by proceeding under a different name, and that where the city was pursuing no action to rectify the alleged dire necessity it then failed to meet the requirements for issuing a moratorium, thus rendering the ban invalid.⁸⁷

The same facts that led the court to conclude that the ban in *Jeffrey* was an invalid moratorium also exemplify the potential hazard of relying on whether or not regulation is temporary in the analysis of takings challenges. It appears that, despite the sunset date built into the ban, the City of Binghamton did not foresee relieving the ban. A skeptic may go so far as to say it was an ideal set-up for the governmental abuse imagined by the dissent in *Tahoe-Sierra*.⁸⁸

Ultimately, this fiction of “temporariness” tends to shift the focus from the burden placed on the property owner and thereby makes it less likely that the interests of fairness and justice are served, as prescribed by *Armstrong*.⁸⁹ That a taking is temporary may fairly go to the compensation owed; however, temporariness is not a factor that should substantively change the analysis.⁹⁰ Whatever a legislature calls a given regulation, the task of the court should be to discern the actual burden suffered by the property owner. While the label of “temporary” surely affects this burden, it alone should not define the analysis if it misses the actual practical effects of the regulation. In light of these manipulable characterizations and risks of distortion, having different legal standpoints for “permanent” and “temporary” regulations is difficult to justify.

C. ADDING THE TEMPORAL DIMENSION TO CONSIDERATION OF PARCEL AS A WHOLE IMPERMISSIBLY DISTRACTS FROM FAIRNESS AND JUSTICE CONCERNS

An added difficulty in reconciling the reasoning in *Tahoe-Sierra* with other regulatory takings decisions is the Court’s unequivocal incorporation of a temporal dimension into the “parcel as a whole” rule.⁹¹ Depending on one’s view of how fiercely property rights should be protected relative to the taking power, reliance on the parcel as a whole to determine impact to a private property interest is either perfectly sensible or fundamentally unfair and unjust. Side-stepping that broader critique, adding a temporal di-

87 *Id.* at *7.

88 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 305 U.S. 302, 347 (2002) (Rehnquist, J., dissenting) (“There is every incentive for government to simply label any prohibition on development ‘temporary,’ or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the ‘temporary’ prohibition into a long-term ban on all development.”).

89 *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

90 Daniel L Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 VT. J. ENVTL. L. 479, 508 (2010) (“Government’s subsequent rescission of the imposition may go to the question of compensation, but probably not to liability.”).

91 *Tahoe-Sierra*, 535 U.S. at 332-33 (“An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner’s interest. Both dimensions must be considered if the interest is to be viewed in its entirety.”).

mention adds considerable uncertainty to an analysis that was already something of an enigma. As compared to physical dimensions of property, the temporal boundaries of property may be indeterminable or indefinite. Beyond the analytical uncertainty involved, this addition arguably unfairly balances the scales against property owners in troublesome ways.

Before considering these problems with *Tahoe-Sierra's* incorporation of a temporal dimension, a brief introduction is warranted. In determining whether a regulation has gone too far, a court will consider what portion of the property has effectively been appropriated by the regulation relative to that portion of the property remains at the owner's [relatively] unrestricted use.⁹² This inquiry is commonly referred to as the "parcel as a whole", or the "denominator" question. For instance, in *Penn Central*, the challenged regulation had prevented the proposed development of the space above Grand Central Terminal as inconsistent with the Landmark Preservation Plan.⁹³ Although the regulation restricted development into the air space—a part of the physical property right—the owners retained the use and enjoyment of the remainder of their property. The portion of the parcel affected is just one factor in the resulting analysis, yet without being able to show that a regulation affects the entire or a significant portion of a parcel, it becomes less likely that the remaining factors introduced by *Penn Central* will compel a finding of a compensable taking.

This basic inquiry into the parcel as a whole practically operates to prevent property owners from severing some portion of their property, asserting that it has been regulated to the point of appropriation, and demanding compensation. The court in *Penn Central* rejected the sort of "conceptual severance" that would allow a property owner to narrow the inquiry to only a portion of the total property interest:

'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole*. . . .⁹⁴

The court further refused to allow conceptual severance in *Keystone Bituminous Coal Association v. DeBenedictis*.⁹⁵ In *Keystone*, the coal company attempted to define their mineral rights in terms of how the property right was affected by Pennsylvania's Subsidence Act.⁹⁶ First, the coal companies asserted that they had lost all economic use of the coal they were unable to mine due to the act.⁹⁷ Second, they framed the taking claim in terms of a separate "support estate," asserting that, because Pennsylvania's Subsidence Act prevented them from recovering the coal that was part of this "support estate," the act affected a total taking of that portion of their interest.⁹⁸ The court, however, refused

92 See *Penn Central Transp. Co. v. N.Y.C.*, 438 U.S. 104, 131 (1978).

93 *Id.* at 116-18.

94 *Id.* at 130-31 (emphasis added).

95 *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987).

96 *Id.*

97 *Id.*

98 *Id.*

to recognize a total taking based on either theory, instead considering the relevant property interest to be their “entire mining operation.”⁹⁹

Additionally, it is important to recognize that the parcel as a whole rule serves an important gatekeeping function by directing the relevant takings analysis, be it under *Penn Central* or *Lucas*.¹⁰⁰ Only regulations affecting an entire parcel enjoy categorical analysis under *Lucas*, while impact to a mere portion of the parcel triggers the more nuanced balancing analysis under *Penn Central*. That said, there is some confusion on this point borne directly from Scalia’s own uncertainty expressed in *Lucas* about the relevant property interest as expressed in a footnote:

When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and we think, unsupportable—view of the relevant calculus, see [*Penn Central*]).¹⁰¹

While the courts have long relied on the parcel as whole rule, in addition to Scalia’s uncertainty, any clear endorsement of the rule was slightly undermined—albeit in dicta—by the majority’s musings in *Palazzolo v. Rhode Island*.¹⁰² In *Palazzolo*, the petitioner attempted to reframe his takings claim before the Supreme Court by severing the affected portion of his property from the total interest.¹⁰³ While the court did not find it proper to take up the question, Justice Kennedy did take the opportunity to offer that:

Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators. Whatever the merits of these criticisms, we will not explore the point here.¹⁰⁴

This oblique comment led to speculation that the court has a weakened commitment to the parcel as a whole rule.¹⁰⁵

The following year, however, *Tahoe-Sierra* not only expressly endorsed *Penn Central*’s parcel as a whole approach, but also unequivocally included in the inquiry the temporal dimension of a property interest.¹⁰⁶ The court rejected arguments by property owners seeking to narrow the inquiry to the time frame during which the moratoria were effec-

99 *Id.*

100 Although *Lucas*’s categorical rule was introduced many years after the *Penn Central* decision, *Penn Central*’s rejection of conceptual severance affects the application of *Lucas*’s categorical rule. In particular, *Penn Central* requires a court to consider the affected property interest relative to the entire property right held, not merely that portion affected by the regulation.

101 *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016, n.7 (1992).

102 *Palazzolo v. Rhode Island*, 533 U.S. 606, 631-32 (2001).

103 *Id.* at 631.

104 *Id.*

105 Johnson, *supra* note 31, at 367.

106 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331 (2002) (internal citations omitted).

tive as the same sort of conceptual severance rejected in terms of physical aspects of property:

Petitioner's 'conceptual severance' argument is unavailing because it ignores *Penn Central's* admonition that in regulatory takings cases we must focus on 'the parcel as a whole.' We have consistently rejected such an approach to the 'denominator' question . . . The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.¹⁰⁷

Doctrinally, an entire property interest would include not only the physical dimensions of property, but also the temporal duration of a property interest.¹⁰⁸ For instance, a lease interest would have a fixed temporal limit, perhaps defined as a set number of months or years whereas a fee simple interest would be temporally unbounded, theoretically extending indefinitely into the future. When this dimension is added to the analysis of the parcel as a whole, it becomes readily apparent that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."¹⁰⁹ And this is so despite the fundamental asymmetry between regulations and property interests noted by Judge Kozinski in his dissenting opinion from the decision to deny en banc review of *Tahoe-Sierra* in the 9th Circuit: "[g]overnment policy is inherently temporary while land is timeless."¹¹⁰

Also first noted by Judge Kozinski, by incorporating the temporal dimension of property into the parcel as a whole, the *Tahoe-Sierra* decision effectively adopted the dissenting view in *First English*. Compare the two following quotations, the first from Stevens' dissent in *First English* and the second from the Ninth Court of Appeals' opinion in *Tahoe-Sierra*, as quoted by the Supreme Court:

Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation and hence whether a taking has occurred.¹¹¹

'Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest)' . . . a regulation that affects only a portion of the parcel—

107 *Id.*

108 *Id.* at 318 (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000)).

109 *Id.* at 332.

110 *Tahoe-Sierra*, 228 F.3d at 1001 n.1 (Kozinski, J., dissenting from denial of review en banc). Johnson, *supra* note 31, at 363-64.

111 *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 330 (1987) (Stevens, J., dissenting).

whether limited by time, use, or space—does not deprive the owner of all economically beneficial use.¹¹²

Considering *Tahoe-Sierra's* virtual parroting of the *First-English's* dissent, it is difficult to faithfully conclude that the two decisions are consistent.

IV. TEMPORARY MORATORIA AND THE NUISANCE EXCEPTION

These analytical inconsistencies in the jurisprudence of regulatory takings, stemming largely from the decision in *Tahoe-Sierra*, while fundamental, are not intractable. The Court in *Tahoe-Sierra* accomplished a rather pragmatic result through reasoning that was, not surprisingly, overly practical.¹¹³ In its attempt to preserve the ability of the government to enact temporary planning moratoria without the prohibitive burden of compensation, the court invests in reasoning that turns attention too far away from the doctrinal and theoretical animus of the Takings clause. Thankfully, however, the Court was not locked into a choice between practical necessities and analytical consistencies. As discussed below, the practical concerns presented in *Tahoe-Sierra* could have instead been answered without analytical and theoretical friction by turning instead to the nuisance exception in *Lucas*.

This section proposes a framework in which *Tahoe-Sierra* might have been decided according to *Lucas's* nuisance exception and then applies that framework to *Tahoe-Sierra* and an emerging area of interest regarding temporary moratoria: unconventional natural gas drilling. The understanding of *Lucas*, *Tahoe-Sierra*, and *First English* advanced below not only better conforms to the Court's precedent, it also makes better sense as constitutional doctrine for several reasons. First, this approach more appropriately serves interests of fairness and justice by focusing attention on the burdens suffered by property owners rather than often artificial and manipulable temporal labels. Second, it strikes a more fair balance between the interests of private property rights and collective well-being by providing modest opportunities for the government to determine where background principles of nuisance and property law already restrict uses before enacting regulation potentially necessary to protect the public health and safety.

A. GUIDING PRINCIPLES AND LIMITATIONS

When asked to apply *Lucas's* categorical rule—that regulations depriving a property owner of all economic use amounted to a categorical taking—the Court in *Tahoe-Sierra* was understandably concerned with the practical implications of allowing the categorical rule to reach temporary development moratoria.¹¹⁴ As previously discussed, *Lucas's* nuisance exception establishes two overriding principles: 1) a regulation that deprives an owner of all economic use of property is a categorical taking; but 2) no taking will be

112 *Tahoe-Sierra*, 535 U.S. at 318-19 (quoting *Tahoe-Sierra*, 216 F.3d at 773).

113 *Tahoe-Sierra*, 535 U.S. at 318-19; see also James E. Holloway & Donald C. Guy, *Tahoe-Sierra Preservation Council Inc.: A Shift or Compromise in the Direction of the Court of Protecting Economic and Property Rights*, 10 ALB. L. ENVTL. OUTLOOK J. 229, 241 (2005).

114 *Tahoe-Sierra*, 535 U.S. at 337-39; see also Holloway & Guy, *supra* note 113, at 241.

found if existing property limitations would have precluded the desired use.¹¹⁵ This analysis suggests that temporary planning moratoria of the kind considered in *Tahoe-Sierra* could be folded into the nuisance exception by adding one logical extension: where the government is uncertain whether a given use would be restricted under background principles of nuisance and property law, a temporary restriction against that use while uncertainty is resolved will not amount to a taking.

First among the advantages of this logical extension is that it secures the practical ability of planners to maintain the status quo without the burden of compensation, yet it does not immediately disadvantage property owners subjected to temporary moratoria unrelated to planning. Thus, even with this extension, the Church in *First English* would still plainly be entitled to compensation for a temporary, but complete, restriction against its property that was unrelated to planning efforts.

Also of significance, the formal and oft arbitrary distinction between “temporary” and “permanent” would be considerably less relevant. Instead, the inquiry would focus on the instrumental purpose and effect of regulation; the prospective label assigned to challenged regulation would be determinative only in the sense that a regulation must be prospectively temporary to be considered under the exception.

To ensure fair application, there are readily discernable circumstances that could limit the availability of the nuisance exception to temporary planning moratoria. These circumstances include the following, each elaborated in turn:

- A condition of uncertainty or emergency;
- Threatening a risk of harm, which may impose considerable or even irreparable costs to the public at large;
- Otherwise preceding under a deficient or wholly silent regulatory framework;
- Yet with a reasonable possibility of resolving uncertainty and designing and implementing appropriate regulatory frameworks.

1. UNCERTAINTY OR EMERGENCY

Defining the substance of the perceived regulatory need is a necessary inquiry in determining whether the state ought to enjoy greater deference when enacting temporary moratoria. The characteristics of uncertainty and emergency should be of particular import in this inquiry.

“Uncertainty” should be understood to include conditions that are not reliable, not known beyond doubt, not having certain knowledge, or not being constant.¹¹⁶ It suggests a lack of credible information and lack of known outcomes significant enough to justify maintaining the status quo. In uncertain conditions, caution weighs in favor of maintaining the status quo until there is information providing reliable, known, certain, or constant expectations.

Allowing for planning in conditions of uncertainty would be supported by the precautionary principle, a principle familiar to the area of environmental management with potential applicability to planning more generally.¹¹⁷ Where there is scientific uncer-

115 *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29 (1992).

116 THE NEW OXFORD AMERICAN DICTIONARY 1838 (2001).

117 Ronnie Harding & Elizabeth Charlotte Fisher, *Introducing the Precautionary Principle*, in PERSPECTIVES ON THE PRECAUTIONARY PRINCIPLE, 2 (Ronnie Harding & Elizabeth Charlotte Fisher, eds., 1999).

tainty surrounding the relationship between some activity and some irreparable or serious environmental harm, the precautionary principle recommends that either that activity should be avoided until uncertainty is resolved or, if the activity must go on, affirmative attempts to mitigate harm should immediately be undertaken despite uncertainty as to their efficacy.¹¹⁸

As we are dealing with uncertainty and forecasted harm, it should not be surprising to find that making clear and confident determinations that some use is already limited by background principles is relatively challenging. This difficulty counsels in favor of expansive, cautionary applications of background principles of nuisance and property law. While expansive applications should trigger some concern that government regulation is being allowed too much latitude, that concern is considerably lessened given the prospectively temporary nature of the potential regulations. Moreover, and again invoking the precautionary principle, that expansiveness should be motivated by concern of some significant and potentially irreparable harm justifying maintaining the status quo at no public cost.

Admittedly, uncertainty of one degree or another is a plain fact of life. This fairly raises the question of how a legislative body or a court is to define the threshold at which the degree of uncertainty warrants enactment of a moratorium. A key factor to consider in making such a determination could include the absence of peer-reviewed scientific analysis of potential impacts (as distinguished from ongoing disagreement among the scientific community, a much more common condition).

An additional consideration would be the newness of the proposed activity, particularly where there are also limited analogous comparisons available. When faced with new or intensified practices that have not yet been subjected to study, there is not only considerable uncertainty, but there is also considerable advantage to be gained by affording an opportunity to consider what regulatory restrictions are necessary to ensure responsible practice. Given the potential for public backlash in the event of unintended public harm, regulated entities would stand to gain considerable cover when reasonable government restrictions were imposed for the express purpose of developing reasoned and adequately protective regulatory frameworks.

2. THREATENING RISK OF HARM

As the suspected threatened hazard of an activity increases, decisionmakers should be afforded more deference in enacting planning moratoria. This is the case especially if an activity may present dissimilar threats across environments.

Of course, in light of the preceding factor, the actual magnitude and quality of harm threatened may be unclear. It would be perfectly reasonable for courts to afford some deference to legislative determinations that significant harm is threatened, but alternatively courts could require some reasonably verified or at least analogous projection of harm. For instance, when considering an off-shore drilling moratorium following the Deep Water Horizon oil spill, there was the analogous harm thoroughly studied after the Exxon Valdez spill years before. Based on that experience, regulators, though uncertain,

118 *Id.* at 3.

were at least able to construct some expectation of the ecological harm threatened in the Gulf.¹¹⁹

3. INSUFFICIENCY OF CURRENT REGULATIONS

Plainly there is limited legitimate need for temporary planning moratoria where the extant regulatory framework is already adequately functioning to protect the public interest. In such conditions, any reconsideration or revisions of regulation can be pursued without threat of public harm in the interim. The same cannot be said, however, where either there is observable escalating harm despite extant regulation—as was the case at Lake Tahoe—or a new or modified activity has been introduced that is beyond the reach or applicability of extant regulation—as is the case with the introduction of unconventional gas drilling in some jurisdictions. Particularly as applied to hazardous activities already heavily regulated elsewhere, it is reasonable to afford governments time unhampered by compensation costs to ensure that regulatory frameworks are established capable of preventing potential considerable or irreversible harm at significant cost to both property owners and the community at large.

4. IMPORTANCE OF MAINTAINING THE STATUS QUO

Where each of the foregoing conditions is present, there should also be an accompanying benefit to maintaining the status quo. Resolving uncertainty may require scientific study or strategic planning, both time-intensive and specialized processes. Establishing new and effective regulatory frameworks is a similarly time-intensive process. Without maintaining the status quo while planning activities are undertaken, regulators may find themselves responding to conditions as they were, rather than as they will be at the time of enactment. By affording reasonable time to explore and implement a given course of action, there is a greater likelihood the regulation will effectively prevent continued threatened harm.

5. ADDITIONAL LIMITATIONS

Beyond these qualifying conditions, there are factors already relied upon by courts that could further ensure application of the nuisance exception to temporary takings is not misapplied or unjustly abused. These factors include consideration of delay, especially “extraordinary delay.”¹²⁰ An expectation of some delay in government decision-making was expressly raised in *First English*, which excluded “the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like. . . .” from amounting to a taking under the Court’s holding.¹²¹ In *Agins*, “extraordinary delay” was distinguished from such instances of normal or expected delay and offered as a factor weighing in favor of finding a regulatory taking: “[m]ere fluctuations in value during the process of governmental decision-making, *absent extraordinary delay*, are incidents of

119 See Edward W. Thrasher, *Cleaning up the Muck: A Takings Analysis of the Moratorium on Deepwater Drilling Following the BP Oil Spill*, 77 BROOK. L. REV. 1285, 1287 (2012).

120 *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980).

121 *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 321 (1987).

ownership. They cannot be considered a taking in the constitutional sense.”¹²² Some years later, the court in *Tahoe-Sierra* endorsed considering the “length of and justification for delay as part of their *Penn Central* analysis.”¹²³

Determining whether a delay is extraordinary is a matter of whether it is “reasonable given the complexity of the agency’s charge, and whether the agency acted in bad faith.”¹²⁴ A court will consider delay with more deference as the matter under consideration increases in complexity and technical uncertainty.¹²⁵ Further, the two considerations of reasonableness and bad faith have previously been treated as co-requisites to a finding of extraordinary delay.¹²⁶ While such limits have been proposed to the court and rejected in the past,¹²⁷ they nonetheless continue to persist in scholarly opinion.¹²⁸

Additionally, the Court might consider whether the situation is one that would reasonably allow resolution of uncertainty or emergency within the time horizon of the temporary moratorium. For instance, while the impacts of unconventional gas drilling are within reasonable reach of scientific resources and faculties, eliminating the uncertainty surrounding impacts of climate change may not reasonably be within reach in the immediate future. Areas that are so perennially uncertain as to invite abuse should be approached with skepticism, with limited latitude afforded to government restrictions on private property while regulatory frameworks are considered and implemented.

B. RECONSIDERING *TAHOE-SIERRA* UNDER THE NUISANCE EXCEPTION

Had the Court in *Tahoe-Sierra* not immediately avoided applying *Lucas*’s categorical rule to temporary regulations, but instead had considered the application of *Lucas*’s nuisance exception as advanced above, what would result? This section reconsiders *Tahoe-Sierra* to demonstrate the potential of reaching the same practical outcome with reasoning that connects existing jurisprudence without the analytical and theoretical inconsistencies that are now arguably a part of *Tahoe-Sierra*’s legacy. Interestingly, the difficulty in still reaching the same result in *Tahoe-Sierra* stems not from the fit with the conditions or limitations introduced here, but with determining whether or not continued development was somehow already credibly restricted by some aspect of existing background principle of nuisance or property law. This difficulty reminds us that, though the nuisance exception may have broader application than originally anticipated, it is not without limitation.

Considered expansively, continued development at Lake Tahoe arguably constituted an actionable public nuisance. There is no reason to suspect that *Lucas*’ nuisance exception should be limited to private nuisances. The underlying logic of the exception is

122 *Agins*, 447 U.S. at 263 n.9 (emphasis added) (quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)) (internal quotation marks omitted).

123 Siegel & Meltz, *supra* note 90, at 486 (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 342 (2002)).

124 *Id.* at 486-87.

125 *Id.* at 487.

126 *See Res. Invs., v. United States*, 85 Fed. Cl. 447, 499 (Fed. Cl. 2009) (noting the Federal Circuit’s, “admonition that extraordinary delay rarely travels without bad faith.”).

127 *See Tahoe-Sierra*, 535 U.S. at 333-38.

128 *See, e.g., Bryan J. Pack, Regulatory Takings: Correcting the Supreme Court’s Wrong Turn in Tahoe Regional Planning Agency*, 17 *BYU J. PUB. L.* 391 (2003).

simply that regulations making explicit the already implicit limitations on private use of private land add no new limitations that warrant compensation. Hence a regulation that explicitly provides that private actors may not engage in some unreasonable activity that substantially interferes with another's use and enjoyment of her private property fits as readily under the nuisance exception as government regulations reaching a public nuisance would fit. In either case, the government merely announced a restriction that already existed, and that the already existing restriction protects a private or public interest is immaterial under the logic that animates the *Lucas* nuisance exception. Public nuisance acts as a preexisting limitation against those uses that are inappropriate uses in an area, not arriving "first in time," and causing some harm to the public at large.

Though some expansive reasoning is called for as regards other elements of nuisance, as a change in use of property (i.e., from an undeveloped to developed condition), it should not be difficult to find that the petitioners had not preceded other reasonable uses in the area. At issue here is not their continued use of their property as it stood before the moratoria, but substantial changes in that use.

As concerns *Tahoe-Sierra*, the development of private property consistent with existing zoning is not obviously an inappropriate use. It is well within conventional use, as demonstrated by the extensive development that had already occurred and caused the nutrient loading that threatened Lake Tahoe.¹²⁹ That said, starting from the relatively safe assumption that the owners of the undeveloped lots bought those lots in part for the proximity to and enjoyment of Lake Tahoe (presumably paying quite a premium for these benefits), the question might be narrowed to whether development in a manner that would threaten that common interest in Lake Tahoe would be consistent with existing uses. Those property owners that had already developed their lots had not done so in a regulatory vacuum; rather, earlier development was constrained by what regulators and individuals expected to be a sufficiently protective regulatory framework. Upon realizing that this framework was insufficiently protecting Lake Tahoe from harm, it would arguably be inappropriate to allow continued development under that framework.

As a general matter, aesthetic harm is not sufficient standing alone to constitute a nuisance and yet aesthetic harm to the lake was the central animus behind the development moratoria.¹³⁰ There are legitimate jurisprudential concerns for this general exclusion, namely the notion that aesthetic values are fundamentally subjective.¹³¹ Coupled with the principle that each individual has a right to the quiet enjoyment of her own property, the subjective nature of aesthetics prevents a judge from making objective judgments about when a use is so aesthetically offensive or displeasing as to warrant injunctive relief or damages.¹³²

Nonetheless, there are arguments in favor of recognizing aesthetic nuisances that start from the notion that aesthetic harm is legitimate and can be objectively defined by the courts.¹³³ First, these arguments recognize that "ugliness can destroy the very purpose

129 *Tahoe-Sierra*, 535 U.S. at 308.

130 *See id.* at 307-08; *see also* Brief for Respondents, at *7-8, *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (No. 00-1167).

131 Stephen E. Woodbury, *Aesthetic Nuisance: The Time Has Come to Recognize It*, 27 NAT. RESOURCES J. 877, 878 (1987).

132 *Id.*

133 *Id.* at 886.

of owning property.”¹³⁴ Some courts may even find an actionable aesthetic nuisance that causes substantial and unreasonable interference.¹³⁵ A substantial nuisance is one that is not only offensive to a plaintiff, but would be considered offensive to the normal member of the community.¹³⁶ This limitation on an aesthetic nuisance would inject a sense of objectivity into the judgment made by the court. The more clearly a community expectation can be gleaned, the more confidently a judge may come to an objective aesthetic standard.¹³⁷

While not certain, it is conceivable that continued development in the Lake Tahoe watershed could have constituted a nuisance insofar as the continued deterioration of Lake Tahoe’s water quality could be linked to development activities. Lake Tahoe is a unique “national treasure” owing largely to its “exceptional clarity.”¹³⁸ The significance of aesthetics at Lake Tahoe did not escape the Court, which shared Mark Twain’s description of the water’s clarity as “not *merely* transparent, but dazzlingly, brilliantly so.”¹³⁹ Given the national ethos surrounding the water at Lake Tahoe, it certainly provides an instance where a court might comfortably recognize an objective aesthetic value as disturbing the clarity of the water would certainly be offensive to an average person not only in the immediate vicinity, but also throughout the country.¹⁴⁰

Finally, and offering further support to an expansive application of nuisance elements, the court might consider the harm to the public coincident to continued development as compared against the burden on each property owner of being temporarily prevented from developing their properties while sufficiently protective regulations were developed and implemented. The loss of a national treasure and accompanying decline in all property values in the region—developed and undeveloped alike—would be staggering. In contrast, while delay imposes a burden on owners of undeveloped land, that delay functions to protect their expectation of Lake Tahoe’s continued brilliance. Thus, that burden is arguably ultimately converted to a benefit.

With that, it is conceivable that the development threatening Lake Tahoe may have amounted to a public nuisance and hence the right to develop in a manner threatening to Lake Tahoe was not within the bundle of rights held by property owners. Having satisfied this initial test of the *Lucas* nuisance exception, the question then becomes whether the conditions identified above were present as well, thus allowing the conclusion that temporary moratoria should avoid takings liability.

As to a condition of uncertainty, in *Tahoe-Sierra* there had been appreciable impacts to Lake Tahoe; however, the causal connection to development in the area was uncer-

134 *Id.* at 883.

135 *Id.* at 884.

136 *Id.*

137 *Id.* at 877, 883-84.

138 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 307 (2002).

139 *Id.* (emphasis added) (quoting Mark Twain, *ROUGHING IT* 174-75 (1872)).

140 And here we might consider not only the enjoyment value of those people residing in the vicinity of Lake Tahoe and those able to travel to Lake Tahoe, but also the existence value held by others throughout the country familiar with the lake, though not yet enjoying it themselves.

tain.¹⁴¹ Authorities believed they were without certain, reliable knowledge as to how much and what character of development, if any, the Lake could withstand without suffering further degradation.¹⁴² Without time to identify and assess the potential impacts, States would be forced to accept potentially hazardous activities or suffer the requirement of compensation for what may well be easily within the reasonable exercise of the police power.

As to a threat of considerable or irreparable harm, we need not look beyond the unique character of Lake Tahoe to understand the precariousness of the situation. First, owing to the severity of the slope surrounding Lake Tahoe, run-off has relatively limited opportunity to infiltrate into and filter through soils, instead running rapidly across the surface and into the lake with considerable suspended nutrients and pollutants.¹⁴³ Second, relative to most lakes in the United States, very little fresh water flows into Lake Tahoe to replace the water already filling the lake.¹⁴⁴ To illustrate, “[i]f the Lake were drained, it would take approximately 650-700 years to be refilled—compared to, for example, 2.6 years for Lake Erie.”¹⁴⁵ As a result of this unique character, continued nutrient loading at Lake Tahoe threatened (and continues to threaten) a virtually irreparable harm.¹⁴⁶

As to a deficient or silent regulatory framework, the observed decline of water quality under existing regulations convincingly demonstrates that the regulations were insufficiently protective of property owner’s expectations. In 1969, the two states, five counties, various municipal governments, and the federal government all sharing jurisdiction over parts of Lake Tahoe and the general region enacted the Tahoe Regional Planning Compact, a first attempt at coordinated action to protect the lake.¹⁴⁷ Within three years, a complex system for managing development in the region had been developed and implemented.¹⁴⁸ Despite this regulatory scheme, by 1980, “the rate of algal growth had doubled over the last 20 years, and water clarity had decreased between 6-13 percent in the preceding 10 years.”¹⁴⁹ Even more disconcerting from the perspective of planners and regulators, noting the declining conditions and anticipating more protective rules, property owners began rushing to develop their parcels in advance of restrictions.¹⁵⁰

As to the possibility of resolving uncertainty, regulators in this instance needed a limited opportunity to evaluate the connection between the intensity of development

141 Brief for Respondents, at *8-9, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (No. 00-1167) (noting that restrictions to commercial development were intended to provide an opportunity to determine the environmental threshold carrying capacities that would protect Lake Tahoe).

142 *Id.*

143 *Id.* at *6.

144 *Id.* at *7.

145 *Id.* (citing John Ayer, *Water Quality Control at Lake Tahoe: Dissertation on Grasshopper Soup*, 1 *ECOLOGY L.Q.* 3, 8 (1971)).

146 *Id.*

147 Brief for Respondents, at *7, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (No. 00-1167).

148 *Id.*

149 *Id.* at *8.

150 *Id.*

and degradation to the lake. Understanding that connection, while requiring some technical and scientific expertise, was achievable. It was also the case, however, that doing so while development continued would have been considerably more challenging than doing so under stable conditions. This suggests not only the potential to resolve uncertainty, but also that maintaining the status quo directly related to the ability to determine what an effective regulatory framework might include.

Thus we can see that it is possible for the Court to reach the same practical result of allowing for non-compensable temporary planning moratoria without the need to create artificial analytical distinctions between “permanent” and “temporary” regulatory takings. Thus, the moratoria in question in *Tahoe-Sierra* could fit within *Lucas*’ nuisance exception as a temporary restriction designed to resolve uncertainty as to what uses were permissible under existing property rights, with conditions threatening considerable harm, and proceeding under a demonstrably deficient regulatory framework.

C. CONSIDERING FUTURE SCENARIOS: UNCONVENTIONAL GAS DRILLING

Having reconsidered *Tahoe-Sierra* through *Lucas*’s nuisance exception, the forward-looking question remains: would this alternate approach also fairly balance the protection of property rights and the need to regulate effectively for the public welfare in other scenarios? Outside the realm of temporary development moratoria, this application of the nuisance exception would be preferable to the existing jurisprudence as applied to regulations responding to the booming practice of shale gas drilling, or unconventional natural gas drilling.

Natural gas drilling is not a new proposition in most states. Many states have over a hundred years of history with natural gas exploration and development and have developed robust regulatory frameworks around the practice. In recent years, however, new market conditions and technology development have made the recovery of natural gas in deep shale plays economically viable.¹⁵¹ The ability to recover from these shale gas reservoirs has prompted something of a shale gas rush.¹⁵² In Pennsylvania, for instance, the Marcellus Shale gas play led to over 2,300 Marcellus wells being drilled within a few short years.¹⁵³

Recovering natural gas from shale requires unconventional drilling techniques, particularly horizontal drilling, in some instances at depths several thousand feet below the surface, and hydraulic fracturing of the shale rock to release the gas contained within.¹⁵⁴ Hydraulic fracturing is the process by which large volumes of water mixed with sand and chemicals are injected into the gas well to release the gas from the shale. Some of the 1 to 8 million gallons of water used per “frack” is recovered at the surface; however, as

151 Charles G. Groat & Thomas W. Grimshaw, *Fact-Based Regulation for Environmental Protection in Shale Gas Development*, THE ENERGY INSTITUTE AT THE UNIVERSITY OF TEXAS AT AUSTIN, 4 (Feb. 2012), http://barnettprogress.com/media/ei_shale_gas_regulation120215.pdf.

152 Andrew Maykuth, *Pa.’s Natural Gas Rush*, THE PHILADELPHIA INQUIRER (Apr. 3, 2011), available at http://www.philly.com/philly/news/special_packages/inquirer/marcellus-shale/20110403_Pa__s_Natural_Gas_Rush.html.

153 *Id.*

154 See ANTHONY ANDREWS ET AL., CONG. RESEARCH SERV., R40894, UNCONVENTIONAL GAS SHALES: DEVELOPMENT, TECHNOLOGY, AND POLICY ISSUES, 1 (Oct. 30, 2009).

much as 60% of the water and chemical mixture remains below ground.¹⁵⁵ The practice has raised a number of concerns, including contamination of drinking water supplies.¹⁵⁶

Contamination concerns stem both from uncertainty regarding the individual and cumulative effects of the chemical mixtures used by drilling companies as well as the interaction between fracking fluids and the shale formations themselves.¹⁵⁷ While a number of companies have voluntarily released lists of the chemicals used in their fracking operations after considerable public outcry, originally no federal or state laws required public disclosure.¹⁵⁸ This fairly raised a question for concerned citizens: if what was going into the water was unknown by regulators and private scientific interests, how could regulators possibly be in a position to declare the activity free from risk? Additionally, fears were compounded by the possibility that the composition of various shales may cause substances even more harmful than any chemical mixture used by the drilling companies. In the Marcellus shale, for instance, flowback water from drilling activities contained radioactive materials.¹⁵⁹ These concerns were amplified by reporting that millions of gallons of chemical-infused and irradiated flowback water were being dumped into public waterways, and that such dumping was not always prevented by existing regulations.¹⁶⁰

Beyond concerns for water contamination, the economic advantages of unconventional gas drilling are themselves fast-moving and uncertain. Shale gas drilling requires considerable capital investment and comes with new risks and uncertain outcomes. Some have speculated that, rather than seeing economic growth from unconventional gas drilling in coming years, what we will realize is the collapse of yet another great bubble:

[T]he more land they acquire, the more capital they have to spend upfront . . . Then they have to drill it or lose it, which further adds to capital costs. And the more they drill, the more gas they produce, which lowers the price of gas and further reduces their revenues. In the end, this drilling treadmill is difficult to sustain for long—especially if the wells underperform, or the resource turns out to not be as valuable as they thought.¹⁶¹

155 *Id.* at 33.

156 Abraham Lustgarten, *Buried Secrets: Is Natural Gas Drilling Endangering U.S. Water Supplies?*, PRO PUBLICA (Nov. 13, 2008) available at <http://www.propublica.org/article/buried-secrets-is-natural-gas-drilling-endangering-us-water-supplies-1113>.

157 These concerns include, but are not limited to, organic chemicals, microbiological communities, and naturally occurring radioactive materials potentially returned in flowback and/or produced water. Goat & Grimshaw, *supra* note 151, at 24-25.

158 Cora Currier, *ALEC and ExxonMobil Push Loopholes in Fracking Chemical Disclosure Rules*, PRO PUBLICA (Apr. 24, 2012) available at <http://www.propublica.org/article/alec-and-exxonmobil-push-loopholes-in-fracking-chemical-disclosure-rules>.

159 Lustgarten, *supra* note 156.

160 Jeff Goodell, *The Big Fracking Bubble: The Scam Behind Aubrey McClendon's Gas Boom*, ROLLING STONE (Mar. 15, 2012) available at <http://www.rollingstone.com/politics/news/the-big-fracking-bubble-the-scam-behind-the-gas-boom-20120301>.

161 *Id.* (quoting Deborah Roger, former investment banker and member of the advisory board for the Federal Reserve Bank of Dallas).

[W]hen you look at the level of debt some of these companies are carrying, and the questionable value of their gas reserves, there is a lot in common with the subprime mortgage market just before it melted down.¹⁶²

And such drilling is not limited to Pennsylvania or the Marcellus shale play, but includes shale plays throughout the northeast, intermountain West and southeast. As the practice of unconventional drilling moves into new areas, regulators are understandably under considerable and competing pressures. That some regulatory framework is necessary to protect against risks is obvious; however, what precisely that framework should consist of is less apparent. Looking at two states in particular, North Carolina and New York, introduces characteristic risks and regulatory needs associated with the shale gas boom. In both cases, it is clear that the conditions identified above—uncertainty, threatened harm, insufficient regulations, and a need to maintain the status quo—would sufficiently justify allowing the respective states some latitude in enacting temporary moratoria without requiring compensation as a taking.

In both states, there is considerable uncertainty regarding the impacts and risks of unconventional gas drilling. Some of this uncertainty stems from the practice itself—for instance, persistent uncertainty over what the long-term impacts to water quality and quantity. However, some uncertainty is unique state-to-state as this practice migrates into different geographic conditions. For instance, the shale plays identified in North Carolina have not been previously explored and thus there is uncertainty surrounding whether or not problems identified in other shale plays occur in North Carolina.¹⁶³ Uncertainty like this is particularly problematic because non-industry funded research in the private and public sector lagged years behind the expansion of shale gas drilling in the northeastern United States. Thus, what data and studies are available often come from self-interested and therefore reasonably dubious sources.

Even with these uncertainties, it is nonetheless clear that significant harm is threatened both to the environment and public health. Again, these threatened harms largely stem from the nature of unconventional gas drilling as briefly introduced above. However, there are unique circumstances state-to-state that engender additional threatened harms. For instance, New York City and the greater area have a population of over eight million.¹⁶⁴ The sheer number of potentially affected individuals in an instance of water contamination is enough to give regulators pause. Moreover, the water system that brings some 1.2 billion gallons of water into New York City daily is already aging and failing.¹⁶⁵ Of even greater concern, is the fact that both New York City and Syracuse rely on an unfiltered system; in fact, New York City's is the largest unfiltered system in

162 *Id.* (quoting Arthur Berman, a Texas-based energy consultant).

163 For instance, it is unclear whether, which, and at what levels radioactive substances will be returned with fracking fluids as has been the case in the Marcellus shale play. Naturally occurring radioactive materials returned in flowback or produced water vary in composition and level in different shale plays. Groat & Grimshaw, *supra* note 151, at 25.

164 NEW YORK CITY DEPARTMENT OF CITY PLANNING, <http://www.nyc.gov/html/dcp/html/census/popcur.shtml> (last visited May 29, 2013).

165 Nicholas Kusnetz, *State Fracking Rules Could Allow Drilling Near New York City Water Supply Tunnels*, PROPUBLICA (Jul. 14, 2011), available at <http://www.propublica.org/article/state-fracking-rules-could-allow-drilling-near-new-york-city-water-supply-t>.

the country.¹⁶⁶ These unique qualities make it imperative that New York's regulators carefully tailor rules to ensure that risk is managed as effectively and completely as possible. A failure to do so would undoubtedly result in significant harm and cost to the public.

As a state without previous experience with natural gas drilling, North Carolina clearly has a deficient regulatory framework for the activity, conventional or unconventional alike.¹⁶⁷ According to a report by North Carolina's Department of Environment and Natural Resources, the agency "believes that hydraulic fracturing can be done safely as long as the right protections are in place . . . A number of states have experienced problems associated with natural gas exploration and development because the appropriate measures were not in place from the beginning—forcing both the state and the industry to react after damage had already been done."¹⁶⁸ This demonstrates a clear intention on the part of the state to ultimately allow the recovery of shale gas. With that assurance, a temporary moratorium would merely provide an opportunity for the state to develop an appropriate regulatory framework.

In both states, given the risks and insufficiencies of current regulatory frameworks, temporary moratoria would allow regulators to maintain the status quo while protective regulations are developed and enacted. Maintaining the status quo would assure that water quality and quantity are not threatened in the interim by under-regulated drilling activities.

Finally, there is a reasonable expectation that temporary planning moratoria would ultimately create reciprocity of benefits to regulated property owners. The temporary burden would arguably yield long-term benefits to owners of mineral rights. To start, the value of the mineral estate should rebound once the moratorium is lifted. Additionally, as mentioned above, there is some political cover enjoyed to insulate companies from public scorn in the event of an accident.

North Carolina and New York provide clear examples of a legitimate need to develop limiting regulations in the face of the shale gas rush. There is considerable uncertainty regarding the potential impacts of drilling as well as presently deficient regulatory frameworks and significant public risks in both states. With that legitimate need at hand, the governing authorities should be afforded some latitude to determine whether and under what conditions this potentially harmful activity may proceed. Practically, a temporary moratorium is an obvious means to enable such planning. That it is temporary should not prevent takings liability. Rather, liability is better avoided because it is uncertain that property owners in fact have the right to recover natural gas through unconventional gas drilling, and until the governing body has an opportunity to determine whether that right exists, the moratorium will have taken nothing away.

166 *Id.*

167 North Carolina had banned hydraulic fracturing until the summer of 2012, thereby creating a de facto ban on unconventional gas drilling. See Sarah K. Adair et al., *Considering Shale Gas Extraction in North Carolina: Lessons from other States*, 22 DUKE ENVTL. LAW & POLICY FORUM 257 (Spring 2012).

168 NORTH CAROLINA OIL AND GAS STUDY, *Executive Summary*, 10 (Apr. 2012) http://portal.ncdenr.org/c/document_library/get_file?uuid=a4546484-3b9c-4feb-90ef-ef29b8f337b2&groupId=14.

V. CONCLUSION

It is quite understandable that a court, in determining how to analyze a takings challenge, would be concerned not only about analytical and theoretical consistency with prior decisions, but also the practical outcome of the analysis in a particular case or type of cases. Regrettably, these legitimate concerns are not always easily balanced. As suggested above, it may well be the case that the Court in *Tahoe-Sierra* focused too readily on the practical implications of the decision at the expense of maintaining analytical consistency in temporary regulatory takings jurisprudence. However, this confusing turn is retraceable; and its correction is readily available in *Lucas*.

The categorical analysis under *Lucas* should be readily applicable to temporary and permanent regulations alike. The temporal description of a regulation as permanent or temporary as often as not may tell us nothing about the actual burden that is placed on regulated property owners. Such descriptions are too imprecise and manipulable to provide a principled method of determining whether or not the categorical rule of *Lucas* applies. Moreover, including the temporal dimension of a property right unfairly advantages and disadvantages some owners based on the property right held. This differential treatment will reliably prevent owners of fee simple interests from successfully challenging temporary regulations as takings despite the clear assertion from *First English* that even temporary burdens require compensation under the Fifth Amendment. For these reasons, *Lucas* would be better understood to apply wherever regulation completely deprives a property owner of all economic use for a period of time. This prevents the temporal description of challenged regulation from determining the applicable analysis, instead leaving temporal description to only determine compensation owed.

While this approach would provide the analytical consistency that I have argued is lacking in *Tahoe-Sierra*, it alone is not enough to ensure the same practical result. Protecting temporary planning moratoria requires the additional modest allowance that temporary moratoria responding to conditions of uncertainty should fit within the background principles and nuisance exception established by *Lucas*. Where decisionmakers are uncertain as to whether a given use is within the existing property rights, it is reasonable to afford a period of time to allow for resolution of that uncertainty and subsequent regulatory planning. This approach affords regulators an opportunity to maintain the status quo while the costs and benefits of potential regulatory frameworks are clarified and considered. The end result is a more consistent analytical framework for our regulatory takings jurisprudence with similar practical protections and added attention to the burdens placed on property owners irrespective of a regulation's temporal character.

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RECENT DEVELOPMENTS

Air Quality	367
Water Quality and Utilities	369
Water Rights	374
Casenotes: Federal	377
Casenotes: State	380

AIR QUALITY

EPA REVISES AIR QUALITY STANDARDS FOR PARTICULATE MATTER

SUMMARY

The U.S. Environmental Protection Agency (EPA) recently announced updates to the National Ambient Air Quality Standards (NAAQS) for fine particle pollution (PM_{2.5}). Press Release, Env'tl. Prot. Agency, EPA Revises the National Ambient Air Quality Standards for Particle Pollution (Dec. 14, 2012), *available at* <http://www.epa.gov/pm/actions.html>. The updated NAAQS for PM_{2.5} reduce the primary annual standard from 15.0 µg/m³ to 12.0 µg/m³, while maintaining the existing primary and secondary 24-hour PM_{2.5} standards. National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086 (Jan. 15, 2013) (to be codified at 40 C.F.R. pts. 50, 51, 52, 53 and 58). EPA issued the update in accordance with a federal court order in a suit against EPA for failing to meet its legal deadline under the Clean Air Act. *See id.* 78 Fed Reg at 3094 (citing *American Lung Association et al v. EPA*, No. 1:12-cv-00243-RLW (D.D.C) (consol. with No. 12-cv-00531)). The updated fine particle pollution NAAQS went into effect on March 18, 2013. National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086 (Jan. 15, 2013) (to be codified at 40 C.F.R. pts. 50, 51, 52, 53 and 58). The stricter standards are expected to improve public health by reducing mortality rates as well as the incidents of heart attacks, strokes, and childhood asthma. Press Release, U.S. Env'tl. Prot. Agency, EPA Revises the National Ambient Air Quality Standards for Particle Pollution (Dec. 14, 2012), *available at* <http://www.epa.gov/pm/actions.html>.

PARTICULATE MATTER DEFINED

Particle pollution, also referred to as particulate matter, is a common air pollutant associated with serious health problems due to the extremely small size of the particles, which can penetrate deep into the lungs and bloodstream, causing adverse respiratory and cardiovascular effects. U.S. ENVTL. PROT. AGENCY, QUANTITATIVE HEALTH RISK ASSESSMENT FOR PARTICULATE MATTER 4-3-4-4, 4-16-4-17 (2010), *available at* http://www.epa.gov/ttnnaqs/standards/pm/data/PM_RA_FINAL_June_2010.pdf. Particulate matter is measured in micrograms per cubic meter of air (µg/m³) and consists of microscopic solid and liquid components such as soil particles, dust particles, organic chemicals, metals, acids, and allergens. 40 C.F.R. §§ 51.100, 58.1 (2012). It is one of six

common air pollutants regulated in accordance with NAAQS, which are set by EPA as required by the Clean Air Act. 42 U.S.C. §§ 7408, 7409, 7409(b)(1) (2006).

Particle pollution is divided into two sub-categories of larger and smaller particles for monitoring and regulatory purposes. 40 C.F.R. §§ 51.1, 58.1; National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086 (Jan. 15, 2013) (to be codified at 40 C.F.R. pts. 50, 51, 52, 53 and 58). Particles in the first sub-category, coarse particles (PM_{10}), are between 2.5 and 10 micrometers in diameter, while those in the second sub-category, fine particles ($PM_{2.5}$), are 2.5 micrometers and smaller. 40 C.F.R. § 58.1. Coarse particles (PM_{10}) are found near dusty industries, unpaved roads, and deserts. *Particle Pollution (PM_{10}) and ($PM_{2.5}$)*, AIRNOW, <http://www.airnow.gov/index.cfm?action=aqibasics.particle> (last visited Oct. 26, 2013). Fine particles ($PM_{2.5}$) are found in smoke and haze, and are produced from multiple kinds of combustion, including power plants, motor vehicles, forest fires, agricultural burning, and certain industrial processes. *Id.* A portion of these fine particles are formed in the chemical reaction of emitted gases with the ambient air. *Id.* These two sub-categories of particulate matter – $PM_{2.5}$ and PM_{10} – occur under different conditions and are regulated by separate NAAQS. *See* 40 C.F.R. §§ 50.6, 50.7.

PARTICULATE MATTER NAAQS

The recent changes to NAAQS for fine particle pollution are spurred in part by contemporary scientific evidence showing that the health problems associated with $PM_{2.5}$ occur at lower concentration levels than previously thought. *See* U.S. ENVTL. PROT. AGENCY, QUANTITATIVE HEALTH RISK ASSESSMENT FOR PARTICULATE MATTER 4-3-4-4, 4-16-4-17 (2010), *available at* http://www.epa.gov/ttnnaqs/standards/pm/data/PM_RA_FINAL_June_2010.pdf. The Clean Air Act requires EPA to review NAAQS every five years to determine if the primary (human health-based) and secondary (environmentally based) standards need to be adjusted in order to prevent their harmful effects. 42 U.S.C. § 7409 (d)(1) If this review process indicates that the current NAAQS do not adequately protect the population and the environment, EPA will adjust those standards; if the NAAQS are still adequate, EPA will retain the standards. Press Release, U.S. Env'tl. Prot. Agency, EPA Revises the National Ambient Air Quality Standards for Particle Pollution (Dec. 14, 2012), *available at* <http://www.epa.gov/pm/actions.html>. Prior to 2012, the last NAAQS review process and associated updates for particulate matter had occurred in 1997. *Id.*

MONITORING PM CONCENTRATION LEVELS

Collection sites in areas across the country monitor the concentration levels of particulate matter to determine whether the area meets EPA standards. *Particle Pollution*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/airtrends/2011/report/particlepollution.pdf> (2011). EPA designates areas that meet the NAAQS as attainment sites and areas that do not meet the NAAQS as non-attainment sites. *Fine Particle ($PM_{2.5}$) Designations*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/pm/designations> (last updated Apr. 24, 2013). NAAQS for fine particulate matter concentration levels include an annual standard and a 24-hour standard. *Id.* The annual $PM_{2.5}$ concentration level is calculated by averaging three years' worth of an area's annual average concentration levels. *Nat'l Ambient Air Quality Standards (NAAQS)*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/air/criteria.html> (last visited Oct. 9, 2013); *see also*

EPA'S REVISED AIR QUALITY STANDARDS FOR PARTICLE POLLUTION: MONITORING, DESIGNATION, AND PERMITTING REQUIREMENTS, <http://www.epa.gov/airquality/particlepollution/2012/decfsimp.pdf> (Dec. 2012). The area's 24-hour $PM_{2.5}$ concentration level is calculated by averaging the 98th percentile concentration. *Basic Information: Area Designations for 2006 24-Hour Fine Particle ($PM_{2.5}$) Standards*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/airquality/particlepollution/designations/2006standards/index.htm> (last updated Apr. 19, 2013). Each temporal standard is also divided into primary and secondary standards, which correspond to human health safety levels and environmental levels, respectively. *Id.* The updated primary annual standard for $PM_{2.5}$ is $12 \text{ }\mu\text{g}/\text{m}^3$ and the retained primary 24-hour standard is $35 \text{ }\mu\text{g}/\text{m}^3$. *Id.*

THE NEW STANDARDS IN TEXAS

When EPA strengthens a standard, the Clean Air Act requires it to determine the attainment status of areas under the new standard. *Fine Particle ($PM_{2.5}$) Designations*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/pmdesignations> (last updated Apr. . 24, 2013). States receiving a nonattainment designation under the new standards have three years after the effective date of their nonattainment status to implement their State Implementation Plans. *Id.* In the last round of updates to 24-hour $PM_{2.5}$ standards, EPA designated all counties in Texas as attainment areas. *2006 $PM_{2.5}$ NAAQS — Region 6 Designations*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/airquality/particlepollution/designations/2006standards/final/region6.htm> (last visited Oct. 26, 2013). In April 2013, EPA released its initial 2012 area designations. *AREA DESIGNATIONS FOR THE 2012 ANNUAL FINE PARTICLE ($PM_{2.5}$) STANDARD*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/airquality/particlepollution/designations/2012standards/index.htm> (last updated Apr. 17, 2013) Some Texas counties will not be in compliance with the new primary annual standards if they do not reduce their $PM_{2.5}$ levels. *Id.* Specifically, Texas cities in Harris County will need to reduce their fine particle pollution levels by 2015 to comply with the new $12.0 \text{ }\mu\text{g}/\text{m}^3$ annual standard. Environmental Protection Agency, *Fine Particle Concentrations Based on Monitored Air Quality from 2009–2011 (2012)*, available at <http://www.epa.gov/pm/2012/20092011table.pdf>.

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WATER QUALITY

***MUSTANG SPECIAL UTIL. DIST. v. PROVIDENCE VILL.*, 392 S.W.3D 311 (TEX. APP.—FORT WORTH 2012, NO PET.) (OP. ON REH'G)**

INTRODUCTION

The Texas Court of Appeals of Fort Worth recently decided a case that will affect the ability of towns and cities to challenge contracts made by state entities regarding

their water supply. On September 27, 2012, the court reversed a trial court decision in favor of Providence Village, a newly incorporated town, challenging a contract entered into by Mustang Special Utility District (Mustang) and a Denton County fresh water supply district. *Mustang Special Util. Dist. v. Providence Vill.*, 392 S.W.3d 311 (Tex. App.—Fort Worth 2012, no pet.) (op. on reh'g). Providence Village filed a motion for rehearing and a motion for en banc reconsideration. *Id.* at 312. In a December 21, 2012 opinion, the court denied both motions, but substituted its September opinion with a new one that allowed Providence Village the opportunity to amend its petition to raise constitutional claims brought to the court's attention by its motion. *Id.* at 319.

FACTUAL BACKGROUND

Mustang, originally a water supply corporation, acquired a Certificate of Convenience and Necessity (CCN) to be the water service provider for northeast Denton County in 1985. *Id.* at 312. Several years later, in 1989, the state created the Upper Trinity Regional Water District (Upper Trinity) to furnish both water distribution utilities and treated water services in Denton County. *Id.* About ten years after that, a new housing development—Providence Village—was established, and both Mustang and Upper Trinity wanted to extend a treated water line to it, and to develop a regional wastewater system nearby. *Id.* at 313. To help finance the water line and wastewater system, the Denton County Commissioners Court created Denton County Fresh Water Supply District No. 9 (the District) as well as other water supply districts. *Id.* Providence Village was within the service areas of both the District and Mustang's CCN. *Id.*

Subsequently, the District entered into contracts with both Upper Trinity and Mustang, but the contracts at issue in this case were the ones between the District and Mustang. *Id.* Under the first set of contracts between the District and Mustang, the District agreed to: use water transported to the District by Mustang, construct “water distribution and wastewater collection facilities, and to apply for water and sewer CCNs within the District's service area.” *Id.* Mustang, in turn, was responsible for services related to the water and sewer facilities. *Id.* Finally, under the contracts, Mustang gained the option to buy the District's systems and thereafter receive the District's water and sewer CCNs. *Id.* Within the following year, Mustang became a special utility district, and the District acquired water and sewer CCNs for its service area. *Id.*

Several years later, in 2005, the District and Mustang entered into an amended agreement, under which the District agreed to convey its sewer collection facilities to Mustang on October 1, 2011. *Id.* The District also agreed to lease its water distribution and storage facilities to Mustang. *Id.* Then, in October 2007, under another amended agreement, the District pledged to convey—instead of lease—its water distribution facilities to Mustang on October 1, 2011. *Id.*

The dispute at issue arose when, in February 2011, the District and Mustang sought approval from the Texas Commission on Environmental Quality (TCEQ) for the planned conveyance of the District's facilities and CCNs to Mustang. *Id.* After the requested approval was filed, Providence Village, which became a city in 2010, protested the transfer. *Id.* Then, Providence Village sued both the District and Mustang in June 2011. *Id.* at 314.

THE TRIAL COURT DECISION

Providence Village contested the 2005 agreement (and the 2007 amendments to it), which contemplated the transfer of the District's facilities and CCNs to Mustang. *Id.* at 314. It characterized its suit as one testing "the rights of citizens to organize themselves into a city, elect officials, and then have those elected officials determine what best meets their current needs." *Id.* It claimed that if the transfer was approved, "neither the local district nor [Providence Village] will have control over their water and sewer services, even though much of the infrastructure was financed with bonds still being repaid by these citizens' taxes." *Id.* Providence sought both injunctive relief and a declaration that the transfer agreement violated the reserved powers doctrine and that the District was not bound to make the transfer. *Id.* at 315

Denying Mustang's motion to dismiss, motion for summary judgment, and a second plea, the trial court rejected Mustang's argument that governmental immunity barred Providence Village's claims against it. *Id.* Mustang then filed an interlocutory appeal challenging the trial court's rulings. *Id.*

THE PARTIES' ARGUMENTS ON APPEAL

On appeal, Mustang maintained that governmental immunity barred Providence Village's declaratory judgment action seeking to invalidate the agreement. *Id.* Specifically, Mustang argued that "declaratory judgment actions seeking to 'invalidate' a contract are suits tantamount to *controlling state action* when alleged against the state and cannot be maintained absent legislative intent to waive immunity." *Id.*

In response, Providence Village argued that it did not seek to control state action in an impermissible way. *Id.* It recognized that certain declaratory judgment actions are barred by government immunity since they seek to control state action. *Id.* Specifically, it conceded that actions "to establish a contract's validity, to enforce performance under a contract, or to impose contractual liability" are generally barred. *Id.* But it argued that it was not seeking to do any of those things—rather, it only sought "a judicial declaration" as to whether the contract was valid under the reserved powers doctrine. *Id.* at 315. Notably, Providence Village declined to make an *ultra vires* claim that Mustang and the District lacked authority to contract. *Id.*

THE COURT OF APPEALS OPINION

In its decision, the court of appeals noted that the parties agreed "that Mustang is a political subdivision of the State of Texas." *Id.* For this reason, Mustang was protected by governmental immunity unless the state had waived its immunity. *Id.*

Next, the court considered whether the state had waived its immunity for this type of claim under the Uniform Declaratory Judgments Act (UDJA), TEX. CIV. PRAC. & REM. CODE §§ 37.001-.011 (West 2008). *Mustang Special Util. Dist.*, 392 S.W.3d at 315. According to Texas Supreme Court precedent, the UDJA waives immunity in two circumstances: (1) challenges of ordinances and statutes, and (2) *ultra vires* claims that state officials acted outside legal or statutory authority or failed to perform purely ministerial duties. *Id.* at 316 (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 & n.6 (Tex. 2009), and *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex. 2002)). But Providence Village's suit did not fall into either of these categories. *Id.* Instead, it sought a declaration that the contract between Mustang and the

District was void. *Id.* So the UDJA itself did not provide a basis under which Providence Village could sue.

The court then explained that, under Texas Supreme Court precedent, government immunity bars declaratory judgment actions against state entities in two situations: (1) suits effectively seeking to recover money damages, and (2) suits “seek[ing] to establish a contract’s validity, to enforce performance under a contract, or to impose contractual liabilities—actions that effectively control state action.” *Id.* (citing *IT–Davy*, 74 S.W.3d at 855–56, and *W.D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 840–41 (Tex. 1958)). The court then turned to the question of whether Providence Village’s suit sought to impermissibly control state action by seeking to establish a contract’s validity. *Id.*

The court ultimately concluded the suit was barred by government immunity because it did seek to establish a contract’s validity. *Id.* In doing so, it relied on the Texas Supreme Court case *W.D. Haden Co. v. Dodgen*, 308 S.W.2d 838 (Tex. 1958). *Mustang Special Util. Dist.*, 392 S.W.3d at 316. In that case, the court held that a suit by W.D. Haden Company against the Texas Game and Fish Commission (the Commission) was barred by government immunity. *W.D. Haden Co.*, 308 S.W.2d at 838–40. The Commission issued a permit to the company, under which the company paid a monthly rate of seven cents per cubic yard of mudshell to remove mudshell out of Galveston Bay. *Id.* at 838–39. The Commission tried to raise the cost of the removals, and W.D. Haden brought suit seeking a declaration that the Commission had to pay the seven-cents rate for the remainder of the permit term. *Id.*

Holding that the suit was barred by government immunity, the *W.D. Haden* court made a distinction between suits against state officials for wrongful conduct—which are not barred by government immunity—and suits against state officials seeking enforcement or cancellation of a contract made by the state in its sovereign capacity—which are barred by government immunity. *Id.* at 840–41. In the second category of suits, the *Mustang* court specifically mentioned suits “to cancel or nullify a contract made for the benefit of the state” as suits barred by government immunity. 392 S.W.3d at 317. The *Mustang* court concluded that a suit to enforce a contract made for the benefit of the state, as well as “a suit to *invalidate* a contract made for the benefit of the State [are both] barred by governmental immunity” *Id.*

In analyzing *W.D. Haden*, the *Mustang* court flatly rejected two of Providence Village’s arguments in its motion for rehearing. First, it denied the contention that a suit to *validate* a contract made by the state is barred by governmental immunity whereas a suit to *invalidate* such a contract is not barred. *Id.* According to the court, both types of suits seek to control state action and are both barred. *Id.* Second, it rejected the idea that *W.D. Haden* was not dispositive since *W.D. Haden*’s discussion of suits to *invalidate* state contracts was dicta. *Id.* The court again disagreed, and it treated as binding *W.D. Haden*’s discussion of suits to *invalidate* state contracts (though it did not explicitly deny that such discussion was dicta). *Id.*

The *Mustang* court also noted that subsequent Texas court of appeals cases had applied the reasoning of *W.D. Haden* to bar suits seeking to *invalidate* contracts under government immunity principles. *Id.* Specifically, it focused on the 2007 decision *Texas Logos, L.P. v. Texas Department of Transportation*, 241 S.W.3d 105 (Tex. App.—Austin 2007, no pet.). *Mustang Special Util. Dist.*, 392 S.W.3d at 317. There, the court cited *W.D. Haden* for the proposition that both suits to enforce contracts with the state and

suits to invalidate contracts with the state are barred by government immunity. *Id.* at 318 (citing *Tex. Logos, L.P.*, 241 S.W.3d at 119–20).

The court also addressed Providence Village's argument in its motion for rehearing that another Texas court of appeals case, *City of Crowley v. Ray*, No. 02-09-00290-CV, 2010 WL 1006278 (Tex. App.—Fort Worth Mar. 18, 2010, no pet.) (mem. op.), dictated the outcome of this case. *Mustang Special Util. Dist.*, 392 S.W.3d at 318. The court was not convinced; it quickly distinguished *City of Crowley* by noting that the claimants in that case did not seek to invalidate a state contract, as they did in the case at hand. *Id.*

After discussing *W.D. Haden* and *Texas Logos*, the *Mustang* court concluded by recognizing that the facts of the case were governed by these precedents. *Id.* Because Providence Village sought to nullify a contract with a state actor (*Mustang*), its suit was barred by governmental immunity. *Id.* at 319. The court further noted that an important policy rationale for governmental immunity applied to the case; namely, "protecting state resources from the costs associated with litigation so that they can be allocated as directed by the legislature or local government, including by executing contractual agreements for the benefit of the state." *Id.* For these reasons, the court held the trial court's denial of *Mustang's* challenges was in error. *Id.*

Although the appeals court reversed the trial court decision and dismissed Providence Village's UDJA claim, it gave Providence Village the opportunity to amend its original petition on remand because it had raised new constitutional claims. *Id.*

THE IMPLICATIONS OF THE CASE

The *Mustang* decision will make it more difficult to challenge contracts involving state entities regarding their water and sewer services. The citizens of Providence Village did not consider it to be in their best interest to have the ownership of their sewer collection facilities and water distribution facilities conveyed from Denton County Fresh Water Supply District No. 9 to *Mustang Special Utility District*. In its suit, Providence Village claimed that, "[i]f the transfer is accomplished, neither the local district nor the Town will have control over their water and sewer services, even though much of the infrastructure was financed with bonds still being repaid by these citizens' taxes." *Id.* at 314. Unless Providence Village's constitutional claims are successful, however, the transfer will be accomplished.

Although this is only a court of appeals decision, its holding is likely to be persuasive to future courts of appeals deciding similar challenges by cities or other entities. Moreover, if this issue reaches the Texas Supreme Court, the opinion may also be persuasive since it is grounded in dicta from the Texas Supreme Court case *W.D. Haden v. Dodgen*, 308 S.W.2d 838 (1958).

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WATER RIGHTS

TEXAS FARM BUREAU ET AL. V. TEXAS COMM'N ON ENVTL. QUALITY, NO. D-1-GN-12-3937, 98TH DIST. COURT OF TRAVIS COUNTY (FILED DEC. 14, 2012)

In December 2012, the Texas Farm Bureau and nine irrigation water rights holders in the Brazos River basin filed a declaratory judgment action and request for temporary and permanent injunctive relief against the Texas Commission on Environmental Quality (TCEQ). Pls.' Original Pet. and Req. for Injunctive Relief at 1–4; Pls.' First Amended Petition at 1. The case was heard by Judge Scott Jenkins of the 53rd Judicial District, Travis County, Texas. The suit challenges the validity of TCEQ's rules related to suspension and adjustment of water rights during drought. 30 TEX. ADMIN. CODE §§ 36.1-36.8 (West 2012) (the "Drought Curtailment Rules"). The rules were recently adopted and went into effect on May 3, 2012. 37 TEX. REG. 3096 (April 27, 2012).

Specifically, Plaintiffs allege that the Drought Curtailment Rules and their application in response to a recent senior priority call made by Dow Chemical Company (Dow) in the Brazos River basin violate the statute under which the rules were adopted, TEX. WATER CODE § 11.053 (West 2011), and the longstanding prior appropriation doctrine, as reflected in TEX. WATER CODE § 11.027 (West 2011) ("As between appropriators, the first in time is the first in right"). See generally Pls.' Original Pet. and Req. for Injunctive Relief at 3. Section 11.053 (Emergency Order Concerning Water Rights) provides that:

- (a) During a period of drought or other emergency shortage of water, as defined by commission rule, the executive director by order may, in accordance with the priority of water rights established by Section 11.027:
 - (1) temporarily suspend the right of any person who holds a water right to use the water; and
 - (2) temporarily adjust the diversions of water by water rights holders.
- (b) The executive director in ordering a suspension or adjustment under this section shall ensure that an action taken:
 - (1) maximizes the beneficial use of water;
 - (2) minimizes the impact on water rights holders;
 - (3) prevents the waste of water;
 - (4) takes into consideration the efforts of the affected water rights holders to develop and implement the water conservation plans and drought contingency plans required by this chapter;
 - (5) to the greatest extent practicable, conforms to the order of preferences established by Section 11.024; and
 - (6) does not require the release of water that, at the time the order is issued, is lawfully stored in a reservoir under water rights associated with that reservoir.

TEX. WATER CODE § 11.053.

In November 2012, Dow made a priority call for water, alleging that it was not able to divert water under its 1942 priority water right. Pls.' Original Pet. at 6. In response, TCEQ issued an order that suspended diversions under all water rights with a priority date junior to February 14, 1942 downstream of Possum Kingdom Reservoir; however, TCEQ exempted all municipal and power generators from the order on public health and safety grounds. Tex. Comm'n Env'tl. Quality, *Order Affirming and Modifying the Executive Director's Order Suspending Water Rights on the Brazos River*, Docket No. 2012-2421-WR (Dec. 5, 2012), available at <http://www7.tceq.state.tx.us/uploads/eagendas/Agendas/2013/1-30-2013/2012-2421-WR.pdf>. In their lawsuit, the Texas Farm Bureau alleges that the Drought Curtailment Rules are invalid and exceed the TCEQ's statutory authority insofar as they allow deviation from the priority system and exemption of water rights for certain preferred uses from a curtailment or suspension order in violation of Water Code Sections 11.053(a) and 11.027.¹ The suspension order identified 845 water rights as suspended, including 716 rights for irrigation. Tex. Comm'n Env'tl. Quality, *Order Affirming and Modifying the Executive Director's Order Suspending Water Rights on the Brazos River*, Docket No. 2012-2421-WR (Dec. 5, 2012), available at <http://www7.tceq.state.tx.us/uploads/eagendas/Agendas/2013/1-30-2013/2012-2421-WR.pdf>. The order also identified 66 water rights for municipal and power generation junior to Dow's priority right which were expressly exempted from the suspension. *Id.* Plaintiffs point out that the total authorized annual use under the suspended rights is 141,090 acre-feet per year, while the total authorized annual use of the exempted rights for municipal and power generation is 3,076,056 acre-feet per year. Pls.' Original Pet. at 6. They argue that this shows "not only is agriculture bearing the brunt of making water available for Dow, it is also making water available for municipal and power generation uses that far exceed the amount authorized for . . . suspended uses." *Id.*

Shortly after the suit was filed, TCEQ issued letters to the junior domestic, municipal and power generators cautioning that they are still subject to potential curtailment if they do not take significant actions to conserve water. Letter from Zak Covar, Exec. Dir., Tex. Comm'n Env'tl. Quality, to Water Rights Holders Regarding Implementation of Mandatory Water Use Restrictions (Dec. 14, 2012), available at <http://www.tceq.texas.gov/assets/public/response/drought/water-right-letters/12-14-12brazos-muni-non-responsive.pdf> (last visited April 7, 2013).

The Executive Director (ED) of the TCEQ modified this suspension order on January 8, 2013, to allow curtailed junior water rights holders to divert water when stream flows in the Brazos and its tributaries meet certain specified non-drought levels. The ED modified the Suspension Order again on January 15, removing or modifying the exemption from curtailment for many municipal and power generation water rights. Dow rescinded its priority call on January 23, 2013, at which point the Farm Bureau amended its Petition to remove its request for injunctive relief. Pls.' First Amended Petition at 9.

1 Plaintiffs also alleged, in the alternative, that the rules and their application have unconstitutionally taken the vested property rights of the Texas Farm Bureau's members without just compensation and argue that TCEQ should require the junior cities and power generators to compensate the irrigators who are unable to divert. Pls.' Original Pet. at 7. Because the trial court's final judgment ruled that the Drought Curtailment Rules are invalid, the trial court necessarily did not reach the alternative takings allegation.

News Release, Texas Farm Bureau, Texas Farmers Relieved as Priority Call Lifted in Brazos River Basin (Jan. 23, 2013), *available at* <http://media.texasfarmbureau.org/?p=512>. Texas Farm Bureau Assistant General Counsel for Public Policy, Regan Beck, said the decision “gives farmers more certainty as they prepare for spring planting and allows them to continue with their crops as planned While this is good news in the short-term, it does not resolve the bigger issue of [TCEQ] ignoring Texas water law of the priority doctrine.” Plaintiffs continued to pursue their declaratory judgment cause of action seeking to invalidate the Drought Curtailment Rules.

Plaintiffs also argue that Texas Water Code § 11.139 is the appropriate provision under which TCEQ has authority to transfer senior irrigation water rights to domestic, municipal and other public health-related uses. *Id.* at 7-8. Texas Water Code § 11.139 (j) provides that “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.” When TCEQ’s new rules related to the suspension or adjustment of water rights during drought or emergency shortage were originally proposed, the Commissioners were advised by TCEQ staff that the rules would be controversial, including the way suspensions and adjustments would be implemented. *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 (2012). The new statute and rules were enacted after a similar situation occurred during the drought of 2009. *Id.* at 142. Dow made a priority call, and TCEQ responded by suspending rights junior to 1980 for non-municipal uses. *Id.* This prompted a recommendation by the Sunset Advisory Commission that the TCEQ Executive Director’s authority to limit water use by rights holders during drought and shortages be clarified. *Id.* During the comment period for the proposed rules, 15 of 28 comments, including a comment by the Texas Farm Bureau, stated that emergency orders cannot circumvent the priority system by allowing the exemption of preferred junior uses. *Id.* at 147. Additionally, some comments expressed that senior rights should be compensated when their rights are curtailed for junior preferred rights, as provided for by Texas Water Code § 11.139. *Id.* Plaintiffs further allege that suspension of water rights was unnecessary because Dow had a contract for additional water that could be delivered by the Brazos River Authority. *Pls.’ Original Pet.* at 4.

On June 6, the trial court heard cross-motions for summary judgment. The court held that the Drought Curtailment Rules are invalid and exceed TCEQ’s statutory authority because they allow deviation from the priority system and the exemption of water rights for preferred uses from a curtailment or suspension order that are not in accordance with the priority of water rights established by Texas Water Code § 11.027. Order on Cross Motions for Summary Judgment, June 6, 2013. The court also found that the exemption of junior water rights from a priority call and curtailment or suspension order is not authorized by TCEQ’s police power or any general authority to protect the public health, safety, or welfare. *Id.*

Defendants filed a Notice of Appeal of this Order on June 21, 2013. On that same day, the Texas Farm Bureau filed a Motion to Prevent Suspension of Judgment and Motion to Post Bond. Texas Farm Bureau requested that the trial court, pursuant to Texas Rule of Appellate Procedure 24(a)(3), decline suspension of its final judgment during pendency of TCEQ’s appeal. TCEQ had taken the position that it has an abso-

lute right to supersede a trial court judgment under Texas Civil Practice and Remedies Code § 6.001 and Texas Rule of Appellate Procedure 25.1(h)(2). In response to another priority call by Dow, the Executive Director of the TCEQ issued another suspension order in the Brazos River basin on July 2, 2013, which once again exempted several municipalities and power generators from suspension based on TCEQ's position that it is entitled to supersede the trial court's final order during the pendency of its appeal.

Judge Jenkins, in a July 5, 2013 letter to counsel, stated that he declined to exercise his discretion to consider Texas Farm Bureau's motion because the record was too sparse to determine what effects in the Brazos River region would follow from the exercise of that discretion. After Defendants filed their notice of appeal, the case was transferred to the Corpus Christi Court of Appeals. The case was subsequently remanded to district court for a hearing and entry of judgment, findings of fact, and conclusions of law regarding Texas Farm Bureau's Motion to Prevent Suspension of Judgment. On August 16, 2013, the court entered an order denying Texas Farm Bureau's motion.

The case is currently in the briefing phase before the Thirteenth Court of Appeals in Corpus Christi, Texas.

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FEDERAL CASENOTE

***CTR. FOR BIOLOGICAL DIVERSITY v. U.S. BUREAU OF LAND MGMT.*, 698 F.3D 1101 (9TH CIR. 2012)**

INTRODUCTION

On October 22, 2012, the U.S. Court of Appeals for the Ninth Circuit invalidated approvals related to the Endangered Species Act (ESA) for the western interstate Ruby Pipeline Project (the Project). *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1128 (9th Cir. 2012). The Project involved "the construction, operation, and maintenance of a 42-inch diameter natural gas pipeline" extending from Wyoming to Oregon and crossing "209 rivers and streams that support federally endangered species." *Id.* at 1106. Ruby Pipeline L.L.C. (Ruby) filed an application with the Federal Energy Regulatory Commission (FERC) seeking a Certificate of Public Convenience and Necessity (CCN) to authorize the Project. *Id.* at 1108; see 15 U.S.C. 717f(c)(1)(A) (2012). Because of the scope of the project, FERC requested consultation with the U.S. Fish and Wildlife Service (USFWS), which issued a Biological Opinion (the Opinion).

Ctr. for Biological Diversity, 698 F.3d at 1108. The Opinion concluded that the Project “would not jeopardize [the listed] species or adversely modify their critical habitat,” taking into account the mitigating effects of actions described in Ruby’s Endangered Species Conservation Action Plan (CAP). *Id.* at 1106, 1109. Accordingly, the Bureau of Land Management (BLM) authorized the Project. *Id.* at 1105. This case focused on the validity of the Opinion’s “no jeopardy” and “no adverse modification” conclusions and BLM’s reliance on those conclusions in issuing its Record of Decision. *Id.* at 1106.

THE BIOLOGICAL OPINION

The Opinion factored into its “no jeopardy” and “no adverse modification” determinations the “voluntary” conservation actions that Ruby had indicated it would facilitate implementing in the CAP. *Id.* at 1109. The listed CAP measures included, for example, “research and monitoring of Warner [S]ucker populations” and “restoration of native riparian vegetation along select tributaries in the Green River Basin to decrease water loss that could adversely impact the endangered Colorado River fishes.” *Id.* at 1111. Although these actions were to be implemented by Ruby in the future, the Opinion concluded they were “reasonably certain to occur.” *Id.* at 1109.

In its “jeopardy” and “adverse modification” analysis, the Opinion referenced the CAP measures as part of its review of the Project’s anticipated “cumulative effects”—the “effects of future [non-Federal] activities that are reasonably certain to occur within the action area of the Project.” *Id.* at 1112. The Opinion then relied on these measures to conclude that the Project would not jeopardize the listed species or adversely modify their habitat. *Id.* These conservation measures were also incorporated into the FERC CCN and BLM’s Record of Decision. *Id.* at 1111.

THE HOLDING OF THE U.S. COURT OF APPEALS FOR THE 9TH CIRCUIT

After BLM authorized the Project, the Coalition of Local Governments, an environmental group, filed a petition for judicial review with the U.S. Ninth Circuit Court of Appeals. See Petition for Review and Corporate Disclosure Statement, *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101 (9th Cir. 2012) (No. 10-72552), 2010 WL 9070530, at *2. Other environmental groups joined the petition. See, e.g., Joint Opening Brief of Petitioners Center for Biological Diversity and Defenders of Wildlife et al., *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101 (9th Cir. 2012) (Nos. 10-72356, 10-72552, 10-72762, 10-72768, 10-72775), 2010 WL 5854347, at *5.

The petitioners brought several challenges under the ESA. Among other things, they challenged the Opinion’s reliance on the actions set forth in the CAP as mitigating the adverse effects of the Project, contending that the “no jeopardy” and “no adverse modification” determinations by the Opinion relied on measures not enforceable under the ESA. *Ctr. for Biological Diversity*, 698 F.3d at 1106. The petitioners further claimed the Opinion was arbitrary and capricious because it failed to consider the potential impacts of groundwater withdrawals on the listed species. *Id.* at 1119.

The court held that the Opinion was invalid because it determined that: (1) USFWS erred in classifying the anticipated beneficial effects of the CAP measures as “cumulative effects”; and (2) the Opinion failed to evaluate the potential impacts of the Project’s groundwater withdrawals on the listed fish species and their habitat. *Id.* at 1128. The court also invalidated the Record of Decision issued by BLM because it relied on the Opinion. *Id.*

EFFECTS OF CAP MEASURES AS “CUMULATIVE EFFECTS”

The court concluded that the erroneous categorization of the CAP measures was legally determinative. *Id.* at 1113. Whether the Opinion properly relied on the CAP in its assessment depended on whether the Opinion characterized the CAP’s projected benefits as either “effects of the proposed action” or “cumulative effects of other anticipated actions.” *Id.* (quoting 50 C.F.R. § 402.14(g) (2009)). Here, the court held the Opinion mischaracterized the CAP measures as private actions that produce “cumulative effects.” *Id.* at 1116.

According to the ESA, “effects of the proposed action” encompass interrelated actions that are part of the larger action, such as conservation measures. *Id.* at 1113 (citing U.S. FISH AND WILDLIFE SERV. AND NAT’L MARINE FISHERIES SERV., ENDANGERED SPECIES ACT CONSULTATION HANDBOOK xii (1998)). “Cumulative effects,” on the other hand, are “those effects of future State or private activities, *not involving Federal activities*, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.* (citing 50 C.F.R. § 402.02 (2009) (emphasis added)). Adequate categorization by the Opinion was critical because non-federal actions giving rise to cumulative effects are not enforceable under the ESA—they are not subject to ESA consultation. *Id.*

Enforceability under the ESA’s procedural provisions ensures recourse by the parties to the agreement and the protection of the listed species. *Id.* at 1114. The court considered this particularly important, as it was possible the contemplated CAP measures could never materialize. *Id.*; see 50 C.F.R. § 402.16(c) (2012) (“[Reinitiation of formal consultation with the ESA is required] if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.”). Furthermore, by mischaracterizing mitigating measures as “cumulative effects,” the ESA scheme is affected, since enforcement authority and discretion is allocated to FERC and BLM, not USFWS—“the expert agency entrusted with administrating the ESA.” *Id.* at 1116. Therefore, a conservation agreement involving measures designed to mitigate the impact of an action must be enforceable under the ESA to be factored into an Opinion’s “jeopardy” or “adverse modification” determination. *Id.* at 1117.

Ultimately, the court held that the CAP measures were dependent on the Project and “fit squarely within the definition of ‘conservation measures’, and that the Opinion unreasonably relied on these measures as “cumulative effects.” *Id.* at 1118-1119. Therefore, the Opinion was arbitrary and capricious. *Id.*

GROUNDWATER WITHDRAWALS

The court also held that the Opinion was invalid as arbitrary and capricious because it failed to consider the effects of groundwater withdrawals on listed fish species and their habitat. *Id.* Whether this omission was arbitrary and capricious depended on “whether information available to USFWS indicated that the groundwater withdrawals ‘may affect’ listed species.” *Id.* at 1120 (citing 50 C.F.R. § 402.14(a) (2009)). In its analysis, the court pointed out that groundwater withdrawals “may affect” listed species if they constitute a “relevant factor” in the Opinion’s “no jeopardy” or “adverse modification” determinations. *Id.* at 1122 (citing *Pac. Coast Fed’n of Fishermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001)). To this end, the court further noted that the burden of establishing a “relevant factor” is low, and that the petitioners need only show that “an effect on listed species or [their] critical habitat is plausible.” *Id.*

The court concluded that, according to the record, the impact of groundwater withdrawals was “sufficiently plausible” because depletion in underlying groundwater levels could alter surface water levels, thereby affecting listed species. *Id.* at 1123. Moreover, the court held USFWS acted unreasonably by not discussing the potential impact of groundwater withdrawals on the species or, alternatively, by failing to explain why such withdrawals would not impact the species. *Id.* at 1124. For these reasons, the Opinion was arbitrary and capricious and, therefore, invalid. *Id.*

The court vacated the Opinion and remanded for USFWS to reformulate a revised biological opinion that: (1) addressed the impact of groundwater withdrawals; and (2) categorized the CAP measures as “interrelated actions” or excluded any reliance on their beneficial effects. *Id.* at 1128. The court also vacated and remanded BLM’s Record of Decision. *Id.* at 128.

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STATE CASENOTES

***HERITAGE ON THE SAN GABRIEL HOMEOWNERS ASS’N v. TEX. COMM’N ON ENVTL. QUALITY*, 393 S.W.3D 417 (TEX. APP.—AUSTIN 2012, PET. DENIED)**

The Austin Court of Appeals remanded an order to the Texas Commission on Environmental Quality (TCEQ) that issued a permit to Williamson County (the County) for purposes of expanding its landfill near Hutto, Texas. *Heritage on the San Gabriel Homeowners Ass’n v. Tex. Comm’n on Env’tl. Quality*, 393 S.W.3d 417 (Tex. App.—Austin

2012, pet. denied). The permit, granted by TCEQ in 2009, allows the County to expand the area of the landfill from 202 acres to 575 acres. *Id.* It was opposed by several community groups, a competitor of the landfill's operator, and Jonah Water S.U.D (Hutto Landowners). *Id.*

Williamson County applied for a permit to expand its landfill in 2005. *Id.* Following public meetings, in 2006, the application was referred to the State Office of Administrative Hearings for a hearing on whether the application complied with TCEQ's requirements. *Id.* at 423. Following the hearing, the administrative law judges concluded that the application met requirements and recommended granting the County the permit. *Id.* The judges' proposal for decision limited the landfill's operating hours from 5:00 a.m. to 8:00 p.m. Monday through Friday and from 6:00 a.m. to 4:00 p.m. on Saturday. *Id.* In 2009, TCEQ granted a permit authorizing 29 more operating hours per week than the administrative law judges' recommendation. *Id.* The Hutto Landowners appealed TCEQ's decision. *Id.* After the district court affirmed the decision, the Hutto Landowners appealed to the Third Court of Appeals. *Id.*

The Hutto Landowners presented six issues upon appeal. *Id.* at 422. The first four grounds for appeal turned upon questions of construction of administrative rules and whether or not the record contained substantial evidence to support TCEQ's construction of these rules. *Id.* at 430-39. The court of appeals ruled that TCEQ's construction of the rules was consistent with their text and that substantial evidence existed to support TCEQ's decisions. *Id.* The appellants' first four issues on appeal were thus overruled. *Id.*

The fifth issue presented by the appellants concerned TCEQ's expansion of the operating hours recommended by the administrative law judges. *Id.* at 439. TCEQ failed to provide any explanation for the expansion of operating hours, in apparent violation of the Texas Health and Safety Code Section 361.0832. *Id.* That section requires the TCEQ to provide an explanation of its reasons for rejecting the findings or decisions made in contested cases under the Solid Waste Disposal Act. *Id.* Because TCEQ failed to explain its reasons for overturning the recommendation of the administrative law judges, the court of appeals sustained the appellants' fifth issue. *Id.* at 441. The district court's decision was affirmed in part and reversed in part and the proceeding was remanded to TCEQ. *Id.* The court noted that TCEQ may "resume exercising its discretion from the point at which it exceeded its authority," indicating the remand's limited scope. *Id.* at 441.

***MONT BELVIEU CAVERNS, LLC v. TEX. COMM'N ON ENVTL. QUALITY*, 382 S.W.3D 472 (TEX. APP.—AUSTIN, 2012, NO PET.)**

The Austin Court of Appeals recently affirmed a grant of summary judgment to the Texas Commission on Environmental Quality (TCEQ) in a suit seeking judicial review of a TCEQ determination that a new brine-pond system installed by Mont Belvieu Caverns, LLC (Mont Belvieu) failed to qualify for a pollution-control property tax exemption. *Mont Belvieu Caverns, LLC v. Tex. Comm'n on Env'tl. Quality*, 382 S.W.3d 472 (Tex. App.—Austin, 2012, no pet.).

For a particular property to qualify for the pollution-control tax exemption, the executive director of TCEQ must determine that the property is used either wholly or in part for the control of pollution (a "use determination"). *Id.* at 476. The applicant for the exemption is required to specify the proportion of the property that is used to control

pollution; if the property is not wholly pollution-control property, the applicant is required to provide sufficient data for the executive director to determine the proportion of the property that qualifies as pollution-control property. *Id.* If the executive director makes a “positive” use determination (a finding that the property is wholly or partly categorized as pollution-control property), then the property is eligible for the tax exemption for the proportion of the property qualified as pollution-control property. *Id.* at 477.

In 2001, the Legislature amended Texas Tax Code Section 11.31 to require that TCEQ establish new rules to distinguish between property used solely for the purpose of controlling pollution and property that had both production and pollution control purposes; while the former would be eligible for a tax exemption on its total value, only the portion of the latter that was actually used for pollution-control purposes would qualify for a tax exemption. *Id.* at 477-478. Thereafter, TCEQ adopted three tiers under which owners could apply for a pollution-control property tax exemption. *Id.* at 478. Tier I contained a predetermined listing (PDL) of property types for which the percentage of the property eligible for tax exemption had already been determined. *Id.* Tax exemption for property not listed in Tier I would be applied for and analyzed under either Tier II, if the applicant claimed the whole property qualified for the pollution-control tax exemption, or Tier III, if only part of the property qualified for the exemption. *Id.* at 479. Following a 2007 amendment to the Texas Tax Code, which took effect in February 2008, TCEQ was required to adopt by rule a predetermined list of qualified properties to be updated every three years. *Id.* at 480. This list became TCEQ’s Equipment and Categories List (ECL). *Id.*

Mont Belvieu stores natural gas liquids in underground storage caverns. *Id.* It uses a system of brine ponds and pumps to manage gas levels in the caverns. *Id.* Mont Belvieu asserted that its brine pond systems qualified as 100% pollution-control property. *Id.* at 480-481. The PDL created by TCEQ in 2002 reflected this view, including “Brine Storage Ponds” as wholly pollution-control property. *Id.* at 481. Between 1997 and 2007, TCEQ granted Mont Belvieu at least five 100% positive use determinations for its brine pond systems. *Id.* In 2008, after the ECL took effect, Mont Belvieu applied for a 100% positive use determination for a new brine pond system in Chambers County. *Id.* However, the “Brine Storage Ponds” listed in the PDL were replaced in the new ECL by “Brine Disposal Ponds.” *Id.* TCEQ’s executive director made a negative use determination for the brine pond on the grounds that brine storage ponds were no longer listed in the new ECL and that the new brine pond was used for the management of gas levels in the storage caverns—a production purpose—thus failing to qualify as 100% pollution-control property. *Id.* at 482.

Mont Belvieu appealed TCEQ’s negative determination to the Travis County District Court. *Id.* at 485. That court granted TCEQ’s motion for summary judgment. *Id.* Mont Belvieu then appealed to the Austin Court of Appeals. *Id.* The primary argument Mont Belvieu advanced in support of its claim was that under the definition of pollution-control property found in Texas Tax Code § 11.31, its brine pond system qualified as 100% pollution-control property and that under this definition, whether a property is concurrently used for production purposes is irrelevant. *Id.* at 487. The court of appeals disagreed, reading Texas Tax Code Section 11.31(g)(3), which explicitly requires TCEQ to distinguish the portion of property that is used for pollution control from the portion of property used for production. *Id.* at 488-489. That limitation reflects the Legislature’s

intent to limit the pollution-control tax exemption to property investment made *solely* for the purpose of complying with environmental regulation. *Id.* That is, if property has *any* productive purpose, it is by definition not 100% pollution-control property. By admitting that its brine pond system had production purposes, Mont Belvieu effectively conceded that it was not 100% pollution-control property. The court thus held that TCEQ's rejection of Mont Belvieu's 100% positive use determination was not in conflict with Tax Code Section 11.31 and overruled appellant's first issue. *Id.* at 489.

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