

# TEXAS ENVIRONMENTAL LAW JOURNAL

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Volume 39

Winter/Spring & Summer 2009

Numbers 2-3

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**WHERE SOVEREIGN IMMUNITY AND WATER DEVELOPMENT ISSUES COLLIDE**

*Jeffrey S. Boyd*

**ATOMIC POWER, FOSSIL FUELS, AND THE ENVIRONMENT:  
LESSONS LEARNED AND THE LASTING IMPACT OF THE KENNEDY ENERGY POLICIES**

*Joshua P. Fershee*

## NOTES

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HOW TEXANS CAN IMPROVE INCENTIVES FOR LANDOWNERS  
TO PRESERVE PRIVATE PROPERTY FROM DEVELOPMENT**

*Will Ikard*

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A COMPARISON TO OTHER PRIOR APPROPRIATION STATES**

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**Environmental & Natural Resources Law Section**

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## STATEMENT OF PURPOSE

The purpose of the *Texas Environmental Law Journal* is to provide the members of the Environmental and Natural Resources Law Section of the State Bar of Texas and the public with legal articles and recent development columns on relevant environmental and natural resources law issues. The *Journal* also provides news of Section activities and other events pertaining to this area of law. The *Journal* is the leading source for articles on Texas environmental and natural resources law.

## JOINT PUBLICATION

The *Texas Environmental Law Journal* is an official publication of the Environmental and Natural Resources Law Section of the State Bar of Texas and is published jointly with the University of Texas School of Law's *Texas Environmental Law Journal*. In 1990, the Environmental and Natural Resources Law Section reached an agreement with this student organization at the University of Texas School of Law to co-produce the *Journal* as the *Texas Environmental Law Journal*. The students' involvement began with the summer issue in 1990.

## OTHER INFORMATION

With this Volume 39, the *Journal* is changing from a quarterly publication to a triannual publication. However, this publication of the *Journal* is a combined publication of Issue Numbers 2 and 3 of Volume 39 (Winter and Spring & Summer).

The opinions expressed in the *Journal* are solely the opinions of the respective authors and are not the opinions of the State Bar of Texas, the Environmental and Natural Resources Law Section of the State Bar of Texas, the University of Texas School of Law, or the University of Texas School of Law's *Texas Environmental Law Journal*.

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**JOURNAL ANNOUNCEMENTS**

With this Volume 39, the *Journal* is changing from a quarterly publication to a triannual publication (Fall, Winter, and Spring & Summer). Also, the *Journal* is no longer carrying the “Changes in the Environment” section. Those announcements can be found on the Section’s website at [www.tenrls.org](http://www.tenrls.org). Also, we are combining Issue Numbers 2 and 3 of Volume 39 into one publication.

**SOLICITATION OF ARTICLES**

The *Journal* is soliciting articles from authors on environmental and natural resources subjects that will assist Texas environmental and natural resource law practitioners and develop the advancement of environmental and natural resource law.

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## FROM THE EDITORS

Dear Readers,

The Editorial Board of the *Journal* is instituting certain changes effective with the publication of this issue of Volume 39. The changes are designed to provide information to Section Members and *Journal* subscribers in a timelier manner, including making information more quickly available on the Section's website ([www.texenrls.org](http://www.texenrls.org)), and to achieve our goal of "catching up" on our production schedule.

One change is that the *Journal* will be published on a triannual basis (Fall, Winter, and Spring & Summer) to reflect the recurring downtime during summer. However, it is our intent to increase the number of articles and notes in the three annual issues to more than offset the reduction in the number of issues per volume.

Also, to provide our Recent Development columns more "recently," we will post them on the Section's website as soon as they are complete, often before they are combined into a published issue of the *Journal*. Again, to provide information more rapidly as the internet allows, we are moving the Changes in the Environment section of the *Journal* to the Section's website.

For our "catch up" plan, we are combining Issue Numbers 2 and 3 of Volume 39 into one publication and will combine Issue Numbers 1, 2, and 3 of Volume 40 into one publication.

In one of our lead articles for this combined issue, **Jeffrey S. Boyd** provides a survey and analysis of the often-encountered issue of "Where Sovereign Immunity and Water Development Issues Collide." Mr. Boyd describes the doctrine of sovereign immunity, along with examples of its application, to disputes involving Texas' water-related entities. He then identifies the types of parties, and particularly the water-related entities, that sovereign immunity protects. Later, Mr. Boyd addresses the standards that courts apply in determining whether the State has waived its sovereign immunity and describes the circumstances in which the courts have found such waivers affecting water-related entities. In the final part of this article, Mr. Boyd highlights key water cases in which the courts have addressed sovereign immunity, and discusses the implications of those holdings.

Our other lead article is by Associate Professor **John Fershee** of the University of North Dakota School of Law entitled "Atomic Power, Fossil Fuels, and the Environment: Lessons Learned and The Lasting Impact of the Kennedy Energy Policies." Because of the brevity of President John F. Kennedy's term in office, his energy policies have not been critiqued, reviewed, or analyzed in the same manner as other administrations. Professor Fershee's article fills part of that void by reviewing key components of President Kennedy's energy and environmental goals and policies that managed to have a lasting impact and by discussing the results of those policies, both positive and negative. Professor Fershee's view is that President Kennedy's policies can become a resource and roadmap for current and future administrations and others who seek to ensure access to affordable energy while preserving the environment.

## FROM THE EDITORS (CONT.)

In one of our student notes, “Encouraging Conservation in the Lone Star State: How Texas Can Improve Incentives for Landowners to Preserve Private Property from Development,” **Will Ikard** describes how conservation easements and open-space property tax valuation work in Texas, the ways they succeed at encouraging landowners to keep private land from being developed, and how they fall short. He then provides specific policy solutions to these shortcomings.

In our other student note, “The Status of Surface Water Rights Laws in Texas: A Comparison to other Prior Appropriation States,” **Jill Sacra Hoffman** asserts that “Texas should amend its water rights laws to plan for increasing population in the near future.” Her note examines water rights law in the United States in general, including riparian rights, but focuses on the doctrine of prior appropriation. She also considers the status of vested rights and the constitutional implications of vested water rights. She then compares water rights laws in various prior appropriation states and demonstrates both the similarities and differences between these laws and Texas’ water rights law. Ms. Sacra Hoffman also focuses on the detrimental effects to junior water right holders and the environment, as well as the economic effect on the public, if Texas law remains unchanged. She concludes her note with a series of recommendations to amend Texas water law to prepare for continued increases in water demand.

As always, we hope that this issue provides you with educational insight and substance for discussion.

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*That none of us is above the law is a bedrock principle of democracy. To erode that bedrock is to risk even further injustice. To erode that bedrock is to subscribe to a “divine right of kings” theory of governance, in which those who govern are absolved from adhering to the basic moral standards to which the governed are accountable. We must never tolerate one law for the Ruler, and another for the Ruled. If we do, we break faith with our ancestors from Bunker Hill, Lexington and Concord to Flanders Field, Normandy, Iwo Jima, Panmunjon, Saigon and Desert Storm.*

— Rep. Henry Hyde (R-Ill), January 16, 1999

These words, spoken as closing remarks during the impeachment trial of President Bill Clinton, sound compelling, if not undeniable, to the ears of most Americans. After all, America was founded, at least in part, on the rejection of a monarchy that placed the rulers above not only the ruled, but even above the rules. In reality, however, even in America, the principle that “none of us is above the law” is not without its exceptions.

Jesse Bennett knows this to be true. His eight-year-old son drowned when he fell into an irrigation ditch in Brownwood, Texas. When Mr. Bennett and his wife sued the Brown County Water Improvement District, alleging that the ditch was an attractive nuisance and that the District’s employees negligently maintained it, the court threw out their claims, finding that the District was protected from liability by the doctrine of sovereign immunity.<sup>1</sup> James and Charlotte Jennings know it as well. They sued the City of Dallas after the City’s sewer main backed up and completely flooded their home with raw sewage. Although the Jennings were completely innocent parties, and the City employees’ conduct clearly destroyed their home, they, like the Bennett’s, were denied any relief on the grounds of immunity.<sup>2</sup>

Few would argue against the assertion that the purpose of the American justice system is to render equal justice to all parties, no matter how powerful or powerless they may be. Yet the application of sovereign immunity to protect governmental entities, such as state departments, cities, counties, and districts, displaces that purpose, under the theory that, at times, the essential need of the greater common good must trump the rights of injured individuals. As Texas Supreme Court Justice Don Willett recently wrote:

Just as immunity is inherent to sovereignty, unfairness is inherent to immunity. Indeed, that is precisely the point of one-sided immunity—to let government off the hook.<sup>3</sup>

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1 See *Bennett v. Brown County Water Improvement Dist. No. 1*, 272 S.W.2d 498 (Tex. 1954).  
 2 See *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2002).  
 3 *City of Galveston v. State*, 217 S.W.3d 466, 480 n.38 (Tex. 2007) (Willett, J., dissenting).

As the Bennetts' and Jennings' stories illustrate, the governmental entities that enjoy the protection of sovereign immunity include those engaged in water-development activities: the supply of water; the placement, construction, and maintenance of water lines; the control of water infrastructure; and the development and conservation of water resources. While general purposes always support the application of sovereign immunity, its protection for water-development entities and activities supports the more specific purpose of promoting and preserving the conservation and development of perhaps our most essential resource. As the Texas Supreme Court opined over fifty years ago, our very future may demand it:

The importance of water and soil conservation to a state and all of its inhabitants is forcibly demonstrated by the facts of history. Whole civilizations, nations, and peoples have perished where the water supply has failed.<sup>4</sup>

This article will provide a general description of the doctrine of sovereign immunity, along with examples of Texas court decisions that apply the doctrine to disputes involving Texas' water-related entities. These disputes are varied, and include claims for personal injuries and property damage, as well as claims arising from contracts and business deals gone "bad." Part I provides an overview of sovereign immunity and its basic purpose. Part II identifies the types of parties, and particularly the water-related entities, that sovereign immunity protects. Part III addresses the standards by which the courts will find that the State has waived its sovereign immunity, and the circumstances in which the courts have found such waivers affecting water-related entities. Part IV highlights some of the key water cases in which the courts have addressed sovereign immunity, and discusses the implications of those holdings for parties who may seek to recover from water-related entities in the future.

## **I. UNDERSTANDING SOVEREIGN IMMUNITY**

Sovereign immunity is a common law doctrine that completely protects the government from lawsuits and liabilities, whether they are based on a contract, tort, or any other theory of recovery.<sup>5</sup> In other words, if the government breaches a legal duty to, or even a contract with, another person, sovereign immunity prohibits the courts from hearing the person's claims against the government, and bars the person from collecting on any judgment that a court might enter, unless the government, on its own, decides to waive its immunity and give the person that right.

Sovereign immunity involves two distinct components: immunity "from suit" and immunity "from liability."<sup>6</sup> "Immunity from suit" prohibits the courts from hearing a claim against the government unless the Legislature has expressly consented to the suit. "Immunity from liability" prohibits collection on a judgment against the govern-

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4 *Bennett*, 272 S.W.2d at 502.

5 *Ben Bolt-Palito Blanco Consol. Ind. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323-24 (Tex. 2006).

6 *See Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003); *Tex. Dept. of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

ment, even if the Legislature has consented to allow the suit.<sup>7</sup> Importantly, immunity from suit deprives the courts of jurisdiction, and thus, completely bars the claim, while immunity from liability does not affect the court's jurisdiction to hear the case. Thus, the government may file a "plea to the jurisdiction" to assert its immunity from suit, but not its immunity from liability.<sup>8</sup>

The concept of sovereign immunity developed hundreds of years ago, beginning with the monarchical principle that "the King can do no wrong."<sup>9</sup> In America, the justification for sovereign immunity evolved, from the purpose of "preserving the dignity of the state" to its current objective, "to protect the public treasury."<sup>10</sup> As the Texas Supreme Court recently described it, "the exposure of governmental entities to liability may shift tax resources away from their intended purposes and toward defending lawsuits and paying judgments, thereby hampering government functions."<sup>11</sup> Ultimately, then, the pragmatic purpose of sovereign immunity is "to shield the public from the costs and consequences of improvident actions of their governments."<sup>12</sup>

Sovereign immunity exists in Texas only because the Texas Supreme Court has recognized it, not because the Legislature or the Constitution has required it.<sup>13</sup> Yet the Texas Supreme Court has repeatedly, and almost without exception, declared that only the Legislature, as the elected representative of the people, can decide whether and when to waive the government's immunity.<sup>14</sup> Of course, what the Court giveth, the Court can taketh away.<sup>15</sup> Through the years, some Texas Supreme Court justices have indicated a willingness to reject sovereign immunity, at least in limited types of cases.<sup>16</sup> But overall, the court's opinions have reaffirmed the existence, scope, and purpose of sovereign immunity, as well as its basic characteristics.

## **II. WHOM DOES SOVEREIGN IMMUNITY PROTECT?**

Generally speaking, sovereign immunity protects the State and all of its governmental units.<sup>17</sup> If the constitution or a statute creates an entity and grants it "the

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7 Ben Bolt, 212 S.W.3d at 324.

8 *Wichita Falls State Hosp.*, 106 S.W.3d at 696; *Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004).

9 See *Tooke*, 197 S.W.3d at 331.

10 *Id.*; see also *Wichita Falls State Hosp.*, 106 S.W.3d at 695.

11 Ben Bolt, 212 S.W.3d at 326.

12 *Tooke*, 197 S.W.3d at 332.

13 See, e.g., *Wichita Falls State Hosp.*, 106 S.W.3d at 694-95 (discussing the history of sovereign immunity in Texas, beginning with the court's recognition of it in *Hosner v. De Young*, 1 Tex. 764, 769 (1847)).

14 See Ben Bolt, 212 S.W.3d at 326-27.

15 See, e.g., *Texas Dept. of Crim. Justice v. Miller*, 51 S.W.3d 583, 592-93 (Tex. 2001) (Hecht, J., concurring) ("The common law rule of immunity in Texas was the judiciary's to recognize, and it is ours to disregard.").

16 See *id.* at 593 (Although the Court "should defer to the Legislature for any waiver of governmental immunity . . . defer does not mean abdicate.").

17 "Official immunity" is not synonymous with sovereign immunity (or governmental immunity), as it protects individual government officials and employees rather than governmental entities, but only when they perform discretionary duties that are within the scope of their

'nature, purposes, and powers' of an 'arm of the State government,' that entity is a government unit unto itself."<sup>18</sup> An entity with "such powers of government and with the authority to exercise such rights, privileges and functions" to achieve its purpose "is considered a governmental unit."<sup>19</sup>

Technically, "sovereign immunity" protects the State and its various state-level divisions, including state agencies, boards, hospitals, and universities, while "governmental immunity" protects geographically-limited political subdivisions of the State, including counties, cities, and school districts.<sup>20</sup> But "sovereign immunity" and "governmental immunity" are otherwise the same, and the courts typically use the two terms interchangeably.<sup>21</sup>

Within the context of water-related entities, the courts have repeatedly confirmed that water conservation, improvement, and reclamation districts, navigation districts, and similar entities created under Article 16, Section 59 of the Texas Constitution are governmental agencies that stand on the same footing as counties and other subdivisions of the State, and are thus entitled to the protection of sovereign immunity.<sup>22</sup>

Similarly, *municipal water systems* and *water utility boards* that cities create to manage and control their water systems are agents of those cities and are also entitled to governmental immunity, as are the cities themselves.<sup>23</sup> Recently, the Texas Supreme Court concluded that a *governmental self-insurance fund* that is composed of local political subdivisions that are protected by sovereign immunity is itself also a governmental unit that is similarly protected.<sup>24</sup>

*Privately-owned irrigation companies*, however, are not governmental units, and thus, are generally not protected by sovereign or governmental immunity.<sup>25</sup> The same distinction is true for *member-owned non-profit water supply corporations*.<sup>26</sup> However, under Section 67.0105 of the Texas Water Code, such an entity can be protected by immu-

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authority in good faith. See, e.g., *Wilson v. Harris County Water Control & Improvement Dist. No. 21*, 194 S.W.3d 551 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

18 *Ben Bolt*, 212 S.W.3d at 325 (quoting *Harris County Flood Control Dist. v. Mann*, 140 S.W.2d 1098, 1101 (Tex. 1940)).

19 *Id.*

20 *Id.* at 324; *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003).

21 See *Ben Bolt*, 212 S.W.3d at 324.

22 *Tarrant Reg. Water Dist. v. Gragg*, 151 S.W.3d 546, 550 (Tex. 2004); *Bennett v. Brown County Water Improvement Dist. No. 1*, 272 S.W.2d 498, 500-02 (Tex. 1954) (Such districts can perform *only* governmental functions.). See *Ben Bolt*, 212 S.W.3d at 324.; see also *Brown Water Marine Serv., Inc. v. Aransas County Navig. Dist.*, No. 13-07-055-CV, 2008 WL 1822727, at \*2 (Tex. App.—Corpus Christi Apr. 24, 2008, pet. denied) (not designated for publication); *Sutton Building Ltd. v. Travis County Water Dist. 10*, No. 03-02-00659-CV, 2004 WL 1404045, at \*2 (Tex. App.—Austin June 24, 2004, no pet.) (not designated for publication).

23 See, e.g., *City of San Antonio Water System v. BSR Water Co.*, 190 S.W.3d 747, 754 (Tex. App.—San Antonio 2005, no pet. h.); *Zacharie v. City of San Antonio*, 952 S.W.2d 56, 59 (Tex. App.—San Antonio 1997, no writ).

24 See *Ben Bolt*, 212 S.W.3d at 326.

25 See *Bennett*, 272 S.W.2d at 502.

26 See *Lone Star Caliper Co. v. Talty Water Supply Corp.*, 102 S.W.3d 198, 201 (Tex. App.—Dallas 2003, pet. denied).



nity if it enters into a contract to provide water to a municipal or volunteer fire department, and the claim against it arises out of its performance of that contract.<sup>27</sup>

By way of example, Texas courts have found that, within the context of water-related activities, each of the following entities is a governmental unit that is protected by sovereign or governmental immunity:

- the City of Dallas;<sup>28</sup>
- the City of Galveston;<sup>29</sup>
- the City of Garden Ridge;<sup>30</sup>
- the City of Aspermont;<sup>31</sup>
- the City of San Antonio's Water System;<sup>32</sup>
- the City of Athens Municipal Water Authority;<sup>33</sup>
- the Clear Lake City Water Authority;<sup>34</sup>
- the Bexar Metropolitan Water District;<sup>35</sup>
- the Brown County Water Improvement District No. 1;<sup>36</sup>
- the Harris County Flood Control District;<sup>37</sup>
- the Harris County Water Control and Improvement District No. 21;<sup>38</sup>
- the Maverick County Water and Improvement District No. 1;<sup>39</sup>
- the Tarrant County Water Control and Improvement District No. 1;<sup>40</sup>

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27 *Id.*; see TEX. WATER CODE § 67.0105.

28 *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004).

29 *City of Galveston v. State*, 217 S.W.3d 466 (Tex. 2007).

30 *City of Garden Ridge v. Ray*, No. 03-06-00197-CV, 2007 WL 486395, at \*1 (Tex. App.—Austin Feb. 15, 2007, no pet.) (not designated for publication).

31 *City of Aspermont v. Rolling Plains Groundwater Conserv. Dist.*, 258 S.W.3d 231, 233 (Tex. App.—Eastland 2008, pet. filed).

32 *City of San Antonio Water System v. BSR Water Co.*, 190 S.W.3d 747, 754 (Tex. App.—San Antonio 1997, no pet. H.); *Zacharie v. City of San Antonio*, 952 S.W.2d 56, 59 (Tex. App.—San Antonio 1997, no writ); *San Antonio Water Sys. v. McKnight*, No. 04-02-00239-CV, 2003 WL 141047 (Tex. App.—San Antonio Jan. 22, 2003, no pet.) (not designated for publication).

33 *Dann v. Athens Mun. Water Auth.*, No. 12-07-00087-CV, 2007 WL 2460058 (Tex. App.—Tyler Aug. 31, 2007, no pet.) (not designated for publication).

34 *Clear Lake City Water Auth. v. Friendswood Devel. Co.*, 256 S.W.3d 735, 742 (Tex. App.—Houston [14th Dist.] 2008, pet. dism'd).

35 *Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture*, 220 S.W.3d 25, 28 (Tex. App.—San Antonio 2006, pet. dism'd as moot); *Ghidoni v. Bexar Metro. Water Dist.*, No. 04-07-00377-CV, 2007 WL 2481034, \*1 (Tex. App.—San Antonio, Sep. 5, 2007, no pet.) (not designated for publication).

36 *Bennett v. Brown County Water Improvement Dist. No. 1*, 272 S.W.2d 498, 499 (Tex. 1954).

37 *EPGT Tex. Pipeline L.P. v. Harris County Flood Control Dist.*, 176 S.W.3d 330, 334 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

38 *Wilson v. Harris County Water Control & Improvement Dist. No. 21*, 194 S.W.3d 551, 555 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

39 *Maverick County Water & Improvement Dist. No. 1 v. Reyes*, No. 04-03-00421-CV, 2003 WL 22900914, \*2 (Tex. App.—San Antonio Dec. 10, 2003, no pet.) (not designated for publication).

40 *Chicago, R.I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1*, 73 S.W.2d 55, 56 (Tex. 1934).

- the Travis County Water District No. 10;<sup>41</sup>
- the Tarrant Regional Water District;<sup>42</sup>
- the Edwards Aquifer Authority;<sup>43</sup>
- the Lower Colorado River Authority;<sup>44</sup>
- the Trinity River Authority of Texas;<sup>45</sup> and
- the Aransas County Navigation District.<sup>46</sup>

As the doctrine of sovereign immunity has developed, the courts have concluded that it applies to protect divisions and subdivisions of the state *even when they are sued by another governmental division or subdivision* of the State.<sup>47</sup> If, for example, one city sues another city, governmental immunity will protect the defendant city, unless it has been waived. In reaching this conclusion, the courts reasoned that these entities are “considered coequal under the law, neither party superior to the other.”<sup>48</sup> Thus, “sovereign immunity principles are to be applied horizontally between governmental entities. That is, political subdivisions . . . can assert immunity against other governmental entities deriving their rights and privileges from the same source.”<sup>49</sup>

Most recently, the Texas Supreme Court held, in a 5-4 split decision, that sovereign immunity applies to protect cities and other subdivisions *even when they are sued by the State*.<sup>50</sup> In what the court described as the first and only time that the State had sued one of its cities for money damages, the court found that cities (and especially home-rule cities) derive their sovereign immunity from the Texas Constitution, and not from the Legislature. Thus, unless the Legislature expressly waives that immunity, it protects cities even from suits brought by the State.<sup>51</sup>

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41 Sutton Building, Ltd. v. Travis County Water Dist. 10, No. 03-02-00659-CV, 2004 WL 1404045, \*2 (Tex. App.—Austin June 24, 2004, no pet.) (not designated for publication).

42 Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 550 (Tex. 2004).

43 Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 623 (Tex. 1996).

44 Stephens v. LCRA Transmission Services Corp., No. 03-06-00604-CV, 2008 WL 2777900, \*1 (Tex. App.—Austin 2008, pet. denied).

45 Boyer, Inc. v. Trinity River Authority of Tex., 279 S.W.3d 354, 358 (Tex. App.—Fort Worth 2008, no pet. h.).

46 Brown Water Marine Serv., Inc. v. Aransas County Navigation Dist., No. 13-07-055-CV, 2008 WL 1822727, \*2 (Tex. App.—Corpus Christi 2008, pet. denied.).

47 City of Texarkana v. Cities of New Boston, 141 S.W.3d 778, 783 (Tex. App.—Texarkana 2004 (pet. denied) (overruled on other grounds, City of Elgin v. Reagan, No. 03-06-00504-CV, 2009 Tex. App. LEXIS 1369, \*18 (Feb. 26, 2009))).

48 *Id.* at 782.

49 *Id.* at 783; *see also* Texas Ass'n of School Bds. Risk Mgmt. Fund v. Benavides Indep. Sch. Dist., 221 S.W.3d 732, 737 (Tex. App.—San Antonio 2007, no pet. h.) (holding that unless waived, sovereign immunity protects self-insurance fund against claims by school district member of the fund).

50 City of Galveston v. State, 217 S.W.3d 466, 473 (Tex. 2007).

51 *Id.*

### **III. WHEN IS SOVEREIGN IMMUNITY WAIVED?**

Although the Supreme Court is responsible for recognizing the existence of sovereign immunity in Texas, it has almost uniformly left it to the Legislature to decide whether and when immunity is or should be waived, reasoning that the Legislature, as the voice of the people, “is better suited to balance the conflicting policy issues associated with” that decision.<sup>52</sup> Following that principle, the courts have recognized that the State has waived its immunity by constitutional provisions, by statute, or—in limited circumstances—by its conduct.

#### **A. WAIVER BY CONSTITUTION: “TAKINGS” (INVERSE CONDEMNATION) CLAIMS**

The Texas Constitution’s “takings clause”<sup>53</sup> provides that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made.” Under this provision, the government may exercise its “power of eminent domain” to “take” (or “condemn”) private property for public use, but only if it pays the private owner “adequate compensation” for doing so.<sup>54</sup>

When the government engages in conduct that creates a nuisance or otherwise takes, damages, or destroys private property without first condemning or paying for it, this constitutional provision effectively allows the owner to sue the government and recover damages for “inverse condemnation.”<sup>55</sup> Texas courts have long recognized and clearly held that this provision effectively waives the government’s sovereign immunity against such suits.<sup>56</sup> This provision applies, however, only when the government takes or destroys property in which a person has a recognized ownership interest. A government-issued license or permit, for example, does not confer any property right, and the non-renewal of such a permit does not constitute a taking.<sup>57</sup>

To establish a constitutional taking, the property owner must show that the governmental entity *intentionally* performed acts that damaged or destroyed private property for public use. “[O]nly an intentional act can give rise to such a taking”<sup>58</sup>;

52 *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003); *see also* *Ben Bolt-Palito Blanco Consol. Ind. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 326 (Tex. 2006).

53 TEX. CONST. ART. I § 17.

54 *See Chicago, R.I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1*, 73 S.W.2d 55, 63 (Tex. 1934) (The constitution and statutes “authorize the recovery of compensation not only for property actually taken under the power of eminent domain, but consequential damages as well.”).

55 *Tarrant Reg. Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004); *City of Dallas v. Jennings*, 142 S.W.3d 310, 316 (Tex. 2004) (holding that a city may be held liable for a nuisance that rises to the level of a constitutional taking).

56 *Jennings*, 142 S.W.3d at 316; *see also* *Hidalgo County Water Improv. Dist. No. 2 v. Holderbaum*, 11 S.W.2d 506 (Tex. 1928) (A governmental agency “has no immunity from liability for injuries referred to in Section 17, Art. 1.”).

57 *See Dann v. Athens Mun. Water Auth.*, No. 12-07-00087-CV, 2007 WL 2460058, \*3 (Tex. App.—Tyler Aug. 31, 2007, no pet.) (not designated for publication).

58 *Jennings*, 142 S.W.3d at 313; *see also* *Sutton Building, Ltd. v. Travis County Water Dist. 10*, No. 03-02-00659-CV, 2004 WL 1404045, \*2 (Tex. App.—Austin Jun 24, 2004, no pet.) (not

“mere negligence that eventually contributes to property damage does not amount to a taking,”<sup>59</sup> and a claimant may not state a claim for inverse condemnation by “merely pleading negligent acts and labeling them a nuisance.”<sup>60</sup> Thus, the government retains sovereign immunity when it accidentally damages or takes private property, but it does not enjoy that protection if it intentionally does so.

Drawing the line between negligence and an intentional taking is not always an easy task. When making this determination, courts consider whether the property was in fact damaged or appropriated “for a public use.”<sup>61</sup> “When damage is merely the accidental result of the government’s act, there is no public benefit and the property cannot be said to be ‘taken or damaged for public use.’”<sup>62</sup> Thus, the claimant must show that the government intentionally engaged in or is engaging in a specific act, and knows that the “specific act is causing identifiable harm or knows that the specific property damage is substantially certain to result” from that act.<sup>63</sup>

For example, when the government’s only intentional act was to reactivate a water line, but the government was not “substantially certain” that leaks would occur, or that the leaks would cause damage to the claimant’s private property, a taking did not occur, and the government remained immune from suit.<sup>64</sup> Similarly, when a plaintiff complains that the government *failed* to take action to prevent damage from occurring, a taking does not occur, at least when the plaintiff does not allege that the government was substantially certain that the resulting damage would occur.<sup>65</sup>

In cases arising out of flooding issues, the Texas Supreme Court has found that “recurrence is a probative factor” in determining whether the flooding was intended or substantially certain to occur.<sup>66</sup> “A single flood event generally does not rise to the level of a taking.”<sup>67</sup> Moreover, the “character” of the flooding—whether the flood water

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designated for publication).

59 *Gragg*, 151 S.W.3d at 554.

60 *Sutton Bldg. Ltd.*, 2004 WL 1404045, at \*2; *see also* *Maverick County Water & Improv. Dist. No. 1 v. Reyes*, No. 04-03-00421-CV, 2003 WL 22900914, at \*3 (Tex. App.—San Antonio Dec. 10, 2003, no pet.) (not designated for publication) (The plaintiff must show that the governmental body performed an authorized, intentional act, of which the claimed damage was a necessarily incidental or consequential result; if the government was merely negligent, or if the damage was not substantially certain to result from the government’s intentional act, then there was no taking.).

61 *Gragg*, 151 S.W.3d at 554-55.

62 *Jennings*, 142 S.W.3d at 314 (emphasis in original).

63 *Id.*; *see also* *Gragg*, 151 S.W.3d at 555.

64 *Sutton Bldg. Ltd.*, 2004 WL 1404045, at \*4.

65 *City of Garden Ridge v. Ray*, No. 03-06-00197-CV, 2007 WL 486395, \*4 (Tex. App.—Austin Feb. 15, 2007, no pet.) (not designated for publication).

66 *Gragg*, 151 S.W.3d at 555; *see also* *Toomey v. Tex. Dept. of Transp.*, No. 01-05-00749-CV, 2007 WL 1153035, \*4 (Tex. App.—Houston [1st Dist.] Apr. 19, 2007, no pet.) (not designated for publication) (“Without recurrence, the property owners cannot demonstrate that TxDOT knew that the flooding was ‘substantially certain to result from [its] authorized government action.’”).

67 *Gragg*, 151 S.W.3d at 555.

arrived sooner or was faster, more forceful, deeper, and longer lasting than in previous floods—may be relevant to the determination.<sup>68</sup>

In *Tarrant Regional Water District v. Gragg*,<sup>69</sup> the owner of an East Texas ranch sued the Tarrant Regional Water District, alleging that its reservoir caused a significant change in flooding characteristics that damaged the plaintiff's ranch.<sup>70</sup> One of the water district's functions is to provide for the control, storage, preservation, distribution, conservation, and reclamation of water, including flood water.<sup>71</sup> In March 1990, extremely heavy rains caused extensive flooding throughout the area, and the water district released water through the reservoir's floodgates, flooding the plaintiff's ranch.<sup>72</sup> The plaintiff sued the water district, alleging that the construction of the reservoir had inversely condemned the plaintiff's property.<sup>73</sup> By the time the case went to trial, the ranch had experienced a large number of floods.<sup>74</sup> While recognizing that the district is a political subdivision of the State that is generally entitled to sovereign immunity, the Texas Supreme Court nevertheless found that it was subject to the "takings" clause of the Texas Constitution and was therefore liable to the plaintiff. In making this determination, the court acknowledged the purpose of sovereign immunity, and the importance of crafting its jurisprudence to abide by that purpose:

For one, we strive to avoid what would be an anomalous result if the State, an entity otherwise generally entitled to immunity for negligence, were subject to liability for something less than intentional behavior. More importantly, though, we seek to ensure that the public does not bear the burden of paying for property damage for which it received no benefit...Accordingly, we have sought objective indicia of intent in particular contexts to determine whether property has been taken or damaged in furtherance of the public interest. . . . [W]e hold that the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result. In the case of flood-water impacts, recurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur.<sup>75</sup>

In holding that a constitutional taking had occurred, the court explained that the extensive damage the ranch experienced "was the inevitable result of the reservoir's construction and of its operation as intended."<sup>76</sup> It then attempted to reconcile the tension between the concept of sovereign immunity and the importance of private property rights:

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68 *Id.*

69 *Id.* at 546 (Tex. 2002).

70 *See id.* at 549.

71 *See id.*

72 *See id.* at 550.

73 *See id.* at 555.

74 *See id.*

75 *Id.* at 554-55.

76 *Id.* at 555.

[G]overnmental agencies and authorities are necessities. They are capable of rendering great and beneficent public services. But any appeal to the tradition of our laws which omits a decent regard for private property rights is both inaccurate and distorted. It is because of this regard that our governmental agencies and authorities in acquiring properties for their public purposes are generally required to proceed under the power of eminent domain rather than under the police power. Such a policy has not resulted in a destruction of flood control and improvement agencies in the past and there is no reason to apprehend that the continuation of such policy will prove overly costly or inimical to the American way of life in the future.<sup>77</sup>

## B. WAIVER BY STATUTE

The Legislature has elected to waive the State's immunity in a variety of circumstances through a variety of Texas statutes. To conclude that the Legislature intended to waive immunity through a statute, courts must find that the statutory waiver is unambiguous and waives the State's immunity "beyond doubt," and the courts must resolve any ambiguities in the statute by retaining immunity.<sup>78</sup> If the statute requires that the State be joined in a lawsuit for which immunity would otherwise attach, then the statute waives sovereign immunity for that suit.<sup>79</sup>

### 1. STATUTES THAT AUTHORIZE GOVERNMENTAL ENTITIES TO "SUE AND BE SUED," "PLEAD AND BE IMPEADED," OR "PROSECUTE AND DEFEND" A LAWSUIT

Dozens of statutes (and even far more city charters and similar governing documents) provide that a particular governmental unit may "sue and be sued," "plead and be impeaded," or "prosecute and defend" lawsuits. Many of these statutes address water-related entities, including, for example:

- water control and improvement districts;<sup>80</sup>
- groundwater conservation districts;<sup>81</sup>
- navigation districts;<sup>82</sup>

77 *Id.* at 556 (citing *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 105 (Tex. 1961)).

78 *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006) (quoting *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d at 697-98).

79 *Id.*

80 TEX. WATER CODE § 49.066(a) (Vernon 2009) ("A [water control and improvement] district may sue and be sued . . . A suit for contract damages may be brought against a district only on a written contract of the district approved by the district's board.").

81 *Id.* at § 36.066(a) (Vernon 2009) ("A [groundwater conservation] district may sue and be sued in the courts of this state in the name of the district by and through its board.").

82 *Id.* at § 61.082(a) (Vernon 2009) ("The [navigation] district, by and through its commission, may sue and be sued in any court in this state in the name of the district."); TEX. WATER CODE § 62.078(a) (Vernon 2009) ("A [navigation] district established under this chapter may, by and through the commission, sue and be sued in all courts of this state in the name of the district."); TEX. WATER CODE § 63.112(a) (Vernon 2009) ("A [self-liquidating navigation] district established under this chapter may sue and be sued, by and through its commission, in any court in this state in the name of the district.").

- the Lower Colorado River Authority;<sup>83</sup> and
- the Texas Water Resources Finance Authority.<sup>84</sup>

Although the Texas Supreme Court's early decisions concluded that such language broadly waived the government's sovereign immunity,<sup>85</sup> subsequent decisions from both the Texas Supreme Court<sup>86</sup> and various courts of appeals held both ways on the issue, as to each of these distinct phrases.<sup>87</sup> Recently, however, the Texas Supreme Court addressed the issue directly, and concluded that such phrases "do not, in and of themselves, waive immunity from suit," but instead refer only to the entity's *legal capacity* to take such actions.<sup>88</sup> Since then, the courts of appeals have, in at least a few cases, unanimously concluded that the Texas Water Code's "sue and be sued" language does not waive a water control and improvement district's immunity from suit.<sup>89</sup>

## 2. STATUTES THAT AUTHORIZE BREACH OF CONTRACT CLAIMS AGAINST THE GOVERNMENT: TEX. GOV'T CODE CHAPTER 2260 AND TEX. LOC. GOV'T CODE §§ 271.151-160

Two key statutes serve as a type of limited waiver of immunity to allow breach of contract claims against the government. For such claims against the State and its state-level agencies, the Legislature has provided an administrative process, subject to judicial review, as a means for private parties to enforce their contracts with the government.<sup>90</sup> More recently, and perhaps more relevant to water-law issues, the Legislature

83 TEX. SPECIAL DISTRICT LOCAL LAWS CODE § 8503.004(k) (Vernon 2009) ("The [Lower Colorado River Authority] may sue and be sued in its corporate name.").

84 TEX. WATER CODE § 20.022 ("The [Texas Water Resources Finance Authority] may sue and be sued in the courts of this state in the name of the authority . . .").

85 In *Missouri Pac. RR v. Brownsville Navigation Dist.*, the Court held that statutory language providing that a governmental body "may sue and be sued" is "quite plain and gives general consent to be sued in the courts of Texas such that immunity from suit is expressly waived." 453 S.W.2d 812, 813 (Tex. 1970) (construing former version of what is now TEX. WATER CODE § 62.078).

86 In *Federal Sign v. Texas Southern Univ.*, the Court cited to *Missouri Pac. RR*'s holding without criticizing or denouncing it. 951 S.W.2d 401, 408 (Tex. 1997). Later, in *Travis County v. Pelzel & Assoc.*, the Court seemed to back away from *Missouri Pac. RR*, commenting that the phrase "sue and be sued" "arguably" shows an intent to waive immunity. 77 S.W.3d 246, 249 (Tex. 2002). Then, however, in *Wichita Falls State Hosp. v. Taylor*, the Court seemed to reaffirm the holding in *Missouri Pac. RR*: "[W]e have little difficulty recognizing the Legislature's intent to waive immunity from suit when a statute provides that a state entity *may be sued* or that 'sovereign immunity to suit is waived.'" 106 S.W.3d 692, 696-97 (Tex. 2003) (emphasis added).

87 For a thorough discussion of these cases, see Jeffrey S. Boyd, *An Ace in the Hole and a Jack of All Trades: Recent Developments Affecting Sovereign Immunity and Pleas to the Jurisdiction*, 6 TEX. TECH. J. ADMIN. LAW 59 (2005) (originally presented at the State Bar of Texas Advanced Administrative Law Course, September 2004).

88 *Tooke v. City of Mexia*, 197 S.W.3d 325, 329, 333 (Tex. 2006). See also *United Water Servs., Inc. v. City of Houston*, 137 S.W.3d 747, 751 (Tex. App.—Houston [14th Dist.] 2004) (finding that "sue and be sued" language in city charter waived immunity), *rev'd*, 201 S.W.3d 690 (Tex. 2006) (finding, based on *Tooke*, that city charter did not waive immunity).

89 See *Clear Lake City Water Auth. v. Friendswood Devel. Co.*, 256 S.W.3d 735, 743-45 (Tex. App.—Houston [14th Dist.] 2008, pet. *dism'd*), and cases cited therein.

90 See TEX. GOV'T. CODE CH. 2260.

adopted Sections 271.151-160 of the Texas Local Government Code to allow certain breach-of-contract suits against local governmental units. Under these provisions, “[a] local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.”<sup>91</sup>

Under this statute, “local governmental entity” means “a political subdivision of this state, other than a county or a unit of state government, as that term is defined by Section 2260.001, Government Code,” and expressly includes a municipality and a “special-purpose district or authority, including any levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, . . . and river authority.”<sup>92</sup>

By its own terms, Chapter 271 of the Texas Local Government Code waives immunity only for breach of contract claims; it does not apply to related causes of action, such as claims for fraud, fraudulent inducement, or breach of fiduciary duties.<sup>93</sup> Moreover, it waives immunity only for breaches of a “contract subject to this chapter,” which is “a written contract stating the essential terms of the agreement for *providing goods or services to the local governmental entity* that is properly executed on behalf of the local governmental entity.”<sup>94</sup> Thus, in the context of water-related entities, courts have held that it does not waive immunity for a breach of a contract to sell real estate (which is not the provision of “goods or services”),<sup>95</sup> or an easement agreement that allowed the government to construct a drainage culvert on the plaintiffs’ land,<sup>96</sup> or an agreement that dedicated a sewage easement to a city.<sup>97</sup>

Nevertheless, the Texas Supreme Court has construed this waiver broadly, finding that it applies to waive a governmental self-insurance fund’s immunity against contract claims asserted by one of the fund’s members, even though the main purpose of the contract was for *the fund* to provide services to its members, rather than vice versa.<sup>98</sup> In *Ben Bolt-Palito Blanco Consolidated Independent School District v. Texas Political Subdivisions Property/Casualty Joint Self-Insurance Fund*,<sup>99</sup> a member of a self-insurance fund made

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91 TEX. LOC. GOV’T. CODE § 271.152.

92 *Id.* at § 271.151(3).

93 See *Ghidoni v. Bexar Metro. Water Dist.*, No. 04-07-00377-CV, 2007 WL 2481034, at \*2 (Tex. App.—San Antonio Sept. 5, 2007, no pet.) (not designated for publication).

94 TEX. LOC. GOV’T CODE § 271.151(2) (emphasis added).

95 *Bexar Metro. Water Dist. v. Ed. & Econ. Dev. Joint Venture*, 220 S.W.3d 25, 32 (Tex. App.—San Antonio 2006, pet. dismissed as moot).

96 *City of Garden Ridge v. Ray*, No. 03-06-00197-CV, 2007 WL 486395, at \*1 n.1 (Tex. App.—Austin Feb. 15, 2007, no pet.) (not designated for publication).

97 *City of San Antonio Water Sys. v. Reed S. Lehman Grain, Ltd.*, No. 04-04-00930-CV, 2007 WL 752197, at \*2 n.2 (Tex. App.—San Antonio Mar. 14, 2007, pet. denied) (not designated for publication).

98 *Ben Bolt-Palito Blanco Consol. Ind. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323-24 (Tex. 2006); see also *Tex. Ass’n of Sch. Bds. Risk Mgmt. Fund v. Benavides Ind. Sch. Dist.*, 221 S.W.3d 732, 739 (Tex. App.—San Antonio 2007, no pet.).

99 212 S.W.3d 320.



up of ninety-two local government entities sued the fund after it denied the plaintiff's claim for benefits.<sup>100</sup> The plaintiff had sustained extensive water and mold damage to one of its school facilities.<sup>101</sup> The court acknowledged that the fund was a political subdivision subject to governmental immunity.<sup>102</sup> But, it found that this immunity was waived by Texas Local Government Code Section 271.152, because the fund "was authorized... to enter" and did in fact enter into "a written contract stating the essential terms of the agreement for providing [insurance] services to [a] local governmental entity," which agreement was properly executed.<sup>103</sup>

Following this approach, the Fourteenth District Court of Appeals has held that Chapter 271 waives immunity for claims on a contract in which a city water authority agreed to include in a bond measure a request for voter authorization to pay for the city's purchase of water, sewer, and drainage lines from a private development company. Relying on the Texas Supreme Court's "expansive view" of Chapter 271, the court of appeals concluded that, because the contract required the developer to "hire third parties to construct the Facilities and to build the streets, roads, and bridges" within the development, the contract was in fact a contract requiring the private party to "provide... services to" the Authority.<sup>104</sup>

Chapter 271 expressly limits the damages that the private party can recover to the balance due and owed for agreed compensation, plus interest, but not including consequential damages or exemplary damages.<sup>105</sup> Thus, the courts have concluded that the statute does not waive immunity against claims to recover lost profits,<sup>106</sup> or increased operational costs, mitigation costs, costs for increased safety precautions, and maintenance measures that result from the government's breach of the agreement.<sup>107</sup> But, if the private party's profits are included within the agreed contract price, they are not "lost profits" or "consequential damages," but instead are direct damages that are recoverable.<sup>108</sup>

A Fort Worth Court of Appeals case illustrates this point. In *Boyer*,<sup>109</sup> the plaintiff had entered into a contract with the Trinity River Authority for work on the river authority's Lake Livingston Dam Improvement Project. The parties had a disagreement

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100 See *id.* at 322.

101 See *id.* at 323.

102 See *id.* at 326.

103 See *id.* at 328; TEX. LOC. GOV'T CODE § 272.151(2).

104 *Clear Lake City Water Auth. v. Friendswood Dev. Co.*, 256 S.W.3d 735, 751 (Tex. App.—Houston [14th Dist.] 2008, pet. dism'd); see also *Clear Lake City Water Auth. v. Kirby Lake Dev. Ltd.*, 274 S.W.3d 41, 46 (Tex. App.—Houston [14th Dist.] 2008r, pet. filed) (concluding that, although Chapter 271 waived the city's immunity, the parties' contract did not require city to include the payment request in more than one subsequent bond measure).

105 See TEX. LOC. GOV'T CODE § 271.153. The statute also allows recovery of attorneys' fees if the contract expressly so provides. *Id.* at § 271.159.

106 See *Tooke v. City of Mexia*, 1975 S.W.3d 325, 346 (Tex. 2006) (finding no waiver as to plaintiff's claims for lost profits).

107 See *City of Alton v. Sharyland Water Supply Corp.*, 2008 WL 4981561, at \*7 (Tex. App.—Corpus Christi Nov. 25, 2008, no pet. h.) (not designated for publication) (finding no waiver as to claims for such money damages).

108 *Boyer v. Trinity River Auth. of Tex.*, 279 S.W.3d 354, 358-59, (Tex. App.—Fort Worth 2008, no pet. h.).

109 *Id.*

over monies owed under the contract, with the plaintiff claiming he was owed a 15 percent markup on its costs.<sup>110</sup> When the parties could not resolve their dispute, the plaintiff filed suit. The river authority claimed that the markup sought by the plaintiff constituted additional profits, or consequential damages, and that Section 271.153 does not waive immunity for suits on consequential damages.<sup>111</sup> The plaintiff argued that these amounts were due under the contract, and therefore *were* recoverable under the statute.<sup>112</sup> The court agreed with the plaintiff, explaining that even if the markup constituted lost profits, they were recoverable if the contract provided for those payments.<sup>113</sup> That is, the lost profits would be direct damages that were recoverable under Section 271.153.<sup>114</sup>

Notably, Chapter 271 is partially retroactive, so that it applies to a claim for breach of a contract that was executed before September 1, 2005, if sovereign immunity had not been expressly waived on the claim before that date.<sup>115</sup>

### 3. THE TEXAS TORT CLAIMS ACT

In the Texas Tort Claims Act,<sup>116</sup> the Legislature expressly waived immunity, both from suit and from liability, for three types of tort claims: those stemming from (1) use of publicly owned automobiles, (2) premises defects, and (3) injuries arising out of conditions or use of property.<sup>117</sup> This waiver is strictly limited, however, and “allow[s] suits to be brought against governmental units only in certain, narrowly defined circumstances.”<sup>118</sup> Thus, in any given case, the courts must look to the specific terms of the Act “to determine the scope of its waiver, and then consider the particular facts of the case . . . to determine whether it comes within that scope.”<sup>119</sup> The mere fact that a petition asserts that the claims are made “pursuant to” the Act is not enough to establish this waiver, and thus not enough to confer jurisdiction on the trial court.<sup>120</sup>

Texas courts, including the Texas Supreme Court, have often struggled with the task of determining the scope of waiver under the Tort Claims Act, leading some supreme court Justices to express with rare frankness their frustration over the Legislature’s continued failure to provide greater clarity, especially for the “use of property” provision.<sup>121</sup>

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110 See *id.* at 356.

111 See *id.* at 358.

112 See *id.* at 359.

113 See *id.*

114 See *id.*

115 See *Tooke v. City of Mexia*, 197 S.W.3d 325, 329, n.7 (Tex. 2006).

116 TEX. CIV. PRAC. & REM. CODE §§ 101.001-109.

117 *County of Cameron v. Brown*, 80 S.W.3d 549, 554 (Tex. 2002); see TEX. CIV. PRAC. & REM. CODE §§ 101.021(1) (waiving immunity for property, injury, and death claims based on government employee’s wrongful or negligent use or operation of motor-driven vehicles or equipment), 101.021(2) (waiver for injury and death claims based on negligent use of tangible personal or real property), 101.022 (waiver for claims based on premises defect).

118 *Texas Dept. of Crim. Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001).

119 *Id.*

120 *Id.* at 586-87.

121 See, e.g., *Miller*, 51 S.W.3d at 589 (Phillips, C.J.) (“For many years, this Court and its justices have expressed their frustration” in applying the use-of-property provisions of the Act.); see

### A. "GOVERNMENTAL" VS. "PROPRIETARY" FUNCTIONS

With regard to water-related entities, it is important to note that sovereign immunity works to protect *municipalities* from tort claims *only* to the extent that the municipality is engaged in a "governmental function" – it does not protect them from liabilities arising out of their "proprietary functions."<sup>122</sup> Generally, a municipality's "proprietary functions are those conducted 'in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government,' while its governmental functions are 'in the performance of purely governmental matters solely for the public benefit.'"<sup>123</sup> However, the Tort Claims Act expressly declares that most water-related activities, including activities involving "sanitary and storm sewers... waterworks... dams and reservoirs [and]... water and sewer service[s]," are governmental functions.<sup>124</sup> Thus, the courts have held that all activities associated with the operation of one of these water-related functions listed are governmental functions, protected by sovereign immunity, unless the Tort Claims Act waives that immunity.<sup>125</sup>

Article 16, Section 59 districts, meanwhile, are like counties, not cities, and are not subject to the proprietary vs. government function dichotomy.<sup>126</sup> These districts can perform only governmental functions, so sovereign immunity will protect them, unless it is waived.<sup>127</sup>

### B. CLAIMS ARISING FROM THE USE OF TANGIBLE PERSONAL PROPERTY

The Tort Claims Act waives immunity for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."<sup>128</sup> This waiver applies only if the governmental unit or employee uses the tangible prop-

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*also id.* at 589-93 (Hecht, J., concurring) ("Frustrated by our inability to find, or even invent from scratch, any cogent explanation for applying the use-of-property standard, we have repeatedly beseeched the Legislature for guidance.").

122 See *City of Texarkana v. City of New Boston*, 141 S.W.3d 778, 783 (Tex. App.—Texarkana 2004, pet. denied); *United Water Servs. Inc. v. City of Houston*, 137 S.W.3d 747, 750, n.5 (Tex. App.—Houston [1st Dist.] 2004), *rev'd on other grounds*, 201 S.W.3d 690 (Tex. 2006); *Tooke*, 197 S.W.3d at 343 (postponing decision on whether the proprietary-vs-government function dichotomy also applies to contract claims).

123 *Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex. 2006).

124 See TEX. CIV. PRAC. & REM. CODE § 101.0215(a).

125 *City of Texarkana*, 141 S.W.3d at 784; *City of San Antonio Water Sys. v. BSR Water Co.*, 190 S.W.3d 747, 753-54 (Tex. App.—San Antonio 2005, pet. dism'd by agr.); *City of San Antonio Water Sys. v. Reed S. Lehman Grain, Ltd.*, No. 04-04-00930, 2007 WL 752197 at \*3 (Tex. App.—San Antonio Mar. 14, 2007, pet. denied) (not designated for publication).

126 *Tarrant Reg. Water Dist. v. Gragg*, 151 S.W.3d 546, 549-550 (Tex. 2004).

127 See *Bennett v. Brown County Water Improvement Dist. No. 1*, 272 S.W.2d 498, 500-02 (Tex. 1954); *Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture*, 220 S.W.3d 25, 28 (Tex. App.—San Antonio 2006, pet. dism'd as moot).

128 TEX. CIV. PRAC. & REM. CODE § 101.021(2).

erty<sup>129</sup> by putting or bringing it “into action or service.”<sup>130</sup> Moreover, that property must itself be the instrumentality that causes the harm.<sup>131</sup>

Thus, a court found that the Act waived immunity against claims that the Bexar Metropolitan Water District delivered water to a hospital containing an inadequate level of chlorine, resulting in an outbreak of Legionnaire’s disease.<sup>132</sup> However, the waiver did not apply when a plaintiff was sitting in a rolling chair in a water district’s office, with his feet propped up on a desk, and a district employee walked by and lifted the plaintiff’s feet, causing the chair to roll out from under him.<sup>133</sup> In that case, the court held that the plaintiff, and not the district employee, was “using” the property (the chair), and the district employee’s lifting of plaintiff’s feet “did not qualify as a use of tangible personal property.”<sup>134</sup>

### C. CLAIMS ARISING FROM A PREMISES DEFECT

The Tort Claims Act waives the immunity of a governmental entity engaged in a governmental function, for injuries caused by a condition of tangible personal or real property, “if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.”<sup>135</sup> A private landowner has a duty to warn licensees of a dangerous condition if the landowner has actual knowledge of the condition and the licensee does not.<sup>136</sup> Thus, the Tort Claims Act does not waive a city water system’s immunity against personal injury claims based on a broken water main, if the city did not know that the water main was broken.<sup>137</sup>

### D. NO WAIVER FOR FIRE PROTECTION ACTIVITIES

Section 101.055(3) of the Tort Claims Act provides that the Act’s waiver of immunity does not apply to “a claim arising... from the failure to provide or the method of providing police or fire protection.” Based on this provision, one court has held that

129 *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 245-46 (Tex. 2004). Similarly, if a governmental body contracts with a private company to perform work, and the company’s employee (rather than the government’s employee) operates motor-driven equipment in a manner that causes injury, no waiver occurs. *EPGT Tex. Pipeline L.P. v. Harris County Flood Control Dist.*, 176 S.W.3d 330, 335-37 (Tex. App.—Houston [1st Dist.] 2004, pet. dismissed). Under limited circumstances, the company’s employee could be treated as the government’s de facto employee, but only if the governmental body controls the details of the work performed. *Id.* at 336.

130 *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996).

131 *Tex. Dep’t of Crim. Justice v. Diller*, 127 S.W.3d 7, 11 (Tex. App.—Tyler 2002, pet. denied).

132 *Bexar Metro. Water Dist. v. Evans*, No. 04-07-00133-CV, 2007 WL 2481023 (Tex. App.—San Antonio Sept. 5, 2007, no pet.) (not designated for publication). The court went on to hold in favor of the District, however, finding that the plaintiffs offered no evidence to establish that the delivered water lacked the minimum required chlorine level.

133 *Wilson v. Harris County Water Control & Improvement Dist.* No. 21, 194 S.W.3d 551, 555 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

134 *Id.*

135 TEX. CIV. PRAC. & REM. CODE § 101.021(2).

136 *City of Dallas v. Reed*, 258 S.W.3d 620, 622 (Tex., 2008).

137 *City of San Antonio Water Sys. v. McKnight*, No. 04-02-00239-CV, 2003 WL 141047 (Tex. App.—San Antonio Jan. 22, 2003, no pet.) (not designated for publication).

the Act does not waive immunity against a claim that a city water system negligently failed to maintain pumps and equipment to supply adequate water to fire hydrants.<sup>138</sup>

#### 4. THE UNIFORM DECLARATORY JUDGMENTS ACT

The Uniform Declaratory Judgments Act empowers courts to settle and afford relief with respect to “rights, status, and other legal relations.”<sup>139</sup> A person whose “rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the statute, municipal ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.”<sup>140</sup> All interested persons must be made a party to the action, including municipalities and other governmental agencies when an ordinance or statute is involved.<sup>141</sup>

As the Texas Supreme Court has explained, suits seeking declaratory relief against state officials who allegedly act without legal or statutory authority are not “suits against the state,” and therefore, do not implicate the doctrine of sovereign immunity.<sup>142</sup> Nevertheless, the controversies over the proper application of this principle and over the question of whether any particular claim for declaratory relief is a “suit against the state” continues.

Historically, the courts have described sovereign immunity as a protection “from lawsuits for money damages.”<sup>143</sup> Thus, the courts have recognized that immunity does not necessarily bar suits for declaratory and injunctive relief under the UDJA. Courts have instead found under the UDJA that immunity does not apply when “private parties... seek declaratory relief against state officials who allegedly act without legal or statutory authority.”<sup>144</sup> Such claims are not “suits against the State” because “suits to compel state officers to act within their official capacity do not attempt to subject the state to liability,” and they “do not implicate the sovereign-immunity doctrine.”<sup>145</sup>

However, the Texas Supreme Court has refused to extend this reasoning to cover declaratory judgment actions that are intended to require the State to perform under a contract. “Declaratory-judgment suits against state officials seeking to establish a contract’s validity, to enforce performance under a contract, or to impose contractual liabilities are suits against the State,” because they “attempt to control state action by imposing liability on the State.”<sup>146</sup> “[P]rivate parties cannot circumvent the State’s sovereign immunity from suit by characterizing a suit for money damages, such as a contract dispute, as a declaratory-judgment claim.”<sup>147</sup>

In line with this reasoning and in the context of water development contracts, the Corpus Christi Court of Appeals recently found that sovereign immunity barred

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138 *Zacharie v. City of San Antonio*, 952 S.W.2d 56, 58 (Tex. App.—San Antonio 1997, no writ).

139 TEX. CIV. PRAC. & REM. CODE § 37.003(a).

140 *Id.* at § 37.004(a).

141 *Id.* at § 37.006(a).

142 *See Texas Natural Res. Conserv. Comm. v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

143 *Id.* at 853 (emphasis added).

144 *Id.* at 855.

145 *Id.*

146 *Id.* at 855-56.

147 *Id.* at 856.

a UDJA suit seeking specific performance and injunctive relief under a contract because that claim was not any different from a claim for breach of the contract, as either would require the city's "expenditure of money."<sup>148</sup> As the court explained, "the distinction is not between suits seeking equitable relief and those seeking money damages... but between suits seeking to compel state officers to act within their official capacity and suits seeking to control state action by imposing liability on the State."<sup>149</sup> Thus, the UDJA might allow a suit to declare that an easement agreement is invalid, but not a suit to declare and enforce the government's obligations under that agreement.<sup>150</sup>

In a case currently pending before the Texas Supreme Court, the Eastland Court of Appeals held that the UDJA waives immunity for a groundwater conservation district's claim for a declaration that a city that withdraws groundwater from within the district's boundaries and transfers that water outside of those boundaries is subject to Chapter 36 of the Texas Water Code and the water conservation rules that require the city to file monthly reports and pay transfer fees.<sup>151</sup> In that case, the court concluded that the UDJA did not permit the district to sue to recover *past* payments or penalties, but the claim for declaratory relief "does not constitute a suit for monetary damages even though it may indeed subject a municipality to future fees or prospective monetary liabilities."<sup>152</sup>

## C. WAIVER BY CONDUCT

The Texas Supreme Court has long held that, "to waive immunity, consent to suit must ordinarily be found in a constitutional provision or legislative enactment."<sup>153</sup> This rule is not without its exceptions, for the court has also acknowledged that governmental bodies may, in some limited circumstances, waive immunity by their conduct, either in their contractual relations with private parties or in litigation.

### 1. WAIVER OF IMMUNITY BY CONDUCT IN CONTRACTS

For several years, the Texas Supreme Court toyed with the idea of holding that the State can waive its immunity from suit by its conduct when contracting with a private party. The court's decisions on this issue demonstrate its discomfort with the Legislature's refusal to address this issue, which had left many private parties without a remedy for damages caused by the government's failure to fulfill its agreements. But each time the court addressed this issue, it declined to create a "waiver-by-contractual-

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148 *City of Alton v. Sharyland Water Supply Corp.*, 277 S.W.3d 132, 157, (Tex. App.—Corpus Christi 2009, pet. filed).

149 *See also* *Bexar Metro. Water Dist. v. Ed. & Econ. Dev. Joint Venture*, 220 S.W.3d 25, 28 (Tex. App.—San Antonio 2006, pet. dismissed as moot).

150 *See* *City of Garden Ridge v. Ray*, No. 03-06-00197-CV, 2007 WL 486395, at \*2-3 (Tex. App.—Austin Feb. 15, 2007, no pet.) (not designated for publication); *City of San Antonio Water Sys. v. Reed S. Lehman Grain, Ltd.*, No. 04-04-00930-CV, 2007 WL 752197, at \*4 (Tex. App.—San Antonio Mar. 14, 2007, pet. denied) (not designated for publication).

151 *City of Aspermont v. Rolling Plains Groundwater Conserv. Dist.*, 258 S.W.3d 231, 236 (Tex. App.—Eastland 2008, pet. filed).

152 *Id.*

153 *See* *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003).

conduct” exception, and each ensuing decision seems to suggest that it is not going to do so anytime soon.<sup>154</sup>

Recently, however, one Texas appellate court found a waiver-by-contractual-conduct.<sup>155</sup> That case was exceptional, however, because the court found waiver due to the “injustice” caused because “the government officials lured [the private party] into the [agreement] with false promises that the contract would be valid and enforceable, then disclaimed any obligation on the contract by taking the position that the contract was not valid after all.”<sup>156</sup> Although the Texas Supreme Court denied the petition for review in that case, it more likely supports the possibility that the State may waive immunity from suit by its inequitable or deceptive conduct, rather than merely its contractual conduct. In the context of water-related entities, the Corpus Christi Court of Appeals has refused to find an equitable waiver of immunity by contractual conduct.<sup>157</sup>

## 2. WAIVER OF IMMUNITY BY CONDUCT IN LITIGATION

In contrast to waiver-by-contractual-conduct, the Texas Supreme Court *has* found that the State can waive immunity, at least to a limited extent, by its conduct in litigation.

### A. NO WAIVER BY FAILURE TO PLEAD IMMUNITY

The first time it addressed the issue, the Texas Supreme Court appeared not to have any problem holding that a governmental body waives its immunity by failing to assert it in the trial court.<sup>158</sup> In that case, the City of San Antonio had waited until after the jury returned its verdict before filing a motion for judgment notwithstanding the verdict, on the ground that it was “immune from liability for malicious prosecution.”<sup>159</sup> The trial court granted the City’s motion, and the court of appeals affirmed.<sup>160</sup> However, the Supreme Court reversed, holding that the City “waived the defense of governmental immunity by failing to affirmatively plead it.”<sup>161</sup> In doing so, the court found that governmental units must litigate according to the rules that bind

154 See the Texas Supreme Court’s series of cases, beginning with *Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401 (Tex. 1997); then, in order, *Gen. Serv. Comm. v. Little-Tex Insul. Co., consolidated with Texas A&M Univ. v. DalMac Constr. Co.*, 39 S.W.3d 591 (Tex. 2001); *Tex. Dept. of Transp. v. Aer-Aerotron, Inc.*, 39 S.W.3d 220 (Tex. 2001); *Texas Natural Res. Conserv. Comm. v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002); *Travis County v. Pelzel*, 77 S.W.3d 246, 252 (Tex. 2002); *Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704 (Tex. 2003).

155 See *Tex. Southern Univ. v. State Street Bank*, 212 S.W.3d 893, 908 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

156 *Id.*

157 *City of Alton V. Sharyland Water Supply Corp.* 277 S.W.3d 132, 143 (Tex. App.—Corpus Christi 2009, pet. filed) (declining to find equitable waiver by contractual conduct, because “it is the legislature’s sole province to waive sovereign immunity”).

158 See *Davis v. City of San Antonio*, 752 S.W.2d 518, 520 (Tex. 1988).

159 *Id.* at 519.

160 *Davis v. City of San Antonio*, 739 S.W.2d 394 (Tex. App.—San Antonio 1987, writ granted).

161 *Davis v. City of San Antonio*, 752 S.W.2d 518, 519 (Tex. 1988).

all other litigants, including the rule that requires parties to plead all matters of avoidance or affirmative defense.<sup>162</sup>

As it turns out, although the *Davis* Court never actually said so, it was talking about immunity from liability, not immunity from suit. At least, that is how the court explained the *Davis* decision later, in *Texas Department of Transportation v. Jones*. In this later case, the court explained that the “component of governmental immunity at issue in [*Davis*] was immunity from liability, not immunity from suit.”<sup>163</sup> Immunity from liability does not affect the court’s jurisdiction and, “like other affirmative defenses to liability, . . . must be pleaded or else it is waived.”<sup>164</sup> In contrast, “immunity from suit bars an action against the state,” and “absent the state’s consent to suit, a trial court lacks subject matter jurisdiction.”<sup>165</sup> The court has reaffirmed these principles in its more recent decisions.<sup>166</sup> In light of the Texas Supreme Court’s decisions, it is clear that a governmental body can waive its immunity from liability, but not its immunity from suit, by failing to assert it in the trial court.

#### B. WAIVER BY FILING AFFIRMATIVE CLAIMS IN LITIGATION

As discussed previously, the Texas Supreme Court has held steadfastly to the idea that only the Legislature can waive sovereign immunity. As a result, a state agency official cannot waive the agency’s immunity from suit, even by agreeing to a contract providing that disputes will be resolved in the courts.<sup>167</sup> However, his rule does not necessarily control once the official actually takes the matter to court.

Long ago, the Texas Supreme Court held that, by filing a suit and voluntarily invoking a court’s jurisdiction, a governmental body waives its immunity from suit as to all “matters properly defensive” to that suit.<sup>168</sup> A related recent decision, *Kinnear v. Texas Commission on Human Rights*,<sup>169</sup> arose when the Texas Commission on Human Rights (“TCHR”) sued Kinnear for violating the anti-discrimination provisions of the Texas Fair Housing Act.<sup>170</sup> The jury found for Kinnear, and the trial court awarded him attorneys’ fees as the prevailing party in a suit under the Act.<sup>171</sup> Although the TCHR did not assert immunity in the trial court or on appeal, the appellate court concluded that the TCHR was immune *from liability* for Kinnear’s fees.<sup>172</sup> The Texas Supreme Court reversed, finding that TCHR had waived its immunity *from liability* for

162 *Id.*

163 *Texas Dept. of Transportation v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (*per curiam*).

164 *Id.* (citing *Davis*, 752 S.W.2d at 519-520).

165 *Id.*

166 *See Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004); *Wichita Falls State Hosp v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003).

167 *See Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 858 (Tex. 2002).

168 *See Anderson, Clayton & Co. v. State ex rel. Allred*, 62 S.W.2d 107, 110 (Tex. 1933) (“[W]here a state voluntarily files a suit and submits its rights for judicial determination, it will be bound thereby, and the defense will be entitled to plead and prove all matters properly defensive.”).

169 14 S.W.3d 299 (Tex. 2000).

170 TEX. PROP. CODE §§ 301.001-.171.

171 *See id.* at § 301.156.

172 *Kinnear*, 14 S.W.3d at 300.



attorneys' fees by failing to plead it.<sup>173</sup> As to whether the trial court lacked jurisdiction due to the TCHR's immunity *from suit*, the court found that the TCHR had waived this immunity, at least as to Kinnear's claim for attorneys' fees, by filing the suit in the first place: "Because the Commission initiated this proceeding . . . , the jurisdictional question was answered when the Commission filed suit . . . ." <sup>174</sup>

The Texas Supreme Court recently reaffirmed and clarified this holding in *Reata Construction Corp. v. City of Dallas*.<sup>175</sup> In that case, the court explained that a governmental agency that files suit (or intervenes in a pending suit) seeking monetary relief waives its immunity from suit "for claims against it which are germane to, connected with and properly defensive to claims" that the agency asserts.<sup>176</sup> However, the agency "continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the [agency's] claims."<sup>177</sup>

In *Reata*, the City of Dallas licensed a cable company to install fiber optic cable beneath the streets of downtown Dallas.<sup>178</sup> The cable company, in turn, subcontracted with Reata Construction to perform the required drilling.<sup>179</sup> While doing so, Reata ruptured a large water main and flooded a building owned by Southwest Properties Group, Inc.<sup>180</sup> Southwest and the building's tenants sued both the cable company and Reata (but not the City) for negligence. In turn, Reata filed a third-party claim against the City, alleging that the City had negligently provided inaccurate information on the water main's location.<sup>181</sup> Before filing an answer to Reata's claims, the City intervened in the case, asserting negligence claims against both Reata and the cable company.<sup>182</sup> It then filed a plea to the jurisdiction, claiming that sovereign immunity barred Reata's claims.<sup>183</sup> The supreme court held that, by filing claims against Reata and the cable company, the City had waived its immunity as to all claims "germane to, connected to, and properly defensive to" the claims it had asserted, but only as an offset against any amount the City might recover.<sup>184</sup> But, the court remanded the case to the trial court without making any effort to determine whether or the extent to which Reata's claims were germane to, connected to, or properly defensive to the City's claims.<sup>185</sup>

In subsequent decisions, Texas courts have clarified that a "*Reata* waiver" occurs not only when a government agency files suit against a private party, but also when it files counterclaims in response to a private party's suit against it. In fact, one court has held that the agency waives its immunity merely by filing an answer in which it requests to recover attorneys' fees and costs incurred in defense of the private party's

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173 *Id.*

174 *Id.*

175 *Reata Constr. Corp. v. City of Dallas* 197 S.W.3d 371 (Tex. 2006).

176 *Id.* at 377.

177 *Id.*

178 *Id.* at 373.

179 *Id.*

180 *Id.*

181 *Id.* at 373.

182 *Id.*

183 *Id.*

184 *Id.* at 378.

185 *Id.*

claims. Several courts have confirmed that this limited waiver extends only as an offset to any damages that the agency might otherwise recover from the private party. Finally, the courts have addressed, but have as yet not reached a consensus on, the appropriate tests for determining whether claims are “germane to, connected to, or properly defensive to” an agency’s claims.

**(1) THE STATE WAIVES IMMUNITY BY FILING ANY CLAIM FOR MONETARY RELIEF, INCLUDING A COMPULSORY COUNTERCLAIM**

In *Reata*, the supreme court found that the City of Dallas had waived its immunity from suit by intervening in a pending case involving private parties. Shortly after issuing that decision, the court confirmed that a governmental agency waives its immunity by filing *any* claim for affirmative relief, including a counterclaim.<sup>186</sup> In that case, Inform Construction filed suit against the City of Irving, alleging that the City had breached the parties’ construction contract.<sup>187</sup> In response, the City filed both a plea to the jurisdiction asserting its sovereign immunity, and a counterclaim alleging that Inform Construction – and not the City – had breached the parties’ contract.<sup>188</sup> On appeal, the City argued that it had not waived its immunity because its claim was a compulsory counterclaim, and thus it was required to assert it.<sup>189</sup> With little explanation, the court disagreed, and concluded that “no difference [exists] between a compulsory counterclaim and a counterclaim which is not compulsory insofar as whether the City has immunity from suit.”<sup>190</sup> The court thus held that, if an agency that is sued for breach of contract elects to file a counterclaim for breach of the same contract, the agency “does not have immunity from suit for claims germane to, connected with, and properly defensive to its counterclaim to the extent [the plaintiff’s] claims act as an offset against the [agency’s] recovery.”<sup>191</sup>

In the context of a water-related entity, one court has recently clarified that waiver does not occur if the government’s counterclaim requests only declaratory relief and not monetary damages.<sup>192</sup>

**(2) THE STATE MAY EVEN WAIVE IMMUNITY BY REQUESTING AN AWARD OF ATTORNEYS’ FEES**

In a very recent decision, the Corpus Christi Court of Appeals held that a governmental agency waives its immunity by filing any request for affirmative relief, even a request that the court dismiss the case and order the plaintiff to pay the attorneys’ fees that the agency incurred in responding to the case.<sup>193</sup> In that case, an inmate filed suit

186 *City of Irving v. Info. Constr., Inc.*, 201 S.W.3d 693, 694 (Tex. 2006).

187 *Id.* at 693.

188 *Id.*

189 *Id.* at 694.

190 *Id.*

191 *Id.*

192 *City of Alton v. Sharyland Water Supply Corp.*, 277 S.W.3d 132, 143 (Tex. App.—Corpus Christi, 2009, pet. filed) (finding the City did not waive immunity by filing counterclaims not seeking any money damages, but instead seeking only a declaration that the contract is void).

193 *Powell v. Tex. Dep’t of Criminal Justice*, 251 S.W.3d 783, 791 (Tex. App.—Corpus Christi 2008, pet. filed).

against the Texas Department of Criminal Justice (“TDCJ”), alleging retaliation and constitutional violations.<sup>194</sup> The TDCJ filed both a plea to the jurisdiction asserting sovereign immunity, and an answer denying liability and requesting an award of its attorneys’ fees and costs.<sup>195</sup> On appeal, the Corpus Christi Court of Appeals concluded that the TDCJ had thereby waived its immunity as against any claim that is germane to, connected with, and properly defensive to the TDCJ’s claim for attorneys’ fees.<sup>196</sup> However, the court did not make any effort to determine whether the inmate’s claims for retaliation and constitutional violations were germane to, connected with, and properly defensive to the TDCJ’s request for attorneys’ fees. Notably, the TDCJ has filed a petition for review in the Texas Supreme Court, therefore, the finality of this decision remains pending.<sup>197</sup>

**(3) IT IS NOT YET CLEAR HOW COURTS WILL DETERMINE WHETHER CLAIMS ARE “GERMANE TO, CONNECTED WITH, AND PROPERLY DEFENSIVE TO” AN AGENCY’S CLAIMS**

Texas courts have issued only a handful of decisions addressing the test for determining whether claims are “germane to, connected with, and properly defensive to an agency’s claims.” Unfortunately, these courts have not fully agreed with each other. They do appear to agree that it is not enough that the claims merely involve the same parties. Beyond that distinction, one court has held that the waiver allows only claims that, in essence, provide a legal defense to the opponent’s claims, while another has held that the waiver allows claims that depend on the resolution of a common fact or legal issue, and yet another has held that the waiver more broadly allows all claims that arise out of the same transaction and occurrence.

The Texas Supreme Court has not provided any additional guidance on the issue, but in one case has spoken of the waiver in very broad terms.<sup>198</sup> This case arose when the Texas Department of Transportation (“TxDOT”) contracted with Sedona Contracting to build a research facility, and Sedona purchased a performance bond from Fidelity & Deposit Co. and Colonial American Casualty & Surety Co (“Fidelity”).<sup>199</sup> After Sedona defaulted on the contract, Fidelity executed a “takeover agreement” with TxDOT and hired another construction company to complete the job.<sup>200</sup> The new company completed the job, but cost disputes then arose between TxDOT and Fidelity.<sup>201</sup> Fidelity initiated an administrative proceeding asserting multiple claims for additional payments; in response, TxDOT sued Fidelity for failing to perform under the performance bond.<sup>202</sup> Fidelity then filed a counterclaim asserting that TxDOT had breached both the original agreement with Sedona and the takeover agreement.<sup>203</sup> The

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194 *Id.* at 786.

195 *Id.* at 786.

196 *Id.* at 791.

197 *See Powell*, 251 S.W.3d 783.

198 *State v. Fid. & Deposit Co. of Maryland*, 223 S.W.3d 309 (Tex. 2007).

199 *Id.* at 310.

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

Texas Supreme Court agreed that, by filing the suit, TxDOT had waived its immunity as to counterclaims that are “sufficiently related” to TxDOT’s claim, and remanded for the trial court to “specify the claims *that arise* from the State’s suit.”<sup>204</sup>

Despite this broad language, the Tyler Court of Appeals did not find any waiver as to claims that were legally distinct from the claims the State asserted.<sup>205</sup> This case began as a condemnation action, in which the State sought to condemn a portion of the Langleys’ land through its power of eminent domain.<sup>206</sup> The Langleys disputed the amount that the State proposed to pay for the land, and also filed counterclaims for statutory damages, breach of contract, and negligent misrepresentation, to recover the expenses they incurred in relocating their business from the condemned land.<sup>207</sup> The Langleys alleged that the State was required by statute to reimburse their relocation expenses or, alternatively, that the State had contractually agreed to do so.<sup>208</sup> Finally, they alleged that the State had misrepresented that it would cover these expenses, and that the Langleys had detrimentally relied on this representation.<sup>209</sup> Although these counterclaims related to the State’s condemnation of the Langleys’ land, the court found that they were not “germane to, connected with, or properly defensive to” the condemnation claim because, under Texas law, the power of eminent domain authorizes only the taking of real property for just compensation, and is separate from any contractual rights that the State may grant for the acquisition or relocation of personal property.<sup>210</sup> The court found that the Langleys’ claims for relocation expenses were irrelevant to, and “wholly separate” from, the condemnation proceeding.<sup>211</sup>

The Corpus Christi Court of Appeals recently used a slightly broader test in *Texas Department of Transportation v. Crockett*.<sup>212</sup> In that case, TxDOT sued Crockett for conversion when Crockett refused to return to TxDOT a \$150,000 payment that TxDOT should have made to a different contractor, but mistakenly made to Crockett.<sup>213</sup> Crockett refused to return the funds because, he alleged, TxDOT owed Crockett’s company more than the amount it had previously paid for services that Crockett’s company had provided under separate contracts.<sup>214</sup> In response to TxDOT’s conversion claim, Crockett filed counterclaims for breach of the contract between Crockett’s company and TxDOT.<sup>215</sup> The court did not have any trouble finding that TxDOT’s claim for conversion had not waived immunity as against Crockett’s breach of contract claims, because Crockett’s claims were not “properly defensive” to the conversion claim, which arose “from distinct conduct at different times and under very different circum-

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204 *Fid. & Deposit Co. of Md.*, 223 S.W.3d at 311.

205 *State v. Langley*, 232 S.W.3d 363, 368-69 (Tex. App.—Tyler 2007, no pet.).

206 *Id.* at 365.

207 *Id.* at 365-366.

208 *Id.*

209 *Id.*

210 *Id.* at 367.

211 *Id.* at 367.

212 *Tex. Dep’t of Transp. v. Crockett*, 257 S.W.3d 412 (Tex. App.—Corpus Christi 2008, pet. denied).

213 *Id.* at 413.

214 *Id.*

215 *Id.*

stances,” and simply “are not related.”<sup>216</sup> Moreover, the court noted, the counterclaims “embraced entirely different elements from the conversion claim,” sought recovery for claims “totally unrelated to the alleged converted check,” and did “not arise from the same transaction or occurrence that is the subject matter of TxDOT’s claim.”<sup>217</sup> In summary, the court found that claims are “germane to, connected with, and properly defensive to” an agency’s claims *only* “for clear and obvious reasons.”<sup>218</sup>

The Fort Worth Court of Appeals used an even broader test in *Muenster Hospital District v. Carter*.<sup>219</sup> In *Carter*, two doctors sued a hospital district for retaliatory discharge and breach of their employment contracts, and the hospital district filed counterclaims for breach of those same contracts as well as a plea to the jurisdiction based on immunity.<sup>220</sup> The hospital district argued that its breach of contract counterclaims did not waive immunity as to the doctors’ claims for retaliatory discharge, because those were not compulsory counterclaims.<sup>221</sup> The court, however, noted that a compulsory counterclaim is simply one that “arises out of the same transaction or occurrence” as the original claim, while the *Reata* court presented “a different test,” which waives immunity for claims that “are germane to, connected with, and properly defensive to” the original claim.<sup>222</sup> The court concluded that the *Reata* test for waiver of immunity is narrower than the test for compulsory counterclaims, and that a counterclaim could be compulsory but still not germane to, connected with, and properly defensive to an underlying claim.<sup>223</sup> In this case, however, the court found that, because the district alleged that the doctors breached their contracts by resigning and that the doctors alleged that they did not voluntarily resign but were actually or constructively discharged, the retaliatory discharge claims were “clearly” germane to, connected with, and properly defensive to the breach of contract claims.<sup>224</sup> Thus, the court held that the district had waived its immunity from suit on the retaliatory discharge claims by filing its claims for breach of the employment contracts.<sup>225</sup>

By contrast, the First District Court of Appeals in Houston held in *Sweeney Community Hospital v. Mendez* that the *Reata* test is *not* narrower than the test for compulsory counterclaims.<sup>226</sup> Under similar facts, Sweeney Community Hospital sued a doctor for breach of his employment contract, and the doctor filed counterclaims for breach of that contract, fraud, tortious interference, defamation, and retaliation.<sup>227</sup> The hospital admitted that it had waived immunity against the claims for breach of contract and fraud, but asserted immunity against the claims for tortious interference, defa-

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216 *Id.* at 416.

217 *Id.*

218 *Crockett*, 257 S.W.3d at 416.

219 *Muenster Hosp. Dist. v. Carter*, 216 S.W.3d 500 (Tex. App.—Fort Worth 2007, no pet.).

220 *Id.* at 502.

221 *Id.* at 502-503.

222 *Id.* at 504.

223 *Id.*

224 *Id.* at 505.

225 *Id.* at 505.

226 *See Sweeney Cmty. Hosp. v. Mendez*, 226 S.W.3d 584 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

227 *Id.* at 587.

mation, and retaliation, which (the hospital argued) were “of a different nature and arise from a different body of law and facts” from its claim for breach of contract.<sup>228</sup> Although the court agreed that the counterclaims “do not mirror” the breach of contract claim, it concluded that it was not necessary that they did so.<sup>229</sup> The court found that the counterclaims arose from the same transaction and occurrence and thus depended on facts that were also pertinent to the hospital’s claims.<sup>230</sup> In direct conflict with the Fort Worth court’s decision in *Carter*, the court held that “‘germane to’ . . . is not narrower in scope than the test for a compulsory counterclaim,” and in fact “a compulsory counterclaim is germane to the opponent’s claim by its very nature.”<sup>231</sup> The court noted that the doctor could recover for tortious interference and defamation only if he showed that he performed his obligations under the contract, and that showing would defeat the hospital’s claim for breach of contract.<sup>232</sup> Thus, the court concluded, “[a]lthough the elements of the claims differ, the core facts are the same, and determining whether [the doctor] and [the hospital] met their obligations under the contract is necessary to the claims asserted by both.”<sup>233</sup>

Notably, in *Mendez*, the First District Court of Appeals went on to consider whether the doctor’s tortious interference, retaliation, and defamation claims were “properly defensive to” the hospital’s breach of contract claims.<sup>234</sup> On this point, the court concluded that the Texas Supreme Court in *Reata* “did not intend the term ‘properly defensive’ to restrict jurisdiction for the *type* of claim raised, but, rather, to restrict the jurisdiction over the *amount* of a claim for damages against the governmental entity to the amount that the government actually recovers.”<sup>235</sup> This holding, it would seem, conflicts with the Tyler court’s decision in *Langley*.

#### (4) A REATA WAIVER DOES NOT ALLOW A PRIVATE PARTY TO RECOVER ANYTHING FROM THE STATE

These recent decisions do confirm that, if an agency waives its immunity by filing claims for affirmative relief, it does so *only* to the extent that the private party’s claims may *offset* the agency’s recovery.<sup>236</sup> Thus, for example, even if the jury were to find in *Carter* that the doctors did not breach their contracts and that the hospital district did engage in retaliatory discharge, the doctors still could not recover any damages.

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228 *Id.* at 591-92.

229 *Id.* at 592.

230 *Id.*

231 *Id.*

232 *Id.* at 592-93.

233 *Id.* at 593.

234 *Id.* at 593-94.

235 *Id.* (emphasis added).

236 *State v. Fid. & Deposit Co. of Md.*, 223 S.W.3d 309, 311 (Tex. 2007) (State retains immunity “to the extent that Fidelity’s damages exceed amounts offsetting TxDOT’s monetary recovery.”); *City of Irving v. Info. Constr., Inc.*, 201 S.W.3d 693, 694 (Tex. 2006) (“The City . . . retains immunity from suit to the extent [the plaintiff’s] damages exceed amounts offsetting the City’s monetary recovery.”); *Muenster Hosp. Dist. v. Carter*, 216 S.W.3d 500, 506 (Tex. App.—Fort Worth 2007, no pet.) (“[T]he maximum amount the doctors may seek to recover . . . is limited to the total affirmative relief recovered by the Hospital District in its breach of contract counterclaims.”).

In other words, a *Reata* waiver will never allow a private party to actually recover damages from the State, but—at most—will allow the party only to preclude the State from recovering damages against it.

#### **IV. THE FUTURE OF SOVEREIGN IMMUNITY IN THE CONTEXT OF WATER DISPUTES**

Recent case law concerning the concept of sovereign immunity in the context of water disputes can be broken down into three general categories: claims arising from contracts and business deals, claims for property damage or loss, and claims for personal injury and death. The ability of private citizens to obtain relief from cities, counties, water improvement or irrigation districts, water import authorities, and other governmental entities for claims stemming from water disputes in the future is not easy to predict. However, general trends may be gleaned from case law.

The first category—claims arising from contracts and business deals—seems to be the easiest to recover for, because of the Legislature’s express waiver of immunity for certain contract claims in Chapter 2260 of the Texas Government Code and Chapter 271 of the Texas Local Government Code. The waiver of immunity for certain contract claims promotes some of the most valued qualities in our civil justice system: freedom of contract, fulfillment of justified contract expectations, and predictability in the enforcement of contractual provisions.<sup>237</sup>

Regarding the second category—claims for property damage or loss—the trend has been to deny most plaintiffs relief under a constitutional “taking” theory. The intent of the governmental entity has been deemed paramount to the issue of whether a “taking” has occurred, and the courts have found various ways to deny relief to plaintiffs on this ground. For example, as previously explained, a “taking” is generally found to have occurred only in the face of recurrent injury.<sup>238</sup> A single destructive incident will not do. As the First District Court of Appeals explained in denying relief to a plaintiff whose property was flooded as a result of a dam built by the Texas Department of Transportation, “[w]hile nonrecurrent flooding may cause damage, a single flood event does not generally rise to the level of a taking.”<sup>239</sup> Another way the courts have denied relief under a “taking” theory is by blaming the property damage on an act of God—e.g., a severe rainfall—rather than on the act of a governmental entity.<sup>240</sup> It is exceedingly difficult for plaintiffs to overcome the intent element of a “takings” claim and thereby recover for property damage against a governmental entity.

The third category—claims for personal injury and death—seems to be the most difficult category of claims for plaintiffs to maintain. One reason may be that many of these claims are not related to work performed by the governmental entity being sued. For example, in *Wilson v. Harris County Water Control & Improvement District No.*

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237 See *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 188 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (Frost, J., dissenting).

238 See *Tarrant Reg. Water Dist. v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004).

239 See *Toomey v. Tex. Dept. of Transp.*, No. 01-05-00749-CV, 2007 WL 1153035, at \*4 (Tex. App.—Houston [1st Dist.] Apr. 19, 2007, no pet.) (not designated for publication).

240 See *City of Garden Ridge v. Ray*, No. 03-06-00197-CV, 2007 WL 486395, at \*4 (Tex. App.—Austin Feb 15, 2007, no pet.) (not designated for publication).

21, the plaintiff was injured after a water district employee lifted his feet off of a desk as he was sitting in a rolling chair with his feet propped up.<sup>241</sup> The Fourteenth District Court of Appeals denied relief on sovereign immunity grounds. This decision is a rational application of sovereign immunity, as it is arguably unfair to penalize the taxpayers for an act of a district employee that was in no way related to the work of the district.

The table below summarizes many of the key “water cases” involving sovereign immunity, organized under the three main categories of claims discussed above:

CLAIMS FOR PROPERTY DAMAGE OR LOSS			
CASE	KEY FACTS	LEGAL CLAIMS	RESULT
Tarrant Reg. Water Dist. v. Gragg, 151 S.W.3d 546 (Tex. 2004).	Plaintiff’s 12,500-acre ranch was repeatedly flooded after District constructed and began releasing water from Richland-Chambers Reservoir.	Taking (inverse condemnation)	Constitution waives immunity for this valid takings claim.
City of Garden Ridge v. Ray, No. 03-06-000197-CV, 2007 WL 486395 (Tex. App.—Austin Feb. 15, 2007, no pet.) (not designated for publication).	Plaintiff’s land flooded when drainage culvert, which City operated on Plaintiff’s land under easement agreement, overflowed following severe rainfall.	Breach of contract, taking, declaratory judgment	Sovereign immunity bars claims.
Toomey v. Tex. Dept. of Transp., No. 01-05-00749-CV, 2007 WL 1153035 (Tex. App.—Houston [1st Dist.] Apr. 19, 2007, no pet.) (not designated for publication).	Concrete ditch constructed by TxDOT caused waters to overflow and flood nearby properties.	Takings (inverse condemnation)	Sovereign immunity bars the claim.

<sup>241</sup> Wilson v. Harris County Water Control & Imp. Dist. No. 21, 194 S.W.3d 551 (Tex. App.—Houston [14th Dist.] 2006, no pet.).



CLAIMS FOR PROPERTY DAMAGE OR LOSS			
CASE	KEY FACTS	LEGAL CLAIMS	RESULT
Maverick County Water & Improv. Dist. No. 1 v. Reyes, No. 04-03-00421-CV, 2003 WL 22900914 (Tex. App.—San Antonio Dec, 10, 2003, no pet.) (not designated for publication).	Plaintiff’s land was flooded when District increased water flow and caused canal to break.	Taking (inverse condemnation)	Sovereign immunity bars the claim.
Sutton Bldg, Ltd. v. Travis County Water Dist. 10, No. 03-02-00659-CV, 2004 WL 1404045 (Tex. App.—Austin, June 24, 2004, no pet.) (not designated for publication).	Plaintiff’s parking lot sustained damaging structural movement caused by water leaking from District’s underground line.	Taking (inverse condemnation)	Sovereign immunity bars the claim.
Ghidoni v. Bexar Met. Water Dist., No. 04-07-00377-CV, 2007 WL 2481034 (Tex. App.—San Antonio, Sept. 5, 2007, no pet. h.) (not designated for publication).	Water District shut off water to plaintiff’s plant nursery.	Fraud, breach of fiduciary duties	Sovereign immunity bars the claims.
City of Dallas v. Jennings, 142 S.W.3d 310 (Tex. 2004).	Plaintiffs’ home was flooded with raw sewage when the City dislodged a clogged sewer main and caused another backup.	Taking (inverse condemnation), nuisance	Sovereign immunity bars the claims.

CLAIMS FOR PROPERTY DAMAGE OR LOSS			
CASE	KEY FACTS	LEGAL CLAIMS	RESULT
Hidalgo County Water Imp. Dist. No. 2 v. Holderbaum, 11 S.W. 2d 506 (Tex. Comm'n App.—1928, jgmt. adopted).	District's irrigation canals continually leaked and overflowed, flooding plaintiff's adjacent land, ruining fruit trees, and rendering the land useless.	Negligent construction and maintenance of canals, resulting in a taking of private property (inverse condemnation)	Constitution waives immunity for this valid takings claim.
EPGT Tex. Pipeline L.P. v. Harris County Flood Control Dist., 176 S.W.3d 330 (Tex. App.—Houston [1st Dist.] 2004, no pet.).	Plaintiff's gas pipeline was broken and displaced when District's contractor removed culverts and soil as part of a drainage excavation project.	Negligence, UDJA, breach of contract, taking	Tort Claims Act did not waive immunity because contractor, and not District, controlled and performed the work.
Zacharie v. City of San Antonio (Water Sys. Bd.), 952 S.W.2d 56 (Tex. App.—San Antonio 1997, no writ).	Plaintiff's business was lost to fire when water hydrants produced insufficient water or were locked or defective.	Negligent failure to provide sufficient water to fire hydrants	Sovereign immunity bars claim (and Tort Claims Act does not waive immunity).
Lone Star Caliper Co. v. Talty Water Supply Corp., 102 S.W.3d 198 (Tex. App.—Dallas 2003, pet. denied).	Plaintiff's business was lost to fire when hydrant was missing and nearby hydrant did not have any water.	Negligent maintenance of hydrants and water supply	Sovereign immunity does not protect a member-owned non-profit water supply corporation
City of Galveston v. State, 217 S.W.3d 466 (Tex. 2007);	City's water line ruptured and damaged TxDOT's highway.	Negligent installation, maintenance, and upkeep of water line	Sovereign immunity bars the State's claims against a city

CLAIMS FOR PERSONAL INJURY/DEATH			
CASE	KEY FACTS	LEGAL CLAIMS	RESULT
Bennett v. Brown County Water Imp. Dist. No. 1, 272 S.W.2d 498 (Tex. 1954).	Eight-year old child drowned in District's irrigation ditch.	Negligent construction and operation of irrigation ditch, creating an attractive nuisance	Sovereign immunity bars claim.
Bexar Metro. Water Dist. v. Evans, No. 04-07-00133-CV, 2007 WL 2481023 (Tex. App.—San Antonio Sept. 5, 2007, no pet. h.) (not designated for publication).	Water District allegedly delivered water to hospital containing inadequate level of chlorine, causing outbreak of Legionnaire's disease.	Negligence	Tort Claims Act waived immunity for injury caused by negligent use of tangible personal property (but no evidence proved water had inadequate level of chlorine).
San Antonio Water Sys. v. McKnight, No. 04-02-00239-CV, 2003 WL 141047 (Tex. App.—San Antonio Jan. 22, 2003, no pet.) (not designated for publication).	Motorist was injured when she drove through water flowing over the road from a ruptured water main.	Negligent condition of Water System's water main	Sovereign immunity will bar the claim if the Water System had no knowledge of the broken water main
Wilson v. Harris County Water Control & Imp. Dist. No. 21, 194 S.W.3d 551 (Tex. App.—Houston [14th Dist.] 2006, no pet.).	District employee lifted plaintiff's feet off a desk as he was sitting in a rolling chair with his feet propped up, causing chair to roll out from under plaintiff.	Negligence	Sovereign immunity bars claim.

<b>CLAIMS ARISING FROM CONTRACTS/BUSINESS DEALS</b>			
<b>CASE</b>	<b>KEY FACTS</b>	<b>LEGAL CLAIMS</b>	<b>RESULT</b>
Ben Bolt–Palito Blanco Consol. Ind. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self-Ins. Fund, 212 S.W.3d 320 (Tex. 2006).	Self-insurance fund denied coverage for school district's loss.	Breach of contract, various tort claims	Chapter 271 waives immunity against contract claims (even between two government subdivisions); sovereign immunity bars tort claims.
Clear Lake City Water Auth. v. Friendswood Dev. Co., 256 S.W.3d 735 (Tex. App.—Houston [14th Dist.] 2008, pet. dism'd).	City Water Authority failed to include in bond measure voter authorization for bond to pay for purchase of water, sewer, and drainage lines from plaintiff, as parties' contract allegedly required.	Breach of contract	Chapter 271 waives Authority's immunity.
Boyer v. Trinity River Auth. of Tex., 279 S.W.3d 354, (Tex. App.—Fort Worth 2008, no pet. h.).	River Authority terminated construction contract after plaintiff performed additional work pursuant to executed change order.	Breach of contract	Chapter 271 waives Authority's immunity from suit on contract.
City of Aspermont v. Rolling Plains Groundwater Conserv. Dist., 258 S.W.3d 231 (Tex. App.—Eastland 2008, pet. filed).	City failed to file monthly reports and refused to pay export fees for water transported to City outside of District.	Breach of statutory obligations, penalties, and declaratory judgment	Sovereign immunity bars claims for money damages, but not for declaration that City must comply with water conservation rules prospectively.

CLAIMS ARISING FROM CONTRACTS/BUSINESS DEALS			
CASE	KEY FACTS	LEGAL CLAIMS	RESULT
City of Texarkana v. Cities of New Boston, 141 S.W.3d 778 (Tex. App.—Texarkana 2004, pet. denied).	Cities complained of damages resulting from Texarkana’s failure to supply water services as contracted.	Unspecified tort claims and breach of contract	Tort Claims Act does not waive immunity for tort claims; but Local Government Code waives immunity for contract claims.
Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Jt. Vent., 220 S.W.3d 25 (Tex. App.—San Antonio 2006, pet. dismissed as moot).	District contracted to sell real estate to Joint Venture, but then failed and refused to close on the deal.	Breach of contract	Sovereign immunity bars the claim.
City of San Antonio Water Sys. v. BSR Water Co., 190 S.W.3d 747 (Tex. App.—San Antonio 2005, no pet. h.).	Water System failed to perform obligations under a water supply agreement and failed to disclose separate agreement that imposed conflicting obligations.	Fraud, fraudulent inducement, conversion	Sovereign immunity bars tort claims against city’s water system.
City of San Antonio Water Sys. v. Reed S. Lehman Grain, Ltd., No. 04-04-00930-CV, 2007 WL 752197 (Tex. App.—San Antonio 2007, pet. denied) (not designated for publication).	City obtained sewer line easement from plaintiff in exchange for agreement to allow plaintiff to connect to the sewer line once installed, but subsequently refused plaintiff’s request to connect.	Breach of contract, fraud, fraudulent inducement	Sovereign immunity bars the claims.

CLAIMS ARISING FROM CONTRACTS/BUSINESS DEALS			
CASE	KEY FACTS	LEGAL CLAIMS	RESULT
Dann v. Athens Mun. Water Auth., No. 12-07-00087-CV, 2007 WL 2460058 (Tex. App.—Tyler Aug. 31, 2007, no pet.) (not designated for publication).	Water Authority employee assured plaintiffs that they would have access to lake over Authority property, but then nonrenewed permit after plaintiffs bought adjacent property and built boat house.	Taking (inverse condemnation)	Sovereign immunity bars the claim.

V. CONCLUSION

The main reason for sovereign immunity is to protect the public treasury. In *Alden v. Maine*,<sup>1</sup> Justice Anthony Kennedy wrote of this justification:

Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public’s behalf.<sup>2</sup>

Although, sovereign immunity may frustrate the principle of just compensation, and ensuring that no person is above the law; in the context of water-related entities, sovereign immunity serves the additional, and arguably more compelling, purpose of promoting the conservation and development of our most essential natural resource.

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1 527 U.S. 706 (1999).

2 *Id.* at 749.



# ATOMIC POWER, FOSSIL FUELS, AND THE ENVIRONMENT: LESSONS LEARNED AND THE LASTING IMPACT OF THE KENNEDY ENERGY POLICIES

BY JOSHUA P. FERSHEE

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*There are two points on conservation that have come home to me in the last 2 days. One is the necessity for us to protect what we already have, what nature gave to us, and use it well, not to waste water or land, to set aside land and water, recreation, wilderness, and all the rest now so that it will be available to those who come in the future. That is the traditional concept of conservation, and it still has a major part in the national life of the United States.*

*But the other part of conservation is the newer part, and that is to use science and technology to achieve significant breakthroughs as we are doing today, and in that way to conserve the resources which 10 or 20 or 30 years ago may have been wholly unknown. So we use nuclear power for peaceful purposes and power.*

President John F. Kennedy, Sept. 26, 1963

## I. INTRODUCTION

When President Barack Obama took office in 2009, the comparisons to President John F. Kennedy, Jr. were inevitable. An engaging and energetic young president had just been sworn into office during complex and rapidly changing times. In 2008, late-Senator Edward M. “Ted” Kennedy compared then-Democratic presidential nominee Obama and his brother, President Kennedy: “There is a new wave of change all around us, and if we set our compass true, we will reach our destination—not merely



victory for our party, but renewal for our nation. . . . [S]o with Barack Obama . . . the dream lives on.”<sup>1</sup>

In comparing President Obama to President Kennedy, both are often viewed as cultural icons “who by [their] very existence denote[] a new social order” and are “youthful renewer[s] of the American spirit.”<sup>2</sup> From a policy perspective, though, President Obama is more often compared to Abraham Lincoln or Franklin Delano Roosevelt, than to President Kennedy.<sup>3</sup> Regardless of the appropriateness of these comparisons, this article argues that President Obama has much to gain from looking to President Kennedy’s policies, not just his rhetoric, especially in setting energy policy.

Because of his short term of office,<sup>4</sup> President Kennedy’s energy policies have not been critiqued, reviewed, or analyzed in the same manner as other administrations.<sup>5</sup> This article seeks to fill part of that void by reviewing the key components of President Kennedy’s energy and environmental goals and policies that managed to have a lasting impact and discussing the results of those policies, both positive and negative. Through this review, President Kennedy’s policies can become a resource and roadmap for the current Administration and all those who seek to ensure access to affordable energy while preserving the environment.<sup>6</sup>

This article considers the motivation behind President Kennedy’s key energy initiatives and proposed legislation and puts that motivation in context. More specifically, the article discusses some of President Kennedy’s key energy initiatives, in light of the technological, regulatory, economic, and political (domestic and international) climate of the Kennedy years and compares those key initiatives to the concerns the United States faces today. This comparison indicates that President Kennedy’s energy and environmental policies were both insightful and prescient, but not without consequences.

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1 ROBERT DENTON, JR., *THE 2008 PRESIDENTIAL CAMPAIGN: A COMMUNICATION PERSPECTIVE* 23 (2009) (quoting Senator Ted Kennedy’s address to the 2008 Democratic National Convention).

2 See Matt Bai, *Don’t Look Back*, N.Y. TIMES, Feb. 1, 2009, at MM9.

3 *Id.* (stating that viewing President Obama as “crisis President” leads comparisons to Lincoln and FDR, but “as cultural icon” President Kennedy is a more apt comparison).

4 See THE NATIONAL ARCHIVES, *OUR DOCUMENTS: 100 MILESTONE DOCUMENTS FROM THE NATIONAL ARCHIVES* 220 (2003) (stating that the Cold War shaped President Eisenhower’s presidency and that it “would dominate President Kennedy’s own short term of office”).

5 See Major Bruce D. Page, Jr., *American Theocracy: The Peril and Politics of Radical Religion, Oil, and Borrowed Money in the 21st Century*, 190/191 MILITARY L. REV. 175, 177 n.12 (2007) (book review) (“In [this book], Phillips reviews the oil policies of every American president from Dwight Eisenhower to Bill Clinton, excluding John F. Kennedy.”).

6 See President Barack Obama, Remarks at Southern California Edison Electric Vehicle Technical Center (Mar. 19, 2009), available at <http://www.energy.gov/news2009/7067.htm> (providing President Obama’s remarks as they were prepared for delivery) (“We can remain one of the world’s leading importers of foreign oil, or we can make the investments that will allow us to become the world’s leading exporter of renewable energy. We can let climate change continue to go unchecked, or we can help stem it.”).

## **II. THE BROAD AND COMPLEX NATURE OF THE KENNEDY ENERGY POLICIES**

President John F. Kennedy's forward-thinking, yet pragmatic, energy and environmental policies were, and are, uniquely comprehensive and coherent. The concerns facing the Kennedy Administration were not that different from the concerns facing the world today. Not since President Kennedy's era have energy, environmental, and public safety issues been so intertwined. Although many of the specific issues have changed over the past fifty years, President Kennedy's policies provide a useful model in developing ways to address modern concerns.

President John F. Kennedy's short time in the White House provides a somewhat conflicted record. He was often, and accurately, portrayed as an environmentalist<sup>7</sup> and a civil rights advocate.<sup>8</sup> President Kennedy was also a major supporter of space exploration and atomic power, and, perhaps above all, he was committed to foreign policy.<sup>9</sup> His policies reflected the complex and difficult nature of the issues of the time. Even when some of his Administration's policies seemed to conflict with many of his primary goals, most of the policy decisions were part of a coherent, if complex, plan.

The complexity of President Kennedy's policies was visible in nearly every key issue. An outspoken champion of civil rights, President Kennedy did not move forward on legislation until two years into his term,<sup>10</sup> when racial violence largely forced the issue.<sup>11</sup> He founded the Peace Corps to help promote peace and prosperity in the world,<sup>12</sup> yet his policies also set the stage for the Vietnam War.<sup>13</sup> An ardent supporter of the environment,<sup>14</sup> he also advocated expansion of nuclear power for civilian use<sup>15</sup> and proposed and supported construction of coal slurry pipelines.<sup>16</sup>

Complex times lead to complex policies. Such were, and are, the times. As President Kennedy explained to the United Nations in 1963, "[n]ever before has man had such capacity to control his own environment . . . . We have the power to make this the best generation of mankind in the history of the world—or to make it the last."<sup>17</sup> This observation remains true today.

President Kennedy, more than 40 years ago, predicted that:

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7 See BENJAMIN KLINE, *FIRST ALONG THE RIVER: A BRIEF HISTORY OF THE U.S. ENVIRONMENTAL MOVEMENT* 75-76 (3d ed. 2007).

8 THEODORE C. SORENSEN, *KENNEDY* 470 (1965).

9 See *id.* at 509, 528.

10 HERBERT S. PARMET, *JFK: THE PRESIDENCY OF JOHN F. KENNEDY* 271-72 (1983).

11 *Id.* at 264-67.

12 SORENSEN, *supra* note 8, at 531-32.

13 Lawrence J. Bassett & Stephen E. Pelz, *The Failed Search for Victory: Vietnam and the Politics of War*, in *KENNEDY'S QUEST FOR VICTORY: AMERICAN FOREIGN POLICY, 1961-1963* 223-52 (Thomas G. Paterson ed., 1989).

14 See KLINE, *supra* note 7, at 75-76.

15 See William J. Barber, *Studied Inaction in the Kennedy Years*, in *ENERGY POLICY IN PERSPECTIVE: TODAY'S PROBLEMS, YESTERDAY'S SOLUTIONS* 324 (Crauford D. Goodwin ed., 1983).

16 See ROBERT GLENNON, *WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESH WATERS* 155 (2004).

17 President John F. Kennedy, Jr., Address Before the 18th General Assembly of the United Nations (Sept. 20, 1963), available at <http://www.jfklibrary.org/Historical+Resources/Archives/>

if we fail to chart a proper course of conservation and development—if we fail to use these blessings prudently—we will be in trouble within a short time. In the resource field, predictions of future use have been consistently understated. But even under conservative projections, we face a future of critical shortages and handicaps. By the year 2000, a United States population of 300 million—nearly doubled in 40 years—will need far greater supplies of farm products, timber, water, minerals, fuels, energy, and opportunities for outdoor recreation. Present projections tell us that our water use will double in the next 20 years; that we are harvesting our supply of high-grade timber more rapidly than the development of new growth; that too much of our fertile topsoil is being washed away; that our minerals are being exhausted at increasing rates; and that the Nation's remaining undeveloped areas of great natural beauty are being rapidly pre-empted for other uses.<sup>18</sup>

On many of these predictions, President Kennedy was right, or at least in the ballpark. The U.S. population in 1963 was approximately 189 million people.<sup>19</sup> In 2000, it was more than 280 million.<sup>20</sup> It was not until approximately 2007 that the population actually hit 300 million people,<sup>21</sup> a mere 7 years “late.” As for water supply, President Kennedy was correct that water needs would increase greatly. Total water withdrawals for all uses in 1960 were 270 billion gallons per day (bgd).<sup>22</sup> By 1980, that number reached a peak use of 440 bgd<sup>23</sup>; twenty years later, the number had decreased to 408 bgd.<sup>24</sup>

Despite the complex problems facing the world, or perhaps because of them, President Kennedy recognized the need to adopt comprehensive energy and environmental policies. Early in his administration, President Kennedy sought to combine “the widely scattered resource policies of the Federal Government.”<sup>25</sup> He noted that

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Reference+Desk/Speeches/JFK/003POF03\_18thGeneralAssembly09201963.htm (providing a transcript of the address, as well as the audio file).

18 John F. Kennedy, Special Message, Special Message to the Congress on Natural Resources (Feb. 23, 1961), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=8466&st=&st1=>.

19 U.S. Census Bureau, Historical National Population Estimates: July 1, 1900 to July 1, 1999, *available at* <http://www.census.gov/popest/archives/1990s/popclockest.txt> (last visited Oct. 23, 2009).

20 U.S. Census Bureau, Census 2000 Demographic Profile Highlights, [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (click on the “Fact Sheet” tab and then click on the “2000” tab) (last visited Oct. 23, 2009).

21 U.S. Census Bureau, Population Estimates, [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (click on “Population Finder” tab and then follow hyperlink to “Population for all states in the United States, 2000-2008”) (last visited Oct. 23, 2009).

22 USGS Estimated Water Use in the United States in 2000, <http://pubs.usgs.gov/circ/2004/circ1268/htdocs/table14.html> (last visited Sep. 27, 2009).

23 *Id.*

24 *Id.*

25 President John F. Kennedy, Special Message to the Congress on Natural Resources (Feb. 23, 1961), *available at* [http://www.jfklink.com/speeches/jfk/publicpapers/1961/jfk49\\_61.html](http://www.jfklink.com/speeches/jfk/publicpapers/1961/jfk49_61.html).

prior policies “overlapped and often conflicted” and that funds were often “wasted on competing efforts.”<sup>26</sup> As such, he sought to provide consistent standards when measuring the proper federal contribution to similar projects.<sup>27</sup> Perhaps most importantly, he recognized that “[f]unds and attention devoted to annual appropriations or immediate pressures divert[] energies away from long-range planning for national economic growth.”<sup>28</sup> Although President Kennedy’s policies did not always achieve this standard, no president since has endorsed such a comprehensive energy plan.

Many of the issues are similar today, but the problems have evolved, and in many cases, expanded. We are still concerned about nuclear proliferation, but instead of being preoccupied with the Soviet Union,<sup>29</sup> now our concerns include Iran, Russia, China, North Korea, and Pakistan, among others.<sup>30</sup> This diffusion of possible sources has changed how the public views nuclear threats. Now, the apprehension about potential threats focuses largely on terrorist activity and how that activity will be funded. This new focus, in turn, raises concern about foreign fuel sources because so much of the world’s fossil fuels are controlled by potentially antagonistic regimes.

In addition, in 2010, as in 1963, we face significant concerns about the environment. Beyond clean air and water—areas in which we have made at least some progress—climate change is now a major issue. Access to foreign resources (particularly oil) and overconsumption are still major concerns. President Kennedy’s policies, and the process through which they were developed, can help shed some light on the critical energy and environmental issues facing the world today. With the benefit of hindsight, President Kennedy’s policies provide valuable guidance, indicating what might work, what should be avoided, and the difficulty in determining which is which.

## A. THE POWER OF (AND FROM) NUCLEAR PROLIFERATION

President Kennedy’s pragmatic and forward-thinking views were apparent in his strong support for atomic energy. This support was based on two key premises. First, he believed that having a civilian use for atomic power was essential to managing nuclear proliferation.<sup>31</sup> He argued that those who believed the United States should not commit “to being a leader in the peacetime use of atomic energy” were choosing to waste resources and “say[ing] no to [the] country.”<sup>32</sup> Accordingly, he argued the Atomic Energy Commission needed to take a “hard look at the role of nuclear power in our economy in cooperation with the Department of the Interior, the Federal Power Commission, other appropriate agencies, and private industry.”<sup>33</sup>

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26 *Id.*

27 *Id.*

28 *Id.*

29 See MICHAEL O’BRIEN, JOHN F. KENNEDY: A BIOGRAPHY 351-52 (2005).

30 See GRAHAM T. ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE 74-75 (2004).

31 See Letter from President John F. Kennedy, to the Chairman of the Atomic Energy Commission (March 17, 1962), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=8324>.

32 President John F. Kennedy, Remarks at the Silver Anniversary Dinner Honoring Senator Magnuson (Nov. 16, 1961), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=8449>.

33 See Letter to the Chairman of the Atomic Energy Commission, *supra* note 31.

Second, he believed that economically competitive nuclear power could be realized relatively quickly, especially in areas in which fossil fuel costs were high.<sup>34</sup> The President believed that the base of U.S. energy resources needed to expand to promote economic growth.<sup>35</sup> Plus, with so much time and money already put into the nuclear program, President Kennedy naturally sought to find additional ways to put that investment to work.

The first major U.S. atomic energy project was the Hanford Nuclear Weapons Reservation (Hanford), which was located near Hanford, Washington.<sup>36</sup> Built during World War II, Hanford was the first full-scale plutonium manufacturing facility in the world.<sup>37</sup> Hanford covers 560 square miles and is adjacent to the Columbia River,<sup>38</sup> which provided the “abundant, clean water supply” that was needed for cooling.<sup>39</sup> Operations started in 1944, and Hanford soon produced the bulk of the plutonium for the U.S. nuclear weapons program, including that which was used for the atomic bomb dropped on Nagasaki.<sup>40</sup>

President Kennedy was adamant that the steam produced as a by-product of Hanford’s operations should be used to generate electricity. He strongly supported the Washington Power Supply System proposal to use the steam produced by Hanford to produce power, arguing that it presented an opportunity “clearly in the public interest... to obtain maximum benefits from the public investment already committed for this facility... [and to] demonstrate national leadership in resource development... [while] achieving national defense objectives.”<sup>41</sup> He congratulated Congress “on the success of their unremitting efforts” to use the by-product steam of the Hanford reactor.<sup>42</sup> “[I]t is clearly in the public interest to utilize the heat output of the Hanford re-

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34 See John F. Kennedy, Special Message to the Congress on Natural Resources (Washington, D.C., Feb. 23, 1961), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=8466&st=kennedy&st1=nuclear> (“[E]conomically competitive nuclear power [can be achieved] before the end of this decade in areas where fossil fuel costs are high will be encouraged through basic research, engineering developments, and construction of various prototype and full scale reactors by the Atomic Energy Commission in cooperation with industry.”).

35 See Letter from John F. Kennedy to the Chairman, Atomic Energy Commission, on the Development of Civilian Nuclear Power (March 17, 1962), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=8557&st=kennedy&st1=nuclear> (“The development of civilian nuclear power involves both national and international interests of the United States.”).

36 See *In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1127 (9th Cir. 2002).

37 *Id.*

38 *Id.*

39 See MICHELE GERBER, *LEGEND AND LEGACY: FIFTY YEARS OF DEFENSE PRODUCTION AT THE HANFORD SITE 6* (1992).

40 *In re Hanford Nuclear Reservation Litig.*, 292 F.3d at 1127.

41 Letter from John F. Kennedy to the Chairman, Joint Committee on Atomic Energy, Concerning Use of By-Product Steam from the Hanford Nuclear Reactor (July 14, 1962), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=8768&st=nuclear&st1=investment>.

42 John F. Kennedy, Remarks Upon Signing the Atomic Energy Commission Authorization Bill (Sept. 26, 1962), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=8901>.

actor, and to obtain maximum benefits from the public investment already committed for this facility if there is a feasible way to do so.”<sup>43</sup>

In his remarks at the Hanford generating plant, President Kennedy applauded the commencement of “work on the largest nuclear power reactor for peaceful purposes in the world.”<sup>44</sup> He noted, “I think this is a good area where we should be first, and we are first.”<sup>45</sup>

President Kennedy also talked of using Hanford to promote conservation. He believed that, in addition to traditional notions of conservation, science and technology could achieve breakthroughs to conserve resources in ways that were previously unidentified.<sup>46</sup> So, he said, “we use nuclear power for peaceful purposes and power.”<sup>47</sup>

The science used at Hanford would prove to be both a benefit and burden. By 1963, Hanford had nine nuclear reactors along the Columbia River.<sup>48</sup> The original three World War II reactors were updated and expanded, and 177 underground waste tanks were built.<sup>49</sup> During forty years of operations, Hanford produced the plutonium supply for the majority of the United States’ 60,000 nuclear weapons.<sup>50</sup> Clearly, the transition from making bombs to making electricity was not as easy as it may have appeared.<sup>51</sup> The science of using nuclear power to generate electricity was an entirely new undertaking.<sup>52</sup> For one, President Kennedy insisted that the steam by-products be incorporated in the process. However, the plutonium for bombs was produced using low-temperature reactors; steam for the electricity generating turbines required a much higher temperature.<sup>53</sup>

The N Reactor, the last plant constructed on the Hanford site, combined plutonium production and steam generation of commercial electric power.<sup>54</sup> The N Reactor produced more than 65 billion kilowatts of electricity in twenty-four years, making the N Reactor the largest electric power producer in the nation during its early years.<sup>55</sup>

As would be expected (at least today), Hanford also proved to be a major environmental hazard. In fact, “[t]he clean-up of American military nuclear waste is the biggest environmental program as well as the biggest public works program in the history

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43 John F. Kennedy, Annual Budget Message to the Congress, Fiscal Year 1964, (Jan. 17, 1963), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9241>.

44 John F. Kennedy, Remarks at the Electric Generating Plant (Sept. 26, 1963), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9436&st=nuclear&st1=reactor>.

45 *Id.*

46 *Id.*

47 *Id.*

48 See *id.* Dep’t of Energy, Richland Operations Office, Office of River Protection, Hanford Overview, available at <http://www.hanford.gov/?page=215> (last visited September 27, 2009).

49 177 tanks were built starting during WWII; 64 were built during this time. See *Id.* Several expansions took place during the Cold War expanding to 149 tanks. See *Id.* 28 additional tanks were built in the late 60s.

50 *Id.*

51 GWYNETH CRAVENS, POWER TO SAVE THE WORLD: THE TRUTH ABOUT NUCLEAR ENERGY 163 (2008).

52 *Id.*

53 *Id.*

54 GERBER, *supra* note 39, at 31.

55 *Id.*

of the world, surpassing the Manhattan Project and the space program combined.”<sup>56</sup> In the mid-1950s, leaks in the single-shell, high-level waste storage tanks were confirmed.<sup>57</sup> Other concerns surrounded the Columbia River, which supplied the water used for cooling the operations. By 1960, wastewater from Hanford discharged 14,500 curies per day into the Columbia River.<sup>58</sup> Recognizing this concern, “Hanford and Atomic Energy Commission leaders discussed rising levels of contamination in fish tissues in the river and in shellfish in coastal waters near the river’s mouth.”<sup>59</sup>

Hanford’s eight single-pass reactors shut down between 1964 and 1971.<sup>60</sup> Following the shut-downs, some reports noted that “radionuclide levels in river water and organisms decreased, and by 1975, only a small measurable burden existed, mainly in the sediments of blind sloughs and of areas behind dams.”<sup>61</sup> However, during operation, “these reactors discharged billions of gallons of cooling water, laden with fission and activation products, to the river and to the ground.”<sup>62</sup>

In the aftermath, the United States Department of Energy (DOE), in 1987, created the Hanford Environmental Dose Reconstruction Project (HEDR), for which the Centers for Disease Control had oversight responsibility.<sup>63</sup> The HEDR was created “to estimate and reconstruct all radionuclide emissions from Hanford from 1944 to 1972, in order to ascertain whether neighboring individuals and animals had been exposed to harmful doses of radiation.”<sup>64</sup> The HEDR analyzed Hanford emissions over a 75,000-square-mile area and examined “how radiation traveled through the air, settled into the soil, and dispersed into ground and surface water, and the resulting exposure to individuals who lived in the surrounding urban and suburban areas.”<sup>65</sup>

In 1990, HEDR released the *Initial Hanford Radiation Dose Estimates*. This report publicly disclosed that Hanford had released large quantities of radioactive and non-radioactive waste starting in the 1940s.<sup>66</sup> The report triggered major litigation. Thousands of individuals filed complaints, claiming a variety of illnesses caused by Hanford’s toxic emissions.<sup>67</sup> In addition to loss of real property value, the complaints “alleged that defendants acted intentionally or negligently, and that the radioactive and other toxic emissions reached numerous off-site residents through ingestion of contaminated vegetables, meat, fish, drinking water and milk, swimming in the ir-

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56 CRAVENS, *supra* note 51, at 278.

57 GERBER, *supra* note 39, at 33.

58 *Id.* at 32.

59 *Id.*

60 *Id.* at 37. The N-reactor stayed in service until 1987. Matthew L. Wald, *Plutonium Plant Quietly Shut Down*, N.Y. TIMES, July 22, 1989, § 1, at 9.

61 GERBER, *supra* note 39, at 37.

62 MICHELE GERBER, ON THE HOME FRONT: THE COLD WAR LEGACY OF THE HANFORD NUCLEAR SITE 4 (2002).

63 *In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1128 (9<sup>th</sup> Cir. 2002).

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

radiated Columbia River, and inhalation of toxic air.”<sup>68</sup> The potential plaintiffs could number in the hundreds of thousands over the fifty years of Hanford’s operations.<sup>69</sup>

In a “strange twist,” the damage to the area is now becoming something of a boon to the region.<sup>70</sup> The Hanford area’s Tri-Cities—Richland, Pasco and Kennewick—are gearing up for another boom, similar to those of years past.<sup>71</sup> In the 1940s, it was the development of nuclear bombs.<sup>72</sup> In the 1960s, during the peak of the Cold War, it was for weapons production.<sup>73</sup> And, in the 1980s and early 1990s, then-House Speaker Tom Foley funneled \$100 million into the local economy.<sup>74</sup> Now, the federal government is funding a \$4 billion vitrification project to address Hanford’s waste.<sup>75</sup>

A job boom related to remediation of Hanford’s nuclear operations was hardly the legacy President Kennedy sought. Hanford’s environmental damage underscored many of the worst parts of nuclear energy. However, despite the massive Hanford clean-up project, it would be a mistake to assert that President Kennedy was wrong to pursue nuclear power.

First, in all fairness, most of the damage at Hanford was not related to waste from power production; instead, it was from “the past production of plutonium for the nation’s nuclear weapons program.”<sup>76</sup> Second, although nuclear power became a lightning rod for criticism from environmental groups as early as the late 1960s,<sup>77</sup> in light of climate change concerns, many “green advocates” are rethinking their position on nuclear power.<sup>78</sup>

Most prominently, Patrick Moore, a co-founder of Greenpeace,<sup>79</sup> has changed his views on nuclear power and argues, “the rest of the environmental movement needs to update its views, too, because nuclear energy may just be the energy source that can save our planet from another possible disaster: catastrophic climate change.”<sup>80</sup>

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68 *Id.*

69 *Id.* at 1128.

70 Mike Lewis, *In Strange Twist, Hanford Cleanup Creates Latest Boom*, SEATTLE POST-INTELLIGENCER, (Apr. 19, 2002) available at [http://www.seattlepi.com/local/67172\\_boom19.shtml](http://www.seattlepi.com/local/67172_boom19.shtml).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*; see also CRAVENS, *supra* note 51, at 279 (noting that some Hanford tank residue would be made into “glass logs” for placement in a geologic disposal).

76 Annette Cary, *Wyden Raises Concerns over Quality Control at Hanford’s Vit Plant*, TRI-CITY HERALD, Kennewick, WA, (Apr. 9, 2008), available at <http://www.hanfordnews.com/sections/vitplant/story/11323.html>.

77 Howard C. Shaffer, *The Downside of Nuclear Power—By an Advocate*, 7 VT. J. ENVTL. L. 1 (2005).

78 Lionel Beehner, *Chernobyl, Nuclear Power and Foreign Policy*, (2006), available at [http://www.cfr.org/publication/10534/chernobyl\\_nuclear\\_power\\_and\\_foreign\\_policy.html](http://www.cfr.org/publication/10534/chernobyl_nuclear_power_and_foreign_policy.html).

79 Greenpeace is a non-profit conservation organization whose message states that the “fight to save the planet has grown more serious—the threat of global warming, destruction of ancient forests, deterioration of our oceans, and the threat of a nuclear disaster loom large.” Greenpeace USA, About Us, <http://www.greenpeace.org/usa/about> (last visited Sept. 27, 2009).

80 Patrick Moore, *Going Nuclear: A Green Makes the Case*, WASH. POST, (Apr. 16, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/14/>



Mr. Moore's support of nuclear power is a major ideological transformation.<sup>81</sup> He explained his transformation this way: "In the early 1970s when I helped found Greenpeace, I believed that nuclear energy was synonymous with nuclear holocaust . . . . That's the conviction that inspired Greenpeace's first voyage up the spectacular rocky northwest coast to protest the testing of U.S. hydrogen bombs in Alaska's Aleutian Islands."<sup>82</sup>

Mr. Moore is not alone in this massive change of perspective. Other leading environmentalists, former critics of nuclear power, now support the idea, as well. Perhaps most notably, "British atmospheric scientist James Lovelock, father of the Gaia theory, believes that nuclear energy is the only way to avoid catastrophic climate change."<sup>83</sup> In addition, the founder of the "Whole Earth Catalog," Stewart Brand, now argues that if the environmental movement is serious about removing fossil fuels from the energy mix, additional nuclear power plants are essential.<sup>84</sup>

In support of his transformation, Mr. Moore makes the point that coal produces 36 percent of U.S. carbon dioxide emissions, which is almost 10 percent of the world's carbon dioxide emissions.<sup>85</sup> Carbon dioxide is "the primary greenhouse gas responsible for climate change."<sup>86</sup> In contrast, nuclear energy produces about 20 percent of the U.S. power supply,<sup>87</sup> with nearly zero greenhouse gas emissions.

Many hurdles remain to overcome—in particular, cost, safety, waste, and proliferation—before additional nuclear power is feasible.<sup>88</sup> But, as a 2003 MIT study put it, "[T]he nuclear option should be retained, precisely because it is an important carbon-free source of power."<sup>89</sup> As such, despite intervening decades of skepticism about nuclear power, climate change concerns have rekindled President Kennedy's vision that nuclear power should have a role in the "other part of conservation . . . to use science and technology to achieve significant breakthroughs."<sup>90</sup>

## **B. PROMOTING CONSERVATION WHILE EXPANDING INFRASTRUCTURE FOR COAL AND ELECTRICITY: A DELICATE BALANCE OR A PRACTICAL IMPOSSIBILITY?**

Despite his firm belief in conservation, President Kennedy also supported the use of coal for energy. This position, too, indicated his pragmatic view relative to energy

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AR2006041401209.html.

81 *Id.*

82 *Id.*

83 *Id.*

84 *See id.*

85 *See Id.*

86 Moore, *supra* note 80.

87 *Id.*

88 STEPHEN ANSOLABEHRE, ET. AL., THE FUTURE OF NUCLEAR POWER: AN INTERDISCIPLINARY MIT STUDY, at ix (2003), available at <http://web.mit.edu/nuclearpower/pdf/nuclearpower-full.pdf>.

89 *Id.* at 2.

90 John F. Kennedy, Remarks at the Hanford Washington Electric Generating Plant (Sept. 26, 1963) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9436&st=hanford&st1=>.

and the environment. He understood the need for additional fuel sources to power the economy and raise the quality of life in many parts of the country.

Specifically, during the 1960 presidential campaign, then-Senator Kennedy promoted coal for electricity, a concept he called “coal by wire.”<sup>91</sup> He noted that, between 1948 and 1960, coal employment had declined from 127,000 employees to less than 50,000.<sup>92</sup> In a telling statement of the times, he stated without equivocation: “Our experts tell us that coal consumption can be doubled and tripled within the next twenty years—but this is a challenge, not a guarantee.”<sup>93</sup> Today, statements about coal are often tied to the need to reduce traditional coal plants and increase “clean coal” technologies. It would be rare indeed to hear of even coal advocates arguing publicly for increased coal use without touting an ability to reduce emissions.

The “ancient power of coal,” he stated, “burned at the mines and transmitted over huge cables—can re-enter homes of America in the most modern of forms—as electric power.”<sup>94</sup> In this manner, he proposed to bring coal back into the home, “not by trucks and a shovel, but by wires and a switch.”<sup>95</sup> Although by no means on its own, this goal has certainly been realized. Even with more utilities shifting away from coal, more than 50 percent of all U.S. electricity still comes from coal-fired plants today.<sup>96</sup>

#### **1. COAL SLURRY PIPELINES: ATTEMPTING TO BALANCE ENVIRONMENTAL CONCERNS WITH ECONOMIC DEVELOPMENT**

President Kennedy recognized the need for energy throughout the country, and coal slurry pipelines were one way he saw to ensure progress.

We look forward to the day when energy will flow where it’s needed. We cannot permit the railroads to prevent coal slurry pipelines from conveying the resources of our mines. We cannot permit the mining industry to say there shall be no nuclear energy because it may affect them negatively.<sup>97</sup>

Once he was in the White House, President Kennedy continued his support for coal, while at the same time promoting increased conservation efforts.<sup>98</sup> In that era, it was not incongruous to advocate for conservation and increased coal use at the same time.<sup>99</sup> In a special message to Congress on conservation, President Kennedy, in addi-

91 John F. Kennedy, Remarks of Senator John F. Kennedy at Morgantown, West Virginia (Apr. 18, 1960) available at [http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/JFK+Pre-Pres/1960/002PREPRES12SPEECHES\\_60APR18B.htm](http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/JFK+Pre-Pres/1960/002PREPRES12SPEECHES_60APR18B.htm).

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 Paul Davidson, *Utilities Shrink the Role of Coal on Global-Warming Worries*, USA TODAY, Sept. 22, 2008, available at [http://www.usatoday.com/money/industries/energy/2008-09-21-coal\\_N.htm](http://www.usatoday.com/money/industries/energy/2008-09-21-coal_N.htm).

97 John F. Kennedy, Remarks at the Dedication of the Oahe Dam, Pierre, South Dakota, (Aug. 17, 1962).

98 John F. Kennedy, Special Message to the Congress (Mar. 1, 1962) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9081&st=&st1=>.

99 See *id.* (promoting conservation and the use of coal).

tion to discussing the need to address water pollution and promote land conservation, also promoted the use of a coal slurry (a coal and water mixture) to produce electricity.<sup>100</sup> In support of coal for electricity, he announced a proposal to develop coal slurry pipelines, similar to those used for oil, to facilitate interstate transportation.<sup>101</sup>

Coal slurry pipelines are still in existence today.<sup>102</sup> From an environmentalist's perspective, these pipelines are particularly unappealing. First, they move coal for use in generating plants, which leads to significant emissions of greenhouse gases and other toxic pollutants.<sup>103</sup> Second, slurry pipelines use a tremendous amount of water.<sup>104</sup>

Large coal power plants use hundreds of tons of coal each day, with corresponding water needs for a slurry pipeline. This issue is especially sensitive for pipelines in areas with scarce water resources. As an example, one of President Kennedy's two proposed coal slurry pipelines was the Black Mesa Mine, which shipped coal slurry 273 miles from a northern Arizona mine (in the middle of the Hopi and Navajo reservations) to the Mohave Generating Station near Laughlin, Nevada.<sup>105</sup> The pipeline was the world's longest water-slurry pipeline and moved five million tons of pulverized coal per year to the 1,580-megawatt electric power plant.<sup>106</sup> To run the pipeline, Peabody, the original owner, began pumping 4,000 acre-feet per year of drinking water from the aquifer under Black Mesa.<sup>107</sup> Crushed coal was mixed with the water and injected into the slurry pipeline.<sup>108</sup>

In 2006, rather than invest \$1 billion to clean up the power plant's emissions, operations of the plant were suspended.<sup>109</sup> The plant was expected to be off-line for at least four years, the amount of time expected that would be needed to resolve conflicts

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100 *Id.*

101 *Id.*

102 See W. SHEPHERD & D.W. SHEPHERD, ENERGY STUDIES 112 (2d ed. 2003). Originally, these pipelines moved the coal slurry using about equal parts coal and water. Newer pipelines can move coal that has been compressed into logs. OFFICE OF INDUS. TECH., U.S. DEP'T OF ENERGY, COAL LOG FUEL PIPELINE TRANSPORTATION SYSTEM (1999), available at <http://www.nrel.gov/docs/fy00osti/26740.pdf>. Coal log pipelines save about 70% water as compared to traditional slurry pipelines. *Id.*

103 See THE INTERNATIONAL HANDBOOK ON ENVIRONMENTAL TECHNOLOGY MANAGEMENT 204, tbl.12.1 (Dora Marinova, et al., eds., 2008) (showing the environmental resources and discharges for the unit processes in propelling motor cars).

104 WILLIAM ASHWORTH, THE LATE, GREAT LAKES: AN ENVIRONMENTAL HISTORY 216 (1986) ("A coal-slurry pipeline moves coal by crushing it to a fine powder, mixing it with large amounts of water, and pumping the water with its suspended coal particles through large-diameter pipes.").

105 ROBERT JEROME GLENNON, WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESH WATERS 155 (2004).

106 John Dougherty, *Wisdom of the Ancestors*, PHOENIX NEW TIMES, Dec. 1, 2005, available at <http://www.phoenixnewtimes.com/2005-12-01/news/wisdom-of-the-ancestors>.

107 *Id.*

108 *Id.*

109 See *Environmental Quandary Shuts Mohave Plant*, POWER MAGAZINE, Mar. 15, 2006, available at [http://www.powermag.com/environmental/Environmental-quandary-shuts-Mohave-plant\\_544.html](http://www.powermag.com/environmental/Environmental-quandary-shuts-Mohave-plant_544.html) (reporting that, according to the plant's utility, "new emissions-control systems and burners needed to comply with the consent decree, as well as a new coal/water supply and delivery system, might cost as much as \$1.1 billion to buy and install").

over the plant's emissions "and to negotiate with two native tribes over rights to the water needed to deliver fuel to Mohave as a slurry."<sup>110</sup> Efforts to reopen the plant have stalled, and it is not evident that the plant, or the pipeline, will ever resume operations.<sup>111</sup>

## 2. THE CONTINUOUS, AND LASTING, NEED FOR INFRASTRUCTURE

President Kennedy's time was not so different from our own in terms of a vast need for energy infrastructure. In addition to nuclear power and coal slurry lines, electricity infrastructure was a continuing need.

President Kennedy often touted the success of the Rural Electrification Act (REA),<sup>112</sup> which provided the long-term financing and technical expertise needed to expand the availability of electricity to rural customers.<sup>113</sup> President Kennedy's prepared remarks for a September 1963 speech at the University of North Dakota stated that, since the REA passed in 1936, more than 900 cooperative rural electrification systems had been built with the assistance of federal financing.<sup>114</sup>

The REA's financial undertaking was enormous. "More than \$5 billion has been advanced to 1,000 borrowers. Over 1,500,000 miles of power lines—enough to criss-cross the nation 500 times—have been built, serving 20 million American people."<sup>115</sup> The investment, President Kennedy noted, was remarkably sound: "Out of roughly 1,000 borrowers, only one is delinquent in payment; and the total losses on the \$5 billion advanced are less than \$50,000."<sup>116</sup> This low level of default is especially striking in today's financial times.

Few investors were willing to invest in the rural electrification project without federal financing, yet few private businesses could cite such a successful record.<sup>117</sup> In 1963, North Dakota-based, REA-funded cooperatives served on average around one metered farm per mile of line, compared to the average urban-area utility system of 33 electric meters per mile of line.<sup>118</sup> North Dakota, at a remarkable 97 percent, was the state with the highest percentage of people being served by REA-funded utilities.<sup>119</sup>

In addition to the financing issues, President Kennedy argued that the REA raised the standard of living, strengthened the U.S. economy, and even improved national

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110 *See id.*

111 S. Cal. Edison, Power Generation: Mohave Generation Station, <http://www.sce.com/PowerandEnvironment/PowerGeneration/MohaveGenerationStation/> (last visited Aug. 28, 2009) (stating that plans to restart the plant stopped in February 2007).

112 Rural Electrification Act, ch. 432, Title I, § 1, 49 Stat. 1363 (1936) (current version at 7 U.S.C. § 901 (2006)).

113 President John F. Kennedy, Planned Remarks for Delivery at the University of North Dakota (Sept. 25, 1963). [hereinafter, Planned Speech].

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.* ("How many other investors and lenders can cite a comparable record? Yet all this has been accomplished by cooperatives working in areas that were regarded, at least at the outset, as hazardous to private industry.").

118 *Id.*

119 Planned Speech, *supra* note 113.

security by providing the power necessary to increase industrial activity at will.<sup>120</sup> In North Dakota, the President noted, prior to the REA, three percent of farms were powered by electricity; by 1963, nearly every farm in the state had power.<sup>121</sup> President Kennedy highlighted the effects: "What was 30 years ago a life of affluence, in a sense today is a life of poverty."<sup>122</sup>

President Kennedy recognized, though, that despite the success of the REA, the task of rural electrification was not complete.<sup>123</sup> The President sought continuation of the REA to ensure that rural residents had access to power at competitive costs.<sup>124</sup> Today, continued construction is necessary, but now, the need is not related to demand.<sup>125</sup> U.S. energy infrastructure has not kept up with the increasing needs of a growing population that uses more per capita power than ever before.<sup>126</sup> Construction of energy infrastructure continued through the 1960s, but investment in electric transmission lines (the high-voltage lines moving wholesale electric energy) declined (in real dollars) for the twenty-three consecutive years between 1975 and 1998.<sup>127</sup> Since 1998, investment has slowly increased, but is still below 1975 levels.<sup>128</sup> In 2004, this failure of infrastructure investment translated into a mere 0.6 percent increase in circuit miles on the U.S. interstate transmission system.<sup>129</sup>

The capital needed to improve the U.S. energy infrastructure investment remains significant. Estimates from \$56 billion to \$100 billion, are common, and others have argued that as much as \$450 billion is needed to appropriately address electricity infrastructure needs.<sup>130</sup> And, these investment estimates do not account for all of the additional investments that are needed to address climate change concerns.

### **III. CONCLUSION**

The need for a coherent and comprehensive energy and environmental policy is one of the most important issues facing our nation today. Energy and environmental

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120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *See id.*

125 *See* Joshua P. Fershee, *Misguided Energy: Why Recent Legislative, Regulatory, and Market Initiatives are Insufficient to Improve the U.S. Energy Infrastructure*, 44 HARV. J. ON LEGIS. 327, 329 (2007).

126 *See id.* at 328-29.

127 Press Release, Federal Energy Regulatory Commission, Commission Proposes Transmission Pricing Reforms to Increase Power Grid Investment (Nov. 17, 2005), *available at* <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=10882511>.

128 *Id.* ("Over that same period, electricity demand has more than doubled, resulting in a significant decrease in transmission capacity relative to demand in every North American electric reliability region.").

129 Joseph T. Kelliher, Chairman Kelliher on Transmission Pricing Proposed Rules (Nov. 17, 2005), *available at* <http://www.ferc.gov/news/statements-speeches/kelliher/2005/11-17-05-kelliher-pricing.pdf>.

130 UNION OF CONCERNED SCIENTISTS, LESSONS FROM THE AUGUST 2003 BLACKOUT (Aug. 10, 2005), [http://www.ucsusa.org/clean\\_energy/technology\\_and\\_impacts/impacts/lessons-from-the-august-2003.html](http://www.ucsusa.org/clean_energy/technology_and_impacts/impacts/lessons-from-the-august-2003.html).

issues impact broad and diverse areas of concern, including national security, public health and safety, economic growth, and climate change. Most of President Kennedy's programs have advanced to the point that little could (or should) be implemented today, from a tactical perspective. However, from a strategic perspective, his bold and expansive vision can still serve as a model for modern policymakers.

President Kennedy was willing to take on multiple industries and make clear that the government would support and facilitate projects that were in the best interests of the country, not just the best interests of particular constituencies. Although, especially in practice, this characterization may be bit idealized, his concept was nonetheless clear. Modern politicians would be well-served to follow President Kennedy's admonition:

*From the beginning of civilization, every nation's basic wealth and progress has stemmed in large measure from its natural resources. This nation has been, and is now, especially fortunate in the blessings we have inherited. Our entire society rests upon—and is dependent upon—our water, our land, our forests, and our minerals. How we use these resources influences our health, security, economy, and well-being.*

President John F. Kennedy, Feb. 23, 1961<sup>131</sup>

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<sup>131</sup> John F. Kennedy, Special Message, *Special Message to the Congress on Natural Resources* (Feb. 23, 1961).



**ENCOURAGING CONSERVATION  
IN THE LONE STAR STATE:  
HOW TEXAS CAN IMPROVE  
INCENTIVES FOR LANDOWNERS  
TO PRESERVE PRIVATE PROPERTY  
FROM DEVELOPMENT**

**BY WILL IKARD**

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**I. INTRODUCTION**

Preserving open-space land from development is vital to the quality of life of humans and wildlife alike. Impervious cover directs pollutants into the water table, buildings divide wildlife habitat, and destruction of flora exacerbates global climate change, among many other harms.<sup>1</sup> One should also consider all of the recreational, psychological, and spiritual advantages of conserving wild land. Unfortunately for Texans, very little of the state is preserved as open-space land. Texas ranks forty-ninth

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1 See generally U.S. ENVTL. PROT. AGENCY, NAT’L SERV. CTR. FOR ENVTL. PUBL’NS, OUR BUILT AND NATURAL ENVIRONMENTS: A TECHNICAL REVIEW OF THE INTERACTIONS BETWEEN LAND USE, TRANSPORTATION, AND ENVIRONMENTAL QUALITY (January 2001), *available at* <http://www.epa.gov/dced/pdf/built.pdf> [hereinafter EPA] (describing effects of impervious cover on the environment).



among states in per capita public spending on parkland<sup>2</sup> and less than two percent of the state is protected state or federal land.<sup>3</sup> To compensate for this lack of public land, state policymakers need to do everything possible to encourage landowners to protect their land from development.

The State of Texas currently offers various benefits to landowners who are willing to leave their land undeveloped. The two most widely used are conservation easements and use restrictions to provide reduced property taxes, which provide financial incentives for landowners to limit development on their land. Unhelpful statutes limit the effectiveness of both benefits.

This note will describe how conservation easements and open-space property tax valuation work in Texas, the ways they succeed at encouraging landowners to keep private land from being developed and how they fall short. It will also provide specific policy solutions to these shortcomings.

Conservation easements have perpetuity problems, are expensive to monitor and enforce, and are inflexible. Other states and countries have proposed solutions to the first two problems, and Texas should adopt them as well. To ensure perpetuity, Texas should require that easements authorize a backup easement holder and establish a minimum-duration to qualify. To help with monitoring and enforcement, Texas should institute a statutory third-party right of enforcement. To make sure the intention of the easement is carried out when conditions change, Texas should apply the *cy pres* doctrine to conservation easements as some courts have done, and that the Third Restatement of Servitudes suggests.

Also, when a landowner preserves her land from development and takes additional affirmative acts to benefit the environment, her property will be taxed at the low rate applied to agricultural land even if the land is not encumbered by a conservation easement.<sup>4</sup> Landowners and appraisers can abuse this tax incentive. Landowners abuse this program by claiming the advantageous tax valuation without using their property to promote conservation. Appraisers abuse the program when they decline to authorize tax breaks for qualifying land. To minimize landowner abuse, the ecological laboratories statute should be made more stringent. To curb abuse by appraisers, landowners who successfully contest an appraiser's improper decision to decline a reduced valuation in court should be awarded reasonable attorney's fees.

## **II. CONSERVATION EASEMENTS**

### **A. HOW THEY WORK**

A conservation easement allows a landowner to limit the ability of future owners to develop the land. Conservation easements can take many forms, ranging from absolute bans on any development on a parcel, to bans on development in environmentally sensitive portions of a parcel, to limits on building size and area of impervious cover. Like traditional easements, the landowner does not give up possession or the right to

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2 Land: Parkland Acquisition, [http://www.texasep.org/html/Ind/Ind\\_5pub\\_acq.html](http://www.texasep.org/html/Ind/Ind_5pub_acq.html) (last visited July 11, 2009).

3 Ralph Blumenthal, *Texas Proceeding with Plan to Auction Preserve*, N.Y. Times, Nov. 3, 2007, at A12.

4 TEX. TAX CODE § 23.012.

use his or her land. He or she merely gives up the development “stick” in his or her “bundle” of property rights. Unlike traditional easements, which encumber one parcel to the benefit of another, conservation easements are held “in gross,” that is, a different parcel does not receive a benefit. The conservation easement is instead held by a nonprofit organization or the government. These easement holders are not benefitted in any way but are given the legal right to enforce the conservation easement against the current or against future owners of the land. As Small puts it:

The tax code says you must “give” the conservation easement to a charitable organization (usually in the conservation field) or to a unit of government. But you don’t really “give” the donee organization the development rights. The development rights are gone, eliminated, extinguished. What you “give” the donee organization is the right to *enforce the recorded restrictions* on the use of your property, against you and against any future owner of your property.<sup>5</sup>

Because easements in gross are unenforceable at common law,<sup>6</sup> state legislatures must specifically authorize conservation easements by statute. To assist legislatures, the National Conference of Commissioners on Uniform State Laws created the Uniform Conservation Easement Act (UCEA).<sup>7</sup> Forty-nine states have adopted some form of the UCEA<sup>8</sup>, and some, including Texas, have added particular provisions.

The Texas conservation easement statute, Sections 183.001 - .005 of the Texas Natural Resources Code, provides flexibility in the creation of conservation easements, but does not offer any incentives for landowners to create them. It defines a conservation easement as a “nonpossessory interest” in a parcel that imposes “limitations or affirmative obligations” in order to achieve any of a broad range of conservation purposes.<sup>9</sup> Under the statute, a federal, state or local governmental body or a conservation organization can hold a conservation easement.<sup>10</sup> Conservation easements may be created, transferred, and terminated in the same manner as other easements

5 STEPHEN J. SMALL, PRESERVING FAMILY LANDS: BOOK II; MORE PLANNING STRATEGIES FOR THE FUTURE 24 (1997) (emphasis in original).

6 See, e.g., *Alley v. Carleton*, 29 Tex. 74 (Tex. 1867).

7 National Conference of Commissioners on Uniform State Laws, Uniform Conservation Easement Act, (2007) [http://www.law.upenn.edu/bll/archives/ulc/ucea/2007\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.htm).

8 See e.g. *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007). Wyoming is the only state without an explicit conservation easement statute. To execute a conservation easement, a donor will, in addition to granting the easement itself, grant a small portion of the property in fee-simple to the easement holder. Thus the transferred portion of property is “benefitted” by the conservation easement and “easement in gross” problems are avoided.

9 See TEX. NAT. RES. CODE § 183.001(1). These conservation purposes are to “(A) retain or protect natural, scenic, or open-space values of real property or assure its availability for agricultural, forest, recreational, or open-space use; (B) protect natural resources; (C) maintain or enhance air and water quality; or (D) preserve the historical, architectural, or cultural aspects of real property.”

10 *Id.* § 183.001(2). The statute defines such an organization as, “A charitable corporation, charitable association, or charitable trust created or empowered to: (i) retain or protect the natural, scenic, or open-space values of real property; (ii) assure the availability of real property for agricultural, forest, recreational, or open-space use; (iii) protect natural resources; (iv) maintain

and must be recorded in a property's deed.<sup>11</sup> Conservation easements in Texas are presumed to be in perpetuity, but can be created for a shorter period.<sup>12</sup> "A person with a third-party right of enforcement," in addition to the holder of the easement and the owner of the property, may bring a judicial action affecting the easement.<sup>13</sup> However, despite this grant, neither the Texas Natural Resources Code nor subsequent case law identifies who this third-party is or might be.<sup>14</sup>

In addition to these UCEA provisions, Texas added a special punitive element for termination of a conservation easement. Because landowners gain significant property tax benefits—discussed below in Part III—from conservation easements, if a landowner terminates a conservation in Texas, the landowner must pay back the tax benefit he or she received from the easement in the preceding five years, plus seven percent interest.<sup>15</sup>

## B. ADVANTAGES

Conservation easements are attractive to conservation activists because they do not require any affirmative government action to be created and are, in theory, perpetual. Landowners like them because they are voluntary, carry significant tax benefits, and are one of the few ways to ensure their interests are respected after they no longer possess their property.

Conservation easements are comparatively easy to create. To establish a public park, for example, a state or municipality has innumerable legislative and administrative hurdles to clear. Foremost among these hurdles is that the government entity wishing to create a park must acquire the land either through purchase or eminent domain. Neither of these options is politically easy. This difficulty is especially true in a place like Texas, where the political culture leans against any government spending, especially spending on conservation, and is fiercely pro-private property rights.<sup>16</sup> John Nolon points out that a public entity's costs in acquiring land to preserve for open-

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or enhance air or water quality; or (v) preserve the historical, architectural, archaeological, or cultural aspects of real property."

11 *Id.* § 183.002.

12 *Id.* § 183.002(c).

13 *Id.* § 183.003.

14 *City of Dallas v. Hall*, 2007 U.S. Dist. LEXIS 78847, at \*38-40 (N.D. Tex. Oct. 24, 2007); *City of Dallas v. Hall* is the only opinion to interpret Section 183.003. In *Hall*, the State of Texas claimed to have authority to terminate an easement held by the U.S. Fish and Wildlife Service under Section 183.003(4), claiming that the federal Administrative Procedures Act, 5 U.S.C. §§ 500-596, was "some other law" that gave the State standing. The Federal District Court for the Northern District of Texas disagreed, holding that Section 183.003 gave third parties the right to *enforce*, not *terminate*, a conservation easement.

15 TEX. NAT. RES. CODE § 183.002(f).

16 Interview with Jeff Hershey, Former Park Manager, Texas Parks & Wildlife Department, in Austin, Tex. (Oct. 23, 2008) ("Conservation easements are very appealing in Texas because they don't constitute a taking."); see e.g. 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) ("The secular religion of private property rights has become so strong in Texas that [the leading independent oil producer industry group] is not powerful enough to sway legislative opinion in support of the public good").

space do not end once the land is purchased: "In addition to the paying the purchase price, which can be substantial, the municipality bears the expense of maintaining the property and loses the property tax revenues it generated."<sup>17</sup> Conservation easements, on the other hand, need only a willing landowner and willing nonprofit or government entity to hold the easement.<sup>18</sup>

Conservation easements do better than public parks and private preserves at long-term conservation because they are difficult or impossible to terminate. A public park can be eliminated if the government entity that manages it becomes cash-strapped and needs the money from a property sale. Even a simple change in policy priorities can lead to the sale of park land. In the same way, the owner of a property without a conservation easement, even if he or she hopes to preserve his or her property from development, cannot ensure that subsequent owners will protect it as well. Similarly, when the owner of open-space land that is not encumbered by a conservation easement dies, his or her heirs may not wish to carry on his or her preservation of open-space land. On the other hand, a conservation easement encumbers land regardless of transfer.

Conservation easements also provide significant federal and state tax benefits for the property owner. Property encumbered by a conservation easement is necessarily less valuable than the same property without the easement because the owner is limited in what he or she can do with the land. Therefore, the value of the conservation easement is calculated by subtracting the encumbered value of the land from the unencumbered value. If the easement is donated to a Section 501(c)(3) nonprofit or a government agency, the value of the donated easement can be deducted from federal income taxes just like any other charitable donation.<sup>19</sup> The federal estate tax benefits of a conservation easement are significant as well. Easement donors can "subtract the value of the easement from a decedent's estate in calculating federal gift or estate taxes" and can "exclude 40 percent of the remainder value of land subject to the easement in calculating federal estate taxes."<sup>20</sup> "The exclusion is available not only to the estate of the [easement] donor, but also to the estates of any of the donor's family members and descendants so long as the land remains in the family."<sup>21</sup>

The estate tax benefit is particularly beneficial for small farmers because estate taxes hit them especially hard.<sup>22</sup> By encumbering their farm with a conservation ease-

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17 JOHN R. NOLON, *OPEN GROUND: EFFECTIVE LOCAL STRATEGIES FOR PROTECTING NATURAL RESOURCES* 523 (1995).

18 Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert*, 18 *FORDHAM ENVTL. LAW REV.* 273, 287 (2007).

19 C. Timothy Lindstrom, *Tax Notes—The Tax Benefits of Conservation Easements*, 79 *MICH B. J.* 690, 692 (2000).

20 *Id.* at 690.

21 *Id.* at 693.

22 Stephanie A. Weber, Note, *Re-Thinking the Estate Tax: Should Farmers Bear the Burden of a Wealth Tax?*, 9 *Elder L.J.* 109, 117-119 (2001) (arguing that it is of great concern that about a quarter of farmers will be retiring within 5 years and will soon face estate tax liability. Thirty-seven percent of those polled said that if estate taxes were due tomorrow they would be forced to liquidate their farm); Barry W. Johnson & Martha Britton Eller, *Federal Taxation of Inheritance and Wealth Transfers*, 20 *IRS(2001)* <http://www.irs.gov/taxstats/article/0,,id=112193,00.html> ("Federal transfer taxes are often cited as impediments to the livelihood of small businesses and farms.").

ment, farmers can continue to farm as they always have and worry less about their heirs having to sell the family farm to pay estate taxes. They also do not have to worry about a descendent wanting to get out of farming and selling the farm for development.

Perhaps most significantly, conservation easements save landowners substantial amounts in state property taxes. In general, because an encumbered property is worth less with the easement than without, the taxable value of the property is less, and therefore, the landowner's property taxes are less. In Texas, conservation easements can eliminate almost all state property taxes, through agricultural-use valuation, discussed in depth below. In short, if land in Texas qualifies as agricultural land—which includes many nonagricultural, conservation-oriented uses—its value is calculated by its productivity value instead of its market value.<sup>23</sup>

### C. PROBLEMS

Despite these advantages, conservation advocates identify three main problems with easements as tools for achieving conservation: (1) Conservation easements may not actually be perpetual, 2) they are expensive to monitor and enforce, and (3) the inflexibility of the easement may frustrate the intended conservation goals.

In contrast to the perceived perpetual nature of conservation easements, easements in Texas need not be established for any minimum length of time. Though they must be perpetual to qualify for federal tax benefits, landowners with conservation easements of only limited length could still receive state property tax reductions. Short-term easements undercut the conservation benefit of conservation easements in the first place because the property could simply be developed after the easement expires.

Similarly, if the easement holder is dissolved, the easement could be dissolved as well. This possibility is a legitimate concern for easements held by nonprofits. Individuals often create small "land trusts" to hold particular conservation easements.<sup>24</sup> All nonprofits, and especially small ones, are susceptible to dissolution at any time, especially from lack of funding. The deeds of some conservation easements specify alternative easement holders to which the easement must be transferred upon termination of the original holder, and some easement holders transfer their easements to other entities before they dissolve.<sup>25</sup> However, in Texas, the law does not provide a legal mechanism to ensure that easement holders pursue either of these remedies.

Conservation easements can also be costly to monitor and enforce. In Texas, once a landowner donates an easement to a nonprofit, the nonprofit must ensure that the landowner does not violate the terms of the easement. Without strict monitoring,

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23 TEX. TAX CODE §§ 23.012, 23.41, 23.51.

24 TEX. PARKS & WILDLIFE DEPT., TEXAS LAND TRUST DIRECTORY i (2000) ("A *land trust* is a local, state, or regional nonprofit organization directly involved in protecting land for its natural, recreational, scenic, historical, or productive value . . . [They] directly work with landowners to help them meet their long-term land use objectives. These organizations may be willing to purchase land or accept donated properties and easements for conservation purposes. These tools can be tailored to meet the specific needs of the property owner.").

25 ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 169 (2nd ed. 2005).

a landowner – either the original donor or a subsequent owner – could easily claim all of the tax benefits of the easement without restricting his or her behavior in any way.<sup>26</sup> To avoid this problem, the easement holder must hire staff to regularly check the site and, if the easement is violated, must hire lawyers to enforce the easement in court. The Nature Conservancy, for example, bears the astronomical cost of monitoring over two million acres of encumbered land in the United States.<sup>27</sup> Monitoring can be nearly impossible if, as is sometimes the case, the easement holder does not have a guaranteed right to enter and inspect the property to ensure landowner compliance. On the enforcement side, a small, local land trust may not be able to afford to hire an attorney to ensure a landowner complies with an easement the trust holds.

Another limit on the effectiveness of these instruments is that courts sometimes apply the doctrine of changed conditions to conservation easements. If the circumstances under which a conservation easement was formed change, it can be difficult to preserve the intended conservation ends or to change the easement as needed to meet those ends. For traditional servitudes (non-conservation easements and other similar legal instruments), courts generally apply the doctrine of “changed conditions.” Under this doctrine, if the purpose of the servitude can no longer be accomplished, a court may modify or terminate the servitude.<sup>28</sup> For example, in *Hahn v. Baker Lodge*, No. 47,<sup>29</sup> a property owner held an easement allowing her to walk across her neighbor’s property to access her house. When a fire destroyed her house, the easement became useless, and the court extinguished the easement.<sup>30</sup>

Some courts have applied the traditional changed conditions doctrine to conservation easements as well.<sup>31</sup> The Alabama and Maine conservation easement statutes specifically allow for judicial termination of easements when conditions change.<sup>32</sup> When applied, the perpetuity of conservation easements is seriously threatened. For example, as occurred in *Hicks v. Dowd*,<sup>33</sup> if a natural resource is discovered on an encumbered property, the easement could be eliminated without compensation to be used to ensure the conservation originally sought would be continued. Or, if an endangered species migrated off property encumbered only to protect that species, a court could terminate the easement without having to ensure any effort by the landowner to protect the wildlife in other ways. The easement holder would not have any recourse or ability to get the conservation easement back.

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26 Vinson, *supra* note 18, at 281-282 (“Without effective stewardship, conservation easements are ultimately meaningless and certainly not worth the tax credit or other financial incentive provided. Pidot explains, ‘even the best written easements are only as good as the holder’s resolve and capacity over the long term to monitor, enforce, and defend them.’”)

27 The Nature Conservancy, Conservation Easements at The Nature Conservancy, <http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/tncandeasements.html> (last visited Jun. 9, 2010)

28 Restatement (Third) of Property: Servitudes § 7.10 (2000).

29 *Hahn v. Baker Lodge* No. 47, 27 P. 166, 167 (Or. 1891).

30 *Id.*

31 See e.g., *Harris v. Pease*, 66 A.2d 590, 592 (Conn. 1949).

32 ALA. CODE § 35-18-3(b) (2008); ME. REV. STAT. ANN. tit. 33, § 477(3)(B) (2008).

33 *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007).

#### D. SOLUTIONS

Many states have solved these problems through legislation or judicial action. To preserve easements after the dissolution of the easement-holding organization, some states require conservation easements to designate a backup easement holder. To help make easements easier to monitor and enforce, some states, even other countries, authorize certain third-party enforcement and give the easement holder the right to enter and inspect the encumbered property. To avoid the problem of the changed conditions doctrine, some courts have applied the doctrine of *cy pres*.

Several states require conservation easements to designate a backup easement holder in case of dissolution of the original easement holder. Iowa's statute is the most broad and flexible. For a private, nonprofit organization to hold a conservation easement, "the instrument granting the easement or the bylaws of the organization [must] provide that the easement will be transferred either to a public body or another private, nonprofit organization upon the dissolution of the private, nonprofit organization."<sup>34</sup> Government easement holders, however, are not affected.<sup>35</sup> Maryland's statute goes further by establishing a "net" through which easements cannot fall. If an easement holder can no longer enforce the easement, and the agreement does not specify a backup organization, the easement is transferred to the Maryland Agricultural Land Preservation Foundation, the Maryland Historical Trust, or the Maryland Environmental Trust.<sup>36</sup> Virginia's statute is similar to Maryland's, but the easement can only be transferred to the Virginia Outdoors Foundation in the event an easement holder dissolves without a specified backup holder.<sup>37</sup> In Pennsylvania, if an easement holder ceases to exist, the easement is transferred to a "willing successive holder."<sup>38</sup> If a willing successive holder cannot be found, "the municipality in which the easement is located shall automatically become the successive holder for perpetuity or the remaining term of the easement."<sup>39</sup>

Iowa's solution is optimal for Texas. Pennsylvania's is attractive, as many Texas municipalities have the budgets and institutional strength to manage and hold conservation easements. However, Texas has a vast amount of unincorporated land.<sup>40</sup> Counties could be the backup easement holder, but they may not be equipped to hold easements, especially in small, rural counties with a limited tax base. Also, Texas does not have a state environmental trust; so Maryland and Virginia's solution would not translate. Iowa's approach, wherein the easement must dictate a backup easement holder, seems the most applicable to Texas.

In addition to ensuring that easements do not fail for lack of a holder, some states encourage perpetual, or at least long-term, easements by limiting landowners' ability to

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34 IOWA CODE § 457A.8 (2008).

35 *Id.*

36 MD. CODE ANN., REAL PROP. § 2-118(e) (2008).

37 VA. CODE ANN. § 10.1-1015 (2008).

38 32 PA. CONS. STAT. § 5054(d) (2008).

39 *Id.*

40 See e.g. Sara C. Galvan, *Wrestling with MUDs to Pin Down the Truth about Special Districts*, 75 FORDHAM L. REV. 3041, 3045 (2007) ("In the Houston area alone, four or five hundred MUDs [Municipal Utility Districts, which provide utility services to unincorporated areas,] comprise over 210,000 acres of land, or about 329 square miles.")

create conservation easements of excessively short duration. Two states, Pennsylvania and West Virginia, require that conservation easements be at least 25 years in length to be valid.<sup>41</sup> Two others, California and Hawaii, require that conservation easements be perpetual.<sup>42</sup> Although a requirement that conservation easements be perpetual seems excessive, some minimum length of easements should be adopted in Texas to ensure that they are long enough in duration to provide conservation value. A five-year conservation easement, for example, would provide only limited value, because a developer could easily wait the five years for the easement to expire before acquiring and developing the encumbered property.

To ensure that conservation easements are not terminated in a manner and after a period of time in opposition to the public interest, a conservation easement cannot be terminated in New Jersey without a public hearing and approval of the Commissioner of Environmental Protection.<sup>43</sup> New Jersey is a much smaller state with a much larger state government than Texas.<sup>44</sup> However, it may be worth including a provision similar to New Jersey's law if the Texas Parks & Wildlife Department (TPWD), General Land Office, or other state agency would be willing to accept this responsibility.

Several states address the problem of the cost of enforcement by authorizing a third-party right to do so. Although some easements authorize third-party rights of enforcement, statutes can fill in the gaps where such provisions are left out of the easements themselves. In Illinois, an individual owning land neighboring a conservation easement can sue to enforce it.<sup>45</sup> Although this option would take some pressure off the easement holder, it is hard to know if many individuals would want to sue their neighbors, as it can be both expensive and antagonistic. Mississippi and Virginia authorize specific state government officials to enforce conservation easements.<sup>46</sup> Virginia additionally authorizes the local government in which the encumbered property is located to enforce the easement.<sup>47</sup> Although certainly the Texas Legislature could give the Texas Attorney General and/or the TPWD a right of enforcement, this approach may not be the most politically viable. Texas has a small state government and budget by design, and the Legislature may not want to expand the scope of duties – and therefore the budget – of either of these state organizations. Texas does have strong

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41 *Id.*; W. VA. CODE § 20-12-4(c) (2008).

42 CAL. CIV. CODE § 815.2(b) (Deering 2008); HAW. REV. STAT. ANN. § 198-2(b) (2008).

43 N.J. STAT. ANN. § 13:8B-5, 13:8B-6.

44 U.S. Census Bureau, 2006 *State Government Finance Data, Summary Table Spreadsheet*, available at <http://ftp2.census.gov/govs/state/06statess.xls>; U.S. Census Bureau, *Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2007*, available at <http://www.census.gov/popest/states/tables/NST-EST2007-01.xls> (showing that the New Jersey state government spent approximately 68% more in 2006 per capita than the Texas state government); U.S. Census Bureau, *United States Summary: 2000; Population and Housing Unit Counts 29* available at <http://www.census.gov/popest/estimates.php> (showing that Texas is over thirty times as large in area as New Jersey).

45 765 ILL. COMP. STAT. 120/4 (2008).

46 MISS. CODE ANN. § 89-19-7 (2008) (authorizing the Attorney General and the Department of Wildlife, Fisheries, and Parks); VA. CODE ANN. § 10.1-1013 (2008) (authorizing the Attorney General, Virginia Outdoors Foundation, and Virginia Historical Landmarks Board).

47 VA. CODE ANN. § 10.1-1013(7) (2008).



counties and, in urban areas, cities;<sup>48</sup> so authorizing the local government to enforce easements may be a good solution.

Following the lead of foreign countries, another possible solution would be to authorize specific third-party nonprofits to enforce conservation easements. In Brazil, for example, specifically enumerated nonprofits can bring suits against the government or against private actors for violation of environmental laws.<sup>49</sup> Texas could adopt this structure and establish a licensing program for nonprofits to gain third-party enforcement rights. This licensing would help limit frivolous lawsuits, but still not be too heavy of a financial burden on the State. With this third-party system, if an easement holder, public or private, failed to enforce the violation of an easement, whether through negligence, apathy, or a lack of funding, one of the state-authorized nonprofits could pick up the slack.

Easement holders or the above third parties can only enforce conservation easements if someone is checking to see if the landowner is violating it. To make this monitoring easier, and avoid trespass suits, Texas should guarantee an easement holder's right to enter and inspect a property on which it holds the easement. Arkansas, Florida, Maine, Massachusetts, New Jersey, New York, Ohio, and Utah all guarantee the easement holder the right to enter and inspect the property to ensure compliance with the easement.<sup>50</sup> Within limits, this allowance seems a practical way for easement holders to monitor the encumbered property. In several of these statutes, the easement holder can enter and inspect "in a reasonable manner and at reasonable times to ensure compliance."<sup>51</sup> This restriction is a fair limit on the ability of easement holders to enter private property to enforce these easements and should be adopted in Texas as well.

To combat the application of the changed conditions doctrine to conservation easements, Texas should statutorily apply the *cy pres* doctrine to conservation easements. *Cy pres*<sup>52</sup> is a common law alternative to the changed conditions doctrine that developed in reference to charitable trusts. Under *cy pres*, if the conditions related to

48 See University of Texas Liberal Arts Instructional Technology Services, Texas Politics Multimedia Textbook: The Constitution, Article 4.3 (available at [http://texaspolitics.laits.utexas.edu/7\\_4\\_3.html](http://texaspolitics.laits.utexas.edu/7_4_3.html)) ("On matters concerning local authority in counties and municipalities, the [Texas Constitution] provide[s] a considerable list of areas in which the Legislature was prohibited from passing laws.")

49 Jeffrey S. Wade, *Environmental Damages and Crimes*, 15 FLA. J. INT'L L. 39, 60-61 (2002).

50 ARK. CODE ANN. § 15-20-409(c) (2008); Fla. Stat. § 704.06(4) (2008); ME. REV. STAT. ANN. tit. 33, § 477(5) (2008); MASS. GEN. LAWS ANN. ch. 184, § 32 (2008); N.J. STAT. ANN. § 13:8B-3 (West 2008); N.Y. ENVTL. CONSERV. LAW § 49-0305(6) (Consol. 2008); OHIO REV. CODE ANN. § 5301.67(A) (LexisNexis 2008); UTAH CODE ANN. § 57-18-6(3) (2008).

51 ARK. CODE ANN. § 15-20-409(c) (2008); Fla. Stat. § 704.06(4) (2008); MASS. GEN. LAWS ANN. ch. 184, § 32 (2008); N.J. STAT. ANN. § 13:8B-3; N.Y. ENVTL. CONSERV. LAW § 49-0305(6) (Consol. 2008); UTAH CODE ANN. § 57-18-6(3) (2008).

52 "The term 'cy pres' is taken from the Norman French phrase 'cy pres comme possible' meaning 'as near as possible,' or 'as near as may be.' The better pronunciation would appear to be as if it were spelled 'see pray,' that being the French pronunciation. If Anglicized, it would seem that the words should be pronounced as if spelled 'si press.' The fairly common usage, 'si pray,' seems to be a mixture of French and English pronunciation." 88 Am. Jur. Proof of Facts 3d 469 § 2 (2008). (citations omitted).

the trust change such that the goals of a charitable trust can no longer be achieved, a court can reformulate the trust in a new way to meet the original goals of the trust. The Second Restatement of Trust describes it in the following way:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor [individual who created the trust] manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.<sup>53</sup>

For example, in *Kolb v. City of Storm Lake*,<sup>54</sup> an Iowa family created a charitable trust to maintain a flower garden in a public park in memory of a deceased family member. The City removed the park and a court, applying *cy pres*, amended the trust to reestablish the memorial in a different location.<sup>55</sup>

*Cy pres* works well in the conservation easement arena. By applying *cy pres* instead of the changed conditions doctrine, a conservation easement that no longer meets its intended conservation goal could be sold and the proceeds used to achieve that goal in other ways. For example, if a wildlife population migrates off of an encumbered property, under *cy pres*, the proceeds of the sale of that easement could go to acquiring a new easement where the population subsequently resided. The Third Restatement of Servitudes, published in 2000, even recommends applying *cy pres* to easements.<sup>56</sup> Courts, however, have differed on whether to follow the Restatement.<sup>57</sup> To ensure an application of *cy pres*, the Texas Legislature should pass a law mandating the application of *cy pres* to conservation easements.

### **III. PROPERTY TAX VALUATION**

#### **A. HOW IT WORKS**

Land owners are encouraged to preserve open-space land by the Texas Tax Code, which changes the way qualifying open-space land is valued for the purposes of property taxation. Two uses of land, managing wildlife and researching agriculture as an ecological laboratory, qualify as agricultural pursuits for the purposes of taxation. Instead of a landowner paying a percentage of the fair market value of the property as property taxes, that percentage tax is applied against the productive value – much less than the market value. This approach saves landowners large amounts of money in taxes, often making it possible for them to resist selling their property to developers.

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<sup>53</sup> Restatement (Second) of Trusts § 399 (1959).

<sup>54</sup> *Kolb v. City of Storm Lake*, 736 N.W.2d 546 (Iowa 2007).

<sup>55</sup> *Id.* at 560.

<sup>56</sup> Restatement (Third) of Property: Servitudes, § 7.11 (2000).

<sup>57</sup> See C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 Wyo. L. Rev. 25, 56-60 (2008).

Land being used for wildlife management or as an ecological laboratory in Texas can be valued the same as agricultural land. This so-called "1-d-1"<sup>58</sup> valuation means the value of the land is assessed by its productive, instead of its fair market, value.<sup>59</sup> By way of example, assume the property tax rate in a given county is 1%. If the fair market value of a farm in that county is \$1 million, the landowner's annual property taxes would be \$10,000 if calculated by fair market value. On the other hand, if the same farmer makes \$50,000 off his farm, and is taxed by productive use, the farmer's annual property taxes would be only \$500. Since most wildlife management and ecological lab lands are not producing any income for a landowner, the property tax burden on that type of property would be zero.<sup>60</sup>

A policy of reduced property taxes for open-space landowners not only limits development, encourages land conservation, and saves family farms, but it also allocates the county property tax burden fairly. Open-space land consumes fewer resources per acre than developed land. Joey Park, the chief lobbyist for several leading conservation organizations in Texas, explains, "deer and cows don't need education or EMS or police."<sup>61</sup> Additionally, neighbors do benefit from open-space land nearby, from cleaner air and water, and from a more attractive landscape. As Nolon notes, property owners "benefit by the restrictions placed on other properties in their vicinity."<sup>62</sup>

Nonagricultural landowners can also get 1-d-1 valuation by managing wildlife on their property.<sup>63</sup> The land must qualify for an agricultural valuation at the time the wildlife management begins.<sup>64</sup> In other words, only current farms and ranches can be turned into wildlife management land. Wildlife management means using the land

in at least three of the following ways to propagate a sustaining breeding, migrating or wintering population of indigenous wild animals for human use, including food, medicine, or recreation: (i) habitat control; (ii) erosion control; (iii) predator control; (iv) providing supplemental supplies of water; (v) providing supplemental supplies of food; (vi) providing shelters; and (vii) making of census counts to determine population.<sup>65</sup>

This set of qualifying undertakings is indeed broad. In addition, landowners can qualify for 1-d-1 classification by operating under a federal permit or pursuant to a number of federal statutes.<sup>66</sup> However, according to former TPWD Park Manager Jeff Hershey, very few federally authorized 1-d-1 properties exist; almost all property own-

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58 "1-d-1" refers to the section of the Texas Constitution, TEX. CONST. art. VIII, § 1-d-1 (amended 1995), that authorizes the wildlife management and ecological laboratory use valuation.

59 TEX. TAX CODE § 23.012.

60 Interview with William F. Ikard, Property Tax Litigator, Ikard Wynne LLP, in Austin, Tex. (Sept. 26, 2008).

61 Interview with Joey Park, Lobbyist, Texas Wildlife Association, in Austin, Tex. (Oct. 23, 2008).

62 NOLON, *supra* note 17, at 524.

63 TEX. TAX CODE § 23.51.

64 *Id.* § 23.51(1).

65 *Id.* § 23.51(7).

66 *Id.*

ers obtain 1-d-1 classification through performing at least three of the forms of wildlife propagation.<sup>67</sup>

To ensure that they are managing enough land to encompass an entire population as defined by the statute, neighboring landowners can group together into a wildlife management property association and all receive 1-d-1 classification.<sup>68</sup> These associations are especially attractive to subdivision developers, who can develop a former farm or ranch and combine pieces of the different lots together to make a wildlife management area. In this way, the developer avoids paying rollback penalties, discussed below.<sup>69</sup> To qualify as a wildlife management property association, each of the landowners in the association must perform at least three of the seven wildlife management activities.<sup>70</sup>

Once a landowner has begun the qualifying wildlife management use, he or she must then seek the approval of the chief appraiser of the county in which the property sits to receive the tax benefits. The appraisers are required to make these determinations based on rules that the TPWD has formulated.<sup>71</sup>

Alternatively, a landowner using his or her land as an ecological laboratory can also qualify for 1-d-1 valuation.<sup>72</sup> Ecological labs are uses of open-space land, other than agriculture, that further agricultural purposes. The land must be used “principally” as an “ecological laboratory” by a “public or private college or university.”<sup>73</sup> For example, in *Nootsie, Ltd. v. Williamson County Appraisal District*,<sup>74</sup> several universities were performing studies on Nootsie’s land, including a study concerning “the preservation and enhancement of native grasses for grazing purposes on ranch lands..., long-term studies of ecological succession, studies of canyon vegetation, studies of the effects of urbanization on the Edwards Plateau, soil sampling, and studies of meadow grasses.”<sup>75</sup> Ecological labs also must be prior agricultural land and must obtain the approval of the county appraiser to qualify.<sup>76</sup>

As mentioned, wildlife management and ecological labs keep landowners, or their conferees that are no longer engaging in agriculture, from bearing significant tax penalties. If a property qualified for agricultural valuation in the preceding tax year, but does not qualify in the current tax year, the current owner must pay the difference in taxes saved on the property over the preceding five tax years, plus seven percent interest.<sup>77</sup> This penalty is a very powerful deterrent to developers buying farms and converting them to nonagricultural land. Wildlife management and ecological labs

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67 Hershey, *supra*, note 16.

68 34 TEX. ADMIN. CODE § 9.2003(g) (2009).

69 Telephone interview with William F. Ikard, property tax litigator, Ikard Wynne LLP, in Austin, Tex. (Nov. 16 2008).

70 *Cordillera Ranch, Ltd., v. Kendall County Appraisal Dist.*, 136 S.W.3d 249, 254 (Tex. App. 2004).

71 TEX. TAX CODE § 23.521.

72 *Id.* § 23.51(1).

73 *Id.* § 23.51(1).

74 *Nootsie, Ltd., v. Williamson County Appraisal Dist.*, 925 S.W.2d 659 (Tex. 1996).

75 *Id.* at 663.

76 TEX. TAX CODE § 23.51(7); 23.521.

77 *Id.* § 23.55.

allow landowners to cease agricultural operations without bearing these huge tax penalties, so long as they use their land to the benefit of wildlife protection or agricultural research.

## B. ADVANTAGES

The advantage of 1-d-1 classification is clear; it saves landowners substantial amounts of money, often up to 90 percent of their tax burden.<sup>78</sup> As of 2001, the 300,000 acres of Texas land valued just as wildlife management property had a fair market value of over \$150 million, but was taxed at under \$1 million.<sup>79</sup> These tax benefits are especially important in Texas, as the *Austin-American Statesman* editorial board noted: "Agricultural, wildlife and ecolab [valuations] are popular because property is the primary base for revenue in Texas, a state with no income tax."<sup>80</sup>

## C. PROBLEMS

Two major impediments exist to the current and continued efficacy of 1-d-1 valuation. First, some people are concerned that properties which do not provide any environmental benefit could get 1-d-1 valuation. Second, some appraisers refuse to grant wildlife management and ecological lab classification, even if the land meets the standards established in the statute.

Some environmentalists worry that wildlife management and ecological labs are too easy to obtain. Hershey, for example, argues that doing nothing to a piece of property could qualify as "propagating" a wildlife population under the statute.<sup>81</sup> To justify a policy that removes money from the county coffers, he argues, the land that is taxed at a lower rate must contribute a "justifiable benefit to the community."<sup>82</sup> His big concern is that rich landowners could keep a hunting lease and, without taking any affirmative actions to manage wildlife, could avoid paying taxes on this land. He believes that such land, on which the landowner does not undertake any legitimate ecological programs and to which the public does not have any access, does not provide a justifiable benefit.

This concern is legitimate. Some landowners, especially corporations, do take advantage of open-space valuation. In 2007, the *Wall Street Journal* reported an especially egregious manipulation of 1-d-1 involving computer maker Samsung:

According to public records at Travis County Central Appraisal District, in Austin, Korean giant Samsung Electronics cut annual real-estate taxes on 54 acres outside its Austin semiconductor plant to \$135.68 from \$21,080 last year by implementing a wildlife plan. Under its 2006 plan, Samsung's activities included hanging 10 birdhouses for wrens, bluebirds, chickadees, and titmice, and spraying for red fire ants. Samsung also took a census count of the local

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78 Asher Price, *Appraisers Devaluing Ecolabs*, AUSTIN-AM. STATESMAN, May 2, 2007, at A1.

79 Alex Taylor, *Owners Fight to Keep Wildlife Appraisals; Travis County, Schools Wait Outcome of Suits over Loss of Exemptions*, AUSTIN-AM. STATESMAN, Oct. 12, 2001, at A1.

80 Editorial, *Here a Cow, There's a Cow, Everywhere a Tax Break*, AUSTIN-AM. STATESMAN, Aug. 1, 2007, at A8.

81 Hershey, *supra* note 16.

82 *Id.*

habitat, recording among other observations that the sky was “mostly cloudy,” “seven rock pigeons flew over,” and “noise from the plant made surveying more difficult.”<sup>83</sup>

Clearly the Legislature envisioned more activity to protect wildlife than that described here.

Environmentalists also argue that it is too easy to obtain an ecological lab valuation. In the worst-case scenario, an influential landowner could cut a deal whereby a college or university with whom the landowner is associated would send a student or two to his or her hunting lease once a year to perform mocked-up “studies” on his or her land, thereby granting the landowner 1-d-1 status.<sup>84</sup> The authorizing statute is so vague that it does not even require the agreement between the landowner and college or university creating the ecological lab to be confirmed in writing.<sup>85</sup>

Just as environmentalists worry about the above over-inclusiveness of the 1-d-1 statutes, appraisers have complete discretion to approve or deny 1-d-1 valuations, which can lead to under-inclusiveness. This under-inclusiveness can take two forms. The first has to do with education. Many appraisers have been doing their job for quite a long time and do not take the time to learn about changes in tax law. Wildlife management classification, for example, only passed the Legislature in 2001, and many county appraisers, especially in small rural counties, simply are unaware that landowners can get such a classification.<sup>86</sup>

Perhaps more troubling are the appraisers who are aware of, but refuse to recognize, 1-d-1 classification. For example, between 1999 and 2001, Travis County Chief Appraiser Art Cory revoked 1-d-1 classification on nearly three-quarters of the properties that previously qualified.<sup>87</sup> Cory claimed that more than 1,000 of these landowners failed to create effective wildlife management plans.<sup>88</sup> However, some practitioners believe he revoked their classification because he disagrees with 1-d-1 valuation in principle and did not want to give up the property tax revenue.<sup>89</sup>

Williamson County Appraisal District (WCAD) has come up with another clever way of getting around wildlife management valuation. Regardless of whether a home exists on a wildlife management property, the WCAD is arbitrarily declaring a portion of the property a home site and taxing that portion at fair market value. According to David Braun, an attorney representing landowners against Williamson CAD,

The Appraisal District is unfairly inflating the value of an arbitrarily designated home site on [agricultural] land, whether a home building exists or not, by sometimes 10 times the value of the surrounding land or more, which has no

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83 Jennifer Levitz, *Why Texas Firms are Keeping Cattle on the Back Forty – Fidelity’s Herd Saves Thousands in Taxes; Now, Nokia is Planting Hay*, WALL ST. J., July 28, 2007, at A1.

84 Interview with Joey Park, *supra* note 61.

85 TEX. TAX CODE § 23.51.

86 Interview with Joey Park, *supra* note 61.

87 Taylor, *supra* note 79.

88 *Id.*

89 Interview with leading Texas property tax attorney who wished to remain anonymous [hereinafter *Off-the-record attorney*] in Austin, Tex. (Nov. 14, 2008).

basis in reality and is costing thousands of landowners hundreds of tax dollars every year. We have investigated all the surrounding counties in central Texas and found that all other appraisal districts value home sites at the same rate as [agricultural] land.<sup>90</sup>

The way 1-d-1 is currently constructed, the appraisers have broad control over what property is granted 1-d-1 valuation.

Unfortunately, the appraisal system gives county appraisal districts complete discretion to determine the appraised value of property, making it difficult for average citizens to challenge an unfair appraisal. Landowners can protest an appraisal to the county appraisal review board and then to state court.<sup>91</sup> Although this appeal may be worthwhile to large corporations protesting millions of dollars in taxes, most individual landowners cannot afford to hire an attorney to protest their property taxes in court.

The Texas statute does not make the cost of attorney's fees for lawsuits over 1-d-1 valuations any easier to bear. If a landowner believes his or her property has been excessively valued, and he or she wins in court, he or she is entitled to reasonable attorney's fees from the defendant appraisal district.<sup>92</sup> This remedy is a powerful tool for challenging one's property appraisal. Unfortunately for small landowners who wish to challenge the denial of 1-d-1 valuation, in *Dallas Central Appraisal District v. Seven Investment Co.*, the Texas Supreme Court held, "a taxpayer is not entitled to attorney's fees in an action protesting the denial of an open-space land designation."<sup>93</sup>

The appraisers have considerable leverage over landowners in these challenges because, when a landowner loses a challenge of the denial of 1-d-1 valuation, the landowner must pay the heavy rollback burden. For example, Art Cory revoked several wildlife management classifications in Travis County in 2001. Several of these landowners settled under terms that Cory offered such as the landowners agreeing not receive 1-d-1 classification in the future in exchange for not having to pay the back taxes.<sup>94</sup> Clearly, the fear of back taxes was enough for these landowners to drop their claims.

#### D. SOLUTIONS

Environmentalists' concern that wildlife management valuation is not actually benefitting the environment is not well-founded from a conservation point of view and need not be "solved." It is certainly true that landowners receive a financial benefit in return for doing very little to benefit wildlife. In the Samsung example noted above, the company could certainly do much more to help the bird population on its fifty-four acres. However, the undeveloped portion is still benefitting the environment

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90 Press Release, Texas Wildlife Association, Texas Wildlife Association Joins Fight Against Appraisal District (Sept. 2006) (*available at* <http://www.texas-wildlife.org/PDFs/WilliamsonAppraisal2006.pdf>).

91 TEX. TAX CODE § 42.01.

92 *Id.* § 42.29.

93 *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75 (Tex. 1992).

94 Telephone Interview with William F. Ikard, Property Tax Litigator, Ikard Wynne, LLP, (Nov. 16, 2008).

and the community. As Park stated, "If 1-d-1 keeps property from being broken up and subdivided, it is a good use," even if the property could be used in a more environmentally beneficial way. Fifty-four acres with nothing more than ten birdhouses and some fire ant control and is much better for the birds on that property than a strip mall or parking lot.<sup>95</sup>

Making the wildlife management statute more stringent also runs the risk of depriving those who are making legitimate efforts to protect wildlife of any tax benefit. Some wildlife management critics have suggested minimum acreage requirements to qualify for the tax reduction. However, as Clif Ludd, a wildlife biologist for Loomis-Austin (now Loomis Partners), points out, such minimum acreage rules would limit small landowners' ability to get tax benefits from land conservation and would make wildlife management valuation even more of a tax haven for only the wealthy.<sup>96</sup>

The ecological lab statute, however, needs to be tightened. Although too stringent a rule could be under-inclusive, illustrated by wildlife management, not having any rules at all is simply too risky. State Representative Patrick Rose (D-Dripping Springs) introduced a bill in the Texas House in 2007 (H.B. 3567) that would have improved the mechanisms for ensuring that only deserving landowners receive approval of their ecological labs.<sup>97</sup> If passed, the bill would have met the stated concerns of environmentalists and 1-d-1 critics that landowners are unjustly receiving ecolab valuation. Although scientists and landowners supported it, the bill died in committee, likely due to opposition from appraisers who claimed the bill was not strict enough.<sup>98</sup> Requiring that the ecological lab to exist for years in order to get 1-d-1 valuation, as the appraisers wanted, would make it too difficult for farmers, ranchers, or their conferees to move from agriculture to an ecological lab. Under their plan, a landowner wishing to move from agriculture to an ecological lab would have to pay heavy rollback penalties for discontinuing an agricultural use before eventually gaining 1-d-1 status.

H.B. 3567 would have made five necessary fundamental changes to the way ecological labs are created, and thus, the Texas Legislature should adopt those changes. First, it would require ecological lab agreements to be in writing. This requirement would give appraisers some assurance that the land was actually being used for proper research. Second, the research would have to be in furtherance of farming, ranching, or wildlife management purposes and the types of this research would have to be enumerated. This requirement would give appraisers more guidance to help determine which property is being used for valuable research and which property is merely a tax haven, and it would limit the scope of ecological labs to valuable open-space purposes. Third, the bill would require at least three research projects to be performed on the property per tax year to qualify for 1-d-1. Fourth, it would require that ecological research be the primary use of the property, prohibiting things such as subdivisions from obtaining an ecological lab valuation. Finally, a residence on a property that qualifies for ecological lab valuation would be taxed at its fair market value, not its productive value. This requirement would limit the number of rich landowners who attempt to

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95 EPA, *supra* note 1.

96 Taylor, *supra* note 79.

97 H.B. 3567, 80<sup>th</sup> Leg., Reg. Sess. (Tex. 2007), available at <http://www.capitol.state.tx.us/tlodocs/80R/billtext/pdf/HB03567I.pdf>.

98 *Appraisers Devaluing Ecolabs*, AUSTIN-AM. STATESMAN, May 2, 2007, at A1.



use ecological labs to avoid paying taxes on their mansions. Despite appraiser opposition, these changes would do much to help appraisers appropriately grant or deny 1-d-1 status to potential ecological labs.

Appraiser ignorance should be combated at the legislative, administrative, and nonprofit level. Although Section 23.521 of the Tax Code does provide some guidance to appraisers on how and when to grant wildlife management properties,<sup>99</sup> the Legislature needs to provide more specific guidelines. In addition, the TPWD needs to produce clearer rules and do a better job of distributing them to the 254 county chief appraisers in Texas. Nonprofits have a role to play as well. The Texas Wildlife Association, for example, has undertaken a program to educate appraisers on the way wildlife management valuation works.<sup>100</sup> Other nonprofits should join this educational effort, and the Legislature should support it as well.

The difficulty and expense of challenging an appraiser's denial of 1-d-1 status should be alleviated by legislatively reversing *Seven Investment Co.* Although the Texas Supreme Court said attorney's fees would not be awarded to a landowner who successfully challenges the denial of 1-d-1 valuation,<sup>101</sup> the Legislature could, and should, expressly allow such awards. This allowance would encourage landowners who rightfully deserve 1-d-1 valuation to challenge an appraiser's denial, encourage attorneys to take these challenges to court under a contingent fee agreement, and discourage appraisers from knowingly denying rightful 1-d-1 valuation.

However, this change may be politically challenging, because the property tax plaintiffs' bar would likely oppose it. The fear of attorney fee reciprocity is too great. Since the Legislature adopted the Tax Code in 1982, it has always been part of the appraisal districts' legislative agenda to make the awarding of attorney's fees mutual.<sup>102</sup> Although they have yet to be successful, property tax plaintiff's attorneys "would give up the statutory right to recover attorney's fees under section 42.29 rather than keeping it in exchange for giving appraisal districts the same right."<sup>103</sup> With this conflict in mind, plaintiff's attorneys would likely oppose any changes to the attorney's fees provisions to avoid the risk of Section 42.29 of the Texas Tax Code being made reciprocal.

#### **IV. CONCLUSION**

Texas has several powerful tools to encourage landowners to protect their land from development. Because so little of Texas land is protected by federal, state, and local government, private landowners in Texas need as much encouragement as possible to protect their land from development and degradation.

Although conservation easements and 1-d-1 valuations have many advantages, they also have significant drawbacks. The perpetual nature of easements is not assured, they can be difficult and expensive to enforce, and they have the potential of being eliminated by courts if conditions change. In response, the Texas Legislature should require backup easement holders; limit short-term easements; give easement holders a

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99 TEX. TAX CODE § 23.521.

100 Interview with Joey Park, *supra* note 61.

101 Dallas Cent. Appraisal Dist. v. Seven Inv. Co., 835 S.W.2d 75.

102 Off-the-record Attorney, *supra* note 89.

103 *Id.*

guaranteed right to enter and inspect the property; give counties, municipalities, and specified nonprofits a third-party right of enforcement; and make courts apply *cy pres* to conservation easements. To keep landowners from abusing the ecological laboratories classification, the Texas Legislature should add stricter provisions for qualification under the ecolabs statute. In return, to make sure appraisers grant open-space valuation when it is appropriate, landowners who successfully challenge the denial of 1-d-1 valuation in court should be awarded attorney's fees from the defendant appraisal district.

By adopting these changes, the Legislature can help ensure more land in Texas is protected from development. Such land protection will keep this State's land and water cleaner, help preserve native plants and wildlife, and give Texans more places to play for generations to come; all this without expanding the size of the state government.

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THE STATUS OF  
SURFACE WATER RIGHTS IN TEXAS:  
A COMPARISON TO OTHER PRIOR  
APPROPRIATION STATES

BY JILL SACRA HOFFMAN

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I. INTRODUCTION

The Concho Water Snake’s days may be numbered. The snake’s habitat includes deep flowing water, shallows with rocks and boulders, stream banks, and protected pools with rock piles.<sup>1</sup> This species is dependent on sufficient flows of fresh water for the survival of its riparian habitat. The human population of Texas has been on the rise since the 1960s and is forecasted to continue growing through the foreseeable future.<sup>2</sup> This population growth will increase the strain on the Texas’ already limited water supply. Competing interests of industry, agriculture, and expanding urban areas may threaten to relegate some of the state’s most fragile environmental assets to a lower priority as water resources become increasingly scarce. The Concho Water Snake’s habitat is in danger due to greater demands on already-scarce water in West Texas. At the heart of the problem is the set of laws regulating the distribution and the use of water resources in Texas.

1 Environmental Impact on Endangered Animals, Concho Water Snake, [http://library.thinkquest.org/2878/tx\\_concho\\_water\\_snake.html](http://library.thinkquest.org/2878/tx_concho_water_snake.html) (last visited Aug. 26, 2010).

2 C. Richard Bath, *A Commentary on Texas Water Law and Policy*, 39 NAT. RESOURCES J. 121, 121 (1999).

Texas water rights law is anomalous among prior appropriation states. Texas should amend its water rights laws to plan for increasing population in the near future. This note will examine water rights law in general in the United States, including the doctrine of riparian rights, but focusing on the doctrine of prior appropriation. It will consider the status of vested rights and the constitutional implications of vested water rights. This note compares water rights laws in various prior appropriation states, including Colorado, California, and New Mexico, and demonstrates both the similarities and differences between these states' laws and Texas' water rights law. This note will focus on the detrimental effects to junior water right holders and the environment; as well as the economic effect on the public if the law remains unchanged. As currently structured, Texas water rights law is ill-equipped to handle a future of increasingly scarce water resources due to the nature of the prior appropriation conditions in place. Senior appropriators may be entitled to the full allotment of their paper permits before any junior appropriators or fragile habitats are allowed to receive their vested allotments, independent of the actual historical use of the senior appropriators.<sup>3</sup> In light of these facts, this note concludes with a series of recommendations to amend the law to prepare for continued increases in water demand.

## **II. BACKGROUND**

Water rights in the United States are governed almost exclusively by two rules: the rule of riparian rights or the prior appropriation doctrine. The majority of states with abundant rainfall, mainly the states in the east, are primarily governed by the rule of riparian rights.<sup>4</sup> By contrast, the states in the western United States, where rainfall is scarce and water supplies are limited, are governed by the prior appropriation doctrine.<sup>5</sup> Riparian rights to water occur as a result of landownership. A landowner who owns land that physically touches a river, stream, pond, or lake has an equal right to that source of water. A water right under riparian rights is merely a usufructuary right and not an actual property right.<sup>6</sup> Riparian rights cannot be lost by nonuse and they last indefinitely.<sup>7</sup>

The rule of prior appropriation is "first in time, first in right." Under prior appropriation, water users who are the first to obtain appropriative rights hold senior rights to use the water of a particular stream system.<sup>8</sup> If senior appropriators cannot use their entire water right, the unused water must flow to those next in line accord-

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3 Colorado Division of Water Resources, The Prior Appropriation System <http://water.state.co.us/wateradmin/prior.asp> (last visited Aug. 26, 2010).

4 Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. ARK. LITTLE ROCK L. REV. 9, 9 (2002).

5 *Id.*

6 National Science and Technology Center, Bureau of Land Management, Western States Water Laws: Water Appropriation Systems, <http://www.blm.gov/nstc/WaterLaws/pdf/WaterApprSystems.pdf> (last visited Aug. 26, 2010).

7 *Id.*

8 Jennifer L. Cordua, *The Search for New Supplies: Salvaging the Remains of Agricultural Water Conservation in California*, 31 U.C. DAVIS L. REV. 591, 596 (1998).

ing to priority.<sup>9</sup> In times of shortage, an earlier appropriation receives its entire water entitlement before a latter, more junior right receives any.<sup>10</sup>

Water rights under prior appropriations are limited by the doctrine of beneficial use. A beneficial use is “the basis, measure, and limit” of a water right.<sup>11</sup> An applicant for an appropriative right must show intent to appropriate water for beneficial use and, in most states, an “overt act manifesting this intent.”<sup>12</sup> Common uses of water that are considered beneficial uses include just about any domestic, agricultural, or industrial activity, including sewage treatment, crop production, stock watering, hydroelectric power generation, mining and recreational pursuits.<sup>13</sup>

Speculative uses of water are not considered beneficial uses. All western states except Texas prohibit water speculation.<sup>14</sup> Colorado expressly codified the anti-speculation doctrine, now referred to as the ‘can and will’ doctrine, which requires that a project to divert water be completed diligently and within a reasonable time.<sup>15</sup> Water speculators do not acquire water rights to utilize their water for a beneficial use immediately, but instead retain the rights with the hope that water values will increase over time, allowing the water rights holder to sell those rights in the future for a profit. Speculation in water can preclude that same water from being used in another manner that is immediately beneficial. As a result, speculation may cause injury to downstream water rights holders and prevent adequate instream flows.

Generally, acquisition of a water right is achieved by putting water to a beneficial use.<sup>16</sup> Thus, a water right perfects when it is put to a beneficial use. But, in most prior appropriation states, two other requirements must be met for a water right to perfect.<sup>17</sup>

First, the potential water-rights holder is required to provide notice of intent to appropriate.<sup>18</sup> This step generally includes acquiring a permit for the water. The permit includes a quantity limitation on the water to be appropriated.<sup>19</sup> The quantity is based on the stated purpose of the appropriation.<sup>20</sup> However, the quantity limitation in a permit is merely an approximation.<sup>21</sup> The definitive description of the water quantity and boundaries is not clear until the water is put to a beneficial use.<sup>22</sup>

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9 *Id.*

10 James N. Corbridge, *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law*, 69 U. COLO. L. REV. 503, 505 (1998).

11 Sandra Zellmer, *The Antispeculation Doctrine and Its Implications for Collaborative Water Management*, 8 NEV. L.J. 1004 (2008).

12 *Id.*

13 *Id.* at 1004.

14 *Id.* at 1011.

15 COLO. REV. STAT. ANN. § 37-92-305(9)(b) (West 2009).

16 Nicole L. Johnson, *Property without Possession*, 24 YALE J. ON REG. 205, 223 (2007).

17 *Id.* at 221-22.

18 *Id.* at 221.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 222.

The second requirement in some states for a water right to vest is the construction of a ditch or another means of diversion.<sup>23</sup> Under Colorado law, for example, one is required to remove “water from its natural course or location, or control[] water in its natural course or location, by means of a ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump or other structure or device.”<sup>24</sup> The diversion structure is especially important because it indicates the quantity of water being removed from the body of water.<sup>25</sup> Therefore, it follows that the perfected water right is limited to the capacity of the ditch because a water right holder could not possibly put more water to a beneficial use than is diverted.<sup>26</sup> Some states include instream flows—in which a diversion structure is unnecessary—as a beneficial use.<sup>27</sup>

Finally, the amount of water claimed in the permit must be put to a beneficial use for the water right to vest.<sup>28</sup> The date that a water right vests is governed by the doctrine of relation. The vesting date is either the date of the use of the water or the date when the right-holder begins construction on a dam, ditch, or flume.<sup>29</sup> This requirement has been a long standing rule.<sup>30</sup>

Once water is put to a beneficial use, that use must continue. An appropriator can lose that water right if beneficial use lapses for a specified period. In most prior appropriation states that period is four or five years,<sup>31</sup> however in Texas, it is ten.<sup>32</sup>

### **III. THE STATUS OF A VESTED WATER RIGHT**

The focus of this note is the status of water rights that have been appropriated, but not yet perfected. To understand fully an unperfected water right, it is necessary to know the status of a vested or perfected right.<sup>33</sup> Under the prior appropriation doctrine, a vested water right is characterized as usufructuary.<sup>34</sup> A usufructuary right is a right of possession and use only. When a right-holder acquires a usufructuary right (“a usufruct”), the right-holder does not acquire a specific property in the actual water itself. Instead, the right-holder acquires a right of diversion and use of some specific quantity of water that at that time may be flowing in the body of water.<sup>35</sup> However, the general rule for private rights of water ownership is that once a water-right holder

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23 *Id.* at 222.

24 COLO. REV. STAT. ANN. § 37-92-103(7) (West 2009).

25 Johnson, *supra* note 16, at 222.

26 *Id.*

27 See e.g. BECK, *infra* note 51, at 418 (citing CAL. FISH & GAME CODE § 5937 (1998)); BECK, *infra* note 51, at 440 (citing COLO. REV. STAT. ANN. § 37-92-102(3) (1991)).

28 Johnson, *supra* note 16, at 223.

29 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 367 (completed by Harold H. Ellis & J. Peter DeBaal, The Lawbook Exchange 2004) (1971).

30 *Id.*

31 See e.g. N.M. STAT. ANN. § 72-5-28, 72-12-8 (West 2009) (forfeiture of permit after 4 years of nonuse).

32 TEX. WATER CODE ANN. § 11.173 (Vernon 2008).

33 The terms ‘perfected’ and ‘vested’ are often used interchangeably even though they may not have the same connotation. The difference between the two is beyond the scope of this note.

34 HUTCHINS, *supra* note 29, at 441.

35 *Id.*

diverts water from a natural stream as allowed by its permit, it becomes the owner of the actual particles of water.<sup>36</sup> At this point, the water right holder has a perfected water right.

A simplified example will help illustrate the difference between water in a water permit that has been appropriated, put to a beneficial use, and perfected and water in a water permit that has been appropriated but not yet perfected or vested. Take, for instance, a scenario in which a state issues a water permit to landowner "A" for 1,000 acre-feet of water in 1990. "A" puts only 500 acre-feet of water to a beneficial use by irrigating his farm. The state then issues a water permit for 1,000 acre-feet of water to landowner "B" in 2000. Landowner "B" is on the same river as "A", but "B" is downstream from "A." "B" puts his entire 1,000 acre-feet of water to a beneficial use, also by irrigating his farm. "A" has a vested water right for the 500 acre-feet and "B" has a vested water right for the entire 1,000 feet.

Complications arise when "A" finally chooses to use his remaining appropriated but unperfected 500 acre-feet when "B" has been relying on that water downstream. Still another issue arises when "A" decides not to put his remaining 500 acre-feet of water to use, but instead transfers that remaining water to person "C." All of these scenarios can have a harmful economic effect to those relying on the water as a public good. The answers to these issues are provided by state law. The different ways that states define the different forms of water rights determine the methodology for resolving these disputes over water rights in that state.

All prior appropriation states treat at least the vested right as a property right. Since vested water rights are treated as property rights, the question arises as to the types of protections that these water rights are afforded. A United States Court of Federal Claims in Nevada found that vested water rights are constitutionally protected property interests subject to protection under the Takings Clause.<sup>37</sup> If a vested right is a constitutionally protected right, then it would follow that once a junior water-right holder vests his water right it is constitutionally protected. This conclusion would apply when that vested water right could have also been a portion of the senior water right holder's appropriated-but not yet vested-water right under the senior appropriator's control. In that scenario, the junior water-right holder has a greater interest in that vested portion than the senior water-right holder does.<sup>38</sup>

#### **IV. WATER RIGHTS LAWS IN THE WESTERN STATES**

The treatment of water rights among prior appropriation states varies from state to state. The stricter a state's water rights laws are concerning its definition of beneficial use, change in use, speculation, and vested water rights, the less likely that water right holders will be able to transfer their water rights to a third party without substantial scrutiny from the state water commission. If a state is too lax in water permit granting,

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36 *Id.* at 144.

37 See *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996).

38 Corbridge, *supra* note 10, at 505.



the implications could be detrimental to a community and its environment. Texas' water rights law is the most generous in terms of flexibility for water rights holders.

While differences among the water rights laws in the majority of western states and the water rights laws in Texas may seem subtle, the devil is definitely in the details. The following section examines the details of the treatment of water rights by prior appropriation states and shows the similarities and differences among them.

### A. COLORADO

In general, the water rights regime of Colorado is the most stringent of all states with regard to perfection, anti-speculation, and change in use. Water rights in Colorado are governed by the prior appropriation doctrine.<sup>39</sup> The Colorado Constitution provides that the "water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as provided."<sup>40</sup> Under Colorado law, a water right is defined as "a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same."<sup>41</sup>

In Colorado, instead of issuing permits as in most states, the state issues "decrees." Decrees in Colorado differ from permits in other states because a potential water right holder is not granted a judicially awarded final decree until the water is put to a beneficial use.<sup>42</sup> The priority of the decree is then backdated to the time of the "first step" that was taken toward appropriation.<sup>43</sup> This concept is often referred to as the doctrine of relation.<sup>44</sup>

Colorado also issues conditional water rights before granting a decree. A conditional water right is defined as "a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be used."<sup>45</sup> A conditional water right comes into play when projects take a long time to complete. An applicant who has taken the initial steps to appropriate water for beneficial use may receive a "conditional" water right to maintain priority until the project is complete.<sup>46</sup> Once the water is put to a beneficial use, the conditionally decreed priority relates back to the originally decreed appropriation date and becomes an absolute right.<sup>47</sup> As a conditional water right, the right is not yet vested before being put to a beneficial use, and therefore, does not carry the same value as

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39 COLO. CONST. art. XVI § 5.

40 *Id.*

41 COLO. REV. STAT. ANN. § 37-92-103(12) (West 2009).

42 See Corbridge, *supra* note 10, at 505.

43 *Id.*

44 HUTCHINS, *supra* note 29, at 383.

45 COLO. REV. STAT. ANN. § 37-92-103(6) (West 2009).

46 *Id.*

47 National Science and Technology Center, Bureau of Land Management, Western States Water Laws: Colorado, <http://www.blm.gov/nstc/WaterLaws/pdf/Colorado.pdf> (last visited Aug. 26, 2010) [hereinafter Colorado].

a vested water right and under the above would not receive the same constitutional protections as a property right.<sup>48</sup>

Colorado defines beneficial use as “the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made...”<sup>49</sup> While specific beneficial uses are not statutorily listed, state recognized beneficial use categories include: aesthetics and preservation of natural environments, augmentation, commercial use, domestic use, fire protection, fishery use, geothermal use, groundwater recharge, industrial use, irrigation, livestock use, and municipal use.<sup>50</sup>

Beneficial use under Colorado law “also includes the appropriation by the State of Colorado of minimum flows between specific points or levels on natural streams and lakes as are required to preserve the environment to a reasonable degree.”<sup>51</sup> In *Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board*, the Supreme Court of Colorado interpreted the statute codifying this concept.<sup>52</sup> The court held that the Board does not have authority to relinquish part of a decreed minimum stream flow right.<sup>53</sup> If the Board wishes to exercise less than its decreed right, “it must proceed instead through a change of use application to modify its water right.”<sup>54</sup>

Changes in water rights include “a change in the type, place, or time of use, a change in the point of diversion, a change from a fixed point of diversion to alternate or supplemental points of diversion, a change from alternate or supplemental points of diversion to a fixed point of diversion and a change in the means of a diversion.”<sup>55</sup> The change in use of a water right is important because uses that lower the water level may negatively affect other water interests downstream, the environment, and instream flows. Therefore, water right holders must apply for a change in use of water to ensure the maintenance of stream conditions as found when holders of other vested water rights first made their appropriations.<sup>56</sup> When considering a change in use of a water right, the Board looks to the historic consumptive use, including a transfer of water rights.<sup>57</sup>

However, it is important to note that the difference between a “beneficial use” and the “historic consumptive use” in Colorado. A “beneficial use” is a close estimate of the amount of water that will be used for the purposes approved.<sup>58</sup> The “historic consumptive use” is the amount the Board takes into consideration for a change in use and is a recorded empirical amount based on a set amount of time when the water

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48 See *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996).

49 COLO. REV. STAT. ANN. § 37-92-103(4) (West 2009).

50 Colorado, *supra* note 47.

51 ROBERT E. BECK, *WATERS AND WATER RIGHTS* 440-41 (1991 edition) (citing COLO. REV. STAT. ANN. §37-92-102(3) (1991)).

52 *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995).

53 *Id.* at 1261.

54 Beck, *supra* note 51, at 441.

55 COLO. REV. STAT. ANN. § 37-92-103(5) (West 2009).

56 Corbridge, *supra* note 10, at 507.

57 *Id.* at 506.

58 *Id.* at 506-07.

was in use.<sup>59</sup> Therefore, the consumptive use will not always match the amount of the projected beneficial use.

Colorado's consideration that no change in use of water may interfere with the expectations of other vested water rights is known as the 'no-injury rule.'<sup>60</sup> Colorado's no-injury rule states that a change in use of water, or a plan for augmentation, shall be approved if such change "will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right."<sup>61</sup>

A Colorado court interpreted the change-in-use doctrine in conjunction with the no-injury rule in the case of *Orr v. Arapahoe*.<sup>62</sup> In that case, the court observed that "several limitations are read into every decree by implication."<sup>63</sup> Among those implications are the ideals that diversions are limited to an amount sufficient for the appropriation's purpose and that a senior water-right holder may not take excess water left over after the irrigation process and lend, rent, or sell it to others against a junior water-right holder.<sup>64</sup>

To illustrate Colorado's water-right law in more detail, consider again the hypothetical example of the senior water-right holder who was issued a water permit (or under Colorado law, a "decree") of 1,000 acre-feet of water, but only had vested 500 acre-feet of water. Under Colorado law, if Landowner "A" wanted to start using more than the perfected 500 acre-feet of water due to a change in use, Landowner "A" would have to apply for a change in use. The Board should approve that change in use only if the amount used over the historic consumptive use of 500 acre-feet would not injure those other water-right holders who have vested water rights in a portion of the second set of 500 acre-feet of water. Also, the increase in amount over the historic consumptive use cannot restrict below a certain threshold water flows to sensitive ecosystems. The measurement of the historic consumptive use is a critical element in determining the quantity that can be transferred without injury to other water users.<sup>65</sup> (It is important to note that a subtle difference in Texas law may result in a completely different outcome in this example.)

Another tool that Colorado has in its water-code arsenal to ensure the most beneficial use of water is the anti-speculation doctrine. Many states have implemented the anti-speculation doctrine in case law,<sup>66</sup> but Colorado is the only one to date that has codified it. As noted, the doctrine is now referred to as the 'can and will' doctrine. In the Colorado Water code, it states:

No claim for a conditional water right may be recognized or a decree therefore granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and

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59 *Id.* at 507.

60 *Id.*

61 COLO. REV. STAT. ANN. § 37-92-305(3)(a) (West 2009).

62 *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1223 (Colo. 1988).

63 Corbridge, *supra* note 10, at 518 (citing *Orr*, 753 P.2d at 1223).

64 *Id.*

65 Corbridge, *supra* note 10, at 504.

66 *Bacher v. State Eng'r*, 146 P.3d 793, 799 (Nev. 2006); *Central Delta Water Agency et. al. v. State Water Res. Control Bd.*, 124 Cal.App. 4th 245, 267 (2004).

will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.<sup>67</sup>

Colorado case law also supports anti-speculation. In *City of Thorton v. Bijou*, the Supreme Court of Colorado said that to fulfill the ‘can and will’ requirement, an applicant must “establish that there is a substantial probability that within a reasonable time the facilities necessary to effect the appropriation can and will be completed with diligence and that as a result waters will be applied to a beneficial use.”<sup>68</sup> More recently, the court in *Pagrosa v. Trout Unlimited*, held that a “governmental water supply agency has the burden of demonstrating three elements in regard to its intent to make a non-speculative conditional appropriation of unappropriated water: (1) what is a reasonable water supply planning period; (2) what are the substantiated population projections, based on a normal rate of growth for that period; and (3) what amount of available unappropriated water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period, above its current water supply.”<sup>69</sup> The court also said that the governmental water supply agency must fulfill the can and will test: that it can and will put the conditionally appropriated water to beneficial use within a reasonable period of time.<sup>70</sup> In 2005, Colorado extended the anti-speculation principles to changes in use of the water, which further emphasizes the importance of anti-speculation.<sup>71</sup>

Colorado water rights laws are well-formulated in preparation for future needs in a state with a relatively large population but a low supply of water. Colorado’s acknowledgement of the full value and protections of a vested water right – including those of junior appropriators – limits the use of water transfers, thereby eliminating any negative impact of water markets on third parties or the environment.

## B. CALIFORNIA

Similar to Colorado, California has adopted water rights laws that are relatively strict in terms of acquiring a water right, but California has also experimented with transferring water rights and water marketing. California was one of the first Western states to identify and adopt the prior appropriation doctrine of water rights.<sup>72</sup> Although California has adopted prior appropriation, the State still recognizes riparian water rights.<sup>73</sup> Some courts have held that riparian rights have a higher priority than prior-appropriation rights except when the appropriated rights were initiated before the grant of a portion of public lands of the United States.<sup>74</sup> This note will limit its discussion to California’s treatment of prior appropriation.

Like all prior-appropriation states, water appropriated must be put to a beneficial use. California’s Constitution states:

67 COLO. REV. STAT. ANN. § 37-92-305(9)(b) (West 2008).

68 *City of Thorton v. Bijou Irrigation Co.*, 926 P.2d 1, 42-43 (Colo. 1996).

69 *Pagrosa Area Water & Sanitation v. Trout Unlimited*, 170 P.3d 307, 309-10 (Colo. 2007).

70 *Id.* at 310.

71 *High Plains A&M, LLC v. Se. Colo. Water Conservancy Dist.*, 120 P.3d 710 (Colo. 2005).

72 BECK, *supra* note 51, at 409.

73 *Id.* (citing *Irwing v. Phillips*, 5 Cal. 140, 146 (1855)).

74 *Id.* at 410 (citing *Pleasant Valley Canal Co. v. Borrer*, 61 Cal. App. 4th 742, 774-775 (1998)).

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to a beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.<sup>75</sup>

Under California law, the water appropriation must be for some useful and beneficial purpose, and when the appropriator fails to put the water to that purpose, the right ceases.<sup>76</sup> Beneficial uses in California include domestic uses,<sup>77</sup> uses for a municipality,<sup>78</sup> irrigation, hydroelectric power,<sup>79</sup> and transfers of water.<sup>80</sup> California is unique in that it explicitly states that transfer of water is a beneficial use. As mentioned above, California is a leader in water marketing. The acknowledgment by the California Legislature in 1980 that a transfer of water qualifies as a beneficial use has hefty implications.

California's Water Code states:

The Legislature...finds and declares that it is in the public interest to conserve all available water resources, and that this interest requires the coordinated assistance of state agencies for voluntary water transfers to allow more intensive use of developed water resources in a manner that fully protects the interests of other entities which have right to, or rely on, the water covered by a proposed transfer.<sup>81</sup>

The policy rationale for implementing a water code section to allow for water transfers is that many scholars and economists believe transfers allow for a means of achieving greater efficiency through water marketing.<sup>82</sup> Water marketing makes water a commodity, establishes a framework for trading, and therefore, allows for the emergence of a price signal. Those in favor of water marketing believe that the opportunity to engage in water transfers increases efficiency, because "users are confronted with the opportunity cost of their existing water management practices."<sup>83</sup> In other words, the opportunity to transfer water puts a price on water that is wasted, causing users such as farmers to view wasted water as lost revenue.

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75 CAL. CONST. art. X, § 2.

76 CAL. WATER CODE § 1240 (West 2009).

77 *Id.* at § 106.

78 *Id.* at § 106.5.

79 *Id.* at § 106.7.

80 *Id.* at § 109.

81 *Id.* at § 475.

82 CAL. WATER CODE § 475 (West 2009).

83 Brian E. Gray, *The Shape of Things to Come: A Model Water Transfer Act for California*, 14 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 623, 632 (2008).

After the California Legislature condoned water transfers in 1980, the Department of Water Resources created a water bank in 1991.<sup>84</sup> The water bank allowed sellers to sell water to the bank for \$125 per acre-foot and buyers to buy water for \$175 per acre-foot. The difference of \$50 was then allocated to cover the administrative costs of running the bank and carriage water needs.<sup>85</sup>

While the water bank seemed to provide a solution to some of California's water shortages, it also created other problems in regards to third parties. The water transfers were detrimental to water levels in some areas due to the displacement. This effect resulted in an increase of social service expenditures and damage to certain fisheries.<sup>86</sup> California's treatment of water as a commodity instead of an economic benefit for the public had detrimental effects to those that relied on it as a public good.

While the California water bank got off to a controversial start, the Board has implemented environmental safeguards to prevent water shortages and negative effects on third parties. The Board now has the authority to reject applications for public interest reasons.<sup>87</sup> While a rejection rarely happens, the Board is now stricter with the limitations on the permits that it issues.<sup>88</sup> The Board is stricter through requiring a greater level of scrutiny when approving beneficial use and by denying applications that appear to be speculative.<sup>89</sup>

California now recognizes that water transfer laws, if implemented, should be implemented with caution and awareness of all those parties who could be affected. As discussed above, vested water rights are treated as property rights in all of the prior appropriation states and, in some, are even afforded constitutional protections. Even those junior appropriators have a property interest in the water that they have put to a beneficial use and have priority at least for that portion of water to the senior appropriator's unperfected right. Therefore, it is imperative that any water transfer law specify, as California law does, that the water transfer occur only in a "manner that fully protects the interests of other entities which have a right to the water covered by the proposed transfer."<sup>90</sup> This clause should prevent harm to the junior appropriator's use of the water and just as importantly, the water essential to preservation of aquatic life downstream.

To prevent water hoarding and to ensure that water appropriated or transferred is appropriated only as needed, California has also adopted the anti-speculation doctrine, although it does not use that term specifically. The California Constitution requires that "a permit to impound water in a reservoir must state, and the Water Board must determine, that an actual, beneficial use, in estimated amounts, will be made of the impounded waters."<sup>91</sup>

Case law in California also supports the anti-speculation doctrine. In *Central Delta Water Agency v. State Water Resource Control Board*, the Board issued permits for the

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84 BECK, *supra* note 51, at 416.

85 *Id.*

86 *Id.*

87 *Id.* at 417.

88 *Id.*

89 *Id.*

90 CAL. WATER CODE § 475 (West 2009).

91 CAL. CONST. art. X, § 2.

appropriation of water for a corporate wetlands project.<sup>92</sup> The Board hoped to divert water from the San Francisco Bay into reservoirs in the wetlands for later redirection and sale to potential buyers in large amounts. The appellate court held that the Board, in violation of the California Water Code, failed to specify the actual intended use of the water to be appropriated for a specific use.<sup>93</sup> Indeed, the court believed that “it was not possible for the Board to estimate the reasonable amount of water that could be put to any specific beneficial use.”<sup>94</sup>

California also acknowledges scrutiny is required when an appropriator wishes to modify the allocation of water. Under California law, when water is appropriated for one specific purpose it “shall not be deemed appropriated for any other or different purpose, but the purpose...may be changed”<sup>95</sup> However, a change in purpose may only occur with the permission of the Board.<sup>96</sup> The Board may approve a water application only if it “will not operate to the injury of any legal user of the water involved.”<sup>97</sup>

Another environmental safeguard found in California law is the public trust doctrine. According to this doctrine, the State holds certain important natural resources in trust for the public.<sup>98</sup> For example, Section 5973 of the California Fish & Game Code requires the owner of dams to allow sufficient water to bypass their dams “to keep in good condition any fish that may be planted or exist below them.”<sup>99</sup> In *National Audubon Society v. Superior Court* (the “Mono Lake” case) the Supreme Court of California held that the State lacked the authority to convey vested rights that resulted in harm to trust resources.<sup>100</sup> The Mono Lake decision is important because it shows that even though vested rights may be property rights, the State can prevent a transfer of water that would impair trust resources. Mono Lake also reemphasized the fact that private water rights in California are contingent and heavily regulated.<sup>101</sup>

California is more lenient than Colorado with its water permits, statutory approval of water transfers, and creation of a state water bank. However, over time, California has realized the importance of implementing procedural safeguards when approving water applications. Many competing factors must be considered: the interests of third-parties, those of junior water-right holders, aquatic life in the environment, and the interest in water as a public good.

### C. NEW MEXICO

Much of New Mexico is desert with little rainfall and water. Therefore, New Mexico’s water-rights laws are critical to ensuring that New Mexico’s residents have access to water. Prior appropriation governs both surface water and groundwater in New

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92 124 Cal.App. 4th 245, 267 (2004).

93 *Id.* at 264.

94 *Id.* at 261.

95 CAL. WATER CODE § 1700 (West 2009).

96 *Id.* at § 1701.

97 *Id.* at § 1702.

98 Mary Kyle McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L. 683, 683-84 (1989).

99 BECK, *supra* note 51, at 418 (citing CAL. FISH & GAME CODE § 5937).

100 Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 Ariz. L. Rev. 701, 701 (1995) (citing *Nat’l Audobon Soc’y v. Superior Court*, 65 P.2d 709 (Cal. 1983)).

101 *Id.* at 710-11.

Mexico.<sup>102</sup> In accordance with the prior-appropriation doctrine and with how most western states treat water rights, beneficial use “shall be the basis, the measure and the limit of the right to the use of the water.”<sup>103</sup> Distinct from some western states, New Mexico law requires that if the water is used for irrigation, that water shall be appurtenant to the land owned by the appropriator.<sup>104</sup> Otherwise, the water is not required to be appurtenant to the land owned by the appropriator. Neither New Mexico’s statutes nor its Constitution list different types of uses considered beneficial. However, many have been so considered in case law. Domestic uses, stock watering, and irrigation have been approved as beneficial uses.<sup>105</sup> Fishing and recreational boating have also been approved.<sup>106</sup> New Mexico has recognized, however, that excessive diversion of water is wasteful and does not constitute a beneficial use.<sup>107</sup>

New Mexico distinguishes between a water permit and a perfected water right. A permit itself is not a perfected water right. A water right is perfected once it is put to a beneficial use.<sup>108</sup> If the water right is not put to a beneficial use for a continuous four-year period, it is forfeited.<sup>109</sup> The portion of the water permit that is not perfected and not vested is not afforded the same rights and protections as that portion that is perfected and vested. However, it is important to note that New Mexico has an exception to its forfeiture rule. New Mexico law allows municipalities and other specified public entities to hold unused water rights in an amount greater than their reasonable needs for up to forty years as long as the entity has an approved water development plan.<sup>110</sup> This exception allows cities to accumulate water without putting it to a beneficial use for forty years in order to plan for future needs.<sup>111</sup>

Similar to other prior appropriation states, New Mexico also issues permits for those “intending to acquire the right to the beneficial use of any waters.”<sup>112</sup> New Mexico is unique in that the applicant must publish notice in a newspaper that is distributed in each county affected by the diversion and in each county where the water will be put to a beneficial use.<sup>113</sup>

While New Mexico created an exception for municipalities to bank water for forty years in anticipation of future needs, New Mexico law prohibits this sort of speculation by other entities.<sup>114</sup> New Mexico law provides that “construction of works shall be diligently prosecuted in order that the project may be completed within the time set by the water permit.”<sup>115</sup>

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102 N. Colorado River Municipal Water District M. STAT. ANN. § 72-1-2 (West 2009).

103 *Id.*

104 *Id.*

105 BECK, *supra* note 51, at 831 (citing First State Bank of Alamogordo v. McNew, 269 P. 56 (1928)).

106 *Id.* at 832 (citing State Game Comm’n v. Red River Valley Co., 182 P.2d 421 (1947)).

107 *Id.* (citing Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981)).

108 *Id.* at 838 (citing Hanson v. Turney, 94 P.3d 1 (N.M. Ct. App. 2004)).

109 N.M. STAT. ANN. § 72-5-28 (West 2009).

110 *Id.* at § 72-1-9.

111 BECK, *supra* note 51, at 833 (citing N.M. STAT. ANN. § 72-1-9 (West 2009)).

112 N.M. STAT. ANN. § 72-5-1 (West 2009).

113 *Id.* at § 72-5-4.

114 *Id.*

115 *Id.* at § 72-5-8.



New Mexico has also codified a no injury rule, which allows the transfer of water for other purposes than those stated in the original application, "if such changes can be made without detriment to existing water rights and are not contrary to conservation of water within the state and not detrimental to the public welfare of the state."<sup>116</sup> Also, just like the application for a water permit, the application for a change in use or a transfer requires publication of notice.<sup>117</sup> Therefore, while New Mexico does allow for transfers of water permits, New Mexico law also provides an important safeguard to protect existing junior appropriators and the public welfare through the notice period and opportunity to object to the change in use.

New Mexico water-rights law seems to fall somewhere between Colorado and California. While it does provide for the opportunity to transfer water rights, New Mexico has a secure safety net in the notice period to protect third parties and the public welfare. This type of safeguard does not exist in Texas.

## D. TEXAS

Similar to the pattern of the rainfall in the United States as a whole, the amount of rainfall in Texas is distinct from one side of the state to the other. In East Texas, rainfall is more abundant, whereas in West Texas rainfall and water supplies are scarce. The side of the state that lies to the east of the I-35 Interstate Highway corridor receives as much as fifty-five inches of rain each year, while the western half receive as little as seven.<sup>118</sup> The population of Texas will have increased from 9.5 million in 1960<sup>119</sup> to an expected 24.6 million in 2009,<sup>120</sup> and the population in the western part of the state is growing at a higher rate than in the eastern part.<sup>121</sup> As the population in Texas grows, effective water planning must ensure both that sufficient water exists for everyone and that sufficient water is left undisturbed in the environment to preserve habitats for wildlife such as the Concho Water Snake.

Water rights laws in Texas have been described as originating from a "hodge-podge of historical and contradictory water rights systems."<sup>122</sup> Water rights law in Texas was "influenced by Spanish and Mexican civil law water rights systems, the English doctrine of riparian water rights, and the western American doctrine of appropriative rights."<sup>123</sup> In the interest of creating a consistent set of water-rights laws in Texas, the Texas Legislature passed the Water Rights Adjudication Act in 1967.<sup>124</sup> The act

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116 *Id.* at § 72-5-23.

117 *Id.*

118 Bath, *supra* note 2, at 121.

119 *Id.*

120 Texas Department of State Health Services, Projected Texas Population by Area, 2009, <http://www.dshs.state.tx.us/chs/popdat/ST2009.shtm> (last visited Nov. 4, 2009).

121 Bath, *supra* note 2, at 121.

122 *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 101 (quoting Robin A. Melvin, *Transferring Water Rights in Texas*, in 14.1, THE CHANGING FACE OF TEXAS WATER RIGHTS IN TEXAS 2003 (State Bar of Texas)).

123 BECK, *supra* note 51, at 1051.

124 *Id.*

converted all water claims from that date forward to prior appropriation.<sup>125</sup> All unappropriated water now requires a permit for use granted by the State.

For the Texas Commission on Environmental Quality to grant a new permit, unappropriated water must exist. Controversy over the definition of “unappropriated” water was resolved in the *Lower Colorado River Authority v. Texas Department of Water Resources* (“Stacy Reservoir”) case.<sup>126</sup> In the Stacy Reservoir case, the Lower Colorado River Authority protested the application permit of a dam on the basis that insufficient levels of water existed to create a lake.<sup>127</sup> The issue was whether the Commission could issue a permit if all the water in the river basin had already been appropriated.<sup>128</sup> The applicant, Colorado River Municipal Water District, argued that unappropriated water included all the water that had not yet been put to a beneficial use, regardless of whether it was permitted.<sup>129</sup> Therefore, water under the Water District’s definition would have included some water already permitted to appropriators.<sup>130</sup> The Texas Supreme Court rejected that argument and found that the term “unappropriated water” means “the amount of water remaining after taking into account all existing uncanceled permits and filings valued at their recorded levels.”<sup>131</sup> The Stacy Reservoir case is significant because it limits the Commission to issuing permits only for water that is not permitted, regardless of whether or not that water has yet been put to a beneficial use. The court also held that the Commission “may not grant permits when its own records show that the supply must come from an existing downstream permittee’s water that the Commission speculates he will not actually need.”<sup>132</sup> Prior to this case, the Commission could appropriate water on which the Commission believed the downstream users were not relying.

Like all prior appropriation states, Texas requires that water be used only if it is to be put to a beneficial use.<sup>133</sup> Under Texas law, beneficial use is defined as the amount of water that is economically necessary for a purpose authorized by law “when intelligence and reasonable diligence are used in applying that water to that purpose.”<sup>134</sup> Beneficial uses under Texas law include: domestic and municipal uses, agricultural and industrial uses, mining and recovery of minerals, hydroelectric power, navigation, recreation and pleasure, public parks, and game preserves.<sup>135</sup> Unlike the other prior appropriation states, Texas includes a catch-all clause that states “water also may be appropriated, stored, or diverted for any other beneficial use.”<sup>136</sup> The clause gives the state agency the discretion to allow other beneficial uses, but raises the issue of agency abuse of discretion.

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125 *Id.*

126 *See* *Lower Colo. River Auth. v. Texas Dep’t of Water Res.*, 689 S.W.2d 873 (Tex. 1984).

127 *Id.* at 875.

128 *Id.* at 876.

129 *Id.*

130 *Id.*

131 *Id.* at 874.

132 *Id.* at 882.

133 TEX. WATER CODE ANN. § 11.134(b)(3)(A) (West 2009).

134 *Id.* at § 11.002(4).

135 *Id.* at § 11.023(a)(1)-(8).

136 *Id.* at § 11.023(b).

Unlike California, Colorado, and New Mexico, Texas has not implemented an anti-speculation or 'can and will' doctrine. Texas does not have any safeguard to prevent speculation when acquiring or maintaining a water right. The prevention of speculation leads to water hoarding, which can negatively affect both instream uses and those who have rights to that same water. The lack of an anti-speculation law in Texas sets it apart from other prior appropriation states and allows more leniency when granting water permits. While Texas has few safeguards to prevent the negative effects of water banking, in Texas an application to amend a water right to change its authorized use must pass the no-injury test. Texas' application of the no-injury rule to amendments is different than that of the states analyzed above.

Section 11.134 (b)(3)(B) of the Texas Water Code provides that the Commission shall grant a water permit application only if "it does not impair existing water rights or vested riparian rights."<sup>137</sup> The no injury rule was implemented to protect existing water rights from impairment. Those water rights to be protected also include those rights that are junior to the water rights being amended.<sup>138</sup> The no injury rule is also important when a water-right holder wishes to change his water right. Under Texas law, a junior appropriator's water right will be protected against proposed changes to a senior appropriator's water right that would impair the junior water right.<sup>139</sup> However, with the implementation of Section 11.122(b) in the Texas Water Code, the limitations on an amendment to a water right under the Commission's consideration is different than that in other prior appropriation states and may even contradict Section 11.134(b)(3)(B).<sup>140</sup>

To fully understand Section 11.122(b) and its implications, it is important to read it in its entirety:

Subject to meeting all other applicable requirements of this chapter for the approval of an application, an amendment, except an amendment to a water right that increases the amount of water authorized to be diverted or the authorized rate of diversion, shall be authorized if the requested change will not cause adverse impact on other water holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.<sup>141</sup>

As stated above, an amendment shall be granted unless the amendment is seeking to increase the total amount of the permit or the rate of diversion. The language in Section 11.122(b) indicates an assumption that the appropriator who is seeking an amendment to his existing water permit is already using the entire water permit. Therefore, unlike in other states, the Commission considers it impairment on other junior ap-

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137 *Id.* at § 11.134(b)(3)(B).

138 TEXAS NATURAL RESOURCE CONSERVATION COMMISSION, A REGULATORY GUIDANCE DOCUMENT FOR APPLICATIONS TO DIVERT, STORE OR USE STATE WATER, RG-141, 27 (1995).

139 *Id.* at 28.

140 TEX. WATER CODE ANN. § 11.122(b) (West 2009).

141 *Id.*

propriators or on the environment to occur in an amendment only if the appropriator is seeking to increase the water permit as a whole or increases the rate of diversion. This standard is different from all other prior appropriation states because in those states, the commission or board examines the historic use of the water to which it was actually put as a consumptive use and not the amount of authorized use in the water permit in its entirety. This difference can severely impact third parties, including the public welfare.

Returning to our hypothetical example will clarify. Under Texas law, in the amendment scenario discussed above, if senior appropriator “A” is seeking an amendment, the Commission will use its discretion only to decide to deny an amendment if “A” is applying to use more water than the 1,000 acre-feet in the water permit. By contrast, under Colorado law, the Commission will use its discretion to deny an amendment if “A” is seeking to amend his permit to use more than the *historic consumptive* use of 500 acre-feet.

The implications of this distinction are far reaching for our original example. If junior appropriator “B” is relying on and has vested the 500 acre-feet of the water left over from “A”’s unused 1,000 acre-feet, that fact is irrelevant under Section 11.122(b) of the Texas Water Code. On the other hand, under Colorado law, any change in use which is above the 500 acre-feet of “A”’s historic consumptive use could be denied if it is found to impair “B”’s right or injure the public welfare.

Under the vested rights analysis, the law in the other prior-appropriation states is the only way to completely protect “B”’s vested rights—which are treated as property rights in all states including Texas. This fact has even greater implications. If vested rights are determined to have constitutional protections (as the *Hage* court believed they do), then the State could commit an unconstitutional taking, through the automatic granting of “A”’s amendment to increase from 500 acre-feet to anywhere within 1,000 acre-feet of water. It would be a violation of the Takings Clause of the Fifth Amendment to approve a water permit application that harms a junior appropriator’s vested rights.

The meaning and implications of Section 11.122(b) were at issue in *City of Marshall v. City of Uncertain*.<sup>142</sup> In that case, the City of Marshall held a water permit recognizing a right to use up to 16,000 acre-feet of water from Cypress Creek.<sup>143</sup> In 2001, the City applied to change the use from municipal to industrial, triggering the amendment to the water permit provisions in Section 11.122(b).<sup>144</sup> An issue in the case was that the City of Marshall was seeking to amend the water permit for another use and increase the amount used from its *historic consumptive use*, which would affect a third party, but the amendment was not seeking to increase the amount of water or rate of diversion from the original water permit amount.<sup>145</sup> Therefore, the City of Marshall argued that under Section 11.122(b), the Commission was required to grant the permit despite the consequences to downstream entities and the environment.<sup>146</sup> The Commission had approved the permit amendment without a notice and hearing

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142 *City of Marshall v. City of Uncertain*, 206 S.W.3d 97 (Tex. 2006).

143 *Id.* at 98.

144 *Id.* at 99.

145 *Id.* at 100.

146 *Id.*

period because “[S]ection 11.122(b)’s full-use assumption mandated authorization of the change.”<sup>147</sup> The Supreme Court of Texas clarified that the full-use assumption or four-corners doctrine requires “the Commission to assess a requested amendment’s impact on other water rights and the on-stream environment based upon the full amount of water authorized by the existing permit irrespective of the amount that the permit holder has actually used.”<sup>148</sup>

The City of Uncertain argued that the introductory sentence of Section 11.122(b) “subject to meeting all other applicable requirements of this chapter for the approval of an application” precluded the Commission from granting a water permit amendment without verifying that the effects of the amendment would not violate other sections of Chapter 11 of the Texas Water Code, which include the no injury rule.<sup>149</sup> In the end, the court held that Section 11.122(b) did not necessarily mandate issuance of the City of Marshall’s water rights amendment.<sup>150</sup> However, the Stacy Reservoir case shows that the Supreme Court of Texas interprets Section 11.122(b) as a presumption of full use of a water permit.<sup>151</sup>

The *City of Marshall* case exemplifies the effects of Section 11.122(b). If Section 11.122(b) mirrored the other prior appropriation states’ change-in-use laws, issuance of a change-in-use of a water permit would require an assessment of historic consumptive use instead of presuming an appropriator used the full amount of his paper right.

The legislative history of Section 11.122(b) indicates the Legislature’s intent to make the amendment process “less cumbersome by imposing the full use restriction on the assessment of adverse impacts on other water rights and the on-stream environment.”<sup>152</sup> However, the Legislature’s intent on enacting Section 11.122(b) was also to protect the public welfare by ensuring protection of water rights.<sup>153</sup> In effect Section 11.122(b) does the opposite. As the court noted in the *City of Marshall* case, the executive director said that Section 11.122(b) limited the Commission’s discretion to deny or condition approval of an amendment.<sup>154</sup> If the Commission continues to only deny water rights if they are above the original water permit amount or increase the authorized rate of diversion, very few amendments to water rights will be rejected. Junior appropriators, the environment, and the economic benefit of water as a public good will suffer.

## **V. CONCLUSION**

If Texas law remains as it is, species such as the Concho Water Snake will not survive. Sufficient water will not exist in their habitats. The Commission will continue to approve water permits based on the assumption of full use. Senior appropriators will continue to transfer water to other entities and for other uses without regard to junior

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147 *Id.*

148 *Id.* at 112.

149 *Id.* at 106.

150 *Id.* at 105.

151 *Lower Colo. River Auth. v. Texas Dep’t of Water Res.*, 689 S.W.2d 873, 874 (Tex. 1984).

152 *City of Marshall*, 206 S.W.3d at 107.

153 *Id.*

154 *Id.*

appropriators who have vested rights in that same water, and without regard to the environment in general. In other words, senior appropriators will be able to transfer unperfected water rights (the amount above their historic consumptive use but within their permitted amount) to the highest bidder.

In addition to detrimental ecological effects, Texas' full use assumption provision may be unconstitutional. The government may well commit an unconstitutional taking when it allows senior appropriators to transfer unappropriated water rights to third parties without regard to vested rights to the same water downstream. Texas courts have yet to address this constitutional issue. In the meantime, water marketing is increasing as water becomes scarcer and therefore more valuable. Without well thought-out safeguards and limitations, Texas will run into the same problem California did in the early 1990s. Third party entities will purchase water rights from appropriators at the cost of downstream users, the environment, and the economic benefit to those relying on water as a public good. Texas' problem could be even worse, given the full use assumption of Section 11.122(b). Therefore, if Texas wishes to continue to allow the transfer of water and water rights, it needs to implement safeguards similar to the ones other states have put in place.

## **VI. RECOMMENDATIONS**

In an effort to amend Texas water law, Texas should consider doing two things in particular: 1) amend Section 11.122(b) to consider the historic consumptive use of water, instead of the four corners of the water permit, when deciding on an application for an amendment to a water right, and 2) implement the 'can and will' doctrine to encourage efficient use of water and to prevent speculation and water hoarding.

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## AIR QUALITY

### THE EPA PROPOSES NEW REGULATIONS FOR THE NATIONAL RENEWABLE FUEL STANDARD PROGRAM

#### BACKGROUND

The U.S. Environmental Protection Agency (EPA) originally adopted the current Renewable Fuel Standard program (RFS1) to implement the provisions of the Energy Policy Act of 2005 (“EPAAct”). Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24,904, 24,908 (May 26, 2009) (to be codified at 40 C.F.R. pt. 80). EPAAct created a major federal renewable fuel volume mandate that called for 7.5 billion gallons of renewable fuel to be available as motor vehicle fuel by 2012, as well as annual volume targets for each preceding year. *Id.* EPAAct charged the EPA with establishing the annual renewable fuel volumes for 2013 and beyond. *Id.* Recent dramatic increases to both crude oil prices and crude oil price forecasts, in conjunction with other market forces, have helped renewable fuel use far exceed the EPAAct mandates. *Id.* In 2007, Congress passed the Energy Independence and Security Act (EISA), which made several modifications to the renewable fuel requirements. *Id.* The statutory revisions to RFS1 required that the EPA likewise promulgate new rules in accordance with the EISA changes. *Id.* The EPA proposed a revised annual renewable fuel standard (hereafter RFS2) on May 26, 2009. *Id.* at 24,904.

#### MANDATED ANNUAL RENEWABLE FUEL REQUIREMENTS AND EXPANSION BEYOND GASOLINE

Among the most notable of the RFS2 regulations are the designated total renewable fuel requirements for every year until 2022. 74 Fed. Reg. at 24,910. The total requirement for each year is the sum of the specified required volumes for cellulosic biofuel, biomass-based diesel fuels, and advanced biofuels. *Id.* That number increases every year before culminating at a 36 billion gallon total renewable fuel requirement in 2022. *Id.* The biomass-based diesel requirement is specified only through 2012. The



EPA will determine requirements for subsequent years through a future rulemaking but will be no less than 1 billion gallons. *Id.*

Refiners and importers of gasoline and diesel are required to ensure that their fuels are a minimum percentage of renewable fuel. *Id.* at 24,915. Once the RFS2 program is implemented, the EPA expects to conduct a notice-and-comment rulemaking process each year to determine the appropriate standards for the following year, which will be announced in a formal rule each November 30 and will be based on the most up-to-date information. *Id.* at 24,914.

As required by EISA, RFS2 also expands the application of the program beyond gasoline to cover all transportation fuel, including gasoline and diesel fuel intended for use in highway vehicles and engines, as well as non-road, locomotive, and marine engines. *Id.* at 24,960. The EPA proposes that the provisions apply to refiners, blenders, and importers of transportation fuel, and that their percentage standards apply to the total amount of gasoline and diesel each business produces for such use. *Id.* at 24,959.

#### **GREENHOUSE GAS REDUCTION THRESHOLDS**

RFS2 also includes mandatory greenhouse gas (GHG) reduction threshold for the various renewable fuel categories mentioned above. 74 Fed. Reg. at 24,924. GHG emissions are evaluated over the full lifecycle, including the production and transport of the feedstock, land use change, production, distribution and blending of the renewable fuel, and end use of the renewable fuel. *Id.* The thresholds are measured in relation to lifecycle emissions of 2005 petroleum baseline fuels. *Id.* Cellulosic biofuel must meet a 60% GHG reduction threshold relative to 2005 in order to qualify. *Id.* Under EISA, biomass-based diesel and advanced biofuel must each meet a 50% reduction minimum. *Id.* However, the EPA is proposing to exercise a 10% adjustment for the advanced biofuels threshold, which would lower the minimum reduction requirement to as low as 40% of the 2005 baseline if the 50% figure was not commercially feasible. *Id.*

#### **FEEDSTOCK PRODUCTION LIMITATIONS**

The EPA additionally includes new definitions and criteria for both renewable fuels and the feedstocks utilized in production. 74 Fed. Reg. at 24,930. As currently defined under RFS1, a “renewable fuel” is generally a fuel “produced from biomass material such as grain, starch, fats, greases, oils and biogas.” *Id.* at 24,911. In contrast, the proposed RFS2 definition, pursuant to EISA, identifies and limits the feedstock from which each subcategory of renewable fuels may be made as well as the land from which this renewable fuel feedstock may come, thereby significantly limiting what qualifies as a “renewable biomass.” *Id.* at 24,930.

#### **PREDICTED ENVIRONMENTAL AND ECONOMIC IMPACTS OF RFS2**

##### **GREENHOUSE GAS EMISSIONS**

Using various models, the EPA evaluated the incremental volumes of each biofuel type to determine their average impact on GHG emissions compared to the 2005 baseline petroleum baseline that the renewable fuel would be replacing. 74 Fed. Reg. at 25,055-25,056. The EPA estimates that the increased volumes of biofuel mandated by RFS2 will reduce transportation GHG emissions by a total of 6.8 billion tons of

CO2 equivalent when measured over a 100-year timeframe and discounted at 2%. *Id.* at 25,056. Assuming a 0% discount over 30 years would result in a total of 4.5 billion tons of CO2 equivalent, which is equivalent to an annual average reduction of 150 million tons of CO2 equivalent. *Id.*

#### **EMISSIONS AND AIR QUALITY**

The EPA expects that the renewable fuels will increase the amount of some pollutants, such as hydrocarbons, nitrogen oxides, acetaldehyde, and ethanol. *Id.* at 25,059-25,060. Other pollutants, such as carbon monoxide, ammonia and benzene can be expected to decrease. *Id.*

#### **OVERALL PETROLEUM CONSUMPTION**

The EPA estimates that the 36 billion gallons of renewable fuel mandated by RFS2 will displace about 15 billion gallons of petroleum-based gasoline and diesel fuel, an amount which represents about 11% of expected annual gasoline and diesel consumption in 2022, and most of these reductions would result in reduced imports of petroleum. *Id.* at 24,916.

#### **FUEL COSTS**

The EPA expects the RFS2 program to significantly raise the cost of gasoline and diesel based on the price of crude oil assumed in the model. *Id.* at 24,916-24,917. This increase in cost is because of the cost of producing and distributing both renewable fuels and gasoline and diesel in addition to blending costs. *Id.* However, the models did not take into account tax subsidies and import tariffs for the renewable fuels. *Id.* For the United States as a whole, the EPA estimates the increases in gasoline and diesel fuel costs are equivalent to \$4 billion and \$18 billion, respectively (in 2006 dollars and amortized). *Id.* at 24,916.

#### **ENERGY SECURITY BENEFITS**

Based on the reduced risks America will face by virtue of not being dependent on any one source for its fuel, the EPA and outside researchers estimate the total energy security benefits of RFS2 to reach \$3.7 billion in 2022 (2006 dollars). *Id.* at 24,917.

#### **AGRICULTURAL SECTOR IMPACTS**

The EPA models predict that the increased use of agricultural crops to create renewable fuels under the RFS2 program will both raise U.S. food costs by \$10 per person by 2022 while increasing net U.S. farm income by \$7.1 billion dollars. 74 Fed. Reg. at 25,088.

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**NATURAL RESOURCES****TEXAS' NEW PIPELINE SAFETY RULES**

On February 10, 2009, the Texas Railroad Commission ("Commission") approved new pipeline safety rules in the Texas Administrative Code that will place all natural gas flow and production lines in heavily populated urban areas under the State's jurisdiction. 16 TEX. ADMIN. CODE ANN. §8 (2009). The Commission is the State's pipeline regulatory agency with the authority to require that all pipelines follow the safety and management rules of the State. All pipelines in urban areas, such as the heavily populated region overlying the Barnett Shale, in Jade, Wise, Denton, Palo Pinto, Parker, Tarrant, Dallas, Erath, Hood, Somerville, Johnson, Bosque, and Hill Counties, were previously unregulated according to federal law and were operating not subject to any safety rules. These new rules became effective on March 2, 2009, and at that time, Texas was the first and only state in the nation to regulate all pipelines in densely populated areas.

**GENERAL REQUIREMENTS AND DEFINITIONS – SUBCHAPTER A**

The change in Texas' pipeline rules were modeled using the federal pipeline safety guidelines to determine which lines would now be regulated. The federal guidelines defining the class locations are based upon the number of dwellings in the vicinity of a pipeline, and Texas has adopted this regulatory framework. 49 C.F.R. § 192.5 (2008) (A "class location unit" is an onshore area that extends 220 yards (200 meters) on either side of the centerline of any continuous 1- mile (1.6 kilometers) length of pipeline). Only Class 2, 3, and 4 locations would be regulated under the new safety rules. 16 TEX. ADMIN. CODE ANN. § 8.1(a)(1)(B) (2009). Class 1 locations are offshore or surrounded by ten or fewer dwellings and are not subject to these new rules. Mella McEwen, *New Pipeline Rules Take Effect in March*, MIDLAND REP.- TELEGRAM, February 22, 2009, at A1. Class 2 locations have more than ten but less than 46 dwellings, and Class 3 locations have 46 or more buildings. *Id.* In addition, Class 3 locations can also be areas where pipeline lies within 100 yards of a building or a "small well-defined outside area such as a playground, recreation area, outdoor theater, or other place of public assembly" that inhabits at least twenty people five days a week for ten weeks in any year. *Id.* Class 4 locations are any class locations where buildings of four or more stories are class location unit. *Id.* Furthermore, the new pipeline safety rules regulate liquefied petroleum gas (LPG) distribution systems. 16 TEX. ADMIN. CODE ANN. § 8.1(a)(1)(A) (2009).

To establish the time for which operators must comply with the new safety rules, the Commission added a new subsection that requires the operators of a pipeline facility that is "new, replaced, relocated, or otherwise changed" must comply with the applicable requirements at the time the facility goes into service. 16 TEX. ADMIN. CODE ANN. § 8.1(g)(1) (2009). Additionally, operators of previously unregulated facilities must now comply with the applicable requirements within specifically enumerated time periods. 16 TEX. ADMIN. CODE ANN. §§ 8.1(g)(2)(A)-(F) (2009).

**REQUIREMENTS FOR ALL PIPELINES – SUBCHAPTER B**

Minor changes were made to the new construction commencement rules, whereby a new form was referenced—Form PS-48. 16 TEX. ADMIN. CODE ANN. § 8.115 (2009). This form aids the operators in providing the Commission pre-construction notice, and it applies to both pipelines and production operations. LPG distribution systems, now regulated by the safety rules, are also required to file a new construction report for initial construction. 16 TEX. ADMIN. CODE § 8.115 (2009). Sour gas pipeline facilities must also file a new construction report and a different form—Form PS-79. *Id.*

The Commission adopted a new section, “Penalty Guidelines for Pipeline Safety Violations,” to move the penalty guidelines from Subchapter C, which only applies to natural gas pipelines, to Subchapter B, to apply to all pipelines. The text of the rule is the same as it was under Subchapter C, but Tables 1 and 5 have been amended to include hazardous liquids and carbon dioxide pipelines and pipeline facilities. 16 TEX. ADMIN. CODE ANN. § 8.135(D) & 16 TEX. ADMIN. CODE ANN. § 8.135(i) (2009). The Commission will use this section strictly as guidelines and moved these provisions Subchapter B to ensure the penalties were administered equally with respect to natural gas pipelines, hazardous liquids pipelines, and carbon dioxide pipelines.

**REQUIREMENTS FOR NATURAL GAS PIPELINES ONLY – SUBCHAPTER C**

The Commission modified the procedure for natural gas pipeline leak complaints and reporting. Upon a natural gas complaint, a supervisory review of the complaint must be completed and documented by the next business day before 10:00 a.m. 16 TEX. ADMIN. CODE ANN. § 8.205(3) (2009). In the case of an accident, leak, or incident report, a gas company should follow previous telephonic reporting protocol, but should now include “the telephone number of the operator’s on-site person” as well as “the estimated property damage, including the cost of gas lost, to the operator, others, or both.” 16 TEX. ADMIN. CODE ANN. §§ 8.210(a)(2)(E)-(G) (2009). Further, the telephonic report should include any other facts significant to the incident, including but not limited to: ignition, explosion, rerouting of traffic, evacuation of any building, and media interest. 16 TEX. ADMIN. CODE ANN. § 8.210(a)(2)(H) (2009). Any reports submitted to the Department of Transportation should also be submitted to the Commission. 16 TEX. ADMIN. CODE ANN. § 8.210(a)(3)(A) (2009). Natural gas operators are also required to submit semi-annual reports cataloging the number of leaks repaired on their systems as well as the number of leaks that remain unrepaired. 16 TEX. ADMIN. CODE § 8.210(e) (2009). Operators must submit these reports by July 15 and January 15 of each calendar year through the use of the Commission’s online reporting system, Form PS-95. *Id.* The new language defines the term “leak” for purposes of this subsection to include “all underground leaks, all hazardous above ground leaks, and all non-hazardous above ground leaks that cannot be eliminated by lubrication, adjustment or tightening.” *Id.*

Concerning the odorization of gas, the Commission has modified the standard that equipment gas companies are allowed to use. No longer is the equipment sufficient if it is “approved by the Commission” or shop-made; it must now be “commercially available” and an extensive inventory of any such equipment is mandatory. 16 TEX. ADMIN. CODE § 8.215(b) (2009). Equipment approved prior to the adoption of the new rules are exempt from this new requirement, but equipment qualifying under

this exemption may not be reinstalled and may only stay operating in their current service. *Id.* Malodorant agents used by gas companies must now be “commercially available,” and natural gas operators must conduct malodorant tests and concentration tests at intervals not to exceed 15 months. 16 TEX. ADMIN. CODE §§ 8.125(c)-(e) (2009).

#### **HAZARDOUS LIQUIDS AND CARBON DIOXIDE PIPELINES ONLY – SUBCHAPTER D**

The new record keeping and reporting protocol for hazardous liquids and carbon dioxide pipelines require the operator to include the telephone number of the operator, the telephone number of the operator’s on-site person, as well as all significant facts related to the incident (such as ignition, explosion, rerouting of traffic, evacuation of any building, and media interest) in accident reports involving crude oil. 16 TEX. ADMIN. CODE § 8.301(a)(1)(A) (2009). All incidents involving hazardous liquids, other than crude oil, and carbon dioxide now require that the operator notify the Commission by telephone at their emergency line as soon as possible after the incident and include all information required on the written report for crude oil incidents. 16 TEX. ADMIN. CODE § 8.301(a)(2)(A) (2009). All reports, whether involving crude oil or not, filed with the Department of Transportation must be forwarded to the Commission. 16 TEX. ADMIN. CODE §§ 8.301(a)(1)(B)-(2)(B) (2009). Each operator must submit an annual report to the Commission on its intrastate systems located in Texas on forms supplied by the Department of Transportation by June 15. 16 TEX. ADMIN. CODE § 8.301(b) (2009). \*\*\*An operator must submit in writing to the Commission any safety-related condition report it issues to comply with its duty to report any safety-related condition under 49 CFR Part 195. 16 TEX. ADMIN. CODE § 8.301(c) (2009).

#### **PUBLIC EDUCATION, LIAISON ACTIVITIES, AND PUBLIC SCHOOLS**

Public education and liaison activities required for both natural gas pipelines and hazardous liquids and carbon dioxide pipelines now require the operators to communicate and conduct liaison activities with fire, police, and other public emergency response officials at intervals not exceeding fifteen months, but at least once each calendar year, as opposed to the prior annual standard. 16 TEX. ADMIN. CODE § 8.235(a) (2009) & 16 TEX. ADMIN. CODE § 8.310(a) (2009). For pipeline facilities located within 1,000 feet of a public school, natural gas operators must notify the Commission no later than January 15 of every even-numbered year, while hazardous liquids and carbon dioxide operators must notify the Commission no later than January 15 of every odd-numbered year. 16 TEX. ADMIN. CODE § 8.235(e) (2009) & 16 TEX. ADMIN. CODE § 8.310(c) (2009).

#### **CONCLUSION**

The new rules that the Commission adopted as part of Chapter 8 of its rules represent a move to strengthen its supervision of all pipelines in the state and to help ensure their safe operation. These new rules have broadened the definition of what constitutes the transportation of natural gas to produce enhanced pipeline safety regulations. The majority of the adopted changes consist of implementing preventative measures through new reporting requirements. As of the effective date of these new

rules, Texas became the only state in the nation to regulate all pipelines in densely populated urban areas.

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## **FISHERY CONSERVATION AND MANAGEMENT AFTER REAUTHORIZATION OF MSA**

The principal law governing marine fisheries management in United States federal waters is the Magnuson-Stevens Fishery Management and Conservation Act (MSA). 16 U.S.C.A. § 1801 (West 2000). Eight regional councils develop fishery management plans and make recommendations to the National Marine Fisheries Service (NMFS) under the MSA. *Id.* § 1852. To address unresolved issues of the MSA, the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (Reauthorization Act) was signed by President Bush on January 12, 2007. Press Release, Office of the Press Secretary, Fact Sheet: Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (Jan. 12, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/01/20070112-1.html> (last visited Aug. 1, 2010).

### **BACKGROUND**

Congress enacted the Magnuson-Stevens Fishery Management and Conservation Act in 1976. National Oceanic and Atmospheric Administration, Magnuson-Stevens Fishery Management and Conservation Act Reauthorized, <http://www.nmfs.noaa.gov/msa2007/details.html> (last visited Aug. 1, 2010). The MSA was intended to help the development of the domestic fishing industry by “phasing out” foreign fishing. *Id.* Other goals of the MSA were fishery management and marine conservation. *Id.* However, the original MSA’s concurrent goals, aiding the development of the domestic fishing industry and fishery management and conservation, competed with one another. Roger Fleming et. al., *Twenty-Eight Years and Counting: Can the Magnuson-Stevens Act Really Deliver On Its Conservation Promise?*, 28 VT. L. REV. 579, 579 (2004). “Federal fishery policy after the passage of the Act struggled to strike the proper balance between conservation and economic development of the nation’s living marine resources.” *Id.* Some felt the MSA’s “resource development objectives promoted the very excessive fishing practices and unsound stewardship practices that the conservation objectives of the statute were aimed at preventing.” *Id.* at 585. To address these concerns, Congress amended the MSA in 1996 with the Sustainable Fisheries Act (and renamed the Magnuson-Stevens Fishery Management and Conservation Act). *Id.* at 586. The 1996 amendments were geared toward three goals: “ending overfishing, minimizing bycatch, and increasing habitat protection.” *Id.* (“Bycatch” is any species caught in fishing gear that was not the target of the fishing expedition).

#### THE REAUTHORIZATION ACT OF 2006

As mentioned above, the 1996 Sustainable Fishery Act amendments were directed toward concerns unresolved by the MSA. Fleming et. al., *supra*, at 579. The 1996 amendments sought to address the conflict between the competing goals of aiding the domestic fishing industry and of conservation of fisheries in general. *Id.* at 585. Likewise, the Reauthorization Act of 2006 was developed to ease several perceived shortcomings, such as the threatened survival of certain stocks of fish, overfishing damaging coastal area economies, and ineffective international agreements. Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3577 (codified as amended in scattered sections of 16 U.S.C.). The Reauthorization Act states that “[i]nternational cooperation is necessary to address illegal, unreported, and unregulated fishing and other fishing practices which may harm the sustainability of living marine resources and disadvantage the United States fishing industry.” 16 U.S.C.A. § 1801(a)(12) (West 2009). The main purposes of the Reauthorization Act are: (1) to end and prevent overfishing, (2) promote market-based management approaches, (3) allow science to play a larger role in decision-making, and (4) enhance international cooperation. *Id.* § 1801(b).

The Reauthorization Act seeks to achieve these purposes through various means. For one, the Reauthorization Act strives to achieve an end to overfishing by establishing annual catch limits (ACLs) and accountability measures (AMs). 16 U.S.C.A. § 1853(a)(15) (West 2009). By 2010, Fishery Management Plans (FMPs) are required to establish mechanisms for ACLs and AMs for stocks “subject to overfishing.” *Id.* FMPs for all other fisheries have until 2011 to meet these requirements. *Id.* To promote market-based management approaches, the Reauthorization Act allows limited access privilege programs. *Id.* § 1853(a). These programs have transferable permits that specify the amount of catch a privilege holder may harvest. *Id.* The permits are intended to serve as tools for fishery managers to rebuild overfished stocks, reduce overcapacity, promote safety, and while doing so, provide economic and social benefits. *Id.* § 1801. Individuals, corporations, communities, and regional fishery associations may hold harvest privileges. *Id.* The Reauthorization Act seeks to prevent the acquisition of excessive shares by requiring that initial allocations of harvest privileges be “fair and equitable.” *Id.* To reach the goal of improving the role played by science in decision-making, the Reauthorization Act calls for the Regional Fishery Management Organizations Councils’ Science and Statistical Committees to play a stronger role and to have an enhanced peer review process. 16 U.S.C.A. § 1852(g) (West 2009).

International issues were a major area of concern leading to the adoption of the Reauthorization Act. *Id.* § 1801(a). The Reauthorization Act seeks to address the international community and their role in fishery management and conservation in two ways: (1) by addressing illegal, unreported, and unregulated fishing (IUU) and bycatch of protected living marine resources, and (2) by calling for enhanced international cooperation. To address IUU, the Secretary of Commerce, in consultation with the Secretary of State, will make a biennial report to Congress on International Compliance, and the NFMS is required to certify whether nations are taking appropriate actions to address IUU fishing and bycatch. *Id.* § 1826h (West 2009). The High Seas Driftnet Fisheries Enforcement Act issues sanctions that nations could be subject to, if found in violation. *Id.* The Reauthorization Act also calls for enhanced international cooperation in several ways: providing recommendations to the State Department and

Congress to end overfishing, improving international monitoring and compliance, strengthening regional fishery management organizations, maintaining U.S. historical catch shares, establishing a new Secretarial representative for international fisheries, and by providing assistance to other nations (especially technological assistance). *Id.* §§ 1821-22. In advance of these goals, the Reauthorization Act also requires “the NMFS to integrate the National Environmental Policy Act (NEPA) and the fisheries management process for environmental review,” subsequent to § 1854(i)(1) of the Reauthorization Act. National Oceanic and Atmospheric Administration, NOAA Fisheries Feature, Magnuson-Stevens Fishery Conservation and Management Act Reauthorized, <http://www.nmfs.noaa.gov/msa2007/nepa.htm> (last visited Aug. 1, 2010). The NMFS, “will work with the Regional Councils and the Council on Environmental Quality (CEQ) to revise procedures for compliance with NEPA.” *Id.*

#### IMPLEMENTATION

The National Marine Fisheries Service, a division of the National Oceanic and Atmospheric Administration (NOAA), is charged with the stewardship and management responsibilities of the Magnuson-Stevens Fishery Conservation and Management Act. Marian Macpherson, “...To The Gulf Stream Waters”: *Stewardship for Essential Fish Habitat*. 18 TUL. ENVTL. L.J. 97, 101 (2004). The MSA provides for eight Fishery Regional Management Councils that have existed since 1976. 16 U.S.C.A. § 1852 (a) (1) (West 2000). The Fishery Regional Management Councils develop Fishery Management Plans (FMPs). *Id.* § 1852(h)(1). The FMPs have to comply with ten national standards. *Id.* § 1851 (a)(1)-(10); *Conservation Law Found. v. Evans*, 209 F.Supp.2d 1, 5-6 (D.D.C. 2001). The ten national standards to which the FMPs are required to adhere are: “(1) prevent overfishing and maintain ‘optimum yield’; (2) base conservation on the best scientific information available; (3) manage each stock of fish as an individual unit; (4) fairly and equitably allocate fishing privileges among the states; (5) be efficient in the utilization of fishery resources; (6) take into account variations and contingencies in fishery resources; (7) minimize costs and unnecessary duplication; (8) minimize adverse economic impacts on communities; (9) minimize bycatch and the mortality of bycatch; and (10) promote the safety of human life at sea.” *Conservation Law Found.*, 209 F. Supp. 2d at 6. The Gulf of Mexico Fishery Management Council manages the fisheries in the Exclusive Economic Zone of the Gulf of Mexico. 16 U.S.C.A. § 1852(a)(1)(e) (West 2000). The five Gulf States, Texas, Louisiana, Florida, Alabama, and Mississippi, have voting representation on the Gulf Council. *Id.*

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## WATER QUALITY AND UTILITIES

**TCEQ AND DISTRICT COURT JURISDICTION OVER WATER UTILITY DISPUTES: *TARA PARTNERS V. CITY OF SOUTH HOUSTON*, 282 S.W.3D 564 (TEX. APP.—HOUSTON [14TH DIST.] 2009, PET. DENIED)**

The question in *Tara Partners v. City of South Houston* is one of jurisdiction. Appellants were apartment-building owners bringing an action against the City of South Houston for increases to water utility rates. *Tara Partners v. City of South Houston*, 282 S.W.3d 564 (Tex. App.—Houston [14 Dist.] 2009, pet. denied). The City argued that the district court did not have jurisdiction over several of the claims. *Id.* at 569. The district court would not have jurisdiction only if it lay exclusively within the jurisdiction of the Texas Commission on Environmental Quality (TCEQ). *Id.* at 571. The question, then, was whether the Legislature intended to confer exclusive jurisdiction over the subject issues to the TCEQ. *Id.* The appeals court concluded that it did not. *Id.*

**TRIAL COURT JURISDICTION OVER RATE CLAIMS**

The City of South Houston altered its residential water utility rates in 2004. *Id.* at 568. Appellants objected to the substantial increases, citing one estimate in which a rate of \$39,294 a month would increase to \$91,622. *Id.* Appellants brought suit in district court, challenging the rate increase. *Id.* Appellant Tara Partners, Ltd. also sought review by the TCEQ under the Texas Water Code. *Id.* During the trial, attorneys from Tara and the City signed a settlement resolution. *Id.* When the City failed to comply with the resolution, Tara amended its petition to include claims regarding the City's alleged breach of this agreement. *Id.*

The City responded with a plea to the jurisdiction. *Id.* at 569. The plea, which the district court granted, argued that (1) the Texas Water Code granted exclusive jurisdiction to the TCEQ on rate disputes; (2) the City was immune from claims for common law tort damages; and (3) Tara's settlement resolution with the City was not valid. *Id.* The Fourteenth Court of Appeals began with *de novo* review of the district court's grant of the plea to the jurisdictional. *Id.*

The appeals court looked at the statute to determine if the Legislature had intended to grant exclusive jurisdiction to the TCEQ. *Id.* at 571. The City had chiefly relied on Section 13.042(d) of the Texas Water Code, which reads:

The commission shall have exclusive appellate jurisdiction to review orders or ordinances of those municipalities as provided in this chapter.

TEX. WATER CODE § 13.042(d) (2009). The court first noted that the provision referred to "orders or ordinances," not "rates." *Tara*, 2009 WL 62942 at 572-73. Next, the court pointed out that if Section 13.042(d) was interpreted as granting the TCEQ exclusive jurisdiction, then Section 13.043(b)(3) would be rendered superfluous. *Id.*; see *F.F.P. Operating Partners, L.P. v. Duenhez*, 237 S.W.3d, 680, 711 (Tex. 2007) (recognizing that statutes should be given effect such that no portion is superfluous). Furthermore, Section 13.042(f) specifically limits TCEQ jurisdiction, suggesting it was not

meant to be exclusive. *Id.* Finally, the court cited the legislative history of Texas public utility regulations, which indicates regulation by both TCEQ and local courts. *Id.*

The City also cited several cases in which Section 13.042(d) is construed as conferring on the TCEQ exclusive appellate jurisdiction, namely *Flagship I* and *II* and *City of Donna*. *Id.* at 573. The court distinguished these cases on the grounds that “they either do not involve review of rates or contain only minimal reasoning in support of their results.” *Id.* at 573-74. In conclusion, the court denied the City’s claim that the TCEQ had of exclusive jurisdiction and found jurisdiction in the district court. *Id.*

Appellants also attempted to separately appeal their “common law and breach of contract claims.” *Id.* The court concluded that these claims were essentially the same as the Appellants’ other claims, which are challenges to the increase in water utility rates. *Id.* Thus, the appeals court found that the district court had jurisdiction for the same reasons noted above. *Id.*

#### RECOVERY OF UNLAWFUL FEES AND ATTORNEY’S FEES

Appellants next contended that they are entitled to equitable relief, under the doctrine of “money had and received,” from unlawful fees and attorney’s fees. *Id.* at 576-77. Ordinarily, the City as a government defendant would be immune from these claims. *Id.* at 576. Appellants argued an exception under *Nivens v. City of League City*, which applied to cases of “fraud, mutual mistake of fact, or duress, whether express or implied.” *Tara*, 282 S.W.3d at 576-77, (citing *Nivens v. City of League City*, 245 S.W.3d 470, 474 (Tex. App.—Houston [1<sup>st</sup> Dist.] Apr. 5, 2007, pet. denied)). Relying on *Nivens*, appellants argued duress for the first time on appeal. *Tara*, 282 S.W.3d at 577. However, Appellants had not made this argument before, nor had they argued facts sufficient to allege duress. *Id.* Because the duress claim was not timely or sufficiently pled, it was barred by government immunity. *Id.* The court rejected Appellants’ request for leave to amend. *Id.*

Appellants also made claims for fees under the Uniform Declaratory Judgment Act (UDJA). See TEX. CIV. PRAC. & REM. CODE ANN. § 37.011 (Vernon 2008). The first claim was that Section 37.011 grants the district court jurisdiction to order reimbursement of unjust fees. *Tara*, 282 S.W.3d at 578. The court disagreed, noting that relief under Section 37.011 was typically an injunction to enforce a declaratory judgment, and that Appellants could not succeed by characterizing a suit for monetary damages as a declaratory-judgment claim. *Id.* (citing *City of Houston v. Williams*, 216 S.W.3d 827, 828-29 (Tex.2007)).

The second UDJA claim was that governmental immunity was waived for claims for attorney’s fees. *Tara*, 282 S.W.3d at 578. The court agreed only to the extent that this claim relates to the district court’s jurisdiction, finding jurisdiction in the district court for a claim to attorney’s fees. *Id.* Thus, the court of appeals agreed that the district court lacked jurisdiction over the unlawful rate damages claim, but granted the district court authority over the claim for attorney’s fees. *Id.*

#### TARA’S ALLEGED SETTLEMENT AGREEMENT AND CITY IMMUNITY

One of the plaintiffs, Tara Partners, Ltd., brought separate claims regarding an alleged settlement agreement forged between the attorneys for both sides. *Id.* at 578-79. Tara argued that the district court had jurisdiction to enforce the settlement agreement because it “arose from a forum where liability had been waived.” *Id.* The City re-

sponded that it maintained governmental immunity because the settlement agreement was invalid. *Id.* If a valid agreement had existed, the City would have waived immunity under Section 271.152 of the Texas Local Government Code. *Id.*

The court agreed with the City. The agreement was undated, handwritten, and signed only by counsel for Appellants and the City. *Id.* The City Secretary testified that she could not find the agreement in the City's records, that she did not find any evidence of the City's adoption of the resolution, and that the resolution was not in a form likely to be executed by the City. *Id.* at 579. Furthermore, a city cannot delegate city business in this fashion. *Id.* For these reasons, the court did not honor the alleged settlement agreement and did not find a waiver of city immunity. *Id.*

The court also quickly dismissed Appellants' claim that the district court had jurisdiction under the *State Street Bank* "extraordinary factual circumstances" doctrine, finding no extraordinary circumstances in the present case. *Id.* at 579-80 (citing *Tex. Southern Univ. v. State Street Bank & Trust*, 212 S.W.3d 893(Tex. App.—Houston [1<sup>st</sup> Dist.] Jan. 11, 2007, pet. denied).

## CONCLUSION

The Legislature did not intend to grant to the TCEQ exclusive appellate jurisdiction under Section 13.042 of the Texas Water Code. *Tara*, 282 S.W.3d at 580-81; TEX. WATER CODE ANN. §13.042 (Vernon 2008). Because the TCEQ's jurisdiction was not exclusive, the trial court did have jurisdiction over water utility rate dispute claims. *Tara*, 282 S.W.3d at 580-81. Therefore, the court remanded the cause to district court for further proceedings. *Id.* Furthermore, the City was immune from the claim for equitable relief by reimbursement of unlawful funds; the district court lacked jurisdiction over these claims. *Id.* However, the court did have jurisdiction over the claim for attorney's fees. *Id.* Finally, the district court lacked jurisdiction over Tara's claims regarding the alleged settlement agreement. *Id.* That agreement was never valid, and the City retained government immunity. *Id.*

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## **TCEQ DISMISSES ANTI-DEGRADATION ARGUMENTS ON DIRECT DISCHARGE PERMITTING CONFLICTS**

The Texas Commission on Environmental Quality (TCEQ) issued final orders in favor of the applicants in two contested case hearings involving direct discharge permits. In both cases, the applicants were applying to release part of their treated wastewater back into the environment through intermittent receiving streams. The two permit applicants, Hays County Water Control & Improvement District No.1 and Lerin Hills, Ltd., both were applying to discharge effluent into tributaries overlying the catchment area of the Edwards Aquifer in Central Texas. Both applications involve essential infrastructure completion to new developments that have been publicly opposed by members of the local communities already established in the region. Both cases extensively address the issue of whether the TCEQ should deny the permit applications due to excessive degradation of waters downstream caused by the discharged effluent.

### **TEXAS ANTI-DEGRADATION STANDARDS FOR SURFACE WATER DISCHARGES**

The main issue in these cases was whether the effluent being discharged by the proposed facilities would cause degradation to the receiving waters. All wastewater discharges to surface waters are governed by Chapter 307 of the TCEQ's rules in Title 30 of the Texas Administrative Code, and anti-degradation policies are located in Section 307.5, in particular. Tex. State Office of Admin. Hearings, *In the Matter of the Application by Lerin Hills Ltd. for Texas Pollution Discharge Elimination System*, Docket No. 582-08-0690, 5 (2009). Degradation is defined in this statute very generally as any effect that results in "lowering water quality" or "does not protect existing uses." 30 TEX. ADMIN. CODE § 307.5(a) (West 2000). These effects are measured using a variety of factors that include, without limitation, aesthetic beauty, temperature, nutrient concentrations, aquatic life, salinity, and enjoyable recreational use. 30 TEX. ADMIN. CODE § 307.4 (West 2000).

At issue in both cases was whether nutrients, specifically nitrogen and phosphorus present in wastewater discharges, would cause degradation by increasing algal growth.

### **THE CASE IN BELTERRA**

Hays County Water Control & Improvement District No. 1 already held a permit to treat wastewater for the new Belterra Housing Development using a subsurface drip irrigation system. *In the Matter of the Application by Lerin Hills* at 5. No discharge of pollutants was authorized by the existing permit. *Id.* To accommodate the continued development in Belterra, District No. 1 applied in December 2005 to expand their sewage treatment plant and authorize a discharge of 800,000 gallons a day of treated effluent into an intermittent stream in the Barton Springs Watershed. *Id.* at 6.

After significant protests from a number of individuals and groups, the case was referred to two Administrative Law Judges (ALJs) at the State Office of Administrative Hearings; a preliminary hearing in November 2007 determined the eligible protestant parties. *Id.* at 2. Parties admitted by the ALJs included the City of Austin, the Lower Colorado River Authority (LCRA), Hays County, the City of Dripping Springs, Save Our Springs Alliance (SOS), as well as a number of affected landowners, homeowners associations, and water conservation organizations. *Id.* Soon after the preliminary

hearing, a number of protestants, notably the LCRA and three water conservation districts, and District No. 1 entered into a partial settlement agreement (PSA). *Id.* The terms of this PSA included the use of additional equipment and procedures to ensure proper treatment and storage of wastewater, continued use of the irrigation drip method to dispose of all possible wastewater, an agreement to release the effluent only when the discharge stream is flowing (presumably during and after rainfall) except in specific circumstances, and in-stream monitoring to ensure background conditions of the receiving waters are not altered. *Id.* at 10. The remaining parties went to contested case hearing in July 2008, and the ALJs issued their Proposal for Decision (PFD) in November 2008. Tex. Comm'n. on Envtl. Quality, *Order Concerning the Application by Hays County Water Control & Improvement District No. 1*, Docket No. 2007-1426-MWD, 3 (final order granting application).

The ALJs' PFD recommended granting the permit to District No. 1, provided they adopt the terms of the PSA. *In the Matter of the Application of Hays County* at 41. The ALJs took into account both the TCEQ's interpretation that *de minimis* means "a less than noticeable decrease in water quality" and a non-binding federal case on water quality that deemed a change as more than *de minimis* if any reduction occurred in the receiving stream's capacity to "support fish, wildlife, and recreation." *Id.* at 13. After considering disputed expert testimony, the ALJs were not persuaded beyond a preponderance of the evidence that the permit that the TCEQ staff prepared, which would allow for continuous direct discharges into Bear Creek, would not result in degradation of the ponds and streams closest to the discharge point. *Id.* at 28. The ALJs were troubled that despite the numerous studies that the experts for both the Applicant and the TCEQ had performed, the record did not have any evidence that the nutrients deposited into the dry creek bed over time would not create increased algal growth in the areas immediately downriver and eventually in Barton Springs. *Id.* at 35. Additionally, the ALJs noted the record did not have a quantitative analysis to measure the link between what amounts of nutrient deposits lead to algal growth, or what effects caused by algal growth would be considered more than *de minimis*. *Id.* at 14, 23, 28.

Based on these findings, the ALJs then recommended that the Commission approve the permit provided the that the Commission adopt the terms of the PSA which included the requirement limiting discharges directly to Bear Creek when Bear Creek is flowing at a rate of 14 cubic feet per second, unless the irrigated area is frozen and the storage pond is full. *Id.* at 10. With the conditions provided by the PSA, the ALJs found much smaller concentrations of nutrients would occur because the Applicant would only be discharging when the stream was flowing. *Id.* at 29.

In their review for the Proposal for Decision, TCEQ Commissioners agreed with the findings and conclusion of the ALJs; their changes from the PFD to their final order were only with the intent to refine the language so that the order more explicitly matched the wording of the PSA. *Order Concerning the Application by Hays County* at 19.

#### THE CASE IN LERIN HILLS

In May 2006, Lerin Hills Ltd., a developer in Kendall County, sought a permit for a new wastewater treatment facility that would directly discharge its wastewater into an intermittent stream. *In the Matter of the Application by Lerin Hills* at 1. The permit would authorize the facility to discharge 180,000 gallons of treated wastewater per day

into an intermittent stream that eventually feeds into the San Antonio River Basin. *Id.* at 3. Following several requests for a contested case hearing, the TCEQ referred the matter to an ALJ at the State Office of Administrative Hearings in October 2007. *Id.* at 1. The ALJ named a landowner that currently uses a pond miles downstream of the discharge area for recreational purposes as a valid protestant. *Id.* at 2. The hearing was heard in November 2008, and the ALJ submitted her PFD to the Commission in March 2009. *Id.*

The ALJ's PFD recommended that the Commissioners deny the wastewater permit to Lerin Hills. *Id.* at 58. Citing Section 307.5 of the Texas Surface Water Quality Standards, the ALJ also wrestled with the standards required by a Tier 2 review, determining some scenarios when degradation was likely or unlikely to occur, and establishing that changes must be measured based on an objective baseline. *Id.* at 9. Despite being unconvinced by the testimony of the protestant's experts, the ALJ found that the Applicant and the TCEQ had not shown by a preponderance of the evidence that under a Tier 2 review, nutrient discharge would not cause degradation. *Id.* at 32-33. The ALJ noted that numerical standards had not been set to determine what definitively shows that degradation has occurred, and therefore, the standard to prove that degradation was unlikely is high. *Id.* at 36. The ALJ also found that the record did not contain any evidence to indicate a link between concentrations of nutrients in effluent with algal growth and to reflect the cumulative nutrient loading over time that may result in degradation. *Id.* at 32.

The TCEQ Commissioners reviewed the recommendation of the ALJ on May 20, 2009. In their review of the case, the Commissioners overturned the recommendation of the ALJ and granted the permit to the applicant in a 2-1 vote. Texas Admin, TCEQ Commissioners' Agenda Meeting - May 20, 2009, [http://www.texasadmin.com/cgi-bin/tagenda.cgi?location=tnrcc&savefile=TCEQ\\_OM052009](http://www.texasadmin.com/cgi-bin/tagenda.cgi?location=tnrcc&savefile=TCEQ_OM052009) (last visited on Aug. 25, 2010). Chairman Buddy Garcia and Commissioner Dr. Bryan W. Shaw held that the ALJ was establishing a new standard of review in recommending denial of a permit based on the evidence given. *Id.* The majority found that the conditions of the permit with respect to the concentrations in nutrient release were some of the lowest the Commission had ever issued. *Id.* Therefore, under the ALJ's reasoning very few of the applications the Commission had approved in the past would be valid, and that the Commission had not established a new standard in determining what concentrations of nutrients were appropriate. *Id.* In dissent, Commissioner Larry R. Soward expressed reservations about the Commission's ability to weigh the evidence better than the ALJ, who was present during expert witness testimony. *Id.* The Commission issued their order conditioned on the Applicant re-writing the findings of the ALJ to comport with the standards currently followed by the ALJ. *Id.* The re-written findings were submitted and accepted by the Commissioners, once again in a 2-1 vote, on June 26, 2009. Texas Admin, TCEQ Commissioners' Agenda Meeting - Jun. 26, 2009, <http://www.texasadmin.com/cgi-bin/omtnrcc.cgi> (last visited on Aug. 25, 2010).

#### POTENTIAL LEGISLATIVE RESPONSE

In the 2009 Session of the Texas Legislature, state legislators proposed multiple bills attempting to limit or ban the ability of wastewater plants to directly discharge their effluent into certain waterways. Representative Valinda Bolton proposed a bill

that would ban direct discharge into the Barton Springs watershed, while Representative David Leibowitz proposed a similar ban that would apply to the entire Edwards Aquifer. *Summary of legislation Affecting the Texas Hill Country*, *Bandera County Courier*, [http://www.bccourier.com/Pages/story\\_ranch.php?recordID=090618FR1](http://www.bccourier.com/Pages/story_ranch.php?recordID=090618FR1) (last visited Aug. 25, 2010). “Efforts have been underway by a broad coalition of cities, counties and GCDs to initiate rules changes at TCEQ prohibiting these permits in small streams where flow is often extremely low or non-existent.” *Id.*

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## WATER RIGHTS

### **THE GROUNDWATER STORY CONTINUES: EDWARDS AQUIFER AUTHORITY V. DAY, 274 S.W.3D 742 (TEX. APP.—SAN ANTONIO 2008, PET.GRANTED)**

In 1996, Justice Abbot stated that the “clash between the property rights of landowners in the water beneath their land and the right of the State to regulate water for the benefit of all is more than a century old” and that *Barshop* was another chapter in the ongoing battle. *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d. 618, 623 (Tex. 1996). Additionally, the exact nature of groundwater placed in a watercourse has been controversial and undecided by the courts. See *City of San Marcos v. Texas Commission on Environmental Quality*, 128 S.W.3d 264, 273 (Tex. App.—Austin, Jan. 8, 2004, pet. denied). Recently, the San Antonio Court of Appeals introduced another chapter in the ongoing story of groundwater and surface water rights with its decision in *Edwards Aquifer Authority v. Day*, which is currently pending before the Supreme Court of Texas. *Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex. App.—San Antonio 2008, pet. granted). Two of the court’s holdings adding to the water rights story are: (1) that once groundwater from a well entered a watercourse, the character of the water from the well changed from groundwater to state water, and (2) applicants had vested property rights in groundwater beneath property that would allow a takings claim to be brought for limiting the use of that water. *Id.* at 755-56.

#### **FACTS OF THE CASE**

Burrell Day and Joel McDaniel applied for an initial regular permit (“IRP”) with the Edwards Aquifer Authority (“EAA”) for a tract of property they purchased containing an aquifer well. *Edwards Aquifer Authority*, 274 S.W.3d at 747-51. As part of the application, the applicants needed to report the beneficial use of water during the historical period, June 1, 1972 through May 31, 1993, but the well did not contain a

functioning pump, did not have a meter, and had an uncontrolled, continuous artesian flow during the historical period. *Id.* Applicants sought authorization to pump seven hundred acre-feet of water from the Edwards Aquifer to irrigate their property, and, because of the lack of a well, the applicants submitted affidavits from the prior owners or users to establish the beneficial use during the historical period. *Id.* Based on the information regarding the use and sources of water for irrigation, the EAA's staff made a preliminary declaration that the historical use was six hundred acre-feet, but that the applicant provided inadequate evidence of irrigation during the historical period. *Id.*

#### **CHARACTER OF THE WATER: GROUNDWATER OR STATE WATER**

In *Edwards Aquifer Authority* case, one point at issue was whether the groundwater from the Aquifer entered a watercourse and then the Lake, thus making it state water, or if the groundwater retained its character as groundwater even after it entered the watercourse. See *Edwards Aquifer Authority*, 274 S.W.3d at 752-55. Prior to this decision, no court had expressly held that groundwater remains groundwater when placed in a watercourse.

In making this distinction, the ALJ's Proposal for Decision (PFD) centered on the following findings: (1) Edwards Aquifer groundwater discharged from Applicant's well by the prior user was directed into a ditch and then into a lake at the bottom of the property, (2) the prior user placed a pump in a lake at the bottom of the property, withdrew water from the lake, and irrigated approximately one hundred fifty acres by means of a portable sprinkler irrigation system during the historical period, (3) the creek and the Lake are watercourses, the water within those watercourses is state surface water, and any irrigation from the lake was irrigation using state surface waters, (4) irrigation from the lake on applicant's property is regulated by the Texas Commission on Environmental Quality (TCEQ) and not by the EAA, and therefore cannot be used a basis for the IRP. *Id.* at 749-50. Based on these findings and conclusions and what the applicants demonstrated as their beneficial use of groundwater, the ALJ recommended the issuance of the IRP for fourteen acre-feet of water per year. *Id.*

Subsequently, applicants challenged the ALJ decision in district court, and the district court held that the water used in the irrigation was groundwater and not state water. *Id.*

The San Antonio Court of Appeals reversed the district court decision. *Id.* at 760. In its analysis of this issue, the San Antonio Court of Appeals first looked at an analogous situation in which storm and flood water may be appropriated and placed in an aquifer for later removal but may lose its classification as state water and become groundwater if it is allowed to sink into the ground. See TEX. WATER CODE ANN. §§ 11.023 (c)-(d) (Vernon 2008). To determine whether the water in this case had undergone a change in character, the court stated "It is well-settled that water becomes state water when it enters a 'watercourse.'" *Edwards Aquifer Auth.*, 274 S.W.3d at 752, citing TEX. WATER CODE ANN. §§ 11.021(a) (Vernon 2008). Next, stating that it is well established that water changes character once it enters a watercourse, the court looked at whether the water here had entered a watercourse and focused on whether the feature in question has: (1) a defined bed and banks, (2) a current of water, and (3) a permanent source of supply. *Id.* (quoting *Hoefs v. Short*, 114 Tex. 501, 273 S.W. 785, 786-87



(1925))(holding a dry wash that usually flowed for a day or two after a rain five to six times a year as a watercourse).

The evidence in *Edwards Aquifer Authority* showed that water was supplied to the Lake via artesian water from the well flowing into the man-made ditch and into the Lake and, also, as runoff or surface water flowing into the Lake. *Edwards Aquifer Auth.*, 274 S.W.3d at 753. Based on this evidence, the court determined that the Lake was a watercourse and that once water from the well entered the Lake, the groundwater lost its character as groundwater and became state water. *Id.* Therefore, the EAA was not the proper authority for regulating the water from the Lake, and the water was subject to the control of the TCEQ. *Id.*

The court did not rule on groundwater being transported in a watercourse. *Id.* The court acknowledged that courts have allowed the transportation of groundwater in a watercourse but specified that the groundwater needed to be precisely measured prior to entering the watercourse and the exact measurement of water must be extracted from the watercourse. *Id.* In the instant case, because the applicants could not specify how much water had been pumped into the watercourse, this rule was not applicable. *Id.*

#### OWNERSHIP RIGHTS TO GROUNDWATER

The San Antonio Court of Appeals relied on its prior decision in *City of Del Rio v. Clayton Sam Colt Hamilton Trust* to hold that landowners hold some ownership rights in the groundwater beneath their property and therefore have vested rights therein. *Edwards Aquifer Authority*, 274 S.W.3d at 756 (citing *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied)). The Trust in the *City of Del Rio* case conveyed the surface estate to the City but reserved through a deed “all the water rights.” *City of Del Rio*, 269 S.W.3d at 614. In *City of Del Rio*, the court discussed the rule of capture and the doctrine that a landowner has absolute ownership of the water beneath his land and held that groundwater can be severed from an estate under the “absolute ownership doctrine.” *Id.* at 617. The court also stated that the rule of capture is not a property rule but a non-liability for drainage rule. *Id.* Therefore, the Trust continued to own the groundwater and the City did not have any right to the groundwater based on the rule of capture. *Id.* However, the court in the *Edwards Aquifer Authority* case stopped at holding that the property owners are entitled to constitutional protection of their property and remanded the constitutional taking claim for further proceedings. *Edwards Aquifer Authority*, 274 S.W.3d at 756.

The question of when groundwater ownership vests continues to be argued in water rights conferences and law review articles. See, e.g., Susana Canseco, *Landowner's Rights in Texas Groundwater: How and Why Texas Courts Should Determine Landowners Do Not Own Groundwater In Place*, 60 BAYLOR L. REV. 491 (2008) (discussing the *Del Rio* case); Dylan Drummand, *Groundwater Ownership in Place: Fact or Fiction*, University of Texas School of Law CLE (Dec. 3-5, 2008) (discussing the *Day* and *Del Rio* cases). Other cases concerning the vested ownership of groundwater are working their way to the federal appellate courts. See *Bragg v. Edwards Aquifer Authority*. No. SA-06-CV-1129-XR (W.D. Tex. Mar. 25, 2008) *aff'd*. 342 Fed.Appx. 43 (5th Cir. Aug 14, 2009) (Not selected for publication in the Fed. Rep., No. 08-50584).

While *Edwards Aquifer Authority v. Day* does not provide a final answer in the water rights clash Justice Abbot described, it does continue to shape the picture of water rights in Texas. At the very least, it shows one court's view that property owners are entitled to rights to the groundwater beneath their property and helps delineate when water retains certain characteristics. The Texas Supreme Court will hopefully address these issues in this or another similar case.

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## THE LOSING BATTLE OVER FASTRILL RESERVOIR

### ABSTRACT

The City of Dallas and the U.S. Fish and Wildlife Service (FWS) are currently engaged in a legal battle over the proposed site of the Neches Wildlife Refuge in East Texas. *City of Dallas v. Hall, et al.*, 562 F.3d 712 (5th Cir. 2009). *City of Dallas v. Hall* was spurred when the FWS set an acquisition boundary and accepted a conservation easement for the refuge, actions which precluded construction of the Fastrill Reservoir, which the City of Dallas and the Texas Water Development Board (TWDB) had proposed for the same site. *City of Dallas*, 562 F.3d at 715. To date, the City of Dallas has lost at every stage of the case, most recently at the Fifth Circuit Court of Appeals. *Id.* at 716-17. On March 12, 2009, that court affirmed the district court decisions in favor of the FWS, and issued an opinion that highlights the primary conflicts at issue. *Id.* at 715. The battle over the so-called Fastrill Reservoir may be nearing its end. The City of Dallas, in the words of one reporter, took its "last breath" on the issue, asking that the U.S. Supreme Court hear the case. Rudolph Bush, *Dallas Asks Supreme Court to Hear Appeal on East Texas Reservoir Plan*, Dallas City Hall Blog (Jun. 10, 2009), <http://cityhallblog.dallasnews.com/archives/2009/06/city-of-dallas-ask-us-supreme.html>.

### BACKGROUND

It was the State of Texas in 1961 that initially identified the Fastrill Reservoir at issue, believing it could serve the evolving Dallas/Ft. Worth Metroplex. *City of Dallas*, 562 F.3d at 715. The site appeared again in State and TWDB plans in 1984, 1997, and 2001. *Id.* The initial plans by the TWDB and the City of Dallas proposed reservoir construction by 2050 and its tapping by 2060. However, none of the developers of the reservoir took any steps to develop the site before 2005. *Id.*

The site's use as a refuge first came into motion in 1985, when the FWS identified it as a potential wildlife refuge for migrating waterfowl, listing the spot as "high-priority for protection." *Id.* at 715-16. In 1988, after approval of a preliminary refuge proposal, the FWS prepared a draft Environmental Assessment. *Id.* at 716. In light of a lack of funding, however, the refuge project temporarily paused, until being revived in 2003. *Id.* After comment periods and public workshops, the FWS prepared another

Environmental Assessment that indicated three alternatives: no action, the recommended 25,281 acre configuration, and a narrower 15,294 acre configuration. *Id.*

After becoming aware of the FWS's actions, the Dallas City Council passed a resolution in March of 2005 stating a "desire to work with FWS on a plan that would allow the reservoir and the refuge to coexist and authorizing a feasibility study." *City of Dallas*, 562 F.3d at 716. On August 16, 2005, the Texas Senate passed a resolution recognizing the need for additional water resources in the Dallas region and identified the Fastrill Reservoir project as a "critical resource that could help meet the water supply requirements of the region." *City of Dallas v. Hall*, Nos. 3:07-CV-0060-P and 3:07-CV-0213-P, 2007 WL 3125311, at \*5. Through the first half of 2006, FWS representatives continued to communicate about an alternative plan that might allow the refuge and reservoir to coexist. *City of Dallas*, 562 F.3d at 716. Despite the communication, however, the FWS pressed on with the refuge plan. *See City of Dallas*, 562 F.3d at 716. The FWS held a public review and comment period in May of 2005 that yielded more than 1,600 comments. However, the FWS did not revise the Environmental Assessment and did not issue a "final" environmental assessment. *City of Dallas*, 562 F.3d at 716. The FWS announced its Finding of No Significant Impact (FONSI) on July 28, 2005, making the creation of an Environmental Impact Statement (EIS) unnecessary. *Id.* On June 11, 2006, the FWS designated an "acquisition boundary" for the refuge that encompassed the larger 25,281 acre site. By this time, the City of Dallas had completed neither the authorized feasibility study, nor taken any "concrete steps toward planning the reservoir." *Id.* The FWS' Conceptual Management Plan accompanied the acquisition boundary that the FWS issued, and the FWS announced that the Neches Wildlife Refuge was to be created when the FWS acquired title or an interest in property within the acquisition boundary. *Id.* In August 2006, this condition was met when the FWS accepted a one-acre conservation easement within the acquisition boundary. *Id.* In response, the TWDB and the City of Dallas filed the lawsuit at issue. *Id.*

#### PROCEDURAL HISTORY

The City of Dallas and TWDB filed suit on January 10, 2007. *City of Dallas*, 562 F.3d at 716. The key legal arguments made were that the Environmental Assessment was faulty, that under the National Environmental Policy Act (NEPA) an EIS should have been prepared, and that the establishment of the refuge violated the Tenth Amendment. *Id.* at 715. The district court granted 12(b)(6) dismissals of five of the City's claims—including the Tenth Amendment claims—and two of the TWDB's claims. *Id.* at 716. Regarding the NEPA claims, both parties filed cross-motions with the district court for partial summary judgment. *Id.* On June 30, 2008, FWS's motion was granted in a judgment relying largely on *Sabine River Auth. V. U.S. Dep't of the Interior*, 951 F.2d 669 (5<sup>th</sup> Cir. 1992). The opinion held that an EIS was not required given that FWS's creation of the acquisition boundary "did not cause any change in the physical environment"; the refuge's effects on Dallas' water supply was speculative and outside the scope of NEPA. *Id.* With respect to the Environmental Assessment, the court concluded that a reasonable range of alternatives was explored and the requisite amount of information had been taken into account. The City of Dallas and TWDB moved for an injunction pending appeal on the matter, followed by an appeal filed on September 8, 2008. *Id.* at 717.

#### LEGAL ISSUES AT THE FIFTH CIRCUIT

On January 11, 2007, after filing the suit, Dallas City Hall issued a News Release spotlighting the City of Dallas' intentions and arguments. Press Release, Dallas City Hall, City of Dallas Files Lawsuit to Protect Region's Water Plan (Jan. 11, 2007), [http://www.dallascityhall.com/pdf/pio/waterCOD\\_FWSlawsuit.pdf](http://www.dallascityhall.com/pdf/pio/waterCOD_FWSlawsuit.pdf). The report stated that in the lawsuit, the City of Dallas asserted, *inter alia*, that FWS violated the NEPA by: 1) failing to prepare an EIS for the refuge, 2) failing to consider any alternatives when establishing the refuge that would allow the construction of Fastrill Reservoir, 3) failing to assess the cumulative environmental impacts on the city and other areas of Texas when establishing the refuge, and 4) that the FWS's actions violate the Tenth Amendment by "unlawfully infringing upon the traditional state and local role of water and land-use planning. *Id.* The court's response to these arguments is presented below.

#### WAS AN EIS REQUIRED?

The Fifth Circuit Court of Appeals first addressed whether an EIS was required. *City of Dallas*, 562 F.3d at 717. The court noted that if an agency decides not to prepare an EIS, a court may only overcome this if it is proven that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* at 716 (citing 5 U.S.C. § 706(2)(A)). The court stated clearly that NEPA doesn't require federal agencies to "favor an environmentally preferable action," but must look at environmental consequences closely. *City of Dallas*, 562 F.3d at 717 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). Thus, an EIS is unnecessary when "the federal action is not major or does not have a 'significant impact on the environment.'" *City of Dallas*, 562 F.3d at 717 (quoting *Sabine River*, 951 F.2d at 677). An Environmental Assessment is performed to determine if an EIS is necessary. *City of Dallas*, 562 F.3d at 717 (citing *Sierra Club v. Espy*, 38 F.3d 792, 802 (5th Cir. 1994)). The EA is concise and succinctly offers evidence and analysis to determine if a "full-fledged" EIS is needed—which is costly and time-consuming—or if a finding of no significant impact is justified, which means no further study of environmental impacts is warranted. *City of Dallas*, 562 F.3d at 717-718 (quoting *Sabine River*, 951 F.2d at 677); *City of Dallas*, 562 F.3d at 718 (citing *La. Crawfish Producers Ass'n-West v. Rowan*, 463 F.3d 352, 356 (5th Cir. 2006)).

The court clarified its position later in the opinion by stating that the establishment of the acquisition boundary does not affect any change in the physical environment because it merely authorizes the purchase or property from willing buyers; hence a FONSI is appropriate. *City of Dallas*, 562 F.3d at 723. Once "sufficient land" is acquired, FWS would have to comply with NEPA in creating a plan for forest management. *Id.* If that plan proposed alterations to the physical environment, an EIS might be required. *Id.* The court stressed this point in order to show that, despite what Appellants urged, *Sabine River* was not distinguishable from the case at hand and thus, no EIS was required under NEPA; just as in *Sabine* where the "acceptance of a negative, non-development easement was 'tantamount to inaction,'" so too here the setting of an acquisition boundary did not "effect a change in the use or character of land." *Id.* at 723 (quoting *Sabine River*, 951 F.2d at 680).

**FAILURE TO DISCUSS ALTERNATIVES AND ANALYZE CUMULATIVE IMPACTS**

In the case at hand, the court found that the Environmental Assessment analyzed three alternatives and the effects they would have on the reservoir proposal. *City of Dallas*, 562 F.3d at 718. The court notes that an environmental assessment must discuss alternatives to the planned action, but not need address all proposed alternatives; the “rejection of even viable and reasonable alternatives, after an appropriate evaluation, is not arbitrary and capricious.” *Id.* The City of Dallas and TWDB argued that in analyzing the alternatives, the FWS was required to consider ones which would permit the refuge and the reservoir to coexist. *Id.* The FWS, the court said, was unable to analyze this dual purpose fully given the speculative nature of the reservoir plans and a lack of proposals for alternative refuge sites prior to the closure of the public comment period. *Id.* Appellants sent a list of four alternatives they claimed had “greater environmental value,” however, the court said no alternative site proposed could have “allowed construction of the reservoir and served FWS’ goal of preserving the bottomlands and wetlands of the Upper Neches.” *Id.* at 718-19. Thus, the court found that the alternatives considered and analyzed by FWS were reasonable to satisfy NEPA’s requirements. *Id.* at 719.

Appellants also argued a failure to consider impacts, claiming that FWS was required to analyze the effects of the refuge on Dallas’ water supply and urban planning process based on the projected population growth. *City of Dallas*, 562 F.3d at 719. The court concluded, however, that the cases cited were “inapposite...since they concern the effect of federal actions on *existing* water sources, not proposed water sources.” *Id.* In short, the court found, the environmental assessment looked to the refuge’s “cumulative impact” on the “past, present, and reasonably foreseeable future actions,” including the reservoir, and was sufficient. *Id.* at 718.

The court additionally established a proximate causation requirement, stating that a plaintiff with a NEPA challenge must “establish that an alleged effect will ensue as a ‘proximate cause,’ in the sense meant by tort law, of the proposed agency action.” *City of Dallas*, 562 F.3d at 719. The court thus found that the speculative nature of the effects of the refuge made it hard to show the requisite proximate causation regarding future water shortages. *Id.* In showcasing the speculative nature of the reservoir, the court highlighted the lack of solid steps towards the creation of a reservoir, noting that the exact position of the dam and the footprint of the reservoir had never even been settled. *Id.*

The use of old data was also pressed by Appellants as improper to the required analyses. The court stated, however, that with respect to an environmental assessment, it cannot be said to be unreasonable since it is by definition a “rough cut, low-budget” assessment. *Id.* at 720.

**ESTABLISHING EIS REQUIREMENTS**

The City of Dallas also looked to three independent authorities that it believed required an EIS be created: FWS’s own NEPA guidelines, NEPA implementing regulations issued by the U.S. Department of Interior (DOI), and NEPA implementing regulations implemented by the Council on Environmental Quality (CEQ). *City of Dallas*, 562 F.3d at 721. Regarding the FWS guidelines, the Appellants argued that these included a number of criteria which aid the agency in determining if an EIS is needed, and in light of those, an EIS is required to “weigh adequately the health and

water supply effects of not building the reservoir.” *Id.* The court is swift to point out, however, that these guidelines are tools to *assist* in determining when an EIS is necessary, not *dictate* when one is necessary, and moreover have no binding force unless they are promulgated pursuant to law. *Id.* at 722.

The court did find that the DOI regulations regarding NEPA were binding, however, under the regulations, when an agency determines “an action will have no major environmental impact,” an EIS is not required even when the action otherwise meets the criteria mandating one. *City of Dallas*, 562 F.3d at 722. Similarly, the court held that the CEQ regulations on NEPA were binding on federal agencies but did not require an EIS in this case. *Id.* The regulations, the court stated, merely required an agency to determine whether an action is one that “normally requires an EIS.” *Id.* (citing 40 C.F.R. § 1501.4(a)). If the action is not determined to be one in which an EIS is normally required, the agency then creates an environmental assessment to determine if the action will have significant environmental impacts. *Id.* at 722 (citing 40 C.F.R. § 1501.4(b)). In harmony with the CEQ regulations, the court found, the FWS prepared an environmental assessment and made a FONSI. *Id.* at 722.

#### TENTH AMENDMENT VIOLATIONS

In the brief to the Fifth Circuit Court of Appeals, the City revised its constitutional argument from that it made at the district court level. *City of Dallas*, 562 F.3d at 723. Appellants argued that in establishing the refuge, the FWS unconstitutionally “invaded a traditional area of state sovereignty—water and land use planning—without clear authorization from Congress.” *Id.* Further, appellants argue, the refuge violates the Tenth Amendment by offending the Property and Necessary and Proper Clauses. *Id.* The court found, however, that these revised arguments bore only a “passing resemblance” to the City’s arguments contained in its motion to dismiss at the district court level. *Id.* Thus, the court found that the arguments were improperly presented and refused to hear them. *Id.* (citing *Singleton v. Wuff*, 428 U.S. 106, 120 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”)).

#### QUESTIONS PRESENTED FOR SUPREME COURT REVIEW

The first question at issue is whether the FWS, in establishing the refuge, complied with NEPA when it 1) established a short-term time frame it knew would preclude consideration of reasonably foreseeable effects beyond that time-frame, 2) excluded the known indirect impacts of its actions on the reservoir project, and 3) refused to consider any alternative that would allow the refuge and reservoir to coexist. Rudolph Bush, *Dallas asks Supreme Court to hear appeal on East Texas reservoir plan*, Dallas City Hall Blog (Jun. 10, 2009), <http://cityhallblog.dallasnews.com/archives/2009/06/city-of-dallas-ask-us-supreme.html>. The second question is whether the Fifth Circuit Court of Appeals failed to follow the proximate causation requirement, as announced in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), when it let the FWS get away with not assessing, under NEPA, the “indirect impacts associated with the loss of a municipal water source.” *Id.* Lastly, the appeal asks if another court can correctly hold that FWS’s reliance on out-dated, inaccurate data did not affect its NEPA decision, despite the fact that the data concerned the

main environmental issue in FWS's decision and despite any evidence in the record indicating FWS accounted for the inaccuracy in its decision-making. *Id.*

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#### CASENOTES: FEDERAL

### **THE EPA'S PATTERN AND PRACTICE OF ADMINISTERING UNILATERAL ADMINISTRATIVE ORDERS (UAOs) UNDER SECTION 106 OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA) DOES NOT VIOLATE DUE PROCESS: *GENERAL ELECTRIC COMPANY V. JACKSON*, 595 F. SUPP. 2D 8 (D.D.C. 2009) AFF'D 595 F. SUPP. 2D 8 (D.D.C. 2009)**

On November 28, 2000, General Electric Company (GE) filed a complaint in the United States District Court for the District of Columbia challenging CERCLA in two ways. *General Electric Company v. Jackson*, 595 F. Supp. 2d 8, 12 (D.D.C. 2009) *aff'd* 595 F. Supp. 2d 8 (D.D.C. 2009). First, GE alleged that Section 106 of the Act facially violates the Due Process Clause of the Fifth Amendment. *Id.* Second, GE alleged that the EPA's "pattern and practice" of administering Unilateral Administrative Orders (UAOs) also violates the Due Process Clause. *Id.*

The EPA moved to dismiss the claim based on Section 113(h) of CERCLA, which bars judicial review of a Section 106 order until after clean-up is complete. *Id.* But on appeal, the D.C. Circuit held that Section 113(h) only bars particularized challenges, not facial or systemic challenges. *Id.* In May of 2004, the EPA filed a motion for summary judgment, arguing that GE's challenge was solely a facial one and that the facial challenge failed under the *Salerno* doctrine (in a facial challenge, a plaintiff must prove that a statute is unconstitutional under every possible application). *Id.*; see *United States v. Salerno*, 481 U.S. 739 (1987). Based on its finding that Section 106 would be constitutional in an emergency situation, even if a potentially responsible party (PRP) was deprived of a property interest before an adequate judicial hearing, the court granted EPA's summary judgment motion as to the facial challenge. *General Electric*, 595 F. Supp. 2d at 13. However, the court saw the "pattern and practice" claim as a distinct challenge and allowed the parties to proceed with discovery on this issue. *Id.* at 13-14.

After two years of discovery, the parties filed cross-motions for summary judgment, which are the subject of the ruling discussed below. *Id.* at 14. In its motion, GE argued that Section 106, as the EPA administers it, (1) violates procedural due process under *Ex parte Young*, 209 U.S. 123 (1908), because PRPs are forced to comply with UAOs, and (2) deprives PRPs of protected liberty and property interests, based on the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976). The EPA, in turn, argued that GE did not suffer the alleged pre-hearing deprivations, that such deprivations would not

require any greater process than is already provided, and that any alleged coercive practices of the EPA are cured through judicial review of noncompliance penalties. *Id.*

#### **BACKGROUND: THE CERCLA FRAMEWORK**

Under CERCLA, once the EPA identifies a hazardous waste site, it seeks out PRPs and then enters into negotiations with them to arrange clean-up of the site. *Id.* at 11. If negotiations fail, the EPA can (1) clean up the site itself and then bring an action to recover the costs, (2) obtain a court order compelling a PRP to clean up the site, or (3) issue a UAO ordering the PRPs to clean up the site. *Id.*

If a PRP receives a UAO but believes that it is not responsible for clean-up, the PRP has two options—it can comply with the UAO and then seek reimbursement for the costs, or it can refuse to comply. *Id.* If the PRP refuses to comply with the UAO, the EPA must file a civil action to enforce the UAO. *Id.* This course of action means that a federal district court will review both the EPA's decision to issue the UAO (arbitrary and capricious standard) and its selection of the responsible party (reviewed *de novo*). *Id.* However, if the court determines that the PRP lacked "sufficient cause" for noncompliance, the EPA may seek both daily penalties (up to \$32,500 per day) and punitive damages (up to three times the clean-up costs incurred). *Id.* at 12.

#### **THE RULING**

##### **EX PARTE YOUNG**

GE's first claim is that the EPA's pattern and practice of administering UAOs violates procedural due process under *Ex parte Young*. *Id.* at 17. Under *Ex parte Young*, a statutory scheme is unconstitutional if the penalties for noncompliance are "so enormous... as to intimidate the company and its officers from resorting to the courts to test the validity [of the ruling]." 209 U.S. 123, 147. However, if the statutory scheme has an exception for good faith challenges, even a statute with severe penalties for noncompliance may be constitutional. *General Electric* at 17.

GE points to four EPA policies that supposedly intimidate companies into compliance with UAOs: 1. the EPA seeks maximum penalties for noncompliance; 2. the EPA seeks multiple penalties for violations at the same site; 3. The EPA refuses to set a cap on daily penalties; and 4. the EPA labels non-complying PRPs "recalcitrant." *Id.* at 17–18.

Ultimately, the court found these arguments unpersuasive for two reasons. First, the EPA may impose penalties only on a non-complying PRP who lacks "sufficient cause." *Id.* at 17. In previous challenges to Section 106 of CERCLA, courts have held that this limitation meets the "good faith" safe harbor requirement under *Ex parte Young*. *Id.* Second, no matter what kind of penalties the EPA seeks, it is ultimately a judge who decides what, if any, penalties to impose. *Id.* at 18.

##### **MATTHEWS V. ELDRIDGE**

GE's second claim is that the EPA's administration of UAOs unconstitutionally deprives them of property or liberty under *Mathews v. Eldridge*. *Id.* at 39. Under *Mathews*, the court must first determine whether the plaintiff has been deprived of a liberty or property interest. *Id.* at 21. Next, the court must balance the private interests, government interests, and the risk of error to determine whether due process requirements have been met. *Id.*



**MATHEWS FIRST PRONG**

PRPs may arguably suffer deprivations without adequate due process at three stages of the UAO procedure. *Id.*

**1. DEPRIVATIONS AT UAO ISSUANCE**

GE submitted that the issuance of a UAO causes an immediate deprivation of property, through reduced stock price and increased financing costs, as well as through damage to the PRP's brand value. *Id.* at 22. Because damage to stock price or brand value could occur whenever an agency took any kind of adverse action, the court determined that these could not be protected property interests at this stage of the process. *Id.*

**2. DEPRIVATION IF A PRP DOES NOT COMPLY**

GE pointed to three kinds of deprivations that a PRP is likely to suffer if it does not comply with a UAO. *Id.* The first two were the same as above—reduced stock price, increased cost of financing and brand value damage. *Id.* The third deprivation claimed was an impaired relationship with certain investors and with the EPA itself. *Id.*

In this situation, the court found the property interests in stock price and brand value to be protected, because they are likely to suffer even greater damage if the PRP does not comply with the UAO and is labeled “recalcitrant” by the EPA, and because a line-drawing issue is not present as was present at the issuance stage. *Id.* Based on expert reports, the court concluded that GE had suffered a pre-hearing deprivation of both types of property interests. *Id.* at 23–25. However, because of flawed methodology, the court was unable to determine the approximate amount of the deprivation. *Id.*

The court analyzed the liberty deprivation claim under the D.C. Circuit's “reputation-plus” standard. *Id.* at 26. This standard requires that the reputational injury be accompanied by collateral effects that are “sufficiently formal or sufficiently broad” enough to merit due process protection. *Id.* Ultimately, the question came down to whether the likelihood of greater EPA penalties for “recalcitrant” PRPs would broadly preclude PRPs from carrying out their chosen line of business. *Id.* at 27. Although in rare cases, penalties might put a PRP out of business, the court held that this action did not amount to broad preclusion. *Id.*

**3. DEPRIVATIONS IF A PRP COMPLIES**

The parties agreed that the response costs PRPs incur if they comply are protected property interests. *Id.* The court determined that the average cost of clean-up is approximately \$4 million. *Id.* at 30.

**MATHEWS SECOND PRONG**

Because GE demonstrated that PRPs are deprived of at least some property interests whether or not they comply with a UAO, the court proceeded to the next step of the *Mathews v. Eldridge* analysis—balancing the private interest, government interest, and risk of error. *Id.* at 29.

### 1. PRIVATE INTEREST

The magnitude of the private interest, for due process purposes, depends upon the type and length of the pre-hearing deprivation, with purely financial deprivations receiving less weight than other types of irreparable deprivations. *Id.*

In this case, the relevant private interest was primarily financial, with the amount dependent upon whether the PRP chose to comply with the UAO. *Id.* at 30. In some cases, the UAOs could also have collateral effects on operations or even cause a PRP to go out of business, but in other cases the amount of the deprivation would not have any material impact. *Id.* PRPs could potentially be deprived of their property interest for several years, but no evidence was in the record that EPA attempts to delay the process. *Id.* at 31. Overall, the court decided that although the private interests were less constitutionally significant because they were primarily financial, they were nevertheless sufficiently large, with enough potential collateral effects, to constitute weighty private interests. *Id.* at 30–31.

### 2. GOVERNMENT INTEREST

The importance of the government interest turns on two factors: (1) whether the government has a “special need for very prompt action” and (2) the financial and operational cost of additional process. *Id.* at 32.

In this case, the court found that the EPA lacked a “special need for very prompt action,” because in true emergencies EPA cleans up the site itself. *Id.* Nevertheless, the government has a weighty interest, because the costs of providing a neutral decision-maker for UAO contests would be extremely high, due to the large quantities of UAOs that the EPA issues. *Id.* at 33.

### 3. RISK OF ERROR

Several abstract principles suggested that the pre-decisional process might result in error—the fact that a neutral decision-maker is an important constitutional safeguard, the fact that the government stood to benefit from the deprivation, and the fact that regional EPA officers could issue UAOs without centralized oversight. *Id.* at 34. However, representation by counsel during the negotiations that precede UAO issuance negated these concerns somewhat. *Id.* In addition, the available concrete evidence suggested that the rate of error for UAO issuance was actually quite low. *Id.* at 37. Out of sixty-eight total UAOs issued to GE, GE was able to find errors in only three of them. *Id.* This number of errors amounted to an error rate of approximately 4.4 percent, which the court held to be an acceptable rate. *Id.*

### 4. BALANCING

Balancing the interests concerned, the court concluded that the size and nature of the private interests were not so great as to justify the large increase in government costs inherent in the provision of additional process, when such additional processes would only provide a marginal improvement in the rate of error. *Id.* at 38. A hearing before a neutral decision-maker is, therefore, not required by due process. *Id.* at 39.

### CONCLUSION

Because the court determined that the EPA’s pattern and practice of administering Section 106 of CERCLA did not violate due process, it granted the EPA’s motion for

summary judgment. *Id.* Thus, the court decision has the effect of apprising PRPs that the EPA's issuance of UAOs will remain unchanged.

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**UNITED STATES V. VIKING RESOURCES, INC. AND ROBERT CHAMBERS, 607 F.SUPP. 2D 808(S.D. TEX. 2009)**

The United States District Court for the Southern District of Texas recently examined a series of motions in a strict liability action concerning the Highland Bayou oil spill of December 2004. *United States v. Viking Resources Inc.*, 607 F.Supp.2d 808 (S.D. Tex. 2009). The United States of America brought this action against Viking Resources, Inc. ("Viking") and the sole shareholder, officer and director of Viking, Roger Chambers, under the Oil Pollution Act (OPA). *Id.* The judgment in the case hinged on the interpretation of whether Viking and Chambers were the "responsible party" for the "facility" that caused the oil spill. *Id.* The court also examined whether the remedies under the OPA require a trial by jury or are equitable remedies. *Id.*

**SUMMARY OF FACTS**

The Highland Bayou spill was reported to the Texas General Land Office (TGLO) on December 18, 2004, after oil leaked into a wetland adjacent to the Highland Bayou, a navigable tributary to Galveston Bay. *Viking Resources*, 607 F.Supp.2d at 812. The oil source was a collection of tanks used to store oil—a tank battery ("old tank battery")—on the Maco Stewart Lease. *Id.* at 813. Originally executed by Maco Stewart in 1945, the Maco Stewart Lease is an oil and gas lease that has since been horizontally and vertically subdivided and assigned to several lessees and operators over the last 50 years. *Id.* Viking was the last known lessee and operator of the portion of the Maco Stewart Lease where the old tank battery was found. *Id.* at 814. Chambers is the sole shareholder, officer, and director of Viking, who began operating the lease in 1996 and last produced oil and/or gas from the lease in 2001. *Id.*

In response to the spill, oil removal operations were initiated and completed by January 13, 2005. *Id.* at 813. Removal crews, "according to the United States... recovered approximately 225 barrels (9,450 gallons) of oil from the land, water, and wetlands combined." *Id.* The United States estimated that the cost of oil removal was

\$376,262.96 and caused \$271,179.82 in damages to natural resources (cost estimated by TGLO and the United States Coast Guard). *Id.* The United States claimed Viking and Chambers are strictly liable for the cleanup costs and damages under the Oil Pollution Act, which provides that the government “may recover from each responsible party...removal costs and damages’ associated with oil discharges ‘into or upon navigable waters.” *Id.* at 814 (citing the Oil Pollution Act (codified at 33 U.S.C. § 2702(a))).

#### **CROSS-MOTIONS FOR SUMMARY JUDGMENT**

The United States argued that it was entitled to summary judgment due to lack of genuine issues of fact in finding Viking and Chambers strictly liable for the oil spill costs and damages under the OPA. *Viking Resources*, 607 F.Supp.2d at 815. To prevail in a strict liability claim under the OPA, the plaintiff needed to prove that the defendant was a “responsible party for the facility from which the oil was discharged and that the discharge resulted in removal costs and damages.” *Id.* (citing 33 U.S.C. § 2702(a)). Viking and Chambers asserted that the United States did not and could not prove that they were the responsible parties and disagreed with the government’s reading of the term “facilities.” *Id.* at 815-16. The defendants also challenged the affidavits that the government used to establish the costs and damages due to the spill. *Id.* Finally, the defendants argued that they were entitled to summary judgment based on affirmative defenses of release, collateral estoppel, and/or res judicata. *Id.* The court denied all of the motions. *Id.*

#### **INTERPRETING “FACILITY” AND “RESPONSIBLE PARTY”**

To determine if the government has established that the defendants are the “responsible party,” the court examined the different criteria supplied by the statute for a responsible party of an “onshore” versus an “offshore” facility. *Viking Resources*, 607 F.Supp.2d at 817. The OPA specifies that the *owner or operator* of an onshore facility is the responsible party while the *lessee or permittee for the area* in which the offshore facility is located is the responsible party. *Id.* Both sides and the court agreed that the old tank battery satisfied the definition for a facility and was an “onshore facility.” *Id.* Yet, the government argued that the definition of “facility” should include “all oil-related equipment and structures located within the geographic boundaries of Viking’s lease.” *Id.* at 816. This reading would have positioned Viking and Chamber as the responsible parties for leasing the land that contained the old battery tank, whether or not they actually owned or operated it. *Id.* at 818.

The court held that the government was “inappropriately expanding” the meaning of “facility” in order to “focus on the geography” of the onshore facility instead of the ownership as required by the statute. *Id.* The court determined that this interpretation was not compliant with Congress’ intent in the statute, and the government must prove that Viking and Chambers were the owners or occupiers of the old battery tank to establish that they are the responsible parties. *Id.* For this reason, the court denied the United State’s motion for summary judgment. *Id.*

The defendants also moved for summary judgment, arguing that “neither of them ever owned or operated the old battery tank” and alleging that the government’s evidence on this issue was insufficient. *Id.* The court determined that “the OPA provides virtually no guidance as to what constitutes ownership under the statute” and had to rely instead on Texas state property law and contract law to determine if ownership of

the old battery tank was transferred to Viking in the assignment of the Maco Stewart Lease. *Id.*

The court found that the right, title, and interest in “The Lease (and the Property)” were conveyed to Viking in the assignment. *Id.* To give effect to each of these clauses, the court presumed the assignment “transferred not only ‘The Lease’ but also ‘The Property.’” *Id.* at 820. The court concluded the extent of “The Property” was ambiguous and thus looked to “extraneous evidence to determine the true intentions of the parties.” *Id.* (citing *R&P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517 (Tex.1980)). Because Chambers admitted to acquiring some oil and gas production equipment with the lease, the court held that a jury could conclude that the assignment conveyed the old battery tank to Viking, making it a question of fact whether Viking was the owner of the facility. *Id.* 820-21.

The court then examined whether Chambers could be found to be the owner or operator of the facility. *Id.* at 822. The government argued that as sole shareholder, officer, and director of Viking, Chambers “abused Viking’s corporate form...such that Viking’s corporate veil should be pierced,” making Chambers liable for Viking as the responsible party. *Id.* The court found it appropriate to pierce the corporate veil in this case, relying on *United States v. Bestfoods*. *Id.* (citing *Bestfoods*, 524 U.S. 51, 118 (1998)). *Id.* That court held that a parent company could be held liable for a subsidiary’s actions under the Comprehensive Environmental Resource, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9607, if the corporate veil is pierced. *Id.* The court here determined that the OPA is similar to CERCLA and the holding from *Bestfoods* would apply. *Id.* at 823 (citation omitted). Because the government presented enough evidence that Chambers acted as the “alter-ego” of the corporation (providing all financing for Viking, which had no assets, and using Viking’s checking account for Chamber’s personal expenses), the corporate veil could be pierced to find Chambers the responsible party via Viking. *Id.* at 824. Yet, because the government has not proven Viking was the responsible party, the court denied the defendants’ summary motion. *Id.*

#### **EXAMINING REMEDIES UNDER OPA: EQUITABLE VERSUS LEGAL**

The United States also requested a motion to strike the defendant’s jury demand. *Viking Resources*, 607 F.Supp.2d at 829. The court stated, and the parties agreed, that “because OPA does not create a statutory right to a trial by jury, Viking and Chambers [were] entitled to a jury trial only if the Seventh Amendment’s limited right to trial by jury applies in this case.” *Id.* (citing *South Port Marine, LLC v. Gulf Oil Ltd.*, 234 F.3d 58, 62 (1st Cir.2000)). The court analyzed the separate remedies sought by the United States to determine if the statute creates a legal right or a right that is equitable in nature (which would not require a jury) for each in order to determine whether the right to a jury existed for the cause of action under the OPA. *Id.*

#### **REMOVAL COSTS**

The OPA states that responsible parties for an oil spill are liable for “all removal costs incurred by the United States...or any person for acts taken...which are consistent with the National Contingency Plan.” *Viking Resources*, 607 F.Supp.2d at 829 (citing OPA (codified at 33 U.S.C. § 2702(a)-(b)(1)). The court found that “no federal court [had] yet decided whether a right to a jury trial arises in an action for removal costs under OPA.” *Id.* Many courts, however, had considered the issue under CERCLA, which

states that “owners and operators of facilities are liable for all costs of removal or remedial action incurred by the United States Government...as well as any other necessary costs of response incurred by any other person.” *Id.* at 830 (citing CERCLA (codified at 42 U.S.C. § 9607(a)(1)). The court here determined that, “because of the similarity of the CERCLA response cost remedy,” it would be appropriate to base its reasoning on the CERCLA jurisprudence. *Id.* at 830. Reviewing the history of CERCLA remedies, the court found most cases interpreted CERCLA response costs as “essentially a form of restitution, which is an equitable remedy.” *Id.* at 829. The court concluded that recovering removal costs under the OPA is an equitable remedy and held that Viking and Chambers were not entitled to a jury trial for this cause of action. *Id.* at 830.

#### **NATURAL RESOURCE DAMAGES**

The court found that recovery of natural resource damages under the OPA had also not yet been determined as an equitable or legal remedy, and used the same comparison to CERCLA for its analysis. *Viking Resources*, 607 F.Supp.2d at 831. Under the OPA, natural resource damages are calculated by adding “the cost of restoring, rehabilitating, replacing or acquiring the equivalent of, the damage natural resource [to] the diminution in value of the natural resources pending restoration and the cost of assessing those damages.” *Id.* (citing the Oil Pollution Act (codified at 33 U.S.C. § 2706(d)(1)). Historically, one court considering similar remedies under CERCLA had determined that they were equitable remedies because the recovery was similar to restitution. *Id.* (citing *United States v. Wade*, 653 F.Supp. 11, 13 (E.D. Penn. 1984)). A later court determined natural resource damages were more similar to tort damages for a property owner in a trespass or nuisance case and thus concluded that they were a legal remedy. *Id.* (citing *In re Acushet River & New Bedford Harbor*, 712 F.Supp. 994, 999-1001 (D. Mass. 1989)). However, that court did not consider the restoration or replacement costs in its analysis, viewing those damages as response costs. *Id.* at 831-32. That court assessed only the value of the resources that had been lost forever as the natural resource damage costs. *Id.* at 832.

The court here decided against fully adopting either interpretation because the OPA “explicitly provides” that restoration, replacement, or rehabilitation costs be included in the recovery. *Id.* The court, however, did conclude that some aspects of natural resource damages are similar to tort damages in a legal cause of action, specifically the recovery for “the diminution in value of those natural resources pending restoration.” *Id.* The court held since “at least one component of the natural resource damages...is legal in nature...Vikings and Chambers’ Seventh Amendment right to a jury trial triggered.” *Id.* Because of this component and the other factual questions that arose in the case, the court denied the United States motion to strike the jury demand of Viking and Chambers. *Id.* at 833.

#### **ADDITIONAL MOTIONS DENIED**

In addition to the above-discussed cross motions for summary judgment, the United States also moved for summary judgment on the removal costs and natural resource damages. *Viking Resources*, 607 F.Supp.2d at 825. Because the Coast Guard employees who estimated costs did not include data to support the figures or the sworn and certified copies of the documents required for compliance with Federal Rule of Civil

Procedure 56(e)(1), the court held that, without these documents, the government had provided insufficient evidence for a summary judgment. *Id.*

Viking and Chambers argued any recovery in this suit should be foreclosed because of prior litigation that the State of Texas had brought. *Id.* The court held that, despite the prior case, the affirmative defenses of release, collateral estoppel, and res judicata all fail because the United States was not a party in the prior suit, and the state suit did “not involve the same claims or issues relevant to the claims asserted” here. *Id.* at 826-27.

The United States filed an additional motion to correct a material inaccuracy concerning certain requests for information from Viking that the United States claimed it did not receive. *Id.* at 827. The court held this motion to be moot and stated that the failure to provide the alleged requests did not factor into the court’s decision. *Id.* at 828.

The court also denied Viking’s and Chambers’ request to bifurcate the trial for the “determination of liability and damages.” *Id.* at 833. Yet, because the court had already determined the necessity for a jury trial for factual issues and “at least one component of natural resource damages,” the court found it would not be convenient or more economical to have separate juries for liability and damages. *Id.* at 833. The court denied the motion to bifurcate. *Id.*

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#### CASE NOTES: STATE

#### **CITY OF SAN ANTONIO V. POLLOCK, 284 S.W.3D 809 (TEX. 2009)**

In *City of San Antonio v. Pollock*, the Texas Supreme Court decided whether a closed municipal waste disposal site, from which harmful gasses escaped onto neighboring private property, could be a nuisance that amounted to a compensable taking under Article I, Section 17 of the Texas Constitution. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 811-12 (Tex. 2009). Article I, Section 17 may require the government to provide adequate compensation for taking or damaging property when it maintains a public nuisance that it knows is substantially certain to cause a specific injury to private property. *Id.* at 811-12 & n.2 (citing *City of Dallas v. Jennings*, 142 S.W.3d 310, 314, 316 (Tex. 2004)). The homeowners claimed the landfill damaged the value of their property and caused their child to contract leukemia, for which they sought personal injury damages. *Id.* at 812.

**SUMMARY OF FACTS**

From 1992 to 1998, Charles and Tracy Pollock lived in a home in San Antonio, which backed up to a waste disposal site called the West Avenue landfill. *Id.* at 813-14. Several years after the landfill was closed in 1972, the City started to receive odor complaints and had attempted to correct problems related to methane and benzene escaping from the landfill. *Id.* These efforts included operating a landfill gas collection system designed to prevent the leaking of gasses into the surrounding community. *Id.* at 814-15. The City's efforts proved largely ineffective, and the gas related problems persisted through the time the Pollocks sold their home in 1998. *Id.*

While living in the home, Tracy was pregnant with the Pollocks' daughter, Sarah, whom at age 4 was diagnosed with acute lymphoblastic leukemia (ALL). *Id.* at 812. The Pollocks sold the home in 1998 for \$2,000 less than they had paid for it, owing to their disclosure of the condition of the property to prospective buyers. *Id.* at 813. In January 2000, the Pollocks sued the City. Their suit alleged that Sarah's ALL was caused by *in utero* exposure to benzene emanating from the West Avenue landfill. *Id.* at 812.

The Pollocks contended that governmental immunity did not bar their recovery for nuisance and negligence because "Article I, section 17 of the Texas Constitution requires compensation for a nuisance that amounts to a taking of property, and the Texas Tort Claims Act waives immunity for governmental negligence in some circumstances." *Id.* at 815. At trial, the jury found that the landfill was a nuisance, that the City was negligent, and that the City acted with malice. *Id.* The jury awarded the Pollocks a verdict totaling almost \$20 million composed in part of awards for personal injury damages and exemplary damages. *Id.* On appeal by the City, the court of appeals reversed the exemplary damage award and affirmed in all other respects. *Id.* The City petitioned the Texas Supreme Court for review.

**SUMMARY OF LEGAL ANALYSIS**

The court's analysis of the Pollocks' nuisance claim focused on the public-use limitation on Article I, Section 17, which "distinguishes a negligence action from one under the constitution for destruction." *Id.* at 821 (citing *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004)). On this issue, the court made clear that, "'mere negligence which eventually contributes to the destruction of property is not a taking;' rather, the government must act intentionally." *Id.* at 820 (quoting *City of Tyler v. Likes*, 962 S.W.2d 489, 504-505 (Tex. 1997)). The court explained that "[t]his requirement is rooted in the constitutional provision that a compensable taking occurs 'only if property is damaged or appropriated for or applied to public use.'" *Id.* (quoting *Gragg*, 151 S.W.3d at 554-555). The court reasoned that because "an accidental destruction of property does not benefit the public" it is not compensable under Article I, Section 17. *Id.*

The supreme court observed that under Article I, Section 17, "a governmental entity acts intentionally if it knows either 'that a specific act [was] causing identifiable harm' or 'that the specific property damage [was] substantially certain to result from' the act." *Id.* at 821 (quoting *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004)). An action is "substantially certain" to cause damage only when the damage is "'necessarily an incident to, or necessarily a consequential result of the [entity's] action.'" *Id.* (quoting *Jennings*, 142 S.W.3d at 314)).



The Pollocks argued that subsidence, ponding, and gas generation and migration were so inherent in the operation of the subject landfill that its operation was substantially certain to damage their property, triggering Article I, Section 17. *Id.* In addressing that argument, the court relied on its prior holding in *City of Dallas v. Jennings*. *Id.* In *Jennings*, the homeowners argued it was the City's intent to damage their property by sewage flooding because the City knew that unclogging a sewer can sometimes cause backflow. *Id.* (citing *Jennings*, 142 S.W.3d at 315)). As in *Jennings*, the court found that "awareness of the mere possibility of damage is no evidence of intent." *Id.* Applying this principle, the court found, "the damage the Pollocks claim—the migration of gas onto their property—is neither necessarily incident to or a consequential result of the operation of a landfill," but was instead preventable, and that the "City's negligent failure to prevent landfill gas migration in this case is no evidence that it intended to damage the Pollocks' property." *Id.* (citation omitted). On that basis, the court reversed the ruling of the court of appeals and held that the City was immune from the Pollocks' property damage claims. *Id.* The court rendered judgment that the Pollocks take nothing on their claims. *Id.*

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**DBMS INVESTMENTS V. EXXONMOBIL CORP., No. 13-08-00449-CV, 2009 WL 1974646 (TEX. APP.—CORPUS CHRISTI JUNE 11, 2009, NO PET. H.)**

In a recent case, *DBMS Investments v. ExxonMobil Corporation*, the Corpus Christi Court of Appeals affirmed a district court's judgment, which held that the discovery rule did not toll the statute of limitations in a cause of action by a property owner against an oil and gas company whose operations contaminated the soil and groundwater on the owner's property over fifteen years before the filing of the suit. No. 13-08-00449-CV, 2009 WL 1974646 (Tex. App.—Corpus Christi June 11, 2009, no pet. h.).

The appellant was the purchaser of an RV Park located adjacent to a tract of land where a succession of oil and gas companies had once operated a gas plant. *Id.* at \*1. While operations at the gas plant had ceased in 1990, the appellant did not purchase the adjacent land until 2002. *Id.* After learning that the property's underground water and subsurface soil had been contaminated, the appellant brought suit against both ExxonMobil and the subsequent gas company operating the plant adjacent to the RV Park. *Id.* The appellant asserted causes of action for negligence, trespass, nuisance, and breach of contract against the subsequent owner of the adjacent property (who was later nonsuited) and gross negligence and malice against ExxonMobil. *Id.* The district court granted ExxonMobil's motion for summary judgment, and DBMS Investments appealed. *Id.*

At issue in the case was the applicability of the discovery rule to toll the statute of limitations for bringing an action for contamination on the property. *DBMS Investments* at \*6. In rare cases in which the nature of the injury is inherently undiscoverable and evidence of the injury is objectively verifiable, courts have recognized the discovery rule as an exception to the general accrual rule. *Id.* (citing *Computer Associates Int'l. Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996)). An injury is inherently undiscoverable if, by its very nature, it is unlikely to be discovered within the prescribed limitations period despite the exercise of due diligence. *Id.* The appellant claimed that the existing soil and groundwater contamination was undiscoverable when the property was purchased, thus tolling the accrual of a cause of action due to the discovery rule. *Id.* at \*5. ExxonMobil, however, argued both that the appellant knew that the RV Park abutted a gas plant at the time of their purchase and further that public records of oil and gas spills on the property existed at the time of purchase. *Id.*

The court of appeals found that “a reasonably diligent property owner would have inquired about the operations of the abutting gas plant and investigated the records... prior to acquiring the property, especially considering aerial photographs dating back to 1979 indicating that the gas plant had several waste pits and storage tanks surrounding the park land.” *Id.* at \*10. Thus, the court held that the contamination was not inherently undiscoverable and that had the appellant and its predecessors in interest been reasonably diligent in investigating the alleged contamination, it would have been able to file suit within the applicable statute of limitations. *Id.* Because the discovery rule did not toll the statute of limitations period in the case, judgment of the trial court against the plaintiff-appellant was affirmed. *Id.* at \*10.

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## PUBLICATIONS

### ACHIEVING THE HIGH-WATER MARK OF WAVE TECHNOLOGY

While wave energy offers the prospect of a relatively benign source of electricity, uncertainties about commercial viability, technology, and environmental impacts have suppressed development. Laura Koch, Comment, *The Promise of Wave Energy*, 2 GOLDEN GATE U. ENVTL. L.J. 163 (2008) [Wave Energy]. Exacerbating problems, according to Koch, is the Federal Energy and Regulatory Commission's (FERC) permit process, which has prematurely encouraged wave-energy developers to stake claims in large sectors of the ocean. See *id.* at 188. Technological challenges and above-market output costs exist as the primary commercial deterrents for developers, while user conflicts and uncertainties over environmental effects, especially within the fishing industry, plague policymakers. *Id.* at 163. But, the growing demand for energy near the coast, coupled with the potential to generate electricity from a clean, sustainable source, war-

rants “thoughtful exploration.” *Id.* at 170–71. In her article, Koch states that despite the need for careful state planning, wave energy is currently being improperly directed by federal agencies, when practically, states should be asserting their own power and leadership. *Id.* at 199, 194–95. While federal approaches lack adequate safeguards and planning mechanisms, states have the ability to optimally guide wave energy programs; the window for such involvement, however, is brief. *Id.* at 163, 194–95, 199. Koch’s solutions hinge on the idea that coastal states must be proactive about asserting their leadership if they are to balance the public interest in sustainable wave energy development with the interests of federal agencies, developers, and local communities. *Id.* at 199. Koch utilizes Oregon as the paradigm of proper state involvement in wave energy, highlighting its Memorandum of Understanding (MOU) with FERC, ongoing preparation, phased development, and research funding. *Id.* at 190–92.

Koch first explains two primary forms of wave energy technology, highlighting their benefits, but noting that their potential environmental impacts are still unknown. *Wave Energy*, 2 GOLDEN GATE U. ENVTL. L.J. at 165–66, 166–68. Wave energy technology is not a new concept, but historically, it has not been commercially viable. *Id.* at 164. However, the potential for tidal and wave energy is significant, theoretically meeting ten percent of U.S. electricity demands. *Id.* at 164. Current wave energy technology exists in two forms, both of which are in infancy: wave farms and point absorbers. *Id.* at 165. Wave farms utilize attenuators—four cylindrical pontoons that float on the surface of the ocean. *Id.* Waves passing over the fixture cause hinged joints between the pontoons to flex, driving hydraulic pumps. *Id.* Point absorbers utilize a free-floating buoy housed in a fixed cylinder; the buoy rises and falls relative to the cylinder, driving a hydraulic converter. *Id.* Both devices implement an undersea cable to transmit electricity to an onshore location. *Id.* The benefits of wave technology, especially as compared to other renewables like wind and solar, include greater consistency of the energy source, fewer devices needed to produce a given amount of electricity, predictability of wave strength, and a lower profile that is likely invisible from the shore. *Id.* at 165–66. These benefits are offset by fears that the devices may not be durable enough to withstand powerful ocean conditions, as well as the high price of this electricity relative to conventional sources. *Id.* at 166. Koch states, however, that costs will improve with economies of scale. *Id.*

Second, Koch frames the current context against which wave energy is emerging. *Wave Energy*, 2 GOLDEN GATE U. ENVTL. L.J. at 167–69. The Pew Oceans Commission and the U.S. Commission on Ocean Policy both indicate that the state of ocean health and the ecological integrity of ocean resources are declining, affecting our abilities to fully realize ocean potential, threatening revenue, and affecting human health. *Id.* at 168. The need to expand wave energy is evidenced, Koch suggests, by the fact that by 2025, seventy-five percent of the population will be living near the coast; ocean conservationists and environmental groups have therefore concluded that offshore renewable energy “appears to be worth the risks.” *Id.* at 170–71. Unlike conservation, “energy expansion always has negative environmental impacts.” *Id.* The U.S. Minerals Management Service (MMS) released a programmatic Environmental Impact Statement (EIS), which insisted that many factors, including the physical and ecological conditions, will vary by location, but several areas of general concern exist. *Id.* at 167. Primarily at issue are the requisite anchoring systems and submarine electrical cables. *Id.* Water quality impacts would be short-term and localized, but the ecological im-

pacts might be vast. *Id.* Among the primary concerns are the cumulative noise of the large facilities, injury to animals, and alteration of coastal zone sediment transport, deposition, and erosion. *Id.* Proposed solutions abound: MMS suggests that proper siting and design can minimize these effects, aided by sonic pingers that warn marine animals. *Id.* at 167–68. Scientists propose a staggering of wave energy development, which would allow the environment to react and adjust. *Id.* at 168. Scientists also want regulators to create incentives for information sharing, believing the current “shotgun” approach of independent information gathering is inefficient. *Id.*

Legally, the realm of wave energy is mired by conflicting policies and overlapping jurisdictions between federal agencies, each of which claiming the right to direct policy. *Wave Energy*, 2 GOLDEN GATE U. ENVTL. L.J. at 176–77. The MMS and FERC stand as the two major players in the agency conflict. *Id.* Koch states that current statutory framework fails to promote a federal-state partnership and lacks a regulatory regime capable of balancing environmental protection and offshore energy development. *Id.* at 174. Suppressing development is the ambiguity about whether MMS or FERC is the lead agency on wave energy regulation. *Id.* at 175. Koch reiterates that siting problems, market conflicts, and unknown environmental impacts already make the commercial viability of wind energy questionable. *Id.* To this list, Koch adds the need for a proven prototype to attract outside investors—the obvious problem being the enormous initial capital that is needed for such a task. *Id.* Separate from these technical factors, Koch identifies the most significant non-technical obstacle as the regulatory conflicts between agencies, specifically the MMS and FERC. *Id.*

Before assessing the jurisdictional issues and the problems stemming from them, Koch outlines the statutory authority to regulate wave energy. *See Wave Energy*, 2 GOLDEN GATE U. ENVTL. L.J. at 177–179. Section 338 of the Energy Policy Act of 2005 (EPAAct) amended the Outer Continental Shelf Lands Act (OCSLA) to give the Secretary of the Interior jurisdiction over the development of wind, wave, ocean current, and other alternative energy sources in federal waters. *Id.* at 177. The EPAAct authorized MMS to develop regulations and policy, to monitor and regulate facilities used for renewable energy, and to act as lead agency in the permitting process. *Id.* A major criticism of MMS is their lack of opportunity for state input. However, MMS has indicated that their wave energy policy is committed to the use of adaptive management strategies, which could allow for state involvement, potentially signaling a “welcome departure” from the current approach. *Id.* at 177–178. On the other side of the problem is FERC, which acts, *inter alia*, as the federal licensing agency responsible for approving hydropower projects in “the navigable waters of the United States.” *Id.* at 178. The FERC derives its powers in this realm from the Federal Power Act (FPA), which preempts state and local laws on hydroelectric power. *Id.* at 178–79. The FERC determined in 2002 that wave, tide, and ocean current devices fell under the umbrella of “hydrokinetic technologies,” and thus required a FERC license. *Id.* at 179. The preliminary permits FERC currently authorizes for wave energy development stand in contrast to the cumbersome and expensive licensing projects of the past, which could last for 50 years initially and reflected “the size, relative permanence, and potential impact of a traditional hydroelectric dam.” *Id.* at 179. Preliminary permits do not authorize project construction, have a maximum duration of three years, and can be obtained relatively easily. *Id.* During the permit’s life, the FERC cannot award another party development rights for a site, allowing the permit holder to study the feasibil-

ity of wave energy project and prepare a license application. *Id.* This five-year permit program was designed to promote industry growth, but a full FERC license for wave energy development still requires substantially the same process as those intending to build large hydroelectric dams. *Id.* at 180. Moreover, the MMS and FERC have conflicting rights to wave energy development, with problems mainly arising in their overlap in jurisdiction. *See id.* at 175-77.

The FERC has created a jurisdictional "overlapping" by implementing a novel interpretation of the phrase, "navigable waters of the United States"—the statutory boundary of its authority. *Wave Energy*, 2 GOLDEN GATE U. ENVTL. L.J. at 180, 179. The FERC claimed its jurisdiction extended to the outer limits of the territorial sea, nine miles beyond state waters. *Id.* at 179-180. The result was a nine-mile overlapping jurisdiction between MMS and FERC, each claiming to be the lead agency. *Id.* at 180. The FERC soon issued a preliminary permit that juttred onto the OCS, causing the MMS to protest that the FERC lacked statutory authority. *Id.* at 181. The MMS criticized the FERC's permit process, arguing that it tied up large areas of potential development to the first applicant rather than the best applicant. *Id.* The MMS and the FERC have abandoned the idea of negotiating a Memorandum of Understanding (MOU). *Id.* This "inter-agency squabbling" has led to regulatory uncertainty that deters development, for which Congress has provided little resolution; currently, development located partially in state waters and partially in the OCS could be required to comply with two sets of complex, potentially-conflicting, federal schemes. *Id.*

Koch focuses much of her remaining Comment criticizing the FERC's hydropower scheme, specifically its "premature" permits. *Wave Energy*, 2 GOLDEN GATE U. ENVTL. L.J. at 186-88. One primary concern is that the agency's first-in-time approach will lead to "site-banking" and speculation, meaning potential sites will be hoarded without any intent to develop a project. *Id.* at 183. Additionally, the process is costly, needlessly time-consuming, and led to redundancies of expensive studies. *Id.* At a 2006 conference hosted by the FERC, panelists urged a more streamlined, shortened process that increased accountability requiring applicants to demonstrate their financial ability to carry out the feasibility studies and requiring submission of detailed activity plans and progress reports. *Id.* In 2007, the FERC opened up to public comments on whether it should change the permit process, and in July 2007, the Chairman Kelliher announced a five-year pilot program that would allow developers to collect data on environmental impacts and test device performance and grid connectivity. *Id.* at 184. Koch states that the unsuitability of the hydropower license scheme remained, and the new pilot program ran afoul of the Coastal Zone Management Act (CZMA). *Id.* Under the CZMA, a federal agency cannot issue a permit for activity in or affecting state waters without state consent. *Id.* States did not want to shorten their timelines to suit FERC, leading FERC to create a workaround, in which they would issue a license after their own review, even if other authorizations "remained outstanding." *Id.* at 184-85. The permits would preclude construction and were highly conditional. However, the FERC downplayed these facts in its press releases. *Id.* A lawsuit has been filed against the FERC claiming their permit policy is inconsistent with federal law. However, should the FERC prevail, their permit process still does not offer any real incentive since state authorization could take years, meaning "a conditional license provides the same certainty as no license at all." *Id.* at 185-86. Koch states that in light of the technical and environmental uncertainties, the FERC's permit process is premature,

moving ahead despite a lack of integrated planning, and making it harder to ensure that facilities are sited to most efficiently use the resource. *Id.* at 188. The long-term effects, Koch argues, of FERC's "intransigence" on the ability to create a successful, sustainable wave energy sector, may take years to understand. *Id.* at 189.

Koch concludes by discussing potential solutions to current development problems, stressing proactive approaches and urging state involvement like that of Oregon. *Wave Energy*, 2 GOLDEN GATE U. ENVTL. L.J. at 188-94. Coastal states have a statutory obligation to ensure that development in the coastal zone is consistent with its CMP and has a concurrent duty to use submerged state lands in the interest of the public. *Id.* at 195. Unlike Oregon, California has generally lacked state leadership, and as a result, the FERC has issued as many as six preliminary permits, "each representing a lost opportunity for the state to optimally guide development." *Id.* 194-195. Koch suggests that to counter the FERC's activities and properly guide wave energy, coastal states need to "prepare to participate in, rather than merely react to, wave energy siting decisions." *Id.* at 190. Oregon is the model of proactive preparation, approving \$4 million to create the Ocean Wave Energy Initiative, which subsidizes the cost of wave energy, promotes research and development, and expedites permitting. *Id.* at 190-91. Oregon has also created the Oregon Wave Energy Trust, a nonprofit energy clearinghouse that provides a forum for the exchange of information between stakeholders, the main benefit of which has been creating baseline data against which to gauge negative ecological effects. *Id.* at 191. An MOU with the FERC has also been negotiated, in which the FERC agrees to consult with the State regarding what studies and information are required by applicants. *Id.* A state emphasis on advance preparation enables states, Koch believes, to open a dialogue, make intelligent facility-siting choices, and monitor environmental impacts. *Id.* at 192.

Wave technology holds great promise to meet the growing energy gap near coastal waters with a viable renewable energy source. With wave energy technology still in its infancy, development must be steered in a way that will promote efficient use of the resource, while preserving the ecosystem and protecting state interests. The current FERC permit process is drastically flawed, and must be balanced by strong state involvement and leadership that takes a proactive approach to planning, management, and monitoring.

Wave energy in Texas is unique, in that the State of Texas has an exception to the MMS control to which other states are subject. JENNIFER VINING, UNIVERSITY OF WISCONSIN-MADISON, ECONOMIC AND LEGAL ASPECTS OF OCEAN WAVE ENERGY CONVERSION 9, (2006). Texas entered the nation as a sovereign state and retained title to lands 10.36 miles from shore, meaning Texas may control offshore leasing, as opposed to MMS. *Id.*

Wave energy in Texas has already become a reality, as the University of Texas at Galveston has tested wave energy in the Gulf of Mexico for three months. Laura McNamara, *UT Galveston Applauds Ocean Wave Energy Technology*, May 29, 2008, <http://domesticfuel.com/2008/05/29/ut-galveston-applauds-ocean-wave-energy-technology>. The testing involved a SEADOG pump, produced by Independent Natural Resources Inc.'s (INRI), which the university says is a preliminary success. *Id.* The SEADOG pump received praise for its mechanical efficiency, which absorbs most potential energy and a significant amount of the kinetic energy in the waves. *Id.*

Since the SEADOG pumps can be placed in close proximity to one another, studies have revealed they are capable of producing five to twenty times more power per square mile than other ocean, wind, and solar renewable technologies. *Id.* SEADOG also addresses two major, inter-related wave energy issues: cost and intermittency. *Id.* This pump, unlike others, is less sensitive to the corrosive effects of seawater, utilizing a simpler design with few moving parts and no electronics. *Id.* The SEADOG pump also reduces intermittency issues by transferring large amounts of water to shore for future energy production or desalination. *Id.* Most wave-energy technology involves using off-shore electrical generation to transfer power to the shore via an electrical cable along the seabed. *Id.* SEADOG pumps, however, capture wave energy to pump seawater to land-based or sea-based holding areas, which then returns the water to the ocean through turbines, producing inexpensive, renewable power. *Id.* The storage of water on-shore also allows for desalination, which adds to the SEADOG pumps' commercial viability; lack of sufficient fresh water is a growing concern in many regions of the world. *Id.*

INRI has plans to launch an 18-pump field in the Gulf of Mexico between Galveston and Freeport, Texas. *Id.* This array will serve as a commercial demonstration facility that has the dual purpose of desalinating seawater using the power that the 18 SEADOG Pumps generate. *Id.*

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## **MANAGING NONPOINT SOURCE POLLUTION IN TEXAS 2008 ANNUAL REPORT**

The Texas Nonpoint Source (NPS) Management Program was established as a joint effort between the Texas Commission on Environmental Quality (TCEQ) and the Texas State Soil and Water Conservation Board (TSSWCB) in 2005 to identify and restore water resources in Texas that are affected by nonpoint source pollution. Texas Nonpoint Source Management Program, [http://www.tceq.state.tx.us/comm\\_exec/forms/pubs/pubs/sfr/068-04\\_index.html](http://www.tceq.state.tx.us/comm_exec/forms/pubs/pubs/sfr/068-04_index.html). The implementation of this program was made possible by grants from the U.S. Environmental Protection Agency (EPA) as part of the Clean Water Act's nonpoint source pollution provisions. Clean Water Act § 319(h), 33 U.S.C. § 1329(h). To satisfy the requirements for the grants, the management program must publish and submit an annual report to the EPA about its objectives, progress, and continuing goals in nonpoint source pollution management. *Id.* The Texas State Soil and Water Conservation Board and Texas Environmental Commission on Environmental Quality released their 2009 annual report on May 13, 2009. Press Release, Texas State Soil and Water Conservation Board, TSSWCB and TCEQ Release 2008 Annual Report on Managing Nonpoint Source Water Pollution in Texas (May 13, 2009) (on file with author); TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY & TEXAS STATE SOIL AND WATER CONSERVATION BOARD, SFF-066/08, MANAGING NONPOINT SOURCE POLLUTION IN TEXAS 2008 ANNUAL REPORT 1 (2009) [hereinafter *TNPS Annual Report*].

#### OVERVIEW OF ANNUAL REPORT

Nonpoint source (NPS) pollution is any pollution that is not generated from regulated outlets of industrial or municipal treatment facilities. *TNPS Annual Report*, at 7. This type of pollution is generated by runoff from land, roads, and buildings that carries off pollutants into rivers, lakes, wetlands, and even underground sources of drinking water. *Id.* The contaminants can include fertilizers, herbicides, insecticides, oil, grease, chemicals, sediment, pet wastes, or leak from septic systems. *Id.* The success of the Texas NPS Management Program depends on the effective interplay of local, regional, state, and federal agencies. *Id.* at 3.

To reach its objectives, the Texas NPS Management Program has both long term and short term goals. Its long term goal is to protect and restore water quality affected by NPS pollution. *Id.* at 8. The program has three main short term goals. The first is to “[c]oordinate with appropriate federal, state, regional, and local entities...[to] target...grant funds towards water quality assessment activities in high priority, NPS-impacted watersheds, vulnerable and impacted aquifers, or areas where additional information is needed.” *Id.* The second short-term goal is to implement various state, region, and local plans aimed towards reducing NPS pollution. *Id.* The last short-term goal is to educate the community on activities that lead to NPS pollution to reduce or manage their occurrence. *Id.* at 9. The progress in reaching each of these goals is discussed accordingly throughout the report.

#### PROGRESS IN DATA COLLECTION AND ASSESSMENT

The TCEQ Surface Water Quality Monitoring Program carries out the assessment of water quality of Texas water bodies through sixteen regional offices, and the Clean Rivers Program through its fifteen regional water agencies. *TNPS Annual Report*, at 17. The TCEQ evaluates the data collected to determine whether the water quality meets its designated use, to implement watershed protection plans (WPPs) or total maximum daily load limits (TMDLs) where necessary, and to allocate EPA funds accordingly. *Id.*

Water bodies are classified into five main categories. *Id.* at 18. Category 1 means that all uses of the water have been assessed and met the required standards. *Id.* Category 2 means that some of the uses have been assessed and standards attained. *Id.* at 18. Category 3 means that the data is insufficient to establish a conclusion, but standards have previously been met. *Id.* Category 4 means the water quality does not meet the standards for its intended use, but the establishment of a TMDL is not needed. *Id.* Last, Category 5 includes water bodies that do not meet minimum standards for their intended use and may require a TMDL. *Id.* at 19. Any water bodies that have data that indicate the need for state remedial action are placed on the 303(d) list. Clean Water Act § 303(d)(1), 33 U.S.C. § 1313(d)(1).

Water quality showed a marginal improvement from the 2006 assessment to the 2008 assessment. In 2006, reports indicated that 543 water bodies suffered severe impairments ranging from pH problems and bacterial growth to dissolved oxygen and metal contamination. *Id.* at 21. The 2008 number shows a decrease to 516 affected



water bodies, with the most notable increases in water bodies with bacterial growth or dissolved oxygen problems. *Id.* at 2.

Another subsidiary portion of the NPS Program, the Continuous Water Quality Monitoring Network (CWQMN), has shown considerable growth. This program collects water quality data automatically from various sites throughout the state, and they are almost immediately reported back to the TCEQ for evaluation. *Id.* at 22. The CWQMN currently has sixty-three sites, with eleven new sites established in FY2008. *Id.* Twenty of these sites are currently used to monitor NPS pollution. *Id.*

One of the most significant parts of the NPS pollution management is the implementation of watershed protection plans (WPPs), which are locally developed water quality plans to manage water quality. *Id.* The TCEQ and the TSSWCB provided funding for various water basins throughout the State, creating WPPs in eight major regions: Armand Bayou, the Arroyo Colorado, Brady Creek, Caddo Lake, Dickinson Bayou, Hickory Creek, Lake Granbury, and the Upper San Antonio River. *Id.* at 39-43. Independent WPPs have also been established: the North Central Texas Water Quality Project, Cedar Creek Reservoir Shed, Eagle Mountain Lake, and Richland-Chambers Watershed. *Id.* at 43-44.

Several new developments have occurred in the WPPs. In the Arroyo Colorado, 3.3 billion pounds of nitrogen and 3.8 billion pounds of phosphorus were prevented from reaching the watershed as a result of the soil testing campaign; the region's WPP also has initiated innovative sediment models to improve soil assessment; the new simulation model was to be released in 2009. *Id.* at 39. Brady Creek has begun its planning to establish a WPP. *Id.* at 40. Dickinson Bayou is nearing completion of its WPP, which was to be ready in mid-2009. *Id.* at 41.

#### **PROGRESS IN IMPLEMENTATION OF NPS MANAGEMENT**

Part of the Texas NPS Management Program involves the allocation of grant funds to improve water quality in water bodies impacted by NPS pollution. *TNPS Annual Report*, at 23. For water bodies identified in the 303(d) list, the Clean Water Act mandates the state to set a TMDL. Clean Water Act § 303(d)(1). The State's TMDL program as of August 2008, includes the following regions: Aquilla Reservoir, the Arroyo Colorado, Clear Creek, Colorado River below E.V. Spence Reservoir, Dallas and Tarrant Counties waterways, E.V. Spence Reservoir, Fort Worth waterways, Lake O' the Pines, North Bosque River, and the Petronila Creek above tidal. *TNPS Annual Report*, at 25. Of these regions, the Aquilla Reservoir has met its goals, and the Fort Worth waterways have met some of their program goals. *Id.*

The Texas Coast Management Program (CMP) was implemented to manage coastal resources in Texas. *Id.* at 26. States that have an approved coastal zone management program are federally required to establish a program to manage coastal NPS pollution. *Id.* To gain EPA and National Oceanic and Atmospheric Association (NOAA) approval for the Texas Coastal NPS Program, the following areas were in need of correction or improvement: new development and existing development, site development, watershed protection, new and operating onsite sewage disposal systems, public transportation routes not under Texas Department of Transportation (TxDOT) jurisdictions, and hydromodification. *Id.* In July 2008, the Coastal Coordination Council notified the EPA and NOAA of the improvements made in

the designated areas, and continues to make improvements for federal approval of the CMP. *Id.*

For fiscal year 2008, the Houston Galveston Area Council (HGC) received CWA funding for its coastal management program. *Id.* The HGC intends to use these funds to implement WPPs and to conduct assessments of water quality in the area. *Id.* Another program that is a part of the TCEQ, the Galveston Bay Estuary Program (GBEP), is currently in the process of developing a WPP, tentatively set to launch in 2010. *Id.* The GBEP also supports the regional Trash Bash program, established as a volunteer litter clean-up effort for the Galveston Bay region, and the Boater Waste Education Program targeted towards reducing illegal boat discharge. *Id.*

The Texas Groundwater Protection Committee (TGPC) was established in 1989 to identify new areas where groundwater programs could be established and to remediate the degradation of groundwater sources from pesticide contamination. *Id.* A large component of the TGPC's efforts in reversing groundwater contamination is through pesticide monitoring. During the 2008 monitoring period, a total of 109 wells, twenty-two springs, and two entry points were sampled in the metropolitan areas of Austin, San Antonio, and Houston. *Id.*

#### **EDUCATING THE COMMUNITY TO REDUCE NPS POLLUTION**

The Texas NPS Management Program conducts education and technology transfer activities to raise awareness of NPS pollution and its causes. *TNPS Report*, at 29. Raising awareness in the community can help reduce the activities that lead to NPS pollution. *Id.* The Texas NPS Management Program conducts community outreach through different organizations and programs, including: Texas Stream Team Volunteer Monitoring and Environmental Education Program, Texas Watershed Steward Program, Plum Creek Outreach and Education, Yardwise Outreach Program, Colorado River Basin Campaign to Eliminate Dumping, Watershed Planning Shortcourse, Broadbased Communication and Forecasting for Environmental Quality, Public Awareness and Trash Cleanup Campaign for Petronila Creek, Oso Creek, and Oso Bay, and Texas Silvicultural NPS Pollution Prevention. *Id.*

One of the most notable efforts was through the Texas Stream Team. Over the past year, the group trained 269 new water quality monitors, certified seventy-two water quality and bacteria monitors, participated in 1,826 monitoring events through its individual monitors, submitted data for 246 statewide sites, and hosted thirty-nine NPS presentations. *Id.* at 29-30. TMDL projects, through the Trash Cleanup Campaign for Petronila and Oso Creek, hosted twenty-six presentations reaching over 5,000 members in the community, predominantly students and teachers. *Id.* at 33. Television campaigns through this program also appeared on the local Spanish station, Univision 28, during news hours and telenovelas. *Id.*

The Texas Silvicultural NPS Pollution Prevention program, set in East Texas successfully prevented over 12,000 tons of sediment from reaching streams and 100,000 tons of sediment from eroding off forestlands annually. *Id.* at 35. These results was accomplished mainly through educating the community and technical assistance programs. *Id.*

The annual report indicates a positive future towards improving water quality in Texas, especially through the ardent effort in creating WPPS and educating the community in reducing NPS-causing activity.

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#### WASHINGTON UPDATE

### ENVIRONMENTAL INITIATIVES IN OBAMA'S STIMULUS PACKAGE

On February 17, 2009 in Denver, Colorado, President Obama signed into law a \$787.2 billion economic stimulus package called the American Recovery and Reinvestment Act. American Recovery and Reinvestment Act, H.R.1, 111st Cong. (2009) (enacted). According to the Committee on Appropriations, the American Recovery and Reinvestment Bill is the "first crucial step in a concerted effort to create and save 3 to 4 million jobs, jumpstart our economy, and begin the process of transforming it for the 21st century with \$787.2 billion in economic recovery tax cuts and thoughtful and carefully targeted priority investments with unprecedented accountability measures built in." See Committee on Appropriations Summary: American Recovery and Reinvestment Conference Agreement, February 13, 2009. This stimulus package includes not only initiatives to restore and improve the economy, but also includes \$71 billion for energy and environmental initiatives and \$20 billion for green tax incentives. See H.R.1. One of the stated purposes of this economic stimulus package is to invest in environmental protection that will provide long-term economic benefits. H.R.1 Sec. 3(4). This goal includes investing in energy efficiency, infrastructure improvements, transportation improvements, environmental clean-up, clean water, and scientific research. See H.R.1.

The federal government will spend billions of dollars on a variety of energy initiatives. These energy initiatives are aimed at creating jobs and reducing dependence on foreign oil by producing more renewable energy and the creation of more energy efficient buildings. See Committee on Appropriations Summary. These initiatives include: \$4.5 billion for repair of federal buildings to increase energy efficiency; \$11 billion to modernize the electric grid; \$6.3 billion for Energy Efficiency and Conservation Grants; \$5 billion for the Weatherization Assistance Program that helps low-income families retrofit and weatherize their homes, reducing energy costs; \$2.5 billion for renewable energy research; and \$6 billion for new loan guarantees for wind and solar projects. See H.R.1. Energy initiatives also include replacing older federal government vehicles with alternative fuel and plug-in vehicles, providing rebates to consumers for replacing old appliances with energy efficient Energy Star products, and funding

carbon capture and sequestration technology demonstration projects to help reduce carbon dioxide emissions. *Id.*

Infrastructure initiatives include \$4.2 billion to invest in energy efficiency projects and improve the repair and modernization of Department of Defense facilities and \$1 billion to provide clean drinking water to rural areas. *Id.* Transportation initiatives include \$8.4 billion for investments in public transportation and \$9.3 billion for investments in rail transportation such as Amtrak, high speed, and intercity rail. *Id.* Environmental clean-up initiatives include \$6 billion to clean up former weapon production and energy research sites, \$1.2 billion for the Environmental Protection Agency (EPA) federal environmental clean-up programs such as Superfund, and \$1.38 billion to support loans and grants for water and waste disposal facilities in rural areas. *Id.* One hundred million dollars will be used for competitive grants for the evaluation and cleanup of former industrial and commercial “Brownfields” sites. *Id.* Clean water initiatives also include the Clean Water State Revolving Fund, which will provide \$4 billion for loans to help communities upgrade wastewater treatment systems. *Id.*

The stimulus package focuses on funding for scientific research, such as \$3 billion for the National Science Foundation and \$2 billion to the Department of Energy for high-energy physics, nuclear physics, fusion energy sciences, and improvements to Department of Energy science facilities. *Id.* One billion dollars will be used for NASA research including climate change research. *Id.* Six hundred million dollars will go to the National Oceanic and Atmospheric Administration (NOAA) for construction and repair of facilities, ships, and equipment. *Id.*

The goal of the American Recovery and Reinvestment Act is to repair and improve the economy, in part, through environmental initiatives. This economic stimulus package emphasizes energy efficiency along with other environmental initiatives as a way for America to cut costs and reduce dependence on foreign energy sources as well as create new jobs. President Obama remarked at the signing of the American Recovery and Reinvestment Act: “Because we know we can’t power America’s future on energy that’s controlled by foreign dictators, we are taking big steps down the road to energy independence, laying the groundwork for new green energy economies that can create countless well-paying jobs. It’s an investment that will double the amount of renewable energy in three years.” Press RRemarks by the President and Vice President at the Signing of the American Recovery and Reinvestment Act, White House Press Release, February 17, 2009.

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## BURLINGTON NORTHERN AND THE RESULTANT LIMITATION OF CERCLA LIABILITY

On May 4, 2009, the Supreme Court of the United States released an opinion that limited the scope of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), for defendants in Texas and the entire nation. *Burlington N. & Santa Fe Ry Co. v. United States*, 129 S. Ct. 1870 (2009); 42 U.S.C. §§ 9601-9675. The Court addressed two specific aspects of CERCLA liability: (1) whether 42 U.S.C. §9607(a)(3) "arranger" liability should apply only to those who intend to dispose of a hazardous substance; and (2) when liability can be apportioned according to each defendant's contribution rather than be joint and several. See *Burlington Northern*, 129 S. Ct. at 1871-73.

The Court determined that an entity may be considered an "arranger" for purposes of 42 U.S.C. § 9607(a)(3) only when it takes intentional steps to dispose of a hazardous substance. *Burlington Northern*, 129 S. Ct. at 1879-80. In *Burlington Northern*, Shell Oil Company (Shell) sold a particular pesticide to Brown & Bryant, Inc. (B&B), an agricultural chemical distribution business. *Id.* at 1874-75. When B&B would purchase the particular pesticide, Shell would arrange for delivery by common carrier. *Id.* at 1875. Shell became aware that spills were occurring during the pesticide's transfer from the common carrier to B&B's storage tanks and undertook various measures to reduce the likelihood of spills. *Id.* The Court held that Shell's mere knowledge was insufficient grounds for it to be held liable as an "arranger" under 42 U.S.C. § 9607(a)(3). *Id.* at 1879-80. Instead, the Court interpreted the language of CERCLA to require actual intent to dispose of the hazardous substance in order for an entity to be considered an "arranger." *Id.*

The Court upheld the apportionment of liability by the District Court for one of the defendants rather than imposing the default of joint and several liability. *Burlington Northern*, 129 S.Ct. at 1881-83. The United States District Court for the Eastern District of California calculated the apportionment of liability of the defendant Railroads by looking into three figures. *Id.* at 1882. It first noted that the Railroad parcel constituted 19% of the surface area of the site. *Id.* Second, it noted that the Railroad had leased its parcel of land to B&B for 45% of the time B&B operated at the facility. *Id.* The District Court last considered that the volume of hazardous-substance-releasing activities on the Railroad parcel was less than 10% of the volume of the releases that occurred on the B&B property. *Id.* The District Court used this information to apportion liability even though the Railroads failed to assist the court in linking the evidence to decipher the appropriate degree of apportionment. *Id.* at 1881-1882. It concluded that the Railroads could be held responsible for 9% of the total CERCLA response cost for the site. *Id.* at 82. The District Court's apportionment is unusual in light of the rule that CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists. See *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 810 (S.D. Ohio 1983) (citation omitted).

The Ninth Circuit criticized the evidence on which the District Court based its apportionment. *Burlington Northern*, 129 S.Ct. at 1882. It did not consider either the duration of the lease or the size of the leased area alone to be a reliable measure of the harm caused by activities on the property. *Id.* The Ninth Circuit disapproved of how the District Court had relied on estimates rather than specific and detailed records as

a basis for its conclusions. *Id.* Notwithstanding these criticisms, the Supreme Court concluded that the facts in the record “reasonably supported the apportionment of liability” because they demonstrated that the Railroad parcel of land contributed less than 10% of the total site contamination. *Id.* at 1882.

The implications of *Burlington Northern* will be felt by both potentially responsible parties and the government in future CERCLA cases. Both of the holdings in *Burlington Northern* limit the liability of defendants in CERCLA cases and limit the government’s ability to obtain cleanup costs from the responsible parties. One need not look past the facts of the case itself to catch a glimpse of the ruling’s effects.

In *Burlington Northern*, the defendant Railroads were apportioned 9% of the total response cost for the site. This holding paired with the “arranger” liability holding, which precluded Shell from liability, leaves the other 91% unassigned because, aside from the defendant Railroads and Shell, all other potentially responsible parties were insolvent.

The *Burlington Northern* majority decision began by reiterating the purpose of CERCLA, which is to “promote the cleanup of hazardous waste sites and to ensure that cleanup costs are borne by those responsible for the contamination.” 129 S.Ct. at 1874. The Supreme Court’s decision, however, may harm the statute’s objective by limiting both the number of responsible parties and the extent of liability for those that are designated as responsible parties. Corporations and environmental attorneys from all parts of the country will be watching to see how lower courts interpret the *Burlington Northern* limitations on CERCLA liability.

The decision will change the way many defendants face potential CERCLA litigation. Defendants facing potential arranger liability will now seek to portray facts to support the notion that they did not intend to dispose of a hazardous substance. The holding also undercuts government efforts to bully potentially responsible parties into settling by using the threat of joint and several liability.

These limitations may have a profound effect on potentially responsible parties in Texas. The Environmental Protection Agency currently has fifty-six Superfund sites listed on its website for the state of Texas alone. U.S. Environmental Protection Agency, Region 6 Superfund Program, Texas Site Summaries, <http://www.epa.gov/earth1r6/6sf/6sf-tx.htm> (last visited June 22, 2009). Another sixty-two Texas counties contain at least one state Superfund site, based on the State’s Superfund statute. Texas Commission on Environmental Quality, Index to Superfund Sites by County, <http://www.tceq.state.tx.us/remediation/superfund/sites/county/index.html> (last visited June 22, 2009). It is unclear how state courts will interpret the *Burlington Northern* limitations on liability with regard to the state statutory equivalents.

*Burlington Northern*’s limitation of the scope of liability in CERCLA cases presents the government with new challenges when it comes to seeking contributions for cleanup costs. It threatens to change the allocation of cleanup costs and place a greater financial burden on the government. Its effects will be felt in Texas and the entire country for years to come.

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