CASE LAW UPDATE

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CHAPTER 3

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BIOGRAPHY

Emily practices in the areas of environmental law, water quality, water and wastewater utilities, and water rights. She represents municipalities, river authorities, water districts, school districts, and private entities in these and related matters before state and federal agencies and in state court. Her practice focuses on client counseling and administrative hearings for industrial, commercial and governmental clients in matters involving water rights, groundwater, water rates, water and wastewater utility matters, water quality matters, industrial and municipal solid waste, and hazardous waste cleanup and disposal.

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Board Certified - Administrative Law, Texas Board of Legal Specialization

Former Staff Attorney at the Texas Natural Resource Conservation Commission (predecessor agency to the Texas Commission on Environmental Quality)

EDUCATIONAL AND PROFESSIONAL BACKGROUND

University of Houston Law Center (J.D. - *cum laude*); Southwest Texas State University (M.A. - History, with honors); The University of Texas (B.A. - History)

Admitted to Practice: Supreme Court of Texas, 1997; United States Court of Appeals for the Fifth Circuit

Reporter on Water Law Developments in Texas for The Rocky Mountain Mineral Law Foundation's Water Law Newsletter

Water Quality and Water and Wastewater Utility Recent Development Columnist for the *State Bar of Texas Environmental Law Journal*

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A. Surface Water Rights Cases

1. *The Aransas Project v. Shaw, et al., United States District Court for the Southern District of Texas, No. 2:10-cv-00075*

On March 10, 2010, The Aransas Project ("TAP"), an environmental group whose focus is water management of the Guadalupe and San Antonio River basins and their bays and estuaries, filed suit in the United States District Court, Corpus Christi division, seeking declaratory and injunctive relief under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq*., against five State of Texas officials including three commissioners of the Texas Commission on Environmental Quality ("TCEQ Defendants" or "Commission"). TAP asks the district court to declare that these State Defendants, through an alleged failure to adequately regulate the use of surface water in the Guadalupe and San Antonio River basins, have violated Section 9 of the ESA, 16 U.S.C. § 1538, by "taking" whooping cranes, including by significantly modifying and destroying crane habitat and "harassing" cranes; and that the State's water use and diversion laws are preempted by federal law to the extent they result in "takes" of cranes.

TAP seeks injunctive relief that would:

- enjoin the TCEQ Defendants from allowing water diversion and use under existing state water rights that would alter or destroy crane habitat;
- enjoin the TCEQ Defendants from approving or processing new or pending water permits;
- enjoin the TCEQ Defendants to compile an inventory of exempt water withdrawals for livestock and domestic use and develop a process for accounting for "all water withdrawals" from the San Antonio and Guadalupe River systems;
- enjoin the TCEQ Defendants to compile inventories of all permitted and exempt withdrawals and develop a "binding plan" for water development and use that may include "reduction of existing water uses or addition of special conditions to existing permits;"
- enjoin the TCEQ Defendants to develop a Habitat Conservation Plan under Section 10 of the ESA, 16 U.S.C. § 1539, "for the San Antonio and Guadalupe River basins and San Antonio Bay," including provisions to "reduce all withdrawals" under certain circumstances; and
- appoint a Special Master to oversee development of the plans, studies, and activities necessary to implement the court's order.

The Court granted motions to intervene in the proceeding filed by the Guadalupe-Blanco River Authority ("GBRA") and the Texas Chemical Council. However, the Court denied motions to intervene filed by the Texas Farm Bureau and American Farm Bureau Federation, San Antonio Water System, San Antonio City Public Service Board, Union Carbide Corporation, and San Antonio River Authority, finding that each are adequately represented by already-admitted parties to the litigation.

The Court categorized the Texas Farm Bureau, American Farm Bureau Federation, and Union Carbide Corporation as "private water users" whose rights might be impacted by TAP's litigation, and denied intervention on the grounds that the Texas Chemical Council, as a private water user whose intervention was already granted, could adequately represent their interests. Texas Farm Bureau, the American Farm Bureau Federation, and Union Carbide Corporation argued that this categorization is improper, as they each individually possess types of water rights that the Texas Chemical Council does not hold and therefore could not represent their interests in settlement, at trial, or in the fashioning of a remedy. Similarly, the Court denied the interventions of the San Antonio Water System, San Antonio City Public Service Board, and San Antonio River Authority because, as "public water users," their interests would be represented in the proceeding by GBRA and TCEQ. San Antonio Water System, San Antonio City Public Service Board, and San Antonio River Authority argued that TCEQ, as the regulator of surface water rights in Texas, cannot be expected to represent their interests as regulated entities, and that each holds different water rights than GBRA, which therefore cannot be expected to represent their interests.

The Texas Farm Bureau, the American Farm Bureau Federation, Union Carbide Corporation, San Antonio Water System, San Antonio City Public Service Board, and San Antonio River Authority appealed the denial of their interventions to the United States Fifth Circuit. The Fifth Circuit issued a stay of the District Court proceeding. On December 22, 2010, the Fifth Circuit upheld the district court's denial of the interventions of all parties except for the San Antonio River Authority. The Court found that the San Antonio River Authority's interests lie in protecting its contractual commitments in the San Antonio River Basin and are therefore not represented by the TCEQ,

TCC, or GBRA, which represents similar interests but in different river basins.

The Texas Farm Bureau, the American Farm Bureau Federation, Union Carbide Corporation, San Antonio Water System, San Antonio City Public Service Board have sought rehearing of the Court's decision denying their respective motions to intervene.

B. Cases Regarding Drainage Easements

1. *City of Edinburg v. A.P.I. Pipe & Supply, LLC, __ S.W.3d __, 2010 WL 3342355 (Tex. App.—Corpus Christi-Edinburg 2010, no pet.)*

The City of Edinburg ("City") filed a petition for condemnation of roughly 10 acres of land to construct drainage outfall ditches along Highway 281, seeking fee title. In 2003, a Judgment in Absence of Objection was entered granting the City title. However, in 2004, the county court entered a Judgment Nunc Pro Tunc, which erroneously granted the City only a right-of-way easement over the 10 acres. The property, including these 10 acres, then changed hands to a new owner.

In 2005, the City granted TxDOT an easement to the property that it thought it owned in fee simple in order to construct the drainage easement. The owner of the property, relying on the 2004 order, filed an inverse condemnation claim, alleging that the City did not own the 10 acres in fee simple and therefore could not grant an easement to TxDOT.

TxDOT and the City both filed pleas to the jurisdiction, alleging that they are immune from suit because governmental entities are not subject to the good faith purchaser for value doctrine. However, no exception is made to this doctrine for governmental entities. The Court of Appeals also found that the property owner purchased in good faith by relying on the 2004 Judgment, which was filed in the property records and did not reflect fee simple ownership of the City. The property owners' inverse condemnation claim was therefore not barred by sovereign immunity.

Another issue in this case is the scope of a drainage easement. The property owner raised an inverse condemnation claim to the soil removed by the City and TxDOT during construction of the drainage easement. Although the 2004 Judgment granting the City a drainage easement allowed that excavating the soil is "reasonably necessary" to construction, at issue is whether the City can keep that soil and move it to another site.

Noting that an easement is merely "a liberty, privilege or advantage in land without profit, existing distinct from the ownership of the soil," the Court found that the easement only allowed the City and TxDOT to take "reasonably necessary" steps to build the easement; keeping the soil removed from the drainage easement was not necessary to its construction, operation, or maintenance. The property owners therefore could maintain an inverse condemnation action for this soil.

C. Cases Regarding Certificates of Convenience and Necessity and Administrative Law

1. *City of Waco v. Tex. Comm'n on Envtl. Quality, __ S.W.3d __, 2010 WL 3629827 (Tex. App.—Austin 2010, no pet.)*

A dairy located 82 miles upstream of Lake Waco applied with the TCEQ for a major amendment to its concentrated animal feed operation ("CAFO") permit to allow it to increase its number of cows from 690 to 999, increase its retention control structure capacity, and increase the number of acres used for land application of waste and wastewater. The City of Waco ("the City") sought a contested case hearing to oppose the application. After conducting a public meeting, the Commission denied this request. The District Court and the Court of Appeals both affirmed the Commission's decision.

The City relies on Lake Waco for its public drinking water supply, and alleged that the Lake is threatened by large amounts of phosphorous, which can produce algae and aquatic plant growth that results in depleted dissolved oxygen levels, taste, and odor problems. The City alleged that animal waste from dairy farms, particularly from heavy rain events, is a major source of the phosphorous.

The Commission determined that the City was not an "affected person" under Texas Water Code § 5.115(a) and 30 Tex. Administrative Code § 55.203. The City's argument focused on the fifth in the list of factors the Commission may consider to determine an affected person, "likely impact of the regulated activity on use of the impacted natural resource by the person." The City alleged that granting the permit to allow the dairy to increase its number of cows would increase the amount of phosphorous discharged into the Bosque River in a way that would impact the City's use of Lake Waco for public drinking water and recreation activities.

However, the Commission determined that, because the permit application would trigger more stringent waste application rules that did not apply to the dairy's existing permit because they were passed after that permit was issued, the proposed permit would reduce, rather than increase, the likelihood that pollutants from the dairy would be discharged into the watershed.

Further, evidence in the record indicated that the 82 mile distance between the dairy and Lake Waco means that any discharge from the dairy would be so diluted by the time it reached Lake Waco that it would pose no danger to the health and safety of the City or its residents.

Additionally, the executive director concluded that the City's recreational and drinking water interests

are common to the general public and thus not a justiciable interest personal to the City. The Court of Appeals held that this conclusion is supported by substantial evidence in the record.

The City also argued on appeal that the Commission's decision violated its due process rights. The Court of Appeals found that the City, by participating in the public meeting on its request for a hearing and presenting evidence with its request for a contested case hearing, was afforded sufficient opportunity for its concerns and request to be heard to satisfy due process concerns.

Justice Patterson dissented, TCEQ should have at the very least referred the question of whether the city was an "affected party" to the State Office of Administrative Hearings, as authorized under Texas Water Code § 5.115(a) and 30 Texas Administrative Code § 55.211. Justice Patterson noted the evidence in the record that the distance from the dairy to Lake Waco did not diminish the adverse effects of the dairy's discharge on the Lake. Further, Justice Patterson would not apply the substantial evidence standard of review because the Commission did not refer the case to SOAH and therefore no findings of fact or conclusions of law were prepared for the courts to review.

2. ***Creedmoor-Maha Water Supply Corporation v. Texas Comm'n on Env. Quality, 307 S.W.3d 505 (Tex. App.—Austin 2010, no pet.)***

The Creedmoor-Maha WSC ("Creedmoor") holds a certificate of convenience and necessity ("CCN") to serve a several-thousand acre region in Caldwell, Hays, Bastrop, and Travis Counties. Creedmoor currently services 2,344 existing connections. Carma-Easton, Inc. ("Carma") is seeking to develop a master planned community consisting of 10,300 living-unit equivalents south of Austin-Bergstrom Airport, a significant portion of which is within Creedmoor's CCN. Peak water demand for the project is estimated at over 13,000 gpm.

In 2005, the Legislature created a means by which an owner of 50 or more acres of land not in a platted subdivision receiving water or sewer service may petition TCEQ for an "expedited release" from a CCN so that landowner may receive service from another retail public utility. The legislature also exempted the TCEQ's proceedings on petitions for expedited release from the APA. *See* TEX. WATER CODE § 13.254(a-4).

In 2008, Carma filed with the TCEQ a petition for expedited release of the area it intends to develop. Carma alleged and presented proof that Creedmoor either refused to provide the service or was unable to do so because of inadequate infrastructure or water supplies. The City of Austin was capable of providing Carma with service. The TCEQ's Executive Director signed an order granting Carma's petition, releasing the area from Creedmoor's CCN.

Creedmoor filed suit against the TCEQ under the Uniform Declaratory Judgments Act ("UDJA") alleging that the TCEQ order was invalid and seeking injunctive relief enjoining its enforcement and enjoining Carma from seeking water service from another utility.

The trial court granted the TCEQ's plea to the jurisdiction, which was affirmed by the Court of Appeals. The Court found that Creedmoor's remedies seek to invalidate a TCEQ order. A suit challenging a specific administrative order implicates sovereign immunity because it seeks to restrain the state (or its officials) in the exercise of its discretionary statutory or constitutional authority. Unless the legislature waives sovereign immunity, such a suit is barred. Merely pleading a suit under the UDJA is no end-around of these jurisdictional limitations, as the remedy would still establish a right of relief in the absence of a waiver of sovereign immunity.

Creedmoor's claims that TCEQ acted ultra vires and unconstitutionally were also unavailing. A valid ultra vires claim cannot complain about the government's exercise of discretion, but rather that the government acted without legal authority or failed to perform a purely ministerial act. The Court found that Creedmoor merely stated legal conclusions that the TCEQ acted ultra vires, not facts demonstrating such conduct. The legislature delegated to TCEQ the exclusive authority to decide expedited release petitions, and made TCEQ's determinations final and unappealable. Creedmoor's petition merely complains of the merits of TCEQ's decision. The Court found the TCEQ acted within its delegated authority.

Creedmoor also raised a Supremacy Clause challenge, alleging that the TCEQ's application of the Water Code violated a federal statute, 7 USCA § 1926(b), which imposes restrictions on competition in areas served by associations indebted to the United States Department of Agriculture. However, the Court determined that in order to invoke the protections of § 1926(b), the utility must have "provided or made service available" to the disputed area, and that because Creedmoor did not have "pipes in the ground" or the physical ability to serve Carma's area, this element was not met.

Finally, the Court of Appeals dismissed Creedmoor's Open Courts and Due Process challenges to TCEQ's order, because Creedmoor's rights under its CCN are merely a function of statute, and a CCN does not confer property rights. Therefore, the TCEQ order does not affect a "protectable property interest" and does not implicate Open Courts or Due Process rights.

D. Cases Regarding Surface Water Flows Onto Neighboring Properties

1. *City of Borger v. Garcia, 290 S.W.3d 325 (Tex. App.-Amarillo 2009, pet. denied)*

Several homeowners' houses were damaged by flooding in 2006. Several months prior to the flood, the City of Borger (the "City") had rerouted the drainage system serving the area and installed larger drain pipes. The homeowners filed claims against the City for damage to their property without just compensation under the takings clause of Texas Constitution Article I, Section 17, alleging their damages were caused by the City's alteration of the pipes. The City filed a plea to the jurisdiction, alleging that the homeowners' claims did not state facts sufficient to invoke the court's jurisdiction. The trial court denied the City's plea, which then filed an interlocutory appeal.

Before the Court of Appeals, the City argued that the homeowners failed to plead that their property was taken or applied for a public use. The homeowners argued that their property was taken for a public use because the damage was incident to a public work that protected others from flooding.

The Court stated that the key consideration in determining whether a taking was for a public use is whether the public bore a cost for which it received a benefit. The Court held that the homeowners failed to plead facts establishing that the property damage they suffered arose out of a public work. The homeowners did not allege facts supporting their conclusion that the new drainage system contributed to their flooding, while the City's only duty in constructing the drainage system was to not increase the flow of surface water across the homeowners' property. The Court reversed the trial court's order denying the plea to the jurisdiction and dismissed the homeowners' suit.

2. *City of San Antonio v. De Miguel, 311 S.W.3d 22 (Tex. App.–San Antonio 2010, no pet.)*

De Miguel sued the City of San Antonio for inverse condemnation and nuisance, alleging that heavy rains divert flood waters onto their property via a City-owned storm water drainage channel. Plaintiffs alleged that the City knew of the condition and had considered a project to correct it. Because there was no statutory waiver of nuisance liability by the City, the Court held that the City could only be liable for a non-negligent nuisance that rises to the level of a constitutional taking. In order to assert such a claim, a party must plead and show three elements: (1) the governmental entity intentionally performed an act in the exercise of its lawful authority; (2) that resulted in the taking, damaging, or destruction of the party's property; (3) for public use.

The Court held that a city has no duty to provide drainage adequate for all floods that might occur as long as it does nothing to increase the flow of surface water across the land in question. The fact that the City had considered but did not construct a drainage project to address the issue cannot convert any negligence on the part of the City into an intentional taking; as "mere negligence that eventually contributes to the destruction of property is not a taking." *Id.* at 28.

3. *Mathis v. Barnes, 316 S.W.3d 795 (Tex. App.—Tyler, pet. filed)*

Mathis and Barnes own adjoining property. A creek flows through both. Mathis cultivated "pristine wetlands" along this creek, relying on beaver dams to keep water year round and attract waterfowl.

Barnes constructed an earthen road on his property, which effectively served as a dam as the road crossed the creek. Water eventually backed up from this road into Mathis' property. After Mathis contacted Barnes to address the flooding, Barnes installed a third drainage culvert into the road.

However, the road gave way to the waters, and as a result destroyed the beaver dams on Mathis' property and caused the release of much of the water in the wetlands that was previously retained by these dams.

Mathis sued Barnes for nuisance, trespass, negligence, and gross negligence. At trial, the jury returned a take-nothing judgment against Mathis. However, the Court of Appeals found that Barnes, by constructing the road, created a nuisance that caused physical damage to Mathis's property. Similarly, Barnes' conduct constituted trespass because the road he constructed caused the retained waters of the creek to enter upon Mathis' property.

E. Groundwater Cases

1. *Edwards Aquifer Authority v. Chemical Lime, Ltd., 291 S.W.3d 392 (Tex. 2009)*

This primary issue in this case was a determination of when the Edwards Aquifer Authority Act (the "EAA Act"), the enabling statute of the Edwards Aquifer Authority (the "EAA") became effective.

In 1993, the Legislature passed the EAA Act, which provided that the EAA would commence operations on September 1, 1993. However, the implementation of the EAA Act was delayed, first by the refusal of the United States Department of Justice to grant administrative preclearance for the EAA under the Voting Rights Act of 1965. After the Legislature amended the EAA Act to meet the Justice Department's objections, a group of landowners sued for a declaration that the EAA Act was unconstitutional, which again delayed the commencement of operations by the EAA. Eventually, the Supreme Court in *Barshop v. Medina Underground*

Water Conservation District, 925 S.W.2d 618 (Tex.1996) declared the EAA Act constitutional.

The EAA began operations the day the *Barshop* opinion was issued. The EAA then issued proposed rules to govern the process of filing for a historical use permit, setting a deadline to file of exactly six months from the date of the *Barshop* opinion. Chemical Lime, Ltd.'s predecessor in interest completed its permit application after this deadline. The EAA later informed Chemical Lime that its application would be denied because it was filed after the deadline.

Chemical Lime sued the EAA, seeking a declaration that the application deadline should have been no sooner than six months from the Supreme Court's denial of a rehearing in *Barshop*, not six months from the date of the *Barshop* ruling, which would make its application timely. In the alternative, Chemical Lime sought a declaration that it had substantially complied with the EAA Act's permit requirements. The trial court concluded that the EAA Act became effective on the date rehearing was denied in *Barshop*, and that Chemical Lime's application was therefore timely filed.

The Court of Appeals affirmed, but concluded that the permit application deadline should be six months from issuance of the mandate in *Barshop*.

The Supreme Court reversed and held for the EAA. The Court found that *Barshop's* approach to resetting the filing deadline was pragmatic, not based on a procedural occurrence in the case but on the practical reality that the EAA was prepared to commence operations on the day *Barshop* was decided, and subsequently did so. The Court held that the EAA permissibly set its permit application deadline six months after the date it became operational, which was the date of the *Barshop* ruling.

Furthermore, by missing its filing deadline, Chemical Lime did not substantially comply with the permit application process, as specified by the EAA Act, which does not allow for extensions.

2. *Bragg v. Edwards Aquifer Authority, Cause No. 06-11-18170-CV, 38th Dist. Court, Medina County, TX (May 7, 2010)*

Plaintiffs Glenn and JoLynn Bragg own two pecan orchards in Hondo, Texas. After the Texas Legislature created the Edwards Aquifer Authority ("EAA") to manage groundwater in the Edwards Aquifer, the Braggs filed for groundwater permits from the EAA for wells located at both of their orchards. Following a contested case hearing, the EAA denied a permit for one of the Bragg's wells and granted a permit in an amount less than requested for the other. The Braggs filed suit asserting a variety of state and U.S. constitutional claims, and a lengthy series of litigation ensued in both federal and state court. The claim that remained for trial in this proceeding was the Bragg's allegation that the EAA's actions constituted a taking under Article I, Section 17 of the Texas Constitution.

Following trial on March 22, 2010, the District Court rendered judgment in favor of the Braggs. The Court found that, while the enactment of the Edwards Aquifer Act (which authorized the creation of the EAA) did not deprive the Braggs of all economically viable use of their property, the implementation of the Act by the EAA – i.e. EAA's denial of the Bragg's first permit application and approval of their second application for an amount less than requested or needed - caused Plaintiffs damage. This action of the EAA unreasonably impeded the Braggs' use of their property as a pecan orchard, causing them "severe economic impact," interfered with their investment-backed expectations, and constituted a regulatory taking by the EAA of the Braggs' property as set forth in the balancing test of *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978) and *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004). The Court therefore determined that the Braggs were entitled compensation for their losses under the Texas and United States Constitutions.

To evaluate the measure of damages, the Court used two methods. For the orchard that did not receive a permit from the EAA, the Court compared the value of a dry land farm in the same county as the Braggs' orchards to the value per acre of an irrigated farm. For the orchard that received a permit in a lesser amount than sought, the Court awarded the market value per acre-foot of groundwater for the amount of water that the Braggs requested but did not receive. The total damages awarded to Plaintiffs were $732,493.40.

An appeal of this Order is anticipated.

3. *Real-Edwards Conservation and Reclamation District v. Save the Frio Foundation, Inc., 2010 WL 547045 (Tex. App.—San Antonio 2010, no pet.) (memorandum opinion)*

The Real-Edwards Conservation and Reclamation District (the "District") held a series of evidentiary hearings on an application to withdraw groundwater. At issue was a determination of whether the water to be produced was surface water or groundwater. The hearing examiner's report concluded, based on the evidence before her, that the water was groundwater.

On the day that the District's board of directors was scheduled to meet and consider the application, the Save the Frio Foundation, Inc. (the "Foundation") filed a declaratory judgment action in district court, seeking a series of seven declarations that the District exceeded its jurisdiction by, for example, issuing permits for state water without adequate testing and without determining the presence of adequate groundwater.

The applicant and the District filed pleas to the jurisdiction alleging that the Foundation's claims were not justiciable and that the Foundation had failed to exhaust administrative remedies by filing its suit before the District had ruled on the application, and without filing a motion for rehearing. The district court denied these pleas to the jurisdiction.

The Court of Appeals reversed and granted the District's pleas to the jurisdiction, finding that there was no justiciable controversy in the District's suit because there is no dispute that the District cannot issue permits for state water or in the absence of proper testing. The Court found that each determination the Foundation sought in its declaratory judgment action was based on the pending groundwater application, and not broader issues relating to the District's authority. The Foundation's declaratory judgment action merely took issue with the manner in which the District determined that the application was for groundwater, which is a fact issue for the District, rather than an issue of law for the courts, and therefore did not state a justiciable claim.

4. *Edwards Aquifer Authority v. Horton, 2010 WL 374551 (Tex. App.—San Antonio 2010, pet. denied) (memorandum opinion)*

A landowner held 629.5 acres of land with irrigation pumping rights. The landowner conveyed 387.5 acres of this land to Buyer A, thereby conveying 387.5 acre feet per annum of its base irrigation groundwater rights as a matter of law. The landowner then conveyed the remaining 242 acres of land to Buyer B, but purported to also convey 400 acre-feet per annum of base irrigation rights. The EAA informed the landowner and Buyer B that it only conveyed 242 acre-feet per annum of base irrigation groundwater because that is all that the landowner held after the first sale of land.

Buyer B sued the landowner pursuant to their contract; the landowner in turn filed a third-party claim against the EAA alleging a takings claim, promissory estoppels, and tortuous interference with contract.

The EAA prevailed on all of the landowner's claims. As a matter of law, the base irrigation groundwater pumping rights remain with the owner of land. When the landowner conveyed the land itself, the base irrigation groundwater rights were conveyed to the new owner and cannot be reserved to the grantor.

The Court also held that the EAA was entitled to its counterclaim for attorney's fees. Texas Water Code § 36.066(g) mandates that attorney's fees be awarded if a district prevails "in any suit other than a suit in which it voluntarily intervenes." In the present case, EAA was sued in a third-party claim, and did not voluntarily intervene.

5. *Mesa Water L.P. et al. v. Tex. Water Development Bd., No. D-1-GN-10-000819 (201st Dist. Ct., Travis County, Tex. Mar. 16, 2010)*

In August 2009, Water L.P. and G&J Ranch, Inc., owners of real property interests within the geographic boundaries of Groundwater Management Area 1 (GMA 1), petitioned the TWDB to modify the Desired Future Conditions (DFCs) adopted by the groundwater districts in GMA 1 to 50 percent storage remaining in 50 years in all areas of GMA 1, which differed from the adopted DFC, which varied storage remaining in the aquifer after 50 years from between 40 and 80 percent in different counties within GMA 1. The Petitioners complained that DFCs arbitrarily allocate water availability based upon different political boundaries instead of following the hydrological characteristics of the aquifer, thus making the DFCs unreasonable and a taking of private property.

On February 17, 2010, the Texas Water Development Board ("TWDB" or "Board") considered and approved the staff recommendation that the DFCs were reasonable. The staff's analysis concluded: (1) the groundwater districts engaged in joint planning; (2) the DFCs do not prohibit someone from pumping their groundwater; (3) county lines can be used to define geographic areas for different desired DFCs provided that aquifer uses and conditions support the areas; (4) the districts reasonably considered environmental impacts and spring flows; (5) the districts balanced the various interests, uses, and potential uses; and (6) the DFCs are physically possible.[1]

Following the decision, Mesa Water L.P. and G&J Ranch, Inc. sued TWDB in Travis County District Court under Texas Water Code § 6.241[2] seeking to set aside the Board's decision and find the DFC to be unreasonable. The plaintiffs sought several declarations under the Uniform Declaratory Judgment Act that claimed, in part, that the groundwater districts in GMA 1 adopted DFCs contrary to Texas law because they discriminated between groundwater right owners in the same aquifer or subdivision of an aquifer and were based on political subdivisions.[3] Plaintiffs also sought several declarations on the construction of Texas Water Code § 36.108 regarding TWDB's authority to require groundwater district's to revise

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[1] Report on Appeal of the Reasonableness of the Desired Future Conditions Adopted by the Groundwater Conservation District in Groundwater Management Area 1 for the Ogallala and Rita Blanca Aquifers, February 10, 2010.

[2] TEX. WATER CODE § 6.241(a) provides: "A person affected by a ruling, order, decision, or other act of the board may file a petition to review, set aside, modify, or suspend the act of the board."

[3] Plaintiffs' First Amended Original Petition, ¶ 21.

their adopted DFC in accordance with the TWDB's recommendations.[4] Plaintiffs further sought a declaration that the appeal process resulted in a deprivation of property without due process because they were denied the right to take discovery, compel evidence, object to testimony or cross-examine witnesses.[5] Plaintiffs filed a motion for partial summary judgment on its requested declarations regarding the Board's authority to approve the DFCs and whether the DFCs complied with the statute.[6]

TWDB filed a plea to the jurisdiction asserting sovereign immunity to suit on the basis that the staff's recommendation that the Board not find the DFCs unreasonable was not a final order that fixed the Plaintiffs' rights or liabilities.[7] TWDB also asserted that Plaintiffs' claims were not ripe, Plaintiffs lacked standing to sue, and the Board's action did not result in the taking of Plaintiffs' property.[8] The trial court agreed and granted the plea to the jurisdiction on December 9, 2010, the day of the hearing on the plea.

F. Administrative Proceedings Before the TCEQ

CCN Cases:

1. *In Re: Petition of Bolivar Water Supply Corporation, CCN No. 11257, Requesting a Cease-and-Desist Order against the City of Denton, Texas; SOAH Docket No. 582-09-6172; TCEQ Docket No. 2009-1224-UCR (Considered January 27, 2010).*

Bolivar Water Supply Corporation ("Bolivar") filed a cease-and-desist petition under Texas Water Code § 13.252 against the City of Denton ("Denton" or "City") with the Texas Commission on Environmental Quality (:TCEQ" or "Commission") after Denton annexed a portion of Bolivar's certificate of convenience and necessity ("CCN") into its municipal limits. While Denton admitted that it intended to provide retail water service to the area in the future, sought an agreement with Bolivar to provide that service, and provided a letter to Bolivar under Texas Water Code § 13.255 notifying it that the City intended to provide service to the area, Denton contended that these actions are not prohibited actions under Texas Water Code section 13.252, and thus, Bolivar's petition should be denied. The ALJ and the Commission agreed and dismissed Bolivar's petition.

2. *In Re: Application under Texas Water Code § 13.255 from the City of Karnes City to decertify a portion of CCN No. 10570 from El Oso Water Supply Corporation in Karnes County; SOAH Docket No. 582-09-6111; TCEQ Docket No. 2009-0324-UCR (Considered August 11, 2010)*

In 2008, the City of Karnes City ("Karnes City" or "City") filed an application (2008 Application) with the TCEQ to decertify a portion of the water certificate of convenience and necessity of El Oso Water Supply Corporation ("El Oso"), including a 60-acre tract that had been the subject of a previous CCN dispute and a 1994 settlement agreement between the two parties. El Oso challenged the Commission's jurisdiction to consider Karnes City's 2008 Application because of *res judicata*. The City's 1994 application for the 60-acre tract had been dismissed with prejudice in return for El Oso's agreement to not seek to have the City pay its legal fees.

The Administrative Law Judge ("ALJ") recommended that the City's 2008 Application be denied because the City's 1994 Application for the same 60-acre tract sought by the City under the 2008 Application had been dismissed with prejudice. The ALJ found that the 1994 Order was properly issued and the TCEQ has no authority to modify the incorporated terms. Karnes City argued, however, that the 2008 Application should be considered a new application and that its filing of its application was not barred because there had been material changes of the conditions since the City's 1994 Application had been dismissed. The Commissioners, disagreeing with the ALJ, agreed with the City and found that the Commission has jurisdiction to consider the 2008 Application and remanded the matter to the State Office of Administrative Hearings ("SOAH") for a hearing on the City's application in accordance with § 13.255 of the Texas Water Code. *Id.*

Rate Cases:

1. *In re: Petition by Tara Partners, Ltd. for Review of City of South Houston Water and Sewer Service Rates; SOAH Docket No. 582-09-4286; TCEQ Docket No. 2009-0445-UCR (Considered January 13, 2010)*

As an outside-city customer, Tara Partners, Ltd. ("Tara Partners") sought review by the TCEQ of the water and sewer rates enacted by the City of South Houston ("City"). The sewer rate portion of the case was severed and considered separately. At issue for the water rate case was whether Tara Partners had met the threshold jurisdictional requirements necessary to maintain an appeal of the City's rates, under Texas Water Code section 13.043(b)(3) and (c).

Specifically at issue was whether Tara Partners, the sole signatory on the petition for review, constituted 10 percent of the 18 ratepayers whose rates

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[4] *Id.*

[5] *Id.*

[6] Plaintiffs' Traditional Motion for Partial Summary Judgment.

[7] TWDB's First Amended Plea to the Jurisdiction, ¶ 32-50.

[8] *Id.* at ¶ 51-59.

had been changed. The ALJ and the Commission agreed with the City finding that under Texas Water Code § 13.043(c), "[o]ne cannot be deemed to be 10 percent of 18 because with mathematical certainty one is only 5.56 percent of 18. Where it is impossible to have less than a whole number, 2 of the 18 ratepayers are required to satisfy the "at least 10-percent" requirement to establish Commission jurisdiction."

2. ***In Re: Appeal of Multi-County Water Supply Corporation to Review the Wholesale Water Rate Increase Imposed by the City of Hamilton, CCN No. 11525, and Request for Interim Rates in Cooke County; Application No. 36280-M; SOAH Docket No. 582-09-2557; TCEQ Docket No. 2009-0048-UCR (Considered June 16, 2010)***

The Multi-County Water Supply Corporation ("MCWSC") purchases wholesale water from the City of Hamilton, who purchases the water from the Upper Leon River Municipal Water District ("Upper Leon"). The Upper Leon increased its wholesale rates by fourteen cents per thousand, which the City sought to pass-through to MCWSC. Under the Commission's bifurcated hearing process for appeals of rates based on written contracts, at issue in this case was whether the protested rate adversely affected the public interest using the factors outlined in 30 Texas Administrative Code § 291.136, specifically whether the City abused its monopoly power in the provision of water service. The ALJ and the Commissioners found that the City, by contract, possessed monopoly power over MCWSC because the 40-year term contract granted the City unilateral rights to adjust MCWSC's rates and limits MCWSC's ability to obtain water from other sources. Nevertheless, the ALJ and the Commissioners found that the City did not abuse its monopoly power when it raised MCWSC's water rates.

Wastewater Permit Cases:

1. ***In Re: Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 issued to Far Hills Utility District; SOAH Docket No. 582-09-5727; TCEQ Docket No. 2009-0290-MWD (Considered September 15, 2010)***

In March 2009, the petitioners filed a petition with the TCEQ seeking revocation of Far Hills Utility District's ("Far Hills") Texas Pollutant Discharge Elimination System ("TPDES") permit based on misstatements in the application regarding the ownership and size of the tract of land in which the treatment plant is located, as well as flaws in the notice published of that application. After the TCEQ granted the hearing requests on the petition and referred the matter to SOAH, Far Hills filed an application for a temporary order in November 2009 that would allow Far Hills to continue to operate if its permit was revoked.

In 2007, Far Hills applied for and obtained a wastewater discharge permit that is the subject of the dispute. The various notices required for the application were published in the *Montgomery County News*, a free weekly newspaper, which Far Hills claimed was the "newspaper of largest circulation in Montgomery County." In its application, Far Hills also represented that it owned 5.34 acres out of a 10-acre tract for the treatment plant site. However, it did not. It was not until 2008, after the permit was issued, that Far Hills acquired the entire 10-acre tract. In 2009, Far Hills then sold most the property, and now owns 4.887 acres of the tract, which it uses for the treatment plant.

Analyzing these facts, the ALJ found that (1) Far Hills had failed to fully disclose to the TCEQ during the application process all relevant facts regarding its ownership and configuration of the property in which the treatment plant is located; (2) the inaccuracies in the description of the land led to an inaccurate determination about who was entitled to receive mailed notice; and (3) Far Hills represented that the *Montgomery County News* was the newspaper of largest circulation in Montgomery County, which it was not. Based on these reasons, the ALJ recommended that the permit be revoked and the Commission issue a temporary order requiring Far Hills to submit a new application.

After considering the ALJ's PFD, the Commission remanded the PFD to SOAH to reopen the record to determine whether suspension of the District's permit may be appropriate in lieu of revocation and directed the ALJ to consider whether the ED's proposed temporary order includes appropriate terms and conditions, whether the proposed temporary order is appropriate under 30 Texas Administrative Code § 35.303, and whether there are feasible alternatives to a discharge under a temporary order.

2. ***In Re: Application of South Central Water Company for Proposed TPDES Permit No. WQ0014804001; SOAH Docket No. 582-08-4290; TCEQ Docket No. 2008-0473-MWD (Considered May 19, 2010)***

After considering the PFD, which recommended granting the TPDES permit, the Commissioners remanded the application back to the ALJ to reopen the record on whether the discharged effluent will impact marine life and wildlife in an adjoining property owner's wetland. Two of the three commissioners expressed concern about whether the Applicant relied too heavily on the analysis prepared by the Executive Director, and whether such reliance conflicts with 30 Texas Administrative Code § 80.127(h).

Chairman Brian Shaw stated: "Because for example, my view of this process is that once we sent that forward and we asked for additional evidence, we

asked for that to be evaluated, that the applicant has a burden obviously he has the burden of proof and he has a requirement to prove that up. But absent evidence to controvert that, that fifty-one percent is there. . . . Our rules specifically say that testimony given in evidence from the staff regardless of who called the witness, that . . . will not be construed as the ED providing or meeting the burden of proof for the applicant. So it's clear, that the ED's analysis can be utilized. And if you can't use it but to a certain amount, then I think that's something we need to discuss what is the right amount."[9]

Commissioner Carlos Rubenstein stated, "I do think there was an over-reliance on the ED's evidence." In a two to one vote, the Commissioners agreed to remand the matter back to SOAH for additional, more independent, evidence relating to the disputed issues.

3. ***In Re: Application by Farmersville Investors, LP, for TPDES Permit No. WQ0014778001; SOAH Docket No. 582-09-2895; TCEQ Docket No. 2008-1305-MWD (Considered June 16, 2010)***

After considering the PFD regarding this application and proposed TPDES permit, which recommended granting the permit with the addition of a dissolved oxygen standard for times when the discharge is directly into Lake Lavon, the Commissioners remanded the case back to SOAH to take additional evidence on (1) whether the outfall will discharge into an intermittent stream or directly into Lake Lavon; and (2) if the discharge is directly into Lake Lavon, whether the effluent limits in the draft permit will be the water quality standards.

Surface Water Rights Cases:

1. ***In Re: Application of Bradley B. Ware to Amend Water Use Permit No. 5594; SOAH Docket No. 582-08-1698; TCEQ Docket No. 2008-0181-WR (Considered April 14, 2010)***

Bradley B. Ware, the applicant, sought to amend his Water Use Permit No. 5594, which is a 10-year term permit authorizing him to annually withdraw 130 acre-feet of water from the Lampasas River. The application proposed to (1) extend the term of the permit an additional 10 years or to convert his right to a perpetual right, (2) authorize the withdrawal of 20 additional acre-feet of water per year, and (3) allow Mr. Ware to irrigate an additional 31 acres of land.

The ED recommended that the application be denied because the ED had determined there was "little to no water" available at Mr. Ware's point of diversion on the Lampasas River and opposed the issuance of the permit. In agreeing with the ED, the ALJ found that (1) the ED had standing to oppose the permit; (2) the ED did not present information outside the limits of the law; (3) the matter was a contested matter; (4) the ED's water availability model was reliable; and (5) there was no unappropriated water available for appropriation. The Commission agreed with the ALJ and denied Mr. Ware's application.

Groundwater District Matters:

1. ***In Re: Creation of a Groundwater Conservation District for Priority Groundwater Management Area in Dallam County; SOAH Docket No. 582-09-2350; TCEQ Docket No. 2008-1940-WR (Considered February 10, 2010)***

The Executive Director initiated proceedings to add three non-contiguous areas in Dallam County, Texas to the North Plains Groundwater Conservation District ("North Plains"). Several landowners within the PGMA opposed the addition of the land to North Plains or the creation of a separate district because they believe (1) there is no critical groundwater problem; (2) the area is already self-regulated; (3) there would be no benefit to the landowners or the management of groundwater in the area; and (4) the inclusion of the areas into North Plains would have no effect on the ability of the North Plains to manage its groundwater resources.

The ALJ held that 30 Texas Administrative Code § 293.19(b)(6) limits the scope of the proceeding before the ALJ to consideration of the feasibility and practicability of the ED's recommendation regarding the PGMA. Need and benefit are not to be considered. With that limitation, the ALJ found that (1) North Plains has a proven track record of effective groundwater management; (2) the boundaries of North Plains can be expanded to provide for effective management of groundwater resources in the area; (3) the tax burden to provide groundwater management in the area would be "extremely reasonable;" and (4) North Plains can be adequately funded to finance groundwater management, planning, regulatory, and district operation functions as required by Texas Water Code Chapter 36.

The Commission agreed with the ALJ and issued the order. An election was held in November 2010 regarding the annexation of the areas into North Plains. With 74 percent of the voters voting against annexation, the measure failed. The TCEQ is now expected to create a district for the area. Another election will be required to give the new district taxing authority.

[9] The video of the Commission's May 19, 2010 agenda item for the SCWC's application may be viewed at http://www.texasadmin.com/agenda.php?confid=TCEQ_OM051910&dir=tnrcc.

2. ***Notice of Executive Director's Report and Recommendation for Kinney County Underground Water Conservation District; TCEQ Docket No. 2010-0875-DIS (Considered August 11, 2010)***

The TCEQ's Executive Director, pursuant to Texas Water Code Chapters 7 and 36 and 30 Texas Administrative Code Chapters 70 and 293, issued a Report and Recommendation for Action ("Report") regarding the Kinney County Underground Water Conservation District ("District"). The ED determined that the District is not operational, and that in February 2010, the State Auditor's Office found that the District failed to implement the District's management plan objections as required by TCEQ rule, documented significant financial and operational deficiencies, and determined that the District had not fully implemented the State Auditor's 2006 recommendations.

As a result, the ED recommended that the Commission issue an order to (1) require the District to take (and in some instances to not take) certain actions; (2) dissolve the District's board of directors and call an election of a new board, (3) request that the Attorney General bring suit to appoint a receiver to collect the assets and carry on the business of the District, (4) dissolve the District, or (5) make recommendations to the Legislature for any actions the Commission deems necessary to accomplish comprehensive management in the District.

The Commission remanded the matter to the ED to investigate the facts and circumstances of any violations of Chapter 36 of the Water Code, and directed the ED to (1) pursue a compliance agreement that clearly identifies the non-compliance issues, and provides District actions needed to comply and a schedule to achieve compliance, and (2) report back to the Commission no later than three months after the compliance agreement is agreed to by the parties.

3. ***In Re: Petition by Mesa Water, L.P., for Inquiry and Selection of Review Panel pursuant to Texas Water Code § 36.108(f) and 30 Tex. Admin. Code 293.23*** **(Considered December 14, 2010)**

This petition is related to *Mesa Water, L.P., et al. v. Texas Water Development Bd.*, No. D-1-GN-10-000819 (201st Dist. Ct., Travis County, Tex. Mar. 16, 2010) previously discussed.

On October 22, 2010, Mesa Water, L.P. ("Mesa Water") filed with the TCEQ a request for an inquiry relating to joint groundwater management in Groundwater Management Area 1 ("GMA 1"), which consists of Hemphill County Underground Water Conservation District, North Plains Groundwater Conservation District, Panhandle Groundwater Conservation District, and High Plains Underground Water Conservation District No. 1. Mesa Water claimed that the GMA 1 planning process failed to result in adequate planning and did not establish reasonable "future desired conditions for the Ogallala aquifer in GMA 1." Mesa Water asserted that the districts in GMA 1 failed to discharge their joint planning responsibilities and will be unable to discharge those responsibilities because the desired future conditions ("DFCs") adopted by GMA 1 are not reasonable. Mesa Water further charged that the groundwater in the management area is not adequately protected by the rules adopted by the District in part because of the failure of the Districts to uniformly enforce substantial compliance with their respective rules and because of the failure of the Districts to adopt rules designed to achieve the DFCs in adjoining district and in areas of GMA 1 that are not in districts. Mesa Water requested that, following the inquiry, the Commission issue an order (1) requiring the Districts to adopt a single DFC for each of the subdivisions of the Ogallala aquifer in GMA 1 and the adopt and enforce equitably rules designed to achieve the DFC; (2) dissolving the boards of directors of the districts in GMA 1; or (3) dissolve the districts in GMA 1. At the December 14, 2010 Commission Agenda, Mesa Water also argued that the Texas Water Development Board ("TWDB") made it clear in its Plea to the Jurisdiction filed in the *Mesa Water L.P., et al. v. Texas Water Development Board* [10]that it had not made a final ruling, order, or decision on the reasonableness of the DFCs.

The GMA 1 groundwater districts and the ED filed responses to the petition all arguing that Texas Water Code § 36.108(f) – (k) does not allow for a review of the reasonableness of the DFCs. Instead, this review is within the purview of the TWDB, whose staff had determined that GMA 1's DFCs were reasonable. The groundwater districts and the ED also argued that Mesa Water's attack on the districts' rules was premature because the TWDB had not yet issued the managed available groundwater (MAG) amounts. The districts must have the MAG to amend management plans in a manner consistent with the DFCs. The Districts also argued that the joint planning process was adequate and that the adoption of different DFCs for different geographical areas over the same aquifer is authorized. The Commissioners agreed with Districts and the ED and dismissed the petition.

[10] No. D-1-GN-10-000819 (201st Dist. Ct., Travis County, Tex. March 16, 2010).