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Case Law Update

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Case Law Update

This case law update provides information about litigation that has occurred or is occurring around the state and before the Texas Commission on Environmental Quality (TCEQ) and the Public Utility Commission of Texas (PUC). These cases cover topics related to surface and groundwater rights, water and sewer utility matters, ratemaking proceedings, water quality permitting matters, questions of standing, issues regarding flooding, and open meetings and open records. The information in this paper is intended to provide a brief explanation of the case or dispute and information about any decision that may have been reached. Many of the cases listed in this summary are still pending or are the subject of on-going appeals.

Surface Water Cases:

Kansas v. Nebraska, 135 S.Ct. 1042 (2015).

Kansas, Nebraska, and Colorado entered into the Republican River Compact, which was approved in 1943, to apportion the “virgin water originating in” the Republican River Basin. In 1998, Kansas filed an original petition with the United States Supreme Court contending that Nebraska’s increased groundwater pumping was subject to regulation by the Compact to the extent that it depleted stream flow in the basin. The Court agreed and the parties negotiated a settlement in 2002. In 2007, following the first post-Settlement accounting period, Kansas petitioned the Supreme Court for monetary and injunctive relief claiming that Nebraska had substantially exceeded its water allocation. Nebraska requested an amendment to a portion of the settlement agreement so that “allocations of water will faithfully reflect the parties’ intent expressed in the settlement agreement and Compact.” The matter was referred to a special master who recommended for Kansas a partial disgorgement but no injunction and for Nebraska a reform to the settlement agreement.

The Supreme Court agreed and held: (1) Nebraska knowingly exposed Kansas to a substantial risk of receiving less water than provided for in the Compact, and thus knowingly failed to comply with the obligations of the settlement agreement; (2) the order requiring Nebraska to disgorge \$1.8 million for Nebraska’s additional gain from its breach of the Compact was a fair and equitable remedy; (3) Kansas was not entitled to an injunction ordering Nebraska to comply with the Compact and settlement agreement; and (4) the settlement agreement’s accounting procedures could be amended to ensure that Nebraska’s consumption of imported water from outside the Republican River basin would not count toward its allotment under the Compact.

Texas v. New Mexico, Original No. 141.

On January 24, 2014, the United States Supreme Court granted the State of Texas’ motion for leave to file a bill of complaint. Texas complains that the State of New Mexico has depleted Texas’ equitable apportionment of water under the Rio Grande Compact by allowing diversion of surface water and pumping of groundwater that is hydrologically

connected to the Rio Grande downstream of Elephant Butte Reservoir. By allowing New Mexico water users to intercept surface water and hydrologically connected groundwater below Elephant Butte in excess of what is allowed under the Compact, deliveries to Texas cannot be assured, and such uses have diminished Rio Grande Project return flows and decreased water available to Rio Grande Project beneficiaries, to the detriment of Texas.

On March 31, 2014, the Court granted the United States' motion for leave to intervene as a plaintiff. In its motion, the United States described several distinct federal interests that are at stake in this dispute over the interpretation of the Compact including: (1) the United States' ability to set diversion allocations for the Rio Grande Project under the 2008 Operating Agreement; (2) the U.S.'s interest in ensuring that New Mexico water users who do not have contracts or authorizations with the Department of the Interior do not intercept Project water or otherwise interfere with the delivery of the water to the Project beneficiaries; and (3) the U.S.'s interest in ensuring that New Mexico water users downstream of Elephant Butte Reservoir do not intercept or interfere with the delivery of Project water to Mexico pursuant to the international treaty obligations.

New Mexico filed a motion to dismiss Texas' complaint and the United States' complaint in intervention on April 30, 2014. The Court appointed A. Gregory Grimsal, Esquire, of New Orleans, Louisiana, as Special Master on November 3, 2014. Oral arguments on New Mexico's motion and the responses to the motion were heard by the Special Master on August 19, 2015.

***The Aransas Project v. Shaw*, 775 F.3d 641 (2014).**

The Aransas Project Case is a suit brought against the TCEQ alleging that the agency's management of water rights and freshwater inflows into the bays caused a take of the endangered whooping crane. On December 15, 2014, the Fifth Circuit Court of Appeals issued a revised opinion in *The Aransas Project v. Shaw* case, superseding its June 2014 opinion. See *The Aransas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014). The Fifth Circuit reversed the trial court's decision holding that the agency's issuance and administration of water rights did not foreseeably and proximately cause deaths of whooping cranes. *Id.* The Aransas Project filed its petition for a writ of certiorari with the United States Supreme Court on May 16, 2015. On June 22, 2015, the United States Supreme Court denied the petition. See *The Aransas Project v. Shaw*, 135 S.Ct. 2859 (Mem.) (2015).

***Guadalupe-Blanco River Auth. v. Texas Attorney General*, 2015 WL 868871 (Tex. App. – Austin 2015, pet. filed) (mem. op., not designated for publication).**

The Guadalupe-Blanco River Authority (GBRA) filed a suit under the Expedited Declaratory Judgment Act (Act) alleging that the San Antonio Water System (SAWS) improperly filed an application with the TCEQ that would significantly diminish the amount of water available for GBRA's water project in the Lower Guadalupe River Basin by allowing SAWS to reuse effluent that it had previously discharged and used. GBRA claimed that SAWS application creates a cloud over the revenue pledge made by GBRA

to secure bonds to pay for its project because there will be less water available to sell to its customers.

SAWS and others filed a pleas to the jurisdiction contending that the district court did not have jurisdiction over GBRA's suit because its claims were not ripe, the claims do not fall within the Act, the TCEQ has exclusive and primary jurisdiction over the controversy, and the claims are barred by sovereign immunity. The trial court granted all of the pleas and dismissed the case in its entirety. GBRA appealed.

The court of appeals affirmed the trial court's decision concluding that the declarations sought by GBRA did not seek judicial approval regarding the legality and validity of GBRA's bonds or the procedures that were used when they were issued, but rather sought declarations on the continued availability of water returned to the Guadalupe River by SAWS and to seek guarantee that the project has a supply of water that GBRA considers adequate. The court concluded that the Act authorized judgments concerning whether the requirements for issuing public securities and for disbursing or using the money pertaining to the securities complied with the Act and do not address the effect that activities of other parties might have on the ability of the bond issuer to fulfill those obligations.

GBRA has appealed the decision to the Texas Supreme Court. *See Guadalupe-Blanco River Auth. v. Texas Attorney General*, Texas Supreme Court Docket No. 15-0255.

***Texas Comm. on Environmental Quality v. Texas Farm Bureau*, 460 S.W.3d 264 (Tex. App. – Corpus Christie 2015, pet. filed).**

This case arises out of the Texas Legislature's 2011 enactment of Texas Water Code § 11.053. The law was intended to clarify the TCEQ's authority over water rights during times of drought. TEX. WATER CODE ANN. § 11.053 (Vernon's Supp. 2013). In response, the TCEQ adopted its drought rules in April 2012. 37 TEX. REG. 3096 (2012) (codified at 30 Tex. Admin. Code Ch. 36). Under these rules, the TCEQ could enforce the priority calls of senior water right holders and curtail junior upstream rights to make water available for seniors. *See* 30 Tex. Admin. Code § 36.3. In passing these rules, however, TCEQ gave its executive director authority to exempt certain junior water rights from curtailment on the basis of public health concerns if the water is needed for municipal or electric power generation purposes. *Id.* at § 36.5(c).

By the end of 2012, with the Brazos River Basin in a severe drought, the TCEQ faced its first test implementing its new rules when Dow Chemical Company (Dow), a senior water rights holder in the lower part of the basin, made a priority call. The TCEQ's executive director issued a series of orders curtailing the use of water by rights junior to Dow's. However, the executive director did not suspend the use of water by municipal and electric power generation users because of the public safety and welfare concerns. The Texas Farm Bureau and several individuals filed suit challenging the validity of the TCEQ's drought rules arguing that the agency had exceeded its statutory authority in adopting rules that allow the TCEQ to ignore priority dates and suspend certain senior water rights while leaving preferred juniors able to divert.

After considering cross-motions for summary judgment, the Travis County district court concluded that the TCEQ's drought rules were invalid and exceeded the TCEQ's statutory authority because they allow for deviation from the priority system and provide an exemption of water rights for preferred users. The TCEQ appealed the decision.

The Corpus Christi Court of Appeals, after briefing and arguments by the parties, affirmed the district court's ruling in April. The court found that the TCEQ exceeded its statutory authority when it adopted rules allowing the agency to exempt preferred junior water rights from priority calls. The court of appeals stated that the goals of section 11.053 must be accomplished in accordance with the priority of water rights established by Texas Water Code § 11.027. Thus, the court found that the TCEQ's rules allowing a senior irrigation water right to be suspended before a junior municipal water right are inconsistent with the plain meaning of Texas Water Code § 11.053. In rejecting the TCEQ's arguments, the court also noted that the "mere fact that a policy seems unwise or inconsistent with other policies does not justify a departure from the plain meaning of the legislative mandate." Moreover, the court pointed out that the TCEQ's arguments fail to consider Texas Water Code § 11.139 relating to the emergency transfers of water rights based on public health and safety reasons.

With respect to the TCEQ's assertions that it has the general power to act in the public's interest, the court held that it may not infer this authority if such authority exceeds the agency's express legislative mandate. Because sections 11.027 and 11.053 are clear regarding how priority calls should work, the court concluded that the TCEQ's general police power does not allow TCEQ to exempt certain preferred junior rights from priority calls because of public health and safety reasons. The TCEQ has appealed the decision to the Texas Supreme Court, which has asked the parties to submit briefs on the merits before it decides whether to grant or deny the TCEQ's petition for review.

***City of Highland Haven v. Taylor et al.*, 2015 WL 655278 (Tex.App. – Austin 2015, no pet.)(mem. op., not designated for publication).**

Two landowners brought suit against the City of Highland Haven (City) and Burnet County seeking damages for inverse condemnation caused by the construction of a bridge upgradient from their properties. The landowners own property along Wolf Creek Channel, which is a man-made channel that provides access to Lake LBJ. After the construction of the new bridge, sediment accumulated in Wolf Creek Channel making the channel impassable for boats. This sedimentation, the landowners argued, constituted inverse condemnation of their waterfront properties because they no longer were able to use the water in the channel as access to and from their property to Lake LBJ. The City and County filed pleas to the jurisdiction, arguing that the landowners' claims were barred by governmental immunity because their inverse condemnation claims were unsupported. The district court denied the pleas, and the City and County filed an interlocutory appeal on the denial.

The court of appeals agreed with the City and County and reversed the district court. The court of appeals found that the landowners' properties are not vested with common-law riparian rights, including the right of access, because those properties are adjacent to a man-made channel on a man-made lake. The court also declined to extend the property owner's right to access an adjacent road to include the right to access an adjacent waterway in the absence of a riparian right to do so.

***R.E. Janes Gravel Co. v. Covar et al.*, No. 14-15-00031-CV (14th Court of Appeals, filed Jan. 8, 2015).**

Over the objections of R. E. Janes Gravel Company (Company), on October 17, 2012, the TCEQ approved the City of Lubbock's (City) application to amend its water right, which already authorizes the City to reuse its surface water-based treated effluent, to allow the City to convey flows created by the discharge of its developed water-based treated effluent from its wastewater treatment plant to a diversion point downstream using the bed and banks of the North Fork Double Mountain Fork Brazos River. The City's developed water-based treated effluent is surface water from the Canadian River basin, and groundwater. The Company appealed the decision to grant the City's amendment to the Travis County District Court. On October 13, 2014, the District Court affirmed the TCEQ's order and the Company appealed.

At issue in this case is the interpretation of sections 11.042(c) and 11.046(c) of the Texas Water Code. The Company complains that the City's diversion of the surface water-based treated effluent should be subordinate to diversions by senior downstream water rights holders. The Company also alleges that neither the City nor the TCEQ measured seepage into a dry, sandy river bed when calculating carriage losses. Briefs have been filed in the case, and all parties have requested oral argument.

***Bradley B. Ware v. Texas Comm. on Environmental Quality*, No. 03-14-00416-CV, (3rd Court of Appeals, filed July 7, 2014).**

On March 20, 2006, Bradley Ware filed an application with the TCEQ to renew his term water rights permit, or in the alternative, to convert his permit to a permanent water right. The TCEQ's review of the application using its water availability model showed that there was not enough water available to grant the application for either a permanent or term permit. After an evidentiary hearing, the TCEQ Commissioner's denied Ware's application in 2010 and the Travis County District Court affirmed the agency decision in 2014. Ware appealed to the 3rd Court of Appeals.

Ware complains that (1) the Commission's finding regarding water availability is not supported by the substantial evidence in the case, (2) the Commission's order fails to comply with Texas Water Code § 11.134(b) because the order "allocates" the water available for appropriation to a subsequent applicant, the BRA, in an application yet to be decided, (3) the Commission's order fails to comply with the requirements of Texas Water Code § 11.1381, (4) the Commission's order fails to comply with the doctrine of "first in time, first in right," (5) the district court erred in failing to find the Commission acted

arbitrarily and capriciously, and (6) the Commission's order improperly contains findings regarding an application of a non-party. Briefing in this case has been completed and the case is ready to be set.

***Upper Trinity Regional Water Dist. and TCEQ v. National Wildlife Federation*, No. 01-15-00374-CV (1st Court of Appeals, filed April 21, 2015).**

By its Final Order October 2, 2013, the TCEQ granted Upper Trinity Regional Water District's (District) Water Use Permit No. 5821, which would allow the District to construct and maintain a dam and reservoir (Lake Ralph Hall) on the North Sulphur River. National Wildlife Federation appealed the TCEQ's decision to the Travis County District Court. After hearing the evidence and argument, on March 6, 2015, the court issued an order holding that the TCEQ erred in deciding that the development and implementation of its water conservation plan complied with Texas Water Code § 11.085(1)(2). The court reversed that portion of the order and remanded the matter to the TCEQ for further proceedings to address the inadequacies in the District's development and implementation water conservation plan as required by § 11.085(1)(2). Both the TCEQ and the District have appealed the decision, which is now pending in the 1st Court of Appeals.

***LGI Land, LLC v. Texas Comm. on Environmental Quality*, No. D-1-GN-15-000853 (200th Dist. Court of Travis Cnty, Tex., filed March 4, 2015).**

In October 2013, the TCEQ issued a notice of enforcement against LGI Land, LLC (LGI) for failing to obtain authorizations to divert and impound state water in on channel reservoirs in a subdivision located in Montgomery County, Texas. The TCEQ issued a default order on December 10, 2014. LGI has appealed the order seeking judicial review of the agency's decision under the Administrative Procedures Act, declaratory judgment, and injunctive relief. LGI complains, in part, that the water impoundments in question were improperly characterized by TCEQ as water of the state.

***In re: Application by the Brazos River Authority for Water Use Permit No. 5851*; TCEQ Docket No. 2005-1490-WR; SOAH Docket No. 582-10-4184.**

On June 25, 2004, the Brazos River Authority (BRA) filed an application for a System Operation Permit, which was declared administrative complete on October 15, 2004. The application was referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing after it was protested by numerous entities and individuals. The first evidentiary hearing was held in May and June of 2011. The ALJs issued a PFD in October 2011, and the Commission, after considering the initial PFD, issued an interim order remanding the application to SOAH with instructions to abate the hearing to allow BRA to develop a water management plan. BRA filed its water management plan in November 2012, and the executive director completed his review in June 2013. Once the review was completed the ALJs held another preliminary hearing and set a new schedule. However, in October 2013, the matter was abated again and the ALJs certified questions to the Commission to address the applicability of the environmental flow standards that were to be adopted in February 2014. The Commission concluded that the environmental

flow standards must be applied immediately to BRA's application and remanded the application to SOAH. BRA then revised the application and its water management plan to incorporate the environmental flow standards. After the revision, a new schedule was adopted and a second evidentiary hearing was held in February 2015. The ALJs issued a second PFD on July 17, 2015. Exceptions and replies to exceptions have been filed, and the PFD is currently pending consideration by the Commission.

Groundwater Cases:

***City of Altus, Okla. v. Spears*, 2015 WL 179004 (N.D. Texas – Amarillo Division, Jan. 14, 2015).**

This is a declaratory action case in US District Court regarding the proper interpretation of contractual provisions in a groundwater lease and water purchase contract between the parties. The contract provided that the city pay the landowners a minimum annual payment and a purchase price or rate per 1,000 gallons of water produced on and transported from land. In 2007, the parties agreed to a new rate of 75 cents per 1,000 gallons for water produced. However, the parties did not agree how to apply the new rate pursuant to the contract's pricing provisions although no water was being produced from the land, and they also disagreed about whether the lease is perpetual. The city maintained that the annual lease payment included the first 2,500 acre-feet of water at two cents per 1,000 gallons and that it did not have to pay the rate of 75 per 1,000 gallons until after it produced the first 2,500 gallons. The landowners argued that the 2007 amendment set the rate for any and all amounts of groundwater produced and that the annual lease payment did not cover the first 2,500 acre-feet.

The court held that it was clear from the plain terms of the parties' agreement that the 2007 amendment removed the first 2,500 acre-feet of water language. The amendment clearly stated that the parties desired to amend the lease to "reflect an increase in the price per 1,000 gallons that Lessee is required to pay Lessor for water produced and transported off the lease premises from two cents per 1,000 gallons to seventy five cents per 1,000 gallons without changing the minimum annual payment" The court also held that the lease was not perpetual but terminable at will by either party. Texas law provides that a lease may be perpetual only where its written terms clearly express an intent of the parties that the lease is perpetual, and for only so long as the land is used for the definitely ascertainable purpose set forth in the lease. In this case, the leased land was no longer used for the sole ascertainable purpose stated within the lease since no groundwater production has occurred on the land since 1990.

***League of United Latin American Citizens (LULAC) v. Edwards Aquifer Auth.*, No. 5:12-CV-620 (W.D. Tex., filed June 21, 2012).**

LULAC brought suit against the Edwards Aquifer Authority challenging the EAA's board apportionment based on the "one-man/one-vote" basis. Both sides have filed motions for

summary judgment, and those motions were heard by the court in June 2014. The federal court has not yet ruled on the case.

***Environmental Processing Systems v. FPL Farming, Ltd.*, 457 S.W.3d 414 (Tex. 2015).**

In the *Environmental Processing Systems* case, the Texas Supreme Court has side-stepped answering the question about whether Texas law recognizes a trespass cause of action for deep subsurface water migration. FPL Farming, Ltd. brought suit against Environmental Processing Systems (EPS) alleging that wastewater from a deep subsurface injection well had migrated and was contaminating the briny groundwater beneath property owned by FLP Farming. At the trial court level, the jury issued a verdict in favor of EPS on all claims.

At issue on appeal was, in part, whether the jury charge, which placed the burden on the plaintiff to prove the defendant entered the property “without having the consent of the owner,” was proper. The Texas Supreme Court held that consent is an element of a trespass cause of action and not an affirmative defense, and thus the plaintiff has the burden to prove that the entry was wrongful and done without consent. The court was able to avoid answering the question whether there is a trespass cause of action for deep subsurface water migration because the jury charge provided the correct definition of trespass, which resulted in a verdict in favor of EPS, thus any error in submitting the trespass question about a possible deep subsurface water migration was harmless.

***Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118 (Tex.App. – San Antonio 2013, pet. denied).**

The Braggs had filed suit against the Edwards Aquifer Authority on the basis that the Authority’s denial of the Bragg’s groundwater permit applications resulted in a regulatory taking. The court of appeals found that the Authority’s permitting system resulted in a regulatory taking but disagreed with the trial court’s methods for determining the compensation. Both parties sought review by the Texas Supreme Court; however, those petitions for review were denied. As per the court of appeals’ decision, the case was remanded to the trial court to determine compensation in a manner that is consistent with the court of appeals’ decision.

***City of Lubbock v. Coyote Lake Ranch, LLC*, 440 S.W.3d 267 (Tex.App. – Amarillo 2014, pet. granted).**

Coyote Lake Ranch, LLC brought an action against the City of Lubbock, which has a 1953 deed to the groundwater rights beneath the ranch property, for inverse condemnation, breach of contract, negligence, and declaratory judgment. Coyote Lake sought to enjoin the City from taking certain actions related to the City’s development of its proposed well field on surface estate owned by the ranch. The trial court granted Coyote Lake’s temporary injunction prohibiting the City from moving forward and the City brought an accelerated interlocutory appeal. At issue in this case whether the “Accommodation Doctrine” should be extended to groundwater development. The Accommodation Doctrine is a concept from oil and gas law which seeks to balance the rights of the surface and mineral owners while recognizing that the mineral estate is the dominant estate. To

require accommodation, the surface estate owner must demonstrate that use of the surface estate by the mineral estate is not reasonably necessary because there are other reasonable, non-interfering ways of producing the minerals.

The court of appeals reversed the trial court. The court noted that it found no authority to support the extension of the Accommodation Doctrine to severed groundwater estates. The court explained that the Texas Supreme Court in *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012) recognized the limitations to the analogy that it draws between the ownership of oil and gas and the ownership of groundwater. Thus, the court declined to extend the Accommodation Doctrine to groundwater estates, stating that “simply because a landowner may own groundwater beneath his land in a manner similar to the way in which a landowner owns oil and gas beneath his land does not necessarily translate into the analogy being taken further.” *Id.* at 274-275.

Coyote Ranch’s filed a petition for review with the Texas Supreme Court, which was granted on September 4, 2015. Oral argument is set for October 14, 2015 (Texas Supreme Court Docket No. 14-0572).

***Texas Comm’n on Environmental Quality and Post Oak Clean Green, Inc. v. Guadalupe County Groundwater Conservation Dist.*, No. 04-15-00433-CV (4th Court of Appeals, filed July 14, 2015).**

In 2001, the Guadalupe County Groundwater Conservation District (GCGCD) adopted a rule which prohibits the application of waste or sludge on any outcrop of any aquifer within the district.

In October 2013, Post Oak Clean Green, Inc. (Post Oak) filed a permit application with the TCEQ for a proposed municipal solid waste landfill to be constructed on the Carrizo-Wilcox Aquifer recharge zone within the boundaries of the district. In April 2014, the district filed suit seeking a declaratory judgment that the proposed landfill violates the district’s rules. TCEQ filed a Petition in Intervention followed by a Plea to the Jurisdiction arguing that it has exclusive jurisdiction over landfill permitting under the Texas Solid Waste Disposal Act. The TCEQ argued that the district’s rule and its declaratory judgment action were an indirect attempt to stop TCEQ from issuing a solid waste disposal permit to Post Oak.

Post Oak countersued for inverse condemnation and argued that the district’s regulations were preempted by the Solid Waste Disposal Act. Post Oak also filed a Plea to the Jurisdiction arguing that the district’s action is a collateral attack on the TCEQ’s authority before the TCEQ has issued a final order subject to judicial review. The trial court denied Post Oak’s Plea to the Jurisdiction reasoning that the District is not seeking to challenge TCEQ’s jurisdiction, but enforcing its own rules.

The court granted the district’s the motion for partial summary judgment finding that the district “is not preempted in prohibiting the application in any manner the waste over the

aquifer it manages.” The court found that there is no express or implied preemption, that the district’s rule is constitutional and not void for vagueness.

On July 13, 2015, Post Oak filed its Notice of Appeal appealing the Trial Court’s Order denying the TCEQ’s Plea to the Jurisdiction. The TCEQ also has appealed and Appellants’ briefs were due September 17, 2015.

***Fort Stockton Holdings, LP v. Middle Pecos Groundwater Conservation Dist. et al.*, No. P-7047-83-CV (83rd Dist. Court of Pecos Cnty, Tex., filed Dec. 27, 2011).**

Fort Stockton Holdings, LP applied to the Middle Pecos Groundwater Conservation District for groundwater permits to allow it to pump 47,418 acre-feet of groundwater from the Edwards-Trinity aquifer. After a contested case hearing on the application, the district denied the permit and Fort Stockton Holdings filed suit against in the district in 2011. After an interlocutory appeal regarding the timeliness of Fort Stockton Holdings’ original petition, which was decided in Fort Stockton’s favor, the case has been remanded back to the district court. The district court heard the case on September 21, 2015. From the bench, the judge granted the district’s motion for summary judgment and affirmed the district’s decision to deny Fort Stockton Holding’s permit. Fort Stockton Holding’s has a pending takings claim which will likely be severed pending the outcome of the appeal.

***Forestar (USA) Real Estate Group, Inc. v. Lost Pines Groundwater Conservation Dist. et al.*, No. 15369 (335th Dist. Court of Lee County, Texas, filed March 14, 2014); *Forestar (USA) Real Estate Group, Inc. v. Lost Pines Groundwater Conservation Dist. et al.*, No. 15385 (335th Dist. Court of Lee Cnty, Tex., filed April 17, 2014).**

Forestar filed for new groundwater production permits from Lost Pines Groundwater Conservation District to produce water from the Simsboro Aquifer for public water supply purposes on land that Forestar leases in Lee County. Although no request for a contested case hearing was received on the application, the Lost Pines board of directors granted the permits for a reduced amount of water. Forestar’s suit claims that the district’s denial of a portion of the application is not supported by substantial evidence, exceeds the district’s authority, and is a taking of Forestar’s property.

Shortly after filing its appeal of the district’s decision on its own application, Forestar challenged the district’s decision to grant a permit to Griffin Industries and the district’s denial of Forestar’s request for a contested case hearing. The suits are currently pending.

***Meyers et al. v. Lost Pines Groundwater Conservation Dist. & End Op, L.P.*, No. 29696 (21st Dist. Ct. of Bastrop Cnty, Tex., filed Nov. 7, 2014).**

Several landowners within the district and Aqua Water Supply Corporation requested party status in a contested case hearing on groundwater permit applications filed by End Op, L.P. The district granted Aqua’s request but referred the landowners’ requests to SOAH to determine if the landowners had standing. SOAH concluded the landowners did not have standing because the landowners do not use groundwater beneath their property nor do they

have plans to use the groundwater. This recommendation was adopted by the district, and the district denied the landowners party status. The landowners brought suit against the district arguing that their ownership interest in groundwater alone is sufficient to confer standing. The hearing on End Op's permit is abated while the district court considers the landowners' claims.

***Weaks v. Tex. Comm'n on Environmental Quality*, No. D-1-GN-15-000810 (53rd Dist. Ct., Travis Cnty, Tex., filed Feb. 27, 2015) (appealing *In Re: In the Matter of the Recommendation by the Executive Director to Add Portions of Briscoe, Hale, and Swisher County Priority Groundwater Management Area in High Plains Underground Water Conservation District*, TCEQ Docket No. 2013-1467-WR; SOAH Docket No. 582-14-0597).**

The Executive Director (ED) of TCEQ petitioned the Commission to create or add a groundwater conservation district in the 406 square miles of Briscoe County within the Briscoe, Hale, and Swisher County Priority Groundwater Management Area (Briscoe PGMA). As part of the petition, it was recommended that the area be included in the High Plains Underground Water Conservation District No. 1 (District). A group of Briscoe County landowners opposed the petition, and the matter was referred to SOAH. They challenged the Commission's jurisdiction in a district court in Travis County requesting the court halt the administrative proceeding; however, SOAH went ahead and convened a hearing on the merits in Briscoe County. Landowners wanted neither to be added to an existing district nor have a new district created. The ED argued that although feasible, it was not practicable to create a new groundwater conservation district. SOAH recommended and ultimately the TCEQ concluded that the addition of the area to the District will result in the effective management of the area's groundwater resources and that the addition of the area to the District can be adequately funded to finance required groundwater management planning and district operation functions.

On December 12, 2014, the TCEQ Commissioners, after considering the Executive Director's Report and the proposal for decision issued by the SOAH ALJ, issued an order requiring that the western portions of Briscoe County that are within a priority groundwater management area be added to the High Plains Underground Water Conservation District No. 1. The order directed the District to hold a vote about adding the area not later than 120 days after the date of the December 12, 2014 order.

The landowners in the case appealed the Commission's decision to the Travis County District Court claiming that the TCEQ lacks jurisdiction to force private property owners into a groundwater conservation district without compensation. The case is currently pending before the court.

***City of Conroe, Texas, et al. v. Lone Star Groundwater Conservation Dist., et al.*, No. 15-08-08942 (284th Dist. Ct., Montgomery Cnty, Tex., filed Aug. 31, 2015).**

The City of Conroe and other water utilities in Montgomery County, Texas filed a suit for declaratory judgement against Lone Star Groundwater Conservation District (District), its board members, and its general manager on August 31, 2015. The lawsuit alleges that the

(1) the District's purported *per user* groundwater regulations are *ultra vires* and thus invalid; and (2) the "desired future conditions" adopted by the District are *ultra vires* and will take, damage, or destroy the Plaintiffs' private property rights. The Plaintiffs also allege that the District did not comply with the Texas Private Real Property Rights Preservation Act of 1995 and request that the Court invalidate the District's desired future conditions, its rules, and its regulatory plan.

Petition for Inquiry Filed by Curtis Chubb, Ph.D. pursuant to Tex. Admin. Code § 293.23; TCEQ Docket No. 2015-0844-MIS.

On June 4, 2015, Dr. Curtis Chubb (Petitioner) submitted a Petition for Inquiry pursuant to Texas Water Code § 36.1082 and 30 Tex. Admin. Code § 293.23(d) alleging that the rules adopted by the Post Oak Savannah Groundwater Conservation District were not designed to achieve the desired future conditions (DFCs) adopted by Groundwater Management Area (GMA) 12, the groundwater in the management area is not adequately protected by the rules adopted by the District, and the groundwater in the management area is not adequately protected due to the failure of the District to enforce substantial compliance with its rules.

The Executive Director recommended that the petition be denied. The ED noted that the Petitioner has a different approach to the management of groundwater in GMA 12, which would be to regulate the issuance of permit rather than regulating the production of groundwater. The ED, however, commented that the Petitioner's approach does not consider a landowner's right to produce groundwater beneath his or her property. The ED concluded that the District's rules protect groundwater by establishing enough flexibility for the District to adapt to the changing circumstances of the actual aquifer levels and to reduce production as necessary to achieve the DFCs.

The Office of the Public Interest Counsel (OPIC) reached a different conclusion and recommended that the petition be granted. OPIC found that the rules adopted by the District were not designed to achieve the DFC because the District's rules do not compel action to implement reductions in groundwater usage soon enough.

The Commission, after reviewing the responses from the ED, OPIC, the District, and several other groundwater conservation districts, dismissed the petition at its August 19, 2015 Commission Agenda.

Utility Facility and CCN Acquisition Cases:

City of Blue Mound v. Southwest Water Co., 449 S.W.3d 679 (Tex.App. - Fort Worth 2014, no pet.).

The City of Blue Mound (City) attempted to use its powers of eminent domain to acquire all real property, fixtures, water rights and CCNs of the Blue Mound Water and Wastewater utility system, which is owned by Monarch Utilities. Monarch argued that the City was

attempting to acquire the entire utility as an “ongoing business solely to effectuate a change in ownership,” while the City argued that it only wanted to condemn the real property and its fixtures. The court held that the City was attempting to condemn a “going concern” and Monarch was entitled to compensation as such. The court explained that usually businesses are not entitled to have value added in a condemnation proceeding for lost profits of an ongoing business since they are free to do business elsewhere after their property has been taken; however, when a privately owned public utility is condemned by a governmental entity, the governmental entity has ensured that it will not have the competition of the former owner. In these instances, the owners are entitled to have value added as a going concern because the utility company cannot pick up and start its business elsewhere. Since Texas has no statutory provisions for compensating a going concern, the City had no authorization to bring a condemnation suit against Monarch in district court.

In the Matter of the Application from the City of Georgetown, Certificate of Convenience and Necessity No. 12369, to Acquire Facilities and Transfer and Cancel CCN No. 11590 Held by Chisholm Trail Special Utility Dist. in Bell, Burnet, and Williamson Counties, Texas; PUC Docket No. 42861; SOAH Docket No. 473-14-5143.

On October 15, 2013, Chisholm Trail Special Utility District (District) and the City of Georgetown (City) executed an Asset Transfer and Utility System Consolidation Agreement that provides for the transfer of all of the District’s assets, rights and obligations to the City and that requires the City to pay the debts of the District. To effectuate the agreement, the parties filed a Sale-Transfer-Merger (STM) Application with the TCEQ (now pending at the PUC). The application was noticed in January of 2014. Several individual and entities protested the application, and it was referred to SOAH for a contested case hearing. SOAH conducted a hearing on the merits in July 2015, and parties have filed their closing briefs. The ALJ’s PFD is expected later this fall.

In an interesting twist, on August 12, 2015, the Chisholm Trail Stakeholders Group filed a lawsuit against the District, the City, and the PUC. *See Chisholm Trail Stakeholders Group v. The Chisholm Trail Special Utility District and Directors in their official capacities; the City of Georgetown, and the Public Utility Commission of Texas*; Cause No. D-1-GN-15-003337 (419th Dist. Court of Travis Cnty, Tex., filed Aug. 12, 2015). The suit alleges that the Asset Transfer and Utility System Consolidation Agreement, as amended, (1) affects an illegal dissolution of the District, and (2) provides an illegal grant of public funds, and is therefore void. The suit alleges that the directors committed ultra vires acts outside their authority. Further, the suit claims that the City’s STM Application will result in an illegal dissolution of the District and transfer of the District’s certificate of convenience and necessity and assets, and therefore the PUC lacks jurisdiction over the City’s STM Application. Finally, the lawsuit alleges open meetings violations by the District and its board members. The suit seeks declarations from the court of various points related to the above referenced allegations.

Wholesale Rate Cases:

***Navarro County Wholesale Ratepayers v. Covar*, 2015 WL 3916249 (Tex.App. – Houston, June 25, 2015, no pet.) (mem. op., not designated for publication).**

In 2009, the City of Corsicana (City) raised the wholesale water rates of its wholesale water customers. The wholesale customers argued, among other things, that the rate increase disproportionately affected wholesale ratepayers when compared to residential retail ratepayers. The wholesale customers appealed the rate increase to the TCEQ and the matter was referred to SOAH to conduct a hearing determine whether the rate change “affected a public interest.” After conducting a hearing, the ALJ issued a PFD finding that the 2009 rate change did not adversely affect the public interest. The wholesale ratepayers appealed to Travis County District Court, which affirmed the TCEQ order dismissing the rate appeal. The wholesale ratepayers appeal the district court’s decision, and the 3rd Court of Appeals transferred the case to the 1st Court of Appeals for consideration.

The Court of Appeals, in affirming the district court’s decision, held that:

- (1) the factors listed in 30 Tex. Admin. Code § 291.133(a)(3) (now 16 Tex. Admin. Code § 24.133(a)(3)) were non-exclusive, and other factors may be considered if appropriate;
- (2) § 291.133(a)(3) does not include a comparison of the impact of the rate on wholesale versus retail customers; however, the rule adequately addresses the issue of discrimination by comparing the treatment of wholesale customers to other wholesale customers and by comparing the treatment of the seller’s own retail customers to the wholesale buyer’s retail customers;
- (3) the cost-of-service evidence is irrelevant to determining whether a protested rate adversely affects the public interest;
- (4) consideration of evidence regarding the “wastewater subsidy” would require a cost-of-service analysis and thus the Commission properly refused to consider the evidence; and
- (5) regardless of the reason for the deficit in the City’s Utility Fund, the deficit was a changed condition which gave the City a reasonable basis for increasing the water rate.

The appellant’s motion for rehearing is currently pending.

The ratepayers in the *Navarro County Wholesale Ratepayers case* have also filed an additional wholesale rate appeal with the PUC regarding the City’s 2014 rate increase. That appeal is currently abated pending the outcome of the appeal of *Navarro County Wholesale Ratepayers case*. See *Appeal of M.E.N. Water Supply Corp., Angus Water Supply Corp., Chatfield Water Supply Corp., Corbet Water Supply Corp., and the City of Kerens for Review of Decision by the City of Corsicana to Set Wholesale Water Rates*, PUC Docket No. 43931, SOAH Docket No. 472-15-1626.

Petition of North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control and Improvement Dist. No. 10, and Wells Branch Municipal Utility District from the Ratemaking Actions of the City of Austin and Request for Interim Rates in Williamson and Travis Counties.

Petition of North Austin Municipal Utility Dist. No. 1, Northtown Municipal Utility District, and Wells Branch Municipal Utility District from the Ratemaking Actions of the City of Austin and Request for Interim Rates in Williamson and Travis Counties.

PUC Docket No. 42857; SOAH Docket No. 473-14-5138.

City of Austin, Texas v. Public Utility Comm'n of Texas and State Office of Admin. Hearings and North Austin Municipal Utility Dist. No. 1, Northtown Municipal Utility Dist., Travis County Water Control and Improvement Dist. No. 10, and Wells Branch Municipal Utility Dist., D-1-GN-15-00513 (200th Dist. Court, Travis County, Texas).

Several districts (Petitioners) within the city limits or extraterritorial jurisdiction (ETJ) of the City of Austin (City) filed an Original Petition with the TCEQ appealing the City's September 10, 2012 rate ordinance that increased water and wastewater rates the City charges to the Petitioners. The jurisdiction of the petition was transferred to the PUC on September 1, 2014.

The appeal was brought pursuant to Texas Water Code § 13.044 which allows districts to appeal the rates charged by a municipality for water or sewer. Section 13.044 only applies to a district located within the corporate limit or ETJ of the City, and for which there is a resolution, ordinance, or agreement of the city consenting to the creation of the district and requiring the district to purchase water or sewer service from the city. The petition was referred to SOAH. After hearing arguments and evidence, the ALJs found that Texas Water Code § 13.044 does not require the Commission to first consider whether the contractual rate adversely affected the public interest. The ALJs noted that under § 13.044, the case is a *de novo* review of the cost of service and that the City has the burden of proof by a preponderance of evidence that its rates charged to the Petitioners for water and sewer service are just and reasonable.

After review and consideration of the evidence, the ALJs concluded that the evidence was insufficient to conduct an analysis of whether the City's rates are just and reasonable, and recommended that the Commission deny the rate increase. The Commission took oral argument and considered the PFD at its August 14, 2015 meeting and took the matter under advisement. The matter was again considered at the Commission's September 11, 2015 meeting. The Commission approved, in part, the PFD with one exception related to the inclusion of green choice electricity in the revenue requirement.

On February 9, 2015, about a week before the hearing on the merits was set to begin, the City filed a petition for declaratory judgment in Travis County District Court claiming that the PUC lacked authority under 16 Tex. Admin. Code § 24.29 to set interim rates or to

require surcharges or refunds if the PUC set a different rate in the rate appeal pending before the PUC. The City also requested a temporary restraining order (TRO) to prevent the ALJs from conducting the hearing on the merits in the SOAH proceeding. The request for the TRO was denied. The City amended its original petition and requested a permanent injunction. The Petitioners filed a plea to the jurisdiction arguing that the Court does not have jurisdiction to hear an appeal of an interlocutory agency order, the claim was not ripe, and the claim sought an advisory opinion. The PUC, in its plea to the jurisdiction and plea in abatement, ask the Court to dismiss the City's injunction petition under the doctrine of sovereign immunity, or in the alternative, to abate the matter until the PUC makes its final ruling in the rate appeal. A hearing on the City's injunction petition was held on September 9, 2015. At the September 9th hearing, the district court dismissed the City's *ultra vires* claim against the Defendants, dismissed all the claims against SOAH, and abated the case on the basis that the court should defer to the primary jurisdiction of the PUC.

Petition of Blueberry Hills Water Works, LLC, Appealing a Decision by the City of Beeville to Change Wholesale Water Rates; PUC Docket No. 44463, SOAH Docket No. 473-15-2671.

On February 18, 2015, Blueberry Hills Water Works, LLC (Blueberry) filed an appeal of the City of Beeville's wholesale water rate increase effective January 1, 2015. The matter has been referred to SOAH where SOAH will consider whether Blueberry's appeal meets the requirements of Texas Water Code § 13.043(f), and whether the wholesale water rate was set by the City pursuant to a written contract. The matter was referred to SOAH, and SOAH set an interim rate. No hearing date has been set in this case and the matter is currently pending before SOAH.

Petition of Travis County Municipal Utility Dist. No. 12 Appealing Change of Wholesale Water Rates Implemented by West Travis County Public Utility Agency, City of Bee Cave, Texas, Hays County, Texas, and West Travis County Municipal Utility Dist. No. 5; PUC Docket No. 42866; SOAH Docket No. 473-14-5144 (First Petition).

Second Petition of Travis County Municipal Utility Dist. No. 12 Appealing Change of Wholesale Water Rates Implemented by West Travis County Public Utility Agency, City of Bee Cave, Texas, Hays County, Texas, and West Travis County Municipal Utility Dist. No. 5; PUC Docket No. 43081; SOAH Docket No. 473-15-0218 (Second Petition).

On March 6, 2014, Travis County Municipal Utility District No. 12 (District) filed its first petition appealing the wholesale water rates set by West Travis County Public Utility Agency (Agency) under Texas Water Code § 13.043(f). The matter was referred to the SOAH. The hearing on the merits was held in April 2015 on whether the protested rate charged pursuant to a contract adversely affects the public interest. The parties have filed closing arguments and the proposal for decision is expected by October 2, 2015.

On July 31, 2014, the District filed a second appeal with TCEQ challenging the decision by the Agency to levy drought surcharges on the District. The Agency contends that the drought surcharges are charged pursuant to a written contract, but the District does not agree that it has entered into a written contract allowing the Agency to charge drought

surcharges. Because the two entities do not agree on whether the rate is set by contract, pursuant to 16 Tex. Admin. Code § 24.131(d), the matter has been abated until the dispute over whether the protested rate is part of a contract has been resolved by a court of proper jurisdiction.

Petition by the City of Dallas for Review of a Decision by the Sabine River Authority; PUC Docket No. 43674; SOAH Docket No. 473-15-1149.

***City of Dallas v. Sabine River Auth.*, No. 03-15-00371-CV (3rd Court of Appeals, filed June 16, 2015).**

***City of Dallas v. Cary Mac Abney et al.*; Cause No. D150045C (pending in the 260th Dist. Court of Orange Cnty, Tex.).**

The Sabine River Authority (SRA) provides wholesale raw water to the City of Dallas (City) pursuant to a set of written contracts (collectively, the Contract). The Contract automatically renewed effective November 1, 2014 for a 40-year term. However, the Contract provides that the amount of compensation that SRA is entitled to receive during the renewal term must be determined by mutual agreement. When the City and SRA were unable to agree to the amount of compensation, SRA unilaterally began charging the City a new rate. The City appealed SRA's rate contending that the rate violates the terms of the contract, is contrary to the public interest, and is unreasonably preferential, prejudicial, and discriminatory. Over SRA's objections, the PUC found that it had jurisdiction over the case, and that the PUC must first conduct a hearing to determine whether the protested rate adversely affects the public interest.

The ALJ has abated the matter because the parties did not agree that the rates set by SRA were set pursuant to the Contract. The abatement allows the courts to decide the contractual dispute between the parties. Before abating the case, however, the ALJ set an interim rate and required SRA to deposit all collections since November 2, 2014 into an escrow account.

In addition to the PUC proceeding, the City filed a declaratory judgment action in Travis County District Court seeking a declaration that the rates were not set pursuant to a written contract. (Trial Court Case Number: D-1-GN-15-000398). SRA filed a plea to the jurisdiction on the grounds that SRA had governmental immunity from the declaratory judgment action. The district court judge agreed with the SRA and granted the plea. Dallas has appealed the dismissal to the Third Court of Appeals.

Additionally, the City filed a petition in Orange County, Texas alleging that individual members of the SRA board acted *ultra vires* in their approval of the protested rates. SRA has filed an intervention against the City for amounts due and owing under Texas Local Government Code Chapter 271. The Orange County suit is still pending. *See City of Dallas v. Cary Mac Abney et al.*; Cause No. D150045C, (260th District Court of Orange Cnty, Tex.).

Retail Rates Cases:

Ratepayers' Appeal of the Decision by the City of Fritch to Change Water Rates, PUC Docket No. 43086; SOAH Docket No. 473-15-0680.

The City of Fritch raised its outside-city rates on December 17, 2013, which became effective on January 1, 2014. The City, however, did not provide notice of the rate change to the outside-city customers as required by Texas Water Code § 13.043(i). Nevertheless, a petition to appeal the rates was circulated and by May 5, 2014 had 78 ratepayer signatures.

Because the City had not given notice as required, the TCEQ directed the City to refund or credit the outside-city ratepayers the excess amount that was collected because notice was not given by the City. The money was to be credited by August 21, 2014.

Jurisdiction over water and sewer utilities transferred to the PUC on September 1, 2014. The City notified its outside-city customers of a rate change in September of 2014, but incorrectly notified the ratepayers that the proper method for appealing the increase was through a protest letter. The matter was eventually referred to SOAH to consider whether the PUC had received appeals of the required 10% of the outside-city ratepayers thereby giving the Commission jurisdiction over the appeal.

In the August 11, 2015 PFD, the ALJ concluded that the protest letters, requests to intervene, along with petitions could all be counted towards determining whether 10% of the ratepayers appealed the rate. Nevertheless, the ALJ dismissed the appeal for lack of jurisdiction because the number of verified signatures fell short of the 10% statutory threshold.

The Commission considered the PFD at its September 24, 2015 agenda.

Petition of Ratepayers of the Former River Place Water and Wastewater Systems Appealing the Water and Wastewater Rates of the City of Austin, PUC Docket No. 44010, SOAH Docket No. 473-15-2123.

On September 9, 2013, the City of Austin (City) adopted new rates for all of its outside city customers, which became effective on November 1, 2013. On September 8, 2014, the City began serving the former District customers pursuant to a contract and sent them notice of the new rates that would be effective November 1, 2014. On December 22, 2014, the customers of the former River Place Water and Wastewater Systems (Petitioners) filed an appeal with the PUC of the retail water and sewer rates imposed by the City.

The City filed a motion to dismiss the case claiming that the PUC lacks jurisdiction to hear the petition because it failed to meet the requirements of Texas Water Code § 13.043. The City contended that there was no rate change because the City simply began charging the Petitioners the same rates that other City of Austin customers were already paying for water

and wastewater service. The ALJs disagreed. They found that the November 1, 2014 rate was a rate change and thus the customers were entitled to appeal that change.

The Petitioners argued that the City's rate should be nullified because the City failed to give proper notice. The ALJs disagreed finding that the September 8, 2014 notice to the new customers adequately gave new ratepayers notice that their rates were going to go up in November 2014. The ALJs found that the Commission had jurisdiction over the cause and the Commission agreed. The case is currently abated because the parties have reached a settlement in the case.

Flooding and Drainage Cases:

***Southwestern Bell Telephone, L.P. v. Harris Cnty et al.*, 459 S.W.3d 578 (Tex. 2015).**

The Harris County Flood Control District (District) adopted the Brays Bayou Flood Damage Reduction Plan to widen and deepen the bayou. As part of the plan, several bridges would need to be demolished and widened. Through an interlocal agreement with the City of Houston, the City and the District outlined the responsibilities relating to the demolition and reconstruction of bridges owned by the City. Southwestern Bell (d/b/a AT&T) owns telecommunication facilities attached to one of the City's bridges set for demolition. At the request of the District, the City sent AT&T a letter indicating that if it failed to relocate its facilities, the City would relocate them and assess the costs against AT&T. AT&T sued the County, whose Commissioners' Court serves as the board for the District, and the City seeking an injunction preventing the removal of the facilities from the bridge and requesting a declaratory judgment that Texas Water Code § 49.223 requires the District to bear any relocation costs resulting from the project.

The trial court granted the Commissioners' plea to the jurisdiction and summary judgment to the City. The appeals court upheld the decision. The Texas Supreme Court, however reversed in part and affirmed in part the judgment of the court of appeals.

The Supreme Court concluded that the District "made necessary" the relocation of utilities as the phrase is used in section 49.223 and thus must bear the cost of relocating the facilities as required by that section. The court reasoned that the District caused the relocation of the facilities to become necessary by adopting the flood control project and contracting with the City to effectuate it. The court also noted that "the availability of an alternate plan that was never adopted is irrelevant to whether the actual plan adopted by the District 'makes necessary' the relocation." *Id.* 585.

***Harris Cnty Flood Control Dist. et al. v. Kerr*, ___ S.W.3d ___, 2015 WL 3641517 (Tex. June 12, 2015).**

Over 400 residents and homeowners in the upper While Oak Bayou watershed brought an inverse condemnation suit against Harris County (and the flood control district) alleging that the county's failure to adopt a flood control plan, and the county's approval of

development without requiring appropriate mitigation caused the plaintiffs' homes to flood. (The county commissioners are the board of directors for the flood control district.) The county filed a plea to the jurisdiction. The trial court and the court of appeals denied the plea. The Texas Supreme Court, in a split decision, affirmed the decision.

The supreme court reasoned that the summary judgment evidence shows a fact question exists regarding each of the elements of an inverse takings claims (intent, causation, and public use) because (1) at least some of evidence shows that the county was substantially certain that its actions in approving development without appropriate mitigation would cause the plaintiff's homes to flood, and (2) the county adopted a plan targeting 10-year flood events, rather than 100-year flood events with the knowledge that floods of less than 100-year events would cause flooding of the plaintiffs' homes.

Justice Willett filed a dissent and was joined by Justices Johnson, Lehrmann, and Brown. The dissent argued that there is no evidence that the County was substantially certain that its conduct would result in the flooding of the plaintiffs' particular homes or that the County ever intended to use those properties in any capacity for flood control measures. Critical of the majority's holding, the dissent noted that the Texas Supreme Court "[has] never recognized a takings claim based on nonfeasance. . . .," and that the failure to act is not an element of an inverse condemnation claim. *Id.* at *8. The dissent expressed concern that this decision greatly expanded, unnecessarily, takings liability, and would only encourage governmental entities to do nothing when it comes to flooding. Justice Willett stated, "I fear today's decision will make the government an insurer of all manner of natural disasters and inevitable man-made accidents. It endangers the ability of government to finance and carry out their necessary functions, the basis of sovereign immunity." *Id.* at *15.

Water Quality Cases:

***State of Texas, et al. v. United States Environmental Protection Agency, et al.*, No. 3:15-cv-0162 (Southern District of Texas – Galveston Division).**

Texas, along with Louisiana and Mississippi, sued the Environmental Protection Agency (EPA) and the Army Corps of Engineers challenging the newly adopted rules establishing a new definition for "Waters of the United States" under the Clean Water Act. This suit is just one of many lawsuits filed across the nation challenging EPA's rule.

On July 27, 2015, the federal government asked for the transfer of all of the district court actions to the U.S. District Court for the District of Columbia. Oral argument on that motion is set for October 1, 2015. While this motion is pending, the Judge in the *State of Texas, et al. v. U.S.E.P.A.*, stayed the suit pending the decision of the D.C. Court panel.

***Wood v. Tex. Comm'n on Environmental Quality*, 2015 WL 1089492 (Tex.App. – Corpus Christi, March 5, 2015, no pet.) (mem. op., not designated for publication).**

Landowner, Rick Wood, challenged Lerin Hill's 2006 application for a new Texas Pollution Discharge Elimination System (TPDES) permit for a wastewater treatment plant to serve the Kendall County area. Wood's contested case hearing request was granted and several issues were referred to SOAH for consideration; however, Wood's issue about whether there was a need for the facility was not referred to SOAH. The case proceeded to a contested case hearing before SOAH.

The ALJ's PFD recommended denial of Lerin Hill's application on one issue only—whether the application met the Commission's antidegradation rule. The Commission measures water quality by two standards: quantitative and narrative standards. Narrative standards apply to constituents, such as nutrients, which are harder to quantify. Quantitative standards are used for elements that are easy to quantify, such as dissolved oxygen, total dissolved solids, and other similar elements. The Commission measures antidegradation under the narrative standard, which means that the Commission would require qualitative, subjective evidence to determine if a permit would “lower . . . water quality by more than a *de minimus* extent, but not to the extent that an existing use is impaired.” *Id.* at *5.

However, the ALJ used a stricter, quantitative standard to determine whether antidegradation would occur, rather than the narrative standard required by 30 Tex. Admin. Code § 307.5. The Commission overruled the ALJ and issued a revised order. Wood's appealed the decision. The trial court upheld the Commission's decision and Woods appealed.

The Court stated that TCEQ “has the primary authority to establish surface water quality standards, which it implements, in part, in its permitting actions.” *Id.* at *5. The Court concluded that, under the substantial evidence standard, the Commission's decision was based on the ALJ's use of an incorrect standard, and that there was substantial evidence to uphold the Commission's decision to overturn the ALJ's decision on antidegradation. *Id.* at *6.

With respect to the issue of need, the Court of Appeals held that the Commission did not err when it refused to refer the issue of regionalization to SOAH. The Court found that Texas Water Code § 5.556(d) gives the Commission discretion to determine which issues should be considered at a hearing and that the Commission “wielded its discretion appropriately.” *Id.* at *4.

***Kunze v. Texas Comm'n on Environmental Quality*, 2015 WL 4908478 (Tex.App. – Austin, Aug. 14, 2015, no pet.) (mem. op., not designated for publication).**

The City of La Coste filed an application to renew its TPDES wastewater discharge permit. Notice of the application was mailed and published in accordance with TCEQ rules. The Executive Director issued the permit after no comments or hearing requests were received regarding the application. Also, no one filed a motion to overturn or reconsider the renewal. Thirty days after the Executive Director issued the permit, Harvey Lee Kunze filed a petition for judicial review of the decision. Kunze complained that that he should

have received individual mailed notice and that he should be considered an “affected person.” The Commission countered arguing that Kunze was not entitled to more notice than what was given, and that he had failed to exhaust his administrative remedies.

The Court of Appeals agreed with the Commission. The court held that Kuntz had not shown that he was entitled to individual notice and that the Commission had complied with the applicable statutes and rules regarding notice of applications. With respect to the exhaustion issue, the Court held that Kuntz failed to file a motion to overturn, and thus, he had not exhausted his administrative remedies. The court noted that “[t]he fact that the administrative remedies are unlikely to be finalized by the time the party must file his petition for judicial review does not excuse him from availing himself to those remedies.” *Id.* at *7. The court clarified that its decision in *Walter West, P.E. v. Texas Comm’n on Environmental Quality*, 260 S.W.3d 256 (Tex.App. – Austin 2008, pet. denied), stating that the court did not hold in *Walter West* that “a party who was a stranger to a permitting proceeding could seek judicial review after never having attempted any involvement in the administrative proceeding.” *Id.*

Application of DHJB Development, LLC for a Major Amendment to TPDES Permit No. WQ0014975001, TCEQ Docket No. 582-14-3427; SOAH Docket No. 2013-2228-MWD.

DHJB Development LLC, the applicant, applied for a major amendment to its wastewater discharge permit for its wastewater treatment plant located in Comal County, Texas. The applicant requested authority to discharge into an unnamed tributary of Cibolo Creek. Several landowners, whose properties were along the discharge route, protested the permit application and four issues were referred to SOAH for consideration: (1) whether the proposed permit will adversely impact use and enjoyment of adjacent and downstream property or create nuisance conditions; (2) whether the discharge route has been properly characterized; (3) whether the proposed permit complies with TCEQ siting regulations; and (4) whether the treated effluent will adversely impact the cattle that currently graze in the area.

The ALJ, after considering the evidence in the case, found that:

- (1) the permit will negatively impact the Protestants’ use and enjoyment of property because the landowners’ children could come into direct contact with wastewater effluent which had not been treated to sufficient levels to play in or drink;
- (2) the proposed discharge route was not a watercourse and the applicant was not entitled to discharge effluent to it;
- (3) the proposed discharge quality complied with the TCEQ’s rules, the discharge will not harm the wells of the Protestants; and the Applicant was permitted to discharge treated effluent under the TCEQ’s Edwards Aquifer protection rules; and

- (4) the applicant failed to demonstrate that the effluent will not adversely impact the cattle on the Protestants' property because no one testified that the cattle could consume the water directly.

The Executive Director and the Applicant filed exceptions to the PFD. They argued that the discharge route was a watercourse and the state has a superior right to use the watercourse to carry the effluent. Thus, state law allows the applicant to discharge to the unnamed tributary. The ED and the Applicant also argued that the ALJ applied an incorrect standard in analyzing the quality of effluent. Texas Surface Water Quality Standards do not require effluent to be treated to drinking water standards and that the term "primary contact recreation" is defined to include activities where there is a significant risk of ingestion.

The ALJ's PFD was considered at its July 1, 2015 Commission Agenda. The Commission agreed with the ED and the Applicant finding that the Applicant had met its burden on all issues. The Commission ordered the Applicant to propose a new order containing findings of fact and conclusions of law consistent with the Commission's directions. The new order was considered and adopted by the Commission on September 9, 2015.

TCEQ Standing Case:

***Sierra Club v. Texas Commission on Environmental Quality*, 455 S.W.3d 214 (Tex. App.-Austin 2015, pet denied).**

The Sierra Club appealed TCEQ's denial of the Sierra Club's request for a contested case hearing in the licensing of a radioactive byproduct disposal facility. The 201st Judicial District Court in Travis County agreed with TCEQ's denial of the request. The organization appealed arguing that it was entitled to a contested case hearing because one of its members had an affected justiciable interest in TCEQ's proposed action. The reasoning was that the member was affected by: (1) negative publicity; (2) dispersal of radioactive material on nearby roads; (3) groundwater contamination; (4) spills on nearby railcar transportation of by-product; (5) the same hydrological formations underlying both the affected member's and the facility's properties; and (6) winds dispersing the radioactive material.

The court of appeals opined that TCEQ was within its discretion to deny the hearing request because there was evidence in the record that among other things: (1) the members lived more than three miles from the proposed facility; (2) the proposed license complied with state rules regarding migration of radioactive materials; (3) the geology and hydrology of the proposed site demonstrate activities would not affect groundwater; (4) computer modeling suggested no detrimental radiological impact to a potential off-site resident; and (5) prevailing winds in the area did not blow in the direction of the member's land. Some arguments the Sierra Club made, i.e., general contamination and negative publicity, were struck down as interest common to the members of the general public and did not qualify as a personal justiciable interest as required in Texas Water Code § 5.115(a).

The Sierra Club also argued that the district court erred in not considering its newly discovered evidence, two internal TCEQ memos whose author was opposed to the issuance of the disposal license. It relied on section 2001.175(c) of the Administrative Procedure Act (APA) which provides that a party may apply to the court to present additional evidence. The court of appeals held that the club's reliance was misplaced because section 2001.175 applies only to judicial review from contested case hearings, and TCEQ's evaluation of the hearing request and its decision to deny such request was not a contested case subject to the APA. Lastly, the court held that even if section 2001.175 applied, the Sierra Club did not demonstrate why it failed to present the evidence to TCEQ as required by section 2001.175.

Open Meetings Cases:

***Tarrant Regional Water Dist. v. Bennett*, 453 S.W.3d 51 (Tex. App.—Ft. Worth 2014, pet. filed).**

In this open meetings case, an individual sued the Tarrant Regional Water District (TRWD) claiming that the board systematically violated the Texas Open Meetings Act (TOMA) by using committees to conduct business. The suit alleged that the Board rubber-stamped the committee's recommendations with no meaningful deliberation. TRWD argued that the suit should be dismissed for lack of jurisdiction because the suit relied upon TOMA to waive TRWD's immunity from suit; however, TOMA does not apply to meetings of board committees when less than a quorum is present. The trial court denied the district's plea to the jurisdiction and an interlocutory appeal followed. The Court of Appeals reversed and rendered a judgment of dismissal, relying on section 49.064 of the Water Code that specifically provides that a meeting of a committee of a board where less than a quorum of any one board is present is not subject to TOMA.

***Board of Adjustment of City of University Park, Texas v. Legacy Hillcrest Investments, LP*, 2014 WL 687103 (Tex. App.—Dallas Dec. 8, 2014, pet. denied)(mem. op., not designated for publication).**

This case involved a dispute between a developer and the City of University Park, Texas regarding a zoning ordinance. Among other things, the trial court found that the Board violated the TOMA by: (1) not keeping minutes or a record of work sessions; (2) not formally convening its work session; (3) not properly meeting in closed session; and (4) not identifying the applicable sections of TOMA at the conclusion of the work session. The trial court granted a permanent injunction against the Board to prohibit future violations. The court of appeals, however, disagreed and held that the trial court abused its discretion by issuing a permanent injunction regarding the taking of minutes or recording work sessions. The court held that although the record showed the Board did not take minutes or otherwise record the work sessions in violation of section 551.0121, a permanent injunction served no useful purpose since the Board has since corrected the deficiency. The court of appeals also opined that the developer did not establish the

existence of imminent harm, the existence of irreparable injury, and the absence of an adequate remedy at law, requirements for an injunction. The court of appeals also found no support for the trial court's findings that the Board violated the TOMA in findings 2-4.

Open Records Cases:

***Randall Kallinen and Paul Kubosh v. City of Houston*, 462 S.W.3d 25 (Tex. 2015).**

Two individuals sued the city in district court to compel disclosure of a traffic light study before the Attorney General issued an opinion whether the Public Information Act (PIA) excepted the withheld information from disclosure. The City filed a plea to the jurisdiction, arguing the court lacked jurisdiction over the suit until the Attorney General ruled. The trial court overruled the plea to the jurisdiction and ordered disclosure of documents and awarded attorneys fees. The court of appeals disagreed and found that, when asked, the AG must first make the determination whether information is subject to disclosure and that a requestor must exhaust all administrative remedies before suing. The Supreme Court overruled the court of appeals' ruling and held that an AG opinion is not a mandatory prerequisite to trial court's subject matter jurisdiction over suit to compel disclosure.

***Boeing Company v. Paxton*, ___ S.W.3d ___, 2015 WL 3854264 (Tex. June 19, 2015).**

This case deals with the exception of information to the PIA which that, if released, would give advantage to a competitor or bidder. Prior AG opinions and a court of appeals case concluded that the exception protects the purchasing interests of a governmental entity when conducting competitive bidding but did not apply to the interests of private parties. The Supreme Court concluded that no such limitation exists in the PIA's text and that a private party may assert the exception to protect its sensitive information.

***Abbott v. City of Dallas*, 453 S.W.3d 580 (Tex. App.—Austin 2014, pet. filed).**

This case involves whether the City of Dallas' confidential attorney-client communications were excepted from disclosure after the City was late when it requested an AG opinion regarding the information. The AG argued that (1) the attorney-client privilege may not be asserted under section 552.101, and (2) even though the privilege may be asserted under section 552.107(1), that section is discretionary and may be waived and that the City failed to demonstrate a compelling reason to withhold the information. The trial court disagreed in this case and concluded that the information constituted attorney-client communications under section 552.101 and therefore was mandatorily excepted from disclosure. The court of appeals affirmed trial court's decision.

***Tyler v. Paxton*, 2015 WL 410281 (Tex. App.—Austin Jan. 28, 2015, no pet.).**

This is yet another public information case wherein the issue was whether the Criminal District Attorney of Victoria County's attorney-client communications were excepted from disclosure after the district attorney's office was late when it requested an AG opinion

regarding the information. Again, the AG argued (1) the attorney-client privilege may not be asserted under section 552.101, and (2) even though the privilege may be asserted under section 552.107(1), that section is discretionary and may be waived and that the district attorney's office failed to demonstrate a compelling reason to withhold the information. In this case, the DA argued that there should be a good faith defense to the failure to meet the strict deadline requirements. The trial court and appeals court both declined to read into the statute a good faith defense to a governmental body's failure to meet the deadlines contained in the PIA. The court of appeals relied on the *Abbott v. City of Dallas* case to conclude that the attorney-client information falls under section 552.101 and is excepted from disclosure and that a governmental entity can establish a compelling reason to withhold the information by establishing that it was protected by the attorney-client privilege.

***Adkisson v. Paxton*, 459 S.W.3d 761 (Tex. App.—Austin 2015, no pet.).**

Bexar County Commissioner brought a declaratory judgment action challenging the AG's decision that correspondence from the commissioner's personal e-mail accounts related to work in his official capacity constituted public information subject to disclosure. The trial court also awarded attorney fees to the AG and the requestor, who had intervened in the suit. On denial of the motion for rehearing, the court of appeals rejected the commissioner's argument that the information was not information collected, assembled, or maintained for the County. It upheld the lower court's finding that correspondence conducted through a commissioner's personal e-mail account regarding transacting county business was public information subject to disclosure. The commissioner also contended that the trial court must still determine whether the information is excepted from disclosure under section 552.101 and the doctrine of common-law privacy. The court held that when the commissioner voluntarily took on his elected office, he relinquished some of the privacy expectations of a private citizen. It further opined that while the commissioner may have some privacy expectations, there is no right to privacy protecting public information or local government records. The court also modified the award of attorney's fees holding that Bexar County, and not the commissioner in his individual capacity, is liable for the attorneys fees since the request was sent to the County, and under the PIA, it was the County's duty to promptly produce the information.

***Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op., not designated for publication).**

The City of Dallas withheld birth dates of certain members of the general public from several public information requests and asked, as required by the PIA, the AG for a ruling as to whether the information should be withheld. The AG opined that the date of birth information was public information and should be disclosed. In response to the letter rulings, the City filed suit seeking a declaration that it was not required to disclose the redacted date of birth information. The trial court granted summary judgment for the City finding that the birth dates of certain members of the general public, contained in the documents being sought, were "confidential by law" and thus excepted from disclosure under section 552.101 of the PIA. The AG argued on appeal that birth dates of members

of the general public are not protected by common-law privacy and therefore are not excepted from disclosure under section 552.101. The court sided with the City and concluded that public citizens have a privacy interest in their birth dates such that the publication would be highly objectionable to the reasonable person.

***Paxton v. City of Liberty*, 2015 WL 832087 (Tex. App.—Corpus Christi-Edinburg, Feb. 26, 2015, no pet.) (mem. op., not designated for publication).**

The City of Liberty (City) received a public information request regarding a personal phone number that belonged to an officer of the City of Liberty Police Department. The city asked the AG for an opinion whether the phone number fell under two exceptions from disclosure: section 552.108 for information related to ongoing criminal cases and the common-law informer's privilege. As required by the PIA, the city notified the requestor that it had sought a ruling about the exceptions. The City provided the requestor with a copy of its written comments it submitted to the AG, with certain portions of the background and analysis redacted. The AG found that the phone records were public information even though the phone number in question was the personal phone of the officer. The AG reasoned that the officer used it for official city business and received a stipend from the city to partially pay for the phone. The AG also found that the City did not comply with the PIA because it over-redacted the copy of the comments that it provided to the requestor and therefore must provide a compelling reason not to disclose the information as required in section 552.302. Although the court of appeals noted that the common law expressly makes information confidential if releasing it would create a substantial risk of physical harm, the court found that the City failed to carry its burden to demonstrate that a compelling reason. The court concluded that because the City did not raise the common-law physical safety exception or the constitutional privacy doctrine, it was required to disclose information regarding personal phone number.

***City of Dallas v. Paxton*, 2015 WL 601974 (Tex. App.—Corpus Christi-Edinburg Feb. 12, 2015, pet. filed) (mem. op., not designated for publication).**

In this public information case, again the issue was whether the City of Dallas' (City) confidential attorney-client communications were excepted from required disclosure when the City was late when it requested an AG opinion regarding the information. Section 552.302 of the Texas Government Code provides that a governmental entity must show a compelling reason why information should be protected when it misses the deadlines established under the PIA to request an AG opinion. The City argued the fact that the information was confidential attorney-client communications was in itself a compelling reason to withhold information and that sections 552.101 and 552.107(1) applied. The AG argued only section 552.107(1) applied and because it was a discretionary exception, disclosure was appropriate because no compelling reason had been provided. The trial court held the city failed to show a compelling reason to protect the privileged communications. On appeal, the city argued that the communications were excepted under 552.101 because it was confidential by other law and excepted under 552.107(1). The court of appeals agreed and reversed the trial court's judgement and rendered judgment that the attorney-client privileged communication at issue was excepted from disclosure under the

PIA because the city had demonstrated a compelling reasons to withhold the information and that attorney-client communications are mandatorily excepted from disclosure under 552.101.

2015 Texas Water Institute

October 29-30, 2015

Austin, Texas

Case Law Update “A Game of Water Thrones” and Quotes from the Wit & Wisdom of Tyrion Lannister, George R.R. Martin

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“If you want to conquer the world, you best have a dragon.”

Texas v. New Mexico, Original No. 141

- Texas alleges New Mexico is depleting Texas’ share of Rio Grande Water.
- United States was allowed to intervene.
- New Mexico filed a motion to dismiss Texas’ complaint and the U.S.’s motion to intervene.
- Oral arguments heard on August 19, 2015.



“Words are wind.”

***The Aransas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014),
petition denied, 135 S.Ct. 2859 (Mem.) (2015)**

- Supreme Court denied TAP’s Petition for Review.



“All sorts of people are calling themselves Kings these days.”

***Texas Comm. on Environmental Quality v. Texas Farm Bureau*, 460 S.W.3d 264 (Tex. App. – Corpus Christi 2015, pet. filed)**



- TCEQ’s implementation of its drought rules in the Brazos basin.
- Court of Appeals affirmed lower court decision holding:
 - TCEQ exceeded authority when it exempted preferred junior water rights from priority call;
 - TCEQ failed to consider Texas Water Code § 11.139.
- TCEQ has appealed and the Texas Supreme Court has asked for briefing ahead of a decision on TCEQ’s petition.

“The Gods are blind. And men see only what they wish.”

***Environmental Processing Systems v. FPL Farming, Ltd.,*
457 S.W.3d 414 (Tex. 2015)**

- Deep subsurface injection well.
- Allegations of trespass for deep subsurface water migration.
- Supreme Court side-stepped the issue.



“Schemes are like fruit, they require a certain ripening.”

***City of Lubbock v. Coyote Lake Ranch, LLC*, 440 S.W.3d 267 (Tex.App. – Amarillo 2014, pet. granted)**

- Applicability of the “Accommodation Doctrine” to groundwater development.
- Coyote Ranch appealed decision to the Texas Supreme Court:
 - Petition granted September 4, 2015;
 - Oral arguments held October 14, 2015.



“I only need half my wits to be a match for you.”

Texas Comm’n on Environmental Quality and Post Oak Clean Green, Inc. v. Guadalupe County Groundwater Conservation Dist., No. 04-15-00433-CV (4th Court of Appeals, filed July 14, 2015).

- Guadalupe County GCD adopted rules prohibiting application of waste on outcrop of any aquifer.
- 2013 Post Oak filed an application with TCEQ for a landfill permit.
- GCD filed suit, and TCEQ intervened.
- Holding:
 - Rules not preempted.
- TCEQ and Post Oak have appealed.



“Guard your tongue before it digs your grave.”

***Fort Stockton Holdings, LP v. Middle Pecos Groundwater Conservation Dist. et al.*, No. P-7047-83-CV (83rd Dist. Court of Pecos Cnty, Tex., filed Dec. 27, 2011).**

- **Fort Stockton Holdings requested new permit from GCD to pump 47,418 acre-feet for municipal use and to transport the water out of the district. At issue was whether the permit was conversion of historic and existing use permits.**
- **The GCD denied the permit and Fort Stockton sued.**
- **District court ruled on September 21, 2015 in favor of the District.**
- **An appeal is anticipated. The takings claim has been severed and abated.**



“The best lies are seasoned with a bit of truth.”

***Harris Cnty Flood Control Dist. et al. v. Kerr*, ____ S.W.3d ____,
2015 WL 3641517 (Tex. June 12, 2015)**



- Inverse condemnation case concerning 400 plus homes in the Houston area:
 - Flood control plan;
 - Unmitigated development.
- County filed a plea to the jurisdiction.
- Supreme Court affirmed lower court's denial of the plea:
 - Some evidence that county was substantially certain development would cause flooding of homes;
 - The flood control plan only targeted a 10-year flood.
- Decision was 5-4 with strong dissent:
 - Nonfeasance not a basis for a takings;
 - Discourages governments from taking action.

“We all need to be mocked from time to time, lest we start to take ourselves too seriously.”

***Navarro County Wholesale Ratepayers v. Covar*, 2015 WL 3916249 (Tex.App. – Houston 1st, June 25, 2015, no pet.) (mem. op., not designated for publication)**

- City of Corsicana rate increase for its wholesale water customers.
- Went through the public interest phase of the wholesale rate challenge:
 - TCEQ found contract did not violate the public interest.
- The Court of Appeals upheld the TCEQ’s decision:
 - Public interest factors in the rules are non-exclusive;
 - No factor that allows a comparison of rate impact on wholesale customers versus retail customers;
 - Cost of service is irrelevant.
- Motion for rehearing is pending.



“Never believe anything you hear in a song.”

***Application of DHJB Development, LLC for a Major Amendment to
TPDES Permit No. WQ0014975001, TCEQ Docket No. 582-14-3427;
SOAH Docket No. 2013-2228-MWD***

- At issue, in part, the characterization of the discharge route as a state watercourse.
- ALJ found that the discharge route was not into a state watercourse.
- TCEQ disagreed and found the discharge route was a watercourse and the State has a superior right to use the watercourse to carry effluent.



“Some allies are more dangerous than enemies.”

***Sierra Club v. Texas Commission on Environmental Quality*, 455 S.W.3d 214 (Tex. App. –Austin 2015, pet. denied)**

- Denial of Sierra Club’s request for a contested case hearing.
- A deeper inquiry into matters that might go to the underlying merits of the case is permissible to determine standing.



“I decline to deliver any message that might get me killed.”

***Kallinen et. Al v. City of Houston*, 462 S.W.3d 25 (Tex. 2015)**

- Sought disclosure of a traffic light study and sued city before AG issued a decision.
- City filed plea to the jurisdiction arguing court lacked jurisdiction until the AG ruled.
- Supreme Court held that an AG opinion is not a mandatory prerequisite to file suit to compel disclosure.



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