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# THE TEXAS PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT AFTER SEVEN YEARS: UNFULFILLED DREAMS AND UNREALIZED FEARS

ANDREW S. "DREW" MILLER

## I. INTRODUCTION

Many people had high hopes for the Texas Private Real Property Rights Preservation Act<sup>1</sup> when the Texas Legislature passed it in 1995. The Attorney General of Texas referred to it as "the basic charter for the protection of private real property rights in Texas."<sup>2</sup> Other people had great fears. One commentator described property rights legislation generally as "a sneak attack on our nation's environmental laws."<sup>3</sup> In any case, one commentator has called the Texas Property Rights Act the "strongest state takings law" in existence.<sup>4</sup>

Seven years later, the Texas Supreme Court rendered its decision in *Bragg v. Edwards Aquifer Authority*.<sup>5</sup> After a hard-fought battle that spanned almost four years and pitted an array of property rights proponents against the fledgling Edwards Aquifer Authority ("Authority"), the Supreme Court handed a major victory to the Authority and a resounding defeat to the property rights proponents by holding that the Authority's permitting rules are exempt from the Property Rights Act. In addition to the Supreme Court's and Court of Appeals' decisions in *Bragg*, three other reported decisions have interpreted and applied the Property Rights Act.

This article traces the history of the passage of the Property Rights Act, discusses its main provisions, and analyzes how the courts have interpreted and applied the Property Rights Act. It also identifies areas in which future litigation may be likely. Because of the exclusions that the Legislature wrote into the Property Rights, this law has not lived up to either the dreams of its proponents or the fears of its detractors.

## II. THE BACKDROP TO ITS PASSAGE

To understand the Property Rights Act and to appreciate the goals of its proponents, one should have some understanding of the constitutional remedies that some see as inadequate to protect owners of private real property, as well as the political climate at the time of its passage.

### A. CONSTITUTIONAL REGULATORY TAKINGS

The Fifth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation.<sup>6</sup> Likewise, Article I, Section 17 of the Texas Constitution prohibits the taking of private property for public use without adequate compensation.<sup>7</sup> Courts have long interpreted these provisions to apply not only to direct physical appropriations of property, but also to instances in which the government's regulation of private property so limits the property owner's use of the property that the government's action amounts to a compensable taking.<sup>8</sup> Plaintiffs asserting a constitutional right to compensation arising from a regulatory taking face procedural hurdles and serious and unclear burdens of substantive law. For example, to succeed on a constitutional regulatory takings claim a plaintiff generally must either: (1) show that the regulation deprives him of *all* economically viable use of his property; or (2) convince the court that a taking has occurred through the application of a complex analysis that considers the economic impact of the regulation on the landowner, the extent of interference with the

landowner's investment-backed expectations, and the nature of the governmental action.<sup>9</sup>

#### B. THE POLITICAL CLIMATE AT THE TIME OF THE PASSAGE OF THE PROPERTY RIGHTS ACT

The two political "lightning rods" that gave rise to the movement that culminated in the passage of the Property Rights Act were: (1) the passage of Edwards Aquifer Authority Act (EAA Act) in 1993 governing the use of water from the Edwards Aquifer;<sup>10</sup> and (2) plans, in 1994, by the United States Fish and Wildlife Service (USFWS) to designate all or portions of thirty-three counties in Central Texas as critical habitat for the golden-cheeked warbler under the federal Endangered Species Act.<sup>11</sup>

Many view the passage of the EAA Act as a direct response to a federal court mandate that the State manage the Edwards Aquifer to protect endangered or threatened species dependent on spring flow at Comal and San Marcos Springs.<sup>12</sup> The prospect of limits on withdrawals from the Edwards Aquifer stirred opposition from ranchers and landowners who staunchly believed in the "rule of capture" – i.e., the traditional common law right, which the Texas Supreme Court adopted in 1904,<sup>13</sup> to pump unlimited amounts of groundwater.<sup>14</sup> Likewise, ranchers and other property owners feared the imposition of land use restrictions resulting from a designation of critical habitat for the golden-cheeked warbler. These concerns persisted despite assurances by the USFWS that any such restrictions would affect only those landowners implementing projects that required a federal permit or used federal funds.<sup>15</sup>

In August 1994, an estimated 3,000 protesters marched on the State Capitol demanding a halt to environmental regulations, which they said were taking their property rights.<sup>16</sup> The founder of the group responsible for organizing the march indicated that his group was determined to get a property rights bill passed during the next legislative session.<sup>17</sup> Less than a year later, the Texas Legislature passed the Property Rights Act.

### III. THE SUBSTANCE OF THE PROPERTY RIGHTS ACT

#### A. THE SCOPE OF THE PROPERTY RIGHTS ACT

The scope of the Property Rights Act appears to be very broad, ostensibly covering many actions of many different types of governmental entities. To explain basic operation of the Property Rights Act and to lay the groundwork for a discussion of some of the legal issues raised by it, this section will discuss the definitions of "taking," "private real property," and "governmental entity" provided by the Act, and describe those governmental actions that are covered and those that are expressly excluded by the Act. It also discusses the special status of municipalities under the Property Rights Act.

##### 1. DEFINITION OF "TAKING"

A key manner in which the Property Rights Act works toward expanding the protection of property rights is through the definition of the term "taking." The first part of the Property Rights Act's dual definition of that term simply incorporates any action that would constitute a "taking" under the United States or Texas constitutions.<sup>18</sup> The second part of the definition, however, defines a "taking" as "a governmental action that . . . affects an owner's private real property . . . in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action . . . [and] *is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property . . .*"<sup>19</sup> The last part of the definition significantly lowers the bar for a regulatory takings plaintiff when compared to the level of interference with the use of property that a plaintiff must show to succeed on a constitutional regulatory takings claim.

The definition of "taking" also includes language that restricts who may assert a claim under the Property Rights Act. It limits the second part of the definition of the term to a governmental action affecting an owner's private real property when that property "is the subject of the governmental action."<sup>20</sup> To illustrate: when a governmental entity grants a permit to build and operate a hazardous waste disposal facility, the landowner

whose property abuts the site of the proposed facility does not own property that is “the subject of the governmental action.” The Property Rights Act does nothing for the neighbor of the planned facility. Only the landowner whose property “is the subject” of a governmental action may experience a “taking” under the crucial second part of the definition.

## 2. DEFINITION OF “PRIVATE REAL PROPERTY”

The Property Rights Act defines the term “private real property” broadly as “an interest in real property recognized by common law, including a groundwater or surface water right of any kind, that is not owned by the federal government, this state, or a political subdivision of this state.”<sup>21</sup> However, by virtue of this definition and its very name – the Private Real Property Rights Preservation Act – it is obvious that the Property Rights Act does not protect all property, only real property. This fact suggests a bias that real property is either more deserving or more threatened by governmental action than other forms of property.

## 3. COVERED GOVERNMENTAL ENTITIES

The Property Rights Act applies to governmental entities and defines the term “governmental entity” broadly as “(A) a board, commission, council, department, or other agency in the executive branch of state government that is created by constitution or statute, including an institution of higher education as defined by Section 61.003, Education Code; or (B) a political subdivision of this state.”<sup>22</sup> Accordingly, the Property Rights Act applies both to state agencies and units of local government.

## 4. COVERED GOVERNMENTAL ACTIONS

The Property Rights Act applies to the following four categories of governmental actions:

- (1) the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure;
- (2) an action that imposes a physical invasion or requires a dedication or exaction of private real property;

- (3) an action by a municipality that has effect in the extraterritorial jurisdiction of the municipality, excluding annexation, and that enacts or enforces an ordinance, rule, regulation, or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality; and
- (4) the enforcement of a governmental action listed in Subdivisions (1) through (3), whether such enforcement is through permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means.<sup>23</sup>

## 5. THE STATUTORY EXCLUSIONS

The Property Rights Act’s exclusions narrow its reach considerably. The Act specifically excludes the following categories of governmental actions:

- a lawful forfeiture or seizure of contraband as defined by Article 59.01, Code of Criminal Procedure;
- a lawful seizure of property as evidence of a crime or violation of law;
- an action, including an action of a political subdivision, that is reasonably taken to fulfill an obligation mandated by federal law or an action of a political subdivision that is reasonably taken to fulfill an obligation mandated by state law;
- the discontinuance or modification of a program or regulation that provides a unilateral expectation that does not rise to the level of a recognized interest in private real property;
- an action taken to prohibit or restrict a condition or use of private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of Texas;

- an action taken out of a reasonable good faith belief that the action is necessary to prevent a grave and immediate threat to life or property;
- a formal exercise of the power of eminent domain;
- an action taken under a state mandate to prevent waste of oil and gas, protect correlative rights of owners of interests in oil or gas, or prevent pollution related to oil and gas activities;
- a rule or proclamation adopted for the purpose of regulating water safety, hunting, fishing, or control of nonindigenous or exotic aquatic resources;
- an action taken by a political subdivision:
  - (A) to regulate construction in an area designated under law as a floodplain;
  - (B) to regulate on-site sewage facilities;
  - (C) under the political subdivision's statutory authority to prevent waste or protect rights of owners of an interest in groundwater; or
  - (D) to prevent subsidence;
- the appraisal of property for purposes of ad valorem taxation;
- an action taken by a governmental entity:
  - (A) in response to a real and substantial threat to public health and safety;
  - (B) designed to significantly advance the health and safety purpose; and
  - (C) that does not impose a greater burden than is necessary to achieve the health and safety purpose; or
- an action or rulemaking by the Public Utility Commission of Texas to require the location or placement of telecommunications equipment owned by another party on the premises of a certificated local exchange company.<sup>24</sup>

In addition to the original exclusions set forth above, the Legislature added a provision to Chapter 49 of the Texas Water Code in 2001 that states that the Property Rights Act "does not apply to a tax levied, a standby fee imposed, or a charge, fee, or rental adopted or enforced by a district under this chapter, another chapter of this code, or Chapter 395, Local Government Code."<sup>25</sup> Chapter 49 districts include: Water Control and Improvement Districts; Fresh Water Supply Districts; Municipal Utility Districts; Drainage Districts; Irrigation Districts; Levee Improvement Districts; Soil and Water Conservation Districts; Wind Erosion Districts; River Authorities; Flood Control Districts; and Coastal Subsidence Districts.<sup>26</sup> Chapter 395 of the Local Government Code establishes substantive requirements and procedures for the assessment of impact fees by such districts.<sup>27</sup>

The interpretation of the Property Rights Act's statutory exclusions and, in particular, their scope and breadth, have been the subject of several appellate decisions and can be expected to be the subject of further litigation.

#### 6. SPECIAL STATUS OF MUNICIPALITIES

Actions by municipalities are largely excluded from the reach of the Property Rights Act.<sup>28</sup> A municipality's action is not excluded, however, when it affects the municipality's extraterritorial jurisdiction but does not impose identical requirements or restrictions in the municipality's entire extraterritorial jurisdiction.<sup>29</sup> Thus, a municipality is generally free from the constraints of the Property Rights Act except in the particular case when it imposes differing requirements or restrictions in different portions of its extraterritorial jurisdiction.<sup>30</sup> By exempting municipalities from the Property Rights Act in all but these limited circum-

stances, the Property Rights Act exhibits a clear bias in favor of rural property owners.

## **B. REQUIREMENT TO PREPARE A TAKINGS IMPACT ASSESSMENT**

The Property Rights Act creates an important procedural requirement in connection with proposed governmental actions: the requirement to prepare a Takings Impact Assessment (TIA). This section discusses the scope of the TIA requirement, lists the required contents of a TIA, and describes the public notice requirements associated with the TIA.

### **1. SCOPE OF THE TIA REQUIREMENT**

The TIA requirement applies to a smaller universe of governmental actions than does the Property Rights Act generally. The requirement to prepare a TIA does not include the fourth category of governmental actions listed in Section 2007.003(a) and set forth in Section III.A.4 above, i.e., the “enforcement of a governmental action listed in Subdivisions (1) through (3), whether the enforcement of the governmental action is accomplished through the use of permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means.” Accordingly, and as the Texas Supreme Court confirmed in *Bragg*, the Property Rights Act does not require preparation of a TIA in connection with individual permitting decisions.<sup>31</sup> The Legislature removed individual permitting decisions from the TIA requirement in response to concerns that the Texas Commission on Environmental Quality (then, the Texas Natural Resource Conservation Commission) expressed about the pending bill.<sup>32</sup>

### **2. CONTENTS OF A TIA**

A TIA must describe the specific purpose of the proposed action and identify whether and how the proposed action substantially advances its stated purpose, the burdens imposed on private real property, and the benefits to society resulting from the proposed use of private real property.<sup>33</sup> In addition, the TIA must determine whether engaging in the proposed governmental action will constitute a taking.<sup>34</sup> Finally, the TIA must describe reasonable alternative actions that could accomplish the specified purpose and compare, evaluate, and explain how an alternative action

would further the specified purpose and whether an alternative action would constitute a taking.<sup>35</sup>

### **3. PUBLIC NOTICE OF THE TIA**

Governmental entities must provide public notice of proposed action subject to the Property Rights Act’s TIA requirement.<sup>36</sup> For political subdivisions, this notice must be published in a “newspaper of general circulation” and contain a reasonably specific description of the proposed action and a reasonably specific summary of the TIA that was prepared in connection with the proposed action.<sup>37</sup> The Attorney General of Texas has opined that a “newspaper of general circulation” is “a newspaper that has more than a de minimis number of subscribers within a specific geographic region, has a diverse subscribership, and publishes some items of general interest to the community.”<sup>38</sup> State agencies must publish notice in the Texas Register in accordance with Section 2001.023 of the Texas Government Code (governing notice of proposed rules) and must include a reasonably specific summary of the TIA that was prepared in connection with the proposed action.<sup>39</sup>

## **C. CAUSES OF ACTION**

The Property Rights Act creates two distinct causes of action: (1) a suit to determine whether a governmental action results in a taking (under Subchapter B of the Property Rights Act) and (2) a suit to invalidate a governmental action for failure to prepare a TIA (under Subchapter C of the Property Rights Act). These causes of action are discussed in more detail below.

### **1. SUIT TO DETERMINE WHETHER AN ACTION RESULTS IN A TAKING**

Subchapter B sets forth the first cause of action, which is a suit by an owner of private real property affected by a governmental action to invalidate the action on the grounds that it results in a “taking” as defined by the Property Rights Act. If asserted against a state agency, this suit takes the form of a contested case proceeding filed with the agency.<sup>40</sup> If asserted against a political subdivision, it takes the form of a lawsuit filed in district court in the county in which the affected private real property is located.<sup>41</sup> In either case, the owner must file suit within 180 days of the day that the property owner knew or should have known that the governmental action in question

restricted or limited his or her right in private real property.<sup>42</sup>

If the court or agency finds that the governmental action is a “taking,” the property owner is entitled to an order directing the governmental entity to rescind the action.<sup>43</sup> In addition, the judgment or decision is to include a finding that determines the monetary damages suffered as a result of the taking.<sup>44</sup> The governmental entity may then elect to pay the damages as compensation to the prevailing property owner.<sup>45</sup> If the governmental entity elects to pay such compensation, the court or agency must withdraw the order rescinding the governmental action.<sup>46</sup>

## 2. SUIT TO INVALIDATE A GOVERNMENTAL ACTION FOR FAILURE TO PREPARE A TIA

Subchapter C sets forth the second cause of action, which is a suit to invalidate a governmental action on the grounds that the Act required the governmental entity to prepare a TIA in connection with the proposal of that action, but the governmental entity did not prepare one.<sup>47</sup> The *Bragg* case – discussed further in Part IV(A) – involved claims asserted under this subchapter.

## 3. ATTORNEY’S FEE PROVISIONS

The Property Rights Act has one attorney’s fee provision that applies to a suit under Subchapter B (to determine whether an action results in a taking) and a different provision that applies to a suit under Subchapter C (to invalidate a governmental action for failure to prepare a TIA). Subchapter B’s provision is a mandatory “loser pays” provision that applies to both the plaintiff and the defendant.<sup>48</sup> Thus, the loser of such a suit, whether the property owner or the governmental entity, must pay the fees of the winner’s attorney. On the other hand, the attorney’s fee provision in Subchapter C inures only to the benefit of the real property owner and cannot benefit the governmental entity.<sup>49</sup> As a result, the risk of paying a considerable judgment for attorney’s fees provides a significant disincentive to the filing of a Subchapter B suit to determine whether the action results in a taking in instances in which the governmental entity defendant has a good argument that a statutory exclusion applies. A similar disincentive does not operate against the filing of a Subchapter

C suit to invalidate a governmental action for failure to perform a TIA.

## IV. CASES INTERPRETING THE PROPERTY RIGHTS ACT

The majority of the reported decisions interpreting and applying the Property Rights Act concern the breadth and scope of the statutory exclusions to its coverage. These cases include the Texas Supreme Court’s recent decision in *Bragg v. Edwards Aquifer Authority*. The *Bragg* case became an important test case and a battleground for interest groups advocating for increased protection of property rights.

### A. BRAGG V. EDWARDS AQUIFER AUTHORITY

#### 1. BACKGROUND: THE EDWARDS AQUIFER AUTHORITY AND THE EAA ACT

The Texas Legislature created the Edwards Aquifer Authority (EAA) as a conservation and reclamation district under Article XVI, Section 59 of the Texas Constitution.<sup>50</sup> Its principal charge is to manage the Edwards Aquifer and to sustain the diverse economic and social interests dependent on Edwards Aquifer water by regulating groundwater withdrawals from the aquifer.<sup>51</sup> The Legislature established a “cap” on permitted withdrawals from the Edwards Aquifer of 450,000 acre-feet, which will decrease to 400,000 acre-feet in 2008.<sup>52</sup> The Legislature directed the EAA to allocate available water from the Edwards Aquifer through a permit system and to give preference to “existing users,” which the EAA Act defines as those who have withdrawn and beneficially used water from the aquifer on or before June 1, 1993.<sup>53</sup>

Although the EAA Act was passed in 1993, it did not become effective for several years. Initially, the Act encountered problems related to the federal Voting Rights Act.<sup>54</sup> After a legislative amendment in 1995 resolved those problems, several parties challenged the facial constitutionality of the EAA Act in a suit filed in district court in Medina County.<sup>55</sup> Judge Mickey Pennington held the EAA Act to be unconstitutional and issued an injunction against its administration and enforcement.<sup>56</sup> In June of 1996, in *Barshop v. Medina*

*County Underground Water Conservation District*,<sup>57</sup> the Texas Supreme Court reversed the district court's decision, dissolved the injunction, and upheld the constitutionality of the EAA Act.<sup>58</sup> The EAA officially came into existence immediately following that decision.

The EAA adopted a series of rules in January 1998 designed to establish a comprehensive and integrated permit program implementing the Legislature's directive to manage the Edwards Aquifer by regulating withdrawals.<sup>59</sup> Three months later, in April of 1998, the EAA's General Manager announced his proposed decisions on over one thousand applications for "initial regular" groundwater withdrawal permits that had been filed with the EAA.<sup>60</sup>

## 2. THE BRAGGS AND THE DISTRICT COURT

Glenn and JoLynn Bragg, pecan farmers in Medina County, had submitted two applications for initial regular permits. For one well, the General Manager's position is that the Braggs are not entitled to an Edwards Aquifer withdrawal permit under the EAA Act because they are not "existing users" as defined under that law, having completed the well in 1995 after the end of the historical period. For the Braggs' other well, the General Manager's position is that the Braggs are entitled to a withdrawal permit under the EAA Act, but at an amount that the Braggs allege is grossly inadequate for watering mature pecan trees. Dissatisfied with the EAA's proposed decisions on their two applications, the Braggs filed suit in district court against the EAA under Subchapter C of the Property Rights Act in July of 1998.

The case was set before Judge Pennington, the same judge who held the EAA Act to be unconstitutional in the suit that gave rise to the *Barshop* decision. A property rights activist who specializes in representing landowners in suits against governmental entities regarding property rights issues represented the Braggs.

The Braggs alleged that the EAA failed to perform TIAs as required in connection with three of its actions: the EAA's adoption of its permit rules and the two proposed actions on each of the Braggs' permit applications. The EAA responded by asserting that the actions at issue are exempt from the Property Rights Act (and therefore the

TIA requirement) under four separate exceptions to the Property Rights Act.

The Braggs were victorious at the trial court. Judge Pennington invalidated all three EAA actions at issue for failure to perform a TIA.<sup>61</sup> The EAA appealed to the Fourth Court of Appeals in San Antonio.

## 3. THE REAL SIGNIFICANCE OF THE BRAGG CASE

The real significance of the *Bragg* litigation lay in the fact that if the EAA's actions are exempt from the Property Rights Act for the purposes of the TIA requirement, then the EAA's actions would also be exempt from a suit to determine whether a taking has occurred under Subchapter B of the Property Rights Act. A ruling that the EAA was exempt from the Property Rights Act would leave potential regulatory takings plaintiffs with remedies under only the United States and Texas constitutions. If the EAA were not exempt and therefore vulnerable to the lowered bar of regulatory takings claims under the Property Rights Act, all of those applicants who are denied a groundwater withdrawal permit or who are entitled to less water than they desired could assert that the permitting actions of the EAA result in a "taking" under the Property Rights Act. These claims would be numerous and takings judgments could be practically limitless.

If it is true that a primary political spark that lit the fuse for the passage of the Property Rights Act was the impending regulation of groundwater withdrawals from the Edwards Aquifer, then a holding that the EAA is exempt from the reach of the Property Rights Act would signify a major defeat for the political movement behind the Property Rights Act. (The other major political spark, i.e., the possible designation of critical habitat for the golden cheeeked warbler by a federal agency, was always beyond the reach of the Texas Legislature.)<sup>62</sup> The alternative result — a holding that the actions of the EAA are not exempt — would have hobbled the fledgling agency, rendering it incapable of accomplishing its statutory mandate.

It made sense that the Braggs and their financial and legal backers chose to fight this battle under Subchapter C of the Property Rights Act (for failure to prepare a TIA) rather than to wait and sue under Subchapter B (to determine whether a taking has occurred) after the EAA took

final action on the Braggs' permit applications. The Braggs and their backers could take advantage of the attorney's fee provision in Subchapter C, which can benefit only the plaintiff property owner. If they had filed a suit under Subchapter B, they would have risked an adverse decision and therefore a significant judgment for attorney's fees.<sup>63</sup> (The plaintiffs were aware that the EAA believed that it was exempt from the Property Rights Act under several statutory exclusions.)

Participation by *amici* parties at the court of appeals demonstrated the level of statewide interest in the *Bragg* case. Several entities filed amicus briefs in support of the Braggs: Texas Farm Bureau, Living Waters Artesian Springs (the "Catfish Farmer"), Texas and Southwest Cattle Raisers Association, Texas Nursery & Landscape Association, American Land Foundation, Texas Sheep and Goat Raisers Association, Riverside Landowners Protection Coalition, Texas Pecan Growers Association, and Pecan Growers of the State of Texas. The parties who filed amicus briefs in support of the EAA were: City of San Antonio, Harris-Galveston Coastal Subsidence District, and the Texas Water Conservation Association.

#### 4. THE COURT OF APPEALS' HOLDING — BASED ON THE (B)(4) "MANDATED BY STATE LAW" EXCLUSION

The San Antonio Court of Appeals reversed the trial court and held that the (b)(4) exclusion, for actions of a political subdivision that are "reasonably taken to fulfill an obligation mandated by state law," applies to the EAA's adoption of its permit rules.<sup>64</sup>

The court reasoned that the EAA Act provides that the EAA "shall adopt rules necessary to carry out the authority's powers and duties . . . including rules governing procedures . . ." <sup>65</sup> The court rejected the Braggs' argument that its construction effectively excludes all rulemaking, stating that "[u]nder our interpretation, the statute covers rulemaking by governmental entities in general but also provides an exception for rulemaking performed by political subdivisions pursuant to a state law mandate."<sup>66</sup> The court concluded that state law mandated the EAA's adoption of its permit rules generally and the rules applied to the Braggs' applications in particular.<sup>67</sup> The court appears to reason that when state law mandates the substance of the particular rules, it necessarily

implies that the action of adopting the rules was *reasonably taken* to fulfill the state law mandate in question. Further, although the court concluded that the Braggs' claim seeking to invalidate the EAA's proposed actions on their permit applications is not ripe for adjudication, it nevertheless declared that those actions are exempt from the Property Rights Act under the same exclusion.<sup>68</sup>

#### 5. THE SUPREME COURT'S HOLDING — BASED ON THE (B)(11)(C) EXEMPTION FOR GROUNDWATER CONSERVATION DISTRICTS

Adding the Texas Justice Foundation, a conservative group that provides legal representation to plaintiffs in cases involving property rights, to their legal team, the Braggs sought discretionary review of the Court of Appeals decision by the Texas Supreme Court. After requesting and receiving full briefing on the merits, the Texas Supreme Court denied the Braggs' petition for review. Then, in response to a motion for rehearing on which the Braggs' legal team added more firepower, William Powers, Dean of the University of Texas School of Law, the Texas Supreme Court reversed itself, granted the Braggs' petition for review, and set the case for submission and argument.

In February 2002, the Texas Supreme Court issued its decision. After adopting the EAA's view of the background facts and law,<sup>69</sup> the court held that the EAA's issuance of permit rules are excluded from coverage by the Property Rights Act, albeit on different grounds than that relied upon by the San Antonio Court of Appeals. Instead of basing its decision on the (b)(4) "mandated by state law" exclusion, the Texas Supreme Court relied on the (b)(11)(C) exclusion, which covers the actions of a political subdivision taken under its "statutory authority to prevent waste or protect rights of owners of interest in groundwater."<sup>70</sup>

The court noted that the Legislature: (1) created the EAA for the express purpose of conserving and managing the water in the Edwards Aquifer by preventing waste and protecting the rights of owners of interests in groundwater; (2) mandated that the Authority manage withdrawals through a permit system; and (3) directed that the Authority adopt rules to carry out its duties.<sup>71</sup> The court found that the EAA adopted its rules under this mandate and that their adoption was therefore exempt from the Property Rights Act under

the (b)(11)(C) exclusion.<sup>72</sup> In doing so, the court rejected the Braggs' arguments based on the assertion that they do not waste water. The court stated that the "[a]uthority to prevent waste as used in [(b)(11)(c)] refers not just to an authority to prevent the specific examples of waste . . . but to the broader concept of preventing waste by conserving, protecting, and preserving the aquifer through the Legislature's designated permit system."<sup>73</sup> The court also held that actions on individual permit applications are not subject to the TIA requirement in the first instance.<sup>74</sup>

In adopting the EAA's favored arguments without condition or equivocation, the Texas Supreme Court handed a major victory to the EAA. Further, the court's opinion was unanimous, which is highly unusual in the fields of water regulation and property rights. Recent cases involving property rights and water issues have been the subject of divisiveness and even acrimony on the Texas Supreme Court.<sup>75</sup> Understandably, the EAA views this decision as a second green light from the State's highest court — the first one being the decision in the *Barshop* case — for the EAA to continue its work.

Moreover, although the Texas Supreme Court relied on different grounds than the San Antonio Court of Appeals, the Supreme Court did not criticize or even question the Court of Appeals' reasoning. Therefore, the San Antonio Court of Appeals' interpretation of the (b)(4) "mandated by state law" exclusion appears to stand.

Finally, the Texas Supreme Court's opinion implies that actions of all Chapter 36 groundwater conservation districts are generally exempt from the Property Rights Act. This implication makes sense in light of the fact that the Legislature has declared groundwater conservation districts to be the State's preferred method of groundwater management.<sup>76</sup>

## B. OTHER CASES INTERPRETING THE (B)(4) "MANDATED BY STATE LAW" EXCLUSION

### 1. *MCMILLAN V. NORTHWEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 24*

In 1999, prior to the issuance of the court of appeals' decision in *Bragg*, another court of appeals decided a case involving the (b)(4) "mandated by state law" exclusion.<sup>77</sup> *McMillan v. North-*

*west Harris County Municipal Utility District No. 24* involved a property owner's claim that the imposition of a municipal utility district's (MUD) standby fee amounted to a taking under the Property Rights Act.<sup>78</sup>

The court held that the exclusion covered the MUD's adoption of the fee.<sup>79</sup> The court reasoned that the MUD was created for the purposes of constructing, operating and maintaining a water and sanitary sewer and disposal plant and a drainage system and is obligated to accomplish those purposes.<sup>80</sup> Thus, the court concluded that the MUD's functions are mandated by state law.<sup>81</sup>

Turning to whether the particular action at issue — the levy of a standby fee — is an action "reasonably taken" to fulfill that function, the court concluded that it is.<sup>82</sup> The court reasoned that: (1) the Texas Water Code authorizes MUDs to issue bonds to accomplish the purposes for which they are created; (2) a MUD may adopt and enforce all necessary charges, fees, or rentals for providing or making available any district facility or service; (3) a MUD may impose standby fees under certain circumstances to distribute a fair portion of its operation and maintenance costs or debt service to owners of property who have not constructed improvements but have water, sewer or drainage capacity available; and (4) the TNRCC approved the particular fees in question.<sup>83</sup>

The imposition of the fee at issue in *McMillan* appears to be the type of action that would be covered by the exclusion to the Property Rights Act added to Chapter 49 of the Water Code in 2001 for taxes and fees levied by a Chapter 49 district, and discussed in Part III(A)(5) above.

### 2. *SOUTH WEST PROPERTY TRUST, INC. V. DALLAS COUNTY FLOOD CONTROL DISTRICT NO. 1*

*South West Property Trust, Inc. v. Dallas County Flood Control District No. 1*<sup>84</sup> also involved the (b)(4) "mandated by state law" exclusion. In *SWP Trust*, the challenged governmental action was a flood control district's imposition of an ad valorem tax. The district argued that its levy of the tax fit within the (b)(4) exclusion.

The court applied a two-part test: the governmental action must be: (1) an obligation mandated by state (or federal) law; and (2) reasonably taken to fulfill the state (or federally) mandated obligation.<sup>85</sup> While attributing this two-part test to the

*McMillan* case, the court went further in its analysis than did the court in *McMillan*.

The court noted that the state law at issue required the district to levy such taxes as are necessary to repay validly issued bonds, thus satisfying the first prong.<sup>86</sup> Turning to the second prong, the court noted that “there is no evidence in the record demonstrating the District’s ad valorem tax rate is necessary to . . . fulfill any state mandated obligation. Consequently, the District failed to prove as a matter of law that its levy of taxes fell within the claimed exception to the Act.”<sup>87</sup> By contrast, the court in *McMillan* never examined whether state law mandated the rate or the amount of the standby fee at issue in that case, or whether the rate or amount was reasonable.

Like the standby fee in *McMillan*, the tax at issue in *SWP Trust* appears to be the type of action that would be covered by the exclusion to the Property Rights Act added to Chapter 49 of the Water Code in 2001. However, because the district in *SWP Trust* imposed this tax before the effective date of the 2001 amendment, it is likely that the Chapter 49 exclusion would not apply in this case.

#### C. STANDING/OWNERSHIP — *CHAMBERS COUNTY V. TSP DEVELOPMENT, LTD.*

TSP Development Ltd. (TSP) had submitted an application to the TCEQ for a solid waste disposal permit on property for which TSP had a contract.<sup>88</sup> While that application was pending, Chambers County passed ordinances prohibiting solid waste disposal in certain areas of the county, including at the proposed disposal site. The issue in *Chambers County v. TSP Development, Ltd.*,<sup>89</sup> was whether the applicant had standing to file suit under the Property Rights Act alleging that those ordinances resulted in a taking.

The court noted that the Property Rights Act: (1) allows *owners* of real property to file a lawsuit under the Property Rights Act to determine whether a taking has occurred; and (2) defines an “owner” as “a person with legal or equitable title to affected private real property at the time a taking occurs.”<sup>90</sup> “The Act does not authorize anyone other than an owner, so defined, to bring suit. Therefore, in order for TSP to have standing . . . it must have held legal or equitable title to property affected by the ordinance.”<sup>91</sup> Reversing the trial court, the court held that the contract between

TSP and the seller of the property was a mere option contract, rather than a contract for sale.<sup>92</sup> Therefore, TSP did not have a sufficient interest to give it standing to attack the ordinance under the Property Rights Act.<sup>93</sup>

### VIII. ISSUES TO BE LITIGATED

#### A. CLARIFICATION REGARDING THE MANDATED BY STATE LAW EXCLUSION

The three appellate decisions applying the (b)(4) exclusion each take a somewhat different approach regarding whether an action was *reasonably taken* to fulfill an obligation mandated by state law. In *Bragg*, after finding that the EAA issued rules pursuant to a state-law mandate, the San Antonio Court of Appeals impliedly held that the action of adopting those rules was reasonably taken by finding that state law mandated the substance of the rules generally, and those the EAA applied, in particular, to the Braggs.<sup>94</sup> The Houston Court of Appeals, in *McMillan*, after finding that state law mandated the MUD’s functions, concluded that their imposition was an action “reasonably taken,” because it was an allowable means by which the MUD could finance the performance of those functions, and because the TNRCC approved the fees.<sup>95</sup> Noting that the law required the district to levy taxes to repay validly issued bonds, the Dallas Court of Appeals, in *SWP Trust*, found that evidence was lacking as to whether the tax rate was “reasonably necessary” to fulfill the district’s state law mandate.<sup>96</sup>

It remains unclear exactly what it means for an action to be *reasonably taken* to fulfill an obligation mandated by state law. The plain language of the (b)(4) exclusion suggests that if an action is unreasonable — i.e., *ultra vires* or otherwise arbitrary and capricious — it would not be “reasonably taken” and would fall outside of the (b)(4) exclusion. Accordingly, it is unclear whether an action merely needs to be reasonable to be reasonably taken. If so, then the language adds little, because actions of governmental agencies normally may not be unreasonable.<sup>97</sup> Nevertheless, the plain language of the (b)(4) exclusion suggests such a reading.

## B. CLARIFICATION REGARDING THE “MANDATED BY FEDERAL LAW” EXCLUSION

Another potential subject of litigation is the scope of the other aspect of the (b)(4) exclusion, that which covers actions of political subdivisions and *state agencies* that are “reasonably taken to fulfill an obligation mandated by *federal law*.”<sup>98</sup> Actions by state agencies and political subdivisions taken to avoid violating the federal Endangered Species Act may fit under this exclusion. These actions could include the preparation of a Habitat Conservation Plan (as a component of an application for an “incidental take permit”) and the subsequent adoption and enforcement of regulatory requirements that result from such a plan.

It is also questionable whether the “mandated by federal law” exclusion would cover actions taken by a state agency under an EPA-approved federal environmental regulatory program, such as the National Pollutant Discharge Elimination System (NPDES) or Underground Injection Control (UIC) programs.<sup>99</sup> Many aspects of these programs must meet criteria set forth in a federal environmental statute for EPA approval. Once approved, the state must run the program in accordance with requirements contained in the federal law and often memorialized in a “memorandum of agreement” between the EPA and the State, which establishes the relationship regarding the State’s administration of the program.<sup>100</sup> In 1998, as part of the package requesting approval of portions of Texas’ UIC program, then Attorney General Dan Morales took the position that the Property Rights Act would not affect the UIC program because it is “federally authorized” and therefore any actions taken under the program would fall within this exclusion.<sup>101</sup> However, arguments to the contrary exist. Specifically, federally authorized environmental regulatory programs are voluntary in that states apply to the EPA for the right to administer these programs, but need not do so.<sup>102</sup> In fact, to the extent that a federal law purports to actually *require* a state to adopt a regulatory program, it could run afoul of the 10th Amendment to the United States Constitution.<sup>103</sup> Moreover, a federal statute – the Unfunded Mandates Reform Act of 1995 – exempts duties “arising from participation in a voluntary federal program” from its definition of “mandate.”<sup>104</sup>

## C. THE APPLICABILITY OF THE (B)(11)(C) EXCLUSION TO LAND- USE RESTRICTIONS AND OTHER WATER QUALITY MEASURES TAKEN BY GROUNDWATER DISTRICTS

Another question that perhaps remains open is whether the (b)(11)(C) exclusion covers actions of groundwater conservation districts that focus on the protection of water quality (as opposed to the quantity-focused pumping limitations such as those at issue in the *Bragg* case), including land-use restrictions. The (b)(11)(C) exclusion covers actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interests in groundwater.<sup>105</sup> In part, because Chapter 36 of the Texas Water Code defines “waste” as including the “pollution or harmful alteration of groundwater in a groundwater reservoir by saltwater or by other deleterious matter admitted from another stratum or from the surface of the ground,”<sup>106</sup> the exclusion could cover these actions.

## IX. CONCLUSION

The Property Rights Act has engendered much passion and some litigation. Undoubtedly, it will be the subject of future litigation. Landowners will also continue to use the act to threaten governmental entities, both statewide and local. Governmental entities should and will continue to be concerned with the prospect of affecting a taking under the Property Rights Act and with compliance issues related to the TIA requirement. Nevertheless, it appears that the Property Rights Act is neither the panacea some had hoped for nor the bogeyman some had feared. It is neither of those things primarily because of its long list of statutory exclusions – some worded broadly and, thus far, interpreted that way by the courts.

*Andrew S. “Drew” Miller is a shareholder with Kemp Smith, P.C., in Austin. Mr. Miller specializes in environmental, administrative, and water law. He represents the Edwards Aquifer Authority and served as its lead counsel in the Bragg litigation. The views expressed in this article are those of the author exclusively and do not necessarily reflect the views of the Edwards Aquifer Authority.*

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ENDNOTES

- 1 TEX. GOV'T CODE ANN. §§ 2007.001- 2007.045 (Vernon 2000) (the "Property Rights Act" or the "Act").
- 2 Office of the Attorney General of Texas, PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT GUIDELINES, 21 Tex. Reg. 387, § 1.11 (1996). A minor revision to these guidelines was issued in 2000. *See* 25 Tex. Reg. 8078 (2000).
- 3 John A. Humbach, *Should Taxpayers Pay People to Obey Environmental Laws*, 6 FORDHAM ENVTL. L. J. 423, 430 (1995).
- 4 George E. Grimes, Comment, *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L. J. 557, 560 (1996).
- 5 Bragg v. Edwards Aquifer Auth., 71 S.W.3d 729 (Tex. 2002).
- 6 U.S. CONST. amend. V, XIV.
- 7 TEX. CONST. art. I, § 17.
- 8 *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); City of Pharr v. Pena, 853 S.W.2d 56 (Tex. App.- Corpus Christi 1993, writ denied).
- 9 *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Agins v. Tiburon, 447 U.S. 255 (1980); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998).
- 10 Act of May 30, 1993, 73<sup>rd</sup> Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350; as amended by Act of May 29, 1995, 74<sup>th</sup> Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 16, 1995, 74<sup>th</sup> Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 6, 1999, 76<sup>th</sup> Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; and Act of May 28, 2001, 77<sup>th</sup> Leg., R.S., ch. 966, §§ 2.60 - 2.62 and 6.01 - 6.05, 2001 Tex. Gen. Laws 1880, 1910 and 1961 - 62; *see also* Act of May 23, 2001, 77<sup>th</sup> Leg., R.S., ch. 1192, Tex. Gen. Laws 2552 ("EAA Act"), § 1.02.
- 11 *See* TEXAS HOUSE COMMITTEE ON LAND AND RESOURCE MANAGEMENT, INTERIM REPORT 1996 (1996) at 7-8.
- 12 *See, e.g., id.* at 7.
- 13 Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).
- 14 TEXAS HOUSE COMMITTEE ON LAND AND RESOURCE MANAGEMENT, INTERIM REPORT 1996 at 8.
- 15 *See id.*
- 16 Rebecca Thatcher, 3000 March for Land Rights, AUSTIN AM. STATESMAN, August 28, 1994, at B1.
- 17 *Id.*
- 18 TEX. GOV'T CODE ANN. § 2007.002(5)(A).
- 19 *Id.* § 2007.002(5)(B) (emphasis added).
- 20 *Id.*
- 21 *Id.* § 2007.002(4).
- 22 *Id.* § 2007.002(1).
- 23 *Id.* § 2007.003(a).
- 24 TEX. GOV'T CODE ANN. § 2007.003(b).
- 25 TEX. WATER CODE ANN. § 49.212(e) (Vernon Supp. 2002).
- 26 *See* TEX. WATER CODE ANN. §§ 49.001(a)(1), 51.011, 53.088, 54.011, 56.011, 57.011, 58.011 (Vernon 2000); TEX. AGRIC. CODE ANN. § 201.001(d) (Vernon Supp. 2002); *id.*, § 202.003 (Vernon 1982); S & A Marinas, Inc. v. Leonard Marine Corp., 875 S.W.2d 766 (Tex. App.-Austin 1994, writ denied); Harris County Flood Control Dist. v. Mann, 140 S.W.2d 1098 (Tex. 1940); Beckendorff v. Harris-Galveston Coastal Subsidence Dist., 558 S.W.2d 75 (Tex. App.-Houston 1977, writ ref'd n.r.e.).
- 27 TEX. LOCAL GOV'T CODE ANN. § 395.001-.082 (Vernon 1999 & Supp. 2002).
- 28 *See* TEX. GOV'T CODE ANN. § 2007.003(b)(1).
- 29 *Id.* § 2007.003(a)(3).
- 30 This provision appears to target and discourage water quality measures taken by the City of Austin to protect environmentally sensitive or valuable areas, such as the Save Our Springs (SOS) Ordinance, by making such actions subject to the Property Rights Act.
- 31 Bragg v. Edwards Aquifer Auth., 71 S.W.3d 729, 737-38 (Tex. 2002).
- 32 Debate on Tex. S.B. 14 on the Floor of the Texas House of Representatives, 74th Leg., R.S., Tape 204, Side B (May 27, 1995—Tape 204 Side B).
- 33 TEX. GOV'T CODE ANN. § 2007.043(b)(1)(A-B).
- 34 *Id.* § 2007.043(b)(2).

- 35 *Id.* § 2007.043(b)(3)(A-B).
- 36 *Id.* § 2007.042.
- 37 *Id.* § 2007.042(a).
- 38 Op. Tex. Att’y. Gen. No. JC-223 (2000).
- 39 TEX. GOV’T CODE ANN. § 2007.042(b).
- 40 *Id.* § 2007.022(a). A decision of an agency adverse to the property owner in such a contested case is subject to de novo judicial review. *Id.* § 2007.025(b).
- 41 *Id.* § 2007.021(a).
- 42 *Id.* §§ 2007.021(b), 2007.022(b).
- 43 *Id.* §§ 2007.023(b), 2007.024(a).
- 44 *Id.* § 2007.024(b).
- 45 *Id.* § 2007.024(c).
- 46 *Id.* § 2007.024(d).
- 47 *Id.* § 2007.044.
- 48 *Id.* § 2007.026.
- 49 *Id.* § 2007.044(c).
- 50 Act of May 30, 1993, 73<sup>rd</sup> Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, § 1.02.
- 51 *Id.* § 1.01.
- 52 *Id.* § 1.14(b)-(c).
- 53 *Id.* §§ 1.15, 1.16, 1.18, 1.19, 1.20.
- 54 See *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618, 625 (Tex. 1996).
- 55 *Id.*
- 56 *Id.*
- 57 *Barshop*, 925 S.W.2d at 618.
- 58 *Barshop*, 925 S.W.2d at 638.
- 59 23 Tex. Reg. 1593-1635 (1998).
- 60 23 Tex. Reg. 4648 (1998).
- 61 *Bragg v. Edwards Aquifer Auth.*, 71 S.W.2d 729, 730 (Tex. 2002).
- 62 See U.S. CONST. Article VI.
- 63 TEX. GOV’T CODE ANN. § 2007.026; see discussion in Part III(C)(3).
- 64 *Edwards Aquifer Authority v. Bragg*, 21 S.W.3d 375, 380 (Tex.App.-San Antonio 2000), *aff’d*, 71 S.W.3d 729 (Tex. 2002).
- 65 *Id.*
- 66 *Id.*
- 67 *Id.*
- 68 *Id.* 21 S.W.3d at 380-81.
- 69 *Bragg v. Edwards Aquifer Auth.*, 71 S.W.3d 729, 731-33 (Tex. 2002).
- 70 *Id.* at 735-37.
- 71 *Id.* at 736.
- 72 *Id.* at 736.
- 73 *Id.* at 735-36.
- 74 *Id.* at 737-38.
- 75 See, e.g., *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000).
- 76 See TEX. WATER CODE ANN. § 36.0015 (Vernon Supp. 2002).
- 77 *McMillan v. Northwest Harris County Mun. Util. Dist. No. 24*, 988 S.W.2d 337 (Tex.App.-Houston [1st Dist.] 1999, pet. denied).
- 78 *Id.*
- 79 *Id.* at 341-42.
- 80 *Id.* at 340.
- 81 *Id.* at 340-41.
- 82 *Id.* at 340.
- 83 *McMillan*, 988 S.W.2d at 341-42.
- 84 *South West Prop. Trust, Inc. v. Dallas Co. Flood Control Dist. No. 1*, 2001 Tex. App. LEXIS 6626, 2001 WL 1161010 (Tex.App.-Dallas 2001), *reh’g overruled*, 2002 Tex. App LEXIS 2411, 2002 WL 501083 (Tex.App.- Dallas 2002).
- 85 *Id.* at \*22-24.
- 86 *Id.* at \*24.
- 87 *Id.* (emphasis added).
- 88 *Chambers Co. v. TSP Dev., Ltd.*, 63 S.W.3d 835 (Tex. App. – Houston [1st Dist.] 2001, pet. denied).
- 89 *Id.*
- 90 *Id.* at 837-38.

- 91 *Id.* at 838.
- 92 The court explains: “A contract for the sale of real estate is an agreement that binds the purchaser to buy and the seller to sell in accordance with the terms of the contract.” *Greve v. Cox*, 683 S.W.2d 535, 536 (Tex.App.-Dallas 1984, no writ). A contract for sale passes equitable title to the buyer. *See Frady v. May*, 23 S.W.3d 558, 565 (Tex. App.-Ft. Worth 200, pet. denied). An option contract for the sale of land gives the optionee the right to elect to purchase the property at stated terms and within a specified period of time, but with no obligation to do so. *Rollingwood Trust No. 10 v. Schuhmann*, 984 S.W.2d 312, 315 (Tex. App.- Austin 1998, no pet.). The primary test for determining whether a real estate agreement is an option contract or a contract for sale is whether the contract imposes a mandatory obligation upon the seller to accept a sum stipulated as liquidated damages in lieu of the purchaser’s further liability. *Cadle Co. v. Harvey*, 46 S.W.3d 282, 286 (Tex.App.-Ft. Worth 2001, pet. denied).” *Id.* at 838 (citations omitted).
- 93 *Chambers*, 63 S.W.3d at 838.
- 94 *Bragg v. Edwards Aquifer Auth.*, 21 S.W.3d 375, 380 (Tex.App.-San Antonio 2000), *aff’d*, 71 S.W.3d 729 (Tex. 2002).
- 95 *McMillan v. Northwest Harris County Mun. Util. Dist. No. 24*, 988 S.W.2d 337 (Tex.App.-Houston [1st Dist.] 1999, pet. denied).
- 96 *South West Prop. Trust, Inc. v. Dallas Co. Flood Control Dist. No. 1*, 2001 Tex. App. LEXIS 6626, 2001 WL 1161010 (Tex.App.-Dallas 2001), *reh’g overruled*, 2002 Tex. App LEXIS 2411, 2002 WL 501083 (Tex.App.- Dallas 2002).
- 97 *City of El Paso v. Public Utility Comm’n*, 883 S.W.2d 201, 203 (Tex. 1994)
- 98 TEX. GOV’T CODE ANN. § 2007.003(b)(4) (emphasis added).
- 99 *See Ann L. Renhard Cole, State Private Property Rights Acts: The Potential for Implicating Federal Environmental Programs*, 76 TEX. L. REV. 685, 710-16 (1998).
- 100 *See, e.g.*, 63 Fed. Reg. 36655 (1998).
- 101 *Id.*
- 102 *See, e.g.*, 33 U.S.C.A. § 1370.
- 103 *See New York v. United States*, 505 U.S. 144, 177-79 (1992).
- 104 2 U.S.C.A. § 658(5) (1998).
- 105 TEX. GOV’T CODE ANN. § 2007.003(b)(11)(C).
- 106 TEX. WATER CODE ANN. § 36.001(8).