Water Law Update

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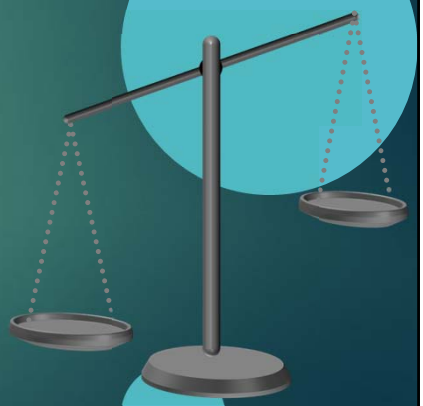

Overview

- Waters of the United States
- Des Moines Water Works
- Regulatory Takings
- Exempt Wells
- Water Wars
- Miscellaneous

"Waters of the United States"

- Rule released in the Federal Register on June 29, 2015, effective August 28, 2015
- Immediately challenged in several court cases
- August 27, 2015, a North Dakota invalidated rule, but ruling only applies within the thirteen states in that circuit
- October 9, 2015: Sixth Circuit Court of Appeals stays rule nationwide

"Waters of the United States"

- Litigation over where case should be heard- United States District Court or United States Court of Appeals
- In January, SCOTUS agreed to hear the jurisidictional dispute
- February 28, 2017- President Trump issues Executive Order requiring the Administer of the EPA and Secretary of the Army for Civil Works to publish a proposed rule "rescinding or revising" the current rule defining "Waters of the United States"
- Comment period extended to September 27, 2017

Waters Of The United States
Duarte Nursery v. U.S. Army Corps of Engineers, 2017 WL 416097 (E.D. Calif).

- Does field cultivation near vernal pools constitute of violation of Section 404 of the CWA?
- District court applied the "significant nexus" test from Rapanos and determined that, even though there was no surface connection between the pools and the closest stream, the pools were hydrologically connected to the stream

Waters Of The United States
United States Army Corps of Engineers v. Hawkes, 136 S.Ct. 1807 (2016).

- Corps issued a jurisdictional determination finding that portions of Hawkes' land constitute a WOTUS
- Landowner has three options: (1) adhere to the finding and conduct no activity on that portion of the property; ignore the determination and proceed to use the land, risking civil and criminal liability; or (3) spend significant sums of money to secure an EPA or Corps permit

Waters Of The United States
United States Army Corps of Engineers v. Hawkes

- United States Supreme Court finds that jurisdictional determination is a "final determination" that may be appealed to court
- In February, United States District Court for the District of Minnesota ruled in favor of Hawkes, finding that the property contains no "WOTUS" (2017 WL 359170)

Des Moines Water Works
***Board of Water Works Trustees of the City of Des Moines v. Sac County Board of Supervisors, et al.*, 2017 WL 382402 (Iowa Supreme Court, Jan. 27, 2017).**

- Des Moines Water Works (DMWW) filed suit against several upstream drainage districts, claiming that the release of nitrates from farm fields into the Racoon River resulted in nitrate levels that was over the legal limit about 25% of the time
- Federal court sends certified questions to the Iowa Supreme Court

Des Moines Water Works

- Iowa Supreme Court answers:

(1) Iowa drainage districts are immune from suits for damages

(2) Constitutional claims brought by DMWW are meant to protect citizens, not government agencies

(3) Even if constitutional protections applied, the increased need to treat nitrates does not amount to a property interes

- Still at issue in the federal court is whether the drainage districts are violating the Clean Water Act

Regulatory Takings

***Edwards Aquifer Authority v. Day*, 55 Tex. Sup. Ct. J. 343, 369 S.W.3d 814 (2012).**

- Authority rules require a permit for groundwater withdrawals, except for wells producing less than 25,000 gallons per day for domestic or livestock use.
- Day filed for a permit to pump 700 acre-feet of water annually for irrigation based on historical use. Authority "preliminarily found" that Day had established a beneficial use of 600 acre-feet per year and notified Day of the preliminary findings. Day then had a well drilled at a cost of $95,000.

Regulatory Takings

***Edwards Aquifer Authority v. Day*, 55 Tex. Sup. Ct. J. 343, 369 S.W.3d 814 (2012).**

- Authority then notified day that his application had been denied due to a failure to prove beneficial use. Day protested and, after a hearing, an administrative law judge found that Day was entitled to pump 14 acre-feet of groundwater per year, based on proof of historical use in that amount.
- Day appealed to the district court, which found that Day had proven irrigation of 150 acres (about ½ of his original claim), but denied Day's constitutional claims, including a takings claim. The district court granted summary judgment to the authority on the takings claim.

Regulatory Takings

***Day* (Cont'd)**

- Day and the Authority appealed. The court of appeals agreed with the Authority that Day was entitled to a permit for only 14 acre-feet per year. In addition the court found that landowners have ownership rights in the groundwater beneath their property that is entitled to constitutional protection, and that Day's takings claim should not have been dismissed.
- The Texas Supreme Court held that land ownership includes an interest in "groundwater in place" that cannot be taken for public use without adequate compensation under the Texas Constitution.

Regulatory Takings

***The Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118 (Tex. Ct. App. 2013), pet. for rev. den., No. 13-023, 2015 Tex. LEXIS 400 (Tex. Sup. Ct. May 1, 2015).**

The Texas Court of Appeals held that the enactment and implementation of the Edwards Aquifer Act substantially advanced a legitimate governmental interest and did not deprive the defendants of all economically viable use of their property. However, the Act did unreasonably impede the defendant's use of the farm as a pecan orchard because the irrigation permit approved withdrawal of water for irrigation at less than a sufficient amount which constituted a regulatory taking, and outright denial of second permit on separate tract also constituted a regulatory taking. The Texas Supreme Court declined to review the case.

Regulatory Takings

***Klamath Irrigation v. United States*, 129 F.Cl. 722 (Dec. 21, 2016)**

- Government ceased water deliveries to farmers in Oregon and California in 2001 to protect endangered species
- Farmers file suit, claiming a regulatory taking
- Court rules that this should be analyzed as a physical taking
- Much easier case for farmers

Exempt Wells
Clark Fork Coalition v. Tubbs, 380 P.3d 771 (Mt. Sup. Ct. 2016).

- Environmental group challenges agency's definition of "combined appropriation", in place since 1991 (physically manifold)
- Trial court rules in favor of environmental group and reinstates 1987 rule and orders agency to begin rulemaking
- Montana Supreme Court affirms as to definition and reinstatement of old rule, but holds that ordering rulemaking exceeds scope of judicial authority
- Vigorous dissent says that majority engaged in legislation from the bench

Exempt Wells
Kittitas County v. Eastern Washington Growth Management Hearings Board, 256 P.3d 1193 (2011)

- County violated GMA by failing to protect rural character in rural areas
- County's subdivision ordinance failed to protect water resources as required under GMA
- County cannot rely solely on DOE
- Daisychaining

Exempt Wells
***Swinomish Indian Tribe v. DOE*, 311 P.3d 6 (2014)**

- Indian tribe petitioned for review of DOE rule that reserved water from river for future year-round out-of-stream uses
- These uses are alleged to impair minimum instream flows

Exempt Wells
Swinomish Indian Tribe v. DOE

- Washington Supreme Court found that "overriding considerations of public interest" exception to prohibition on impairing instream flows did not give DOE authority for rule
- Rule is invalid
- 400-500 homes involved
- DOE is now looking at trucking water or piping water to these locations in Skagit County

Exempt Wells
Whatcom County v. Hirst, 381 P.3d 1 (2016)

- Whatcom adopted amendments to its comprehensive plan and zoning ordinance in 2012 in response to Growth Management Hearing Board rulings
- Landowner challenged rural land use planning element, in particular the adequacy of the county's measures to protect surface and groundwater resources
- Kittitas County case- daisychaining

Exempt Wells
Whatcom County v. Hirst

- Whatcom incorporates DOE rules
- Board finds that the DOE rules in the county ordinance are not proper- first remands, then finds invalid; county must make its own determination of availability
- Instream flows- Nooksack rule
- Court of Appeals reverses Board
- Washington Supreme Court reinstates decision of Board

Exempt Wells

Five Corners Family Farmers, et al. v. State, 268 P.3d 892 (Wash. 2011).

- Stock-watering exemption in 1945 state law providing for exemptions from permit requirement for certain types of withdrawals of groundwater not limited to 5,000 gallons per day (as industrial uses are).
- Withdrawals at issue involved between 450,000 and 600,000 gallons per day for 30,000-head cattle feedlot.

Exempt Wells

Five Corners Family Farmers, et al. v. State, 268 P.3d 892 (Wash. 2011).

- At time of enactment in 1945 legislature could have reasonably believed that stock-watering was of significant importance and impact of such watering slight.
- Dissent opined that legislature never intended that statute would allow such large withdrawals with no examination of whether existing rights impaired or public welfare harmed.

Water Wars

***Texas v. New Mexico* (United States Supreme Court)**

- Special Master files 300 page draft report recommending that New Mexico's motion to dismiss be denied (and strongly implying that New Mexico will not prevail on the merits)
- Special Master recommends that the United States be granted leave to intervene, but that Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 be denied their motions to intervene

Water Wars
Mississippi v. Tennessee

- Twisted history (Mississippi filed suit against Memphis several years ago)
- Mississippi alleges that Memphis is pumping groundwater from beneath Mississippi (131 mgd)
- United States Supreme Court asked the Obama administrative for brief stating its opinion
- Obama administration urged the Court to reject the case; Court promptly accepted the case

Water Wars
Mississippi v. Tennessee

- Mississippi does not want equitable apportionment, but that may be the only remedy
- Mississippi alleges conversion, trespass, unjust enrichment, constructive trust and nuisance, asks for injunction and damages of "not less than $615 million
- Special Master releases report on August 12, 2016, recommending that hearing be held on whether aquifer is interstate or instrastate
- Seems to be heading for dismissal

Miscellaneous

***Jowers v. South Carolina Department of Health and Environmental Control*, 2017 WL 3045982 (Sup. Ct. S.C. July 19, 2017).**

- South Carolina passed the Surface Water Withdrawal, Permitting, Use, and Reporting Act
- Agricultural uses were subject to registration instead of permitting
- Registration perpetual, agricultural uses presumed to be reasonable, and no volume limitations
- Other large volume uses must apply for a permit, which is limited in time and scope

Miscellaneous

***Jowers v. South Carolina Department of Health and Environmental Control*, 2017 WL 3045982 (Sup. Ct. S.C. July 19, 2017).**

- Downstream riparian owners from potato farm file suit alleging that treatment of agricultural uses enacts a taking, violates due process and violates the public trust doctrine
- Supreme Court of South Carolina finds that plaintiffs lack standing and that claims are not ripe (exception to standing does not apply)
- Majority and concurring opinions discuss public trust claim in depth anyway

Miscellaneous

***Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (Ninth Cir. 2017).** 2017 WL 3045982

- Tribe brought suit to have the court declare that the federal government had reserved groundwater rights for the tribe when the reservation was formed in the 1870's.
- The Tribe does not currently pump groundwater, but receives surface water from the Whitewater River System pursuant to a 1938 adjudication. The Tribe additionally purchases groundwater from several water districts.

Miscellaneous

***Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (Ninth Cir. 2017).**

- The water districts argue that the federal government reserved no groundwater for the Tribe when the reservation was formed.
- The court found that the reservation clearly reserved water rights for the tribe.
- Reserved water right applies to groundwater.
- Appealed to United States Supreme Court

Miscellaneous

***Coyote Lake Ranch, LLC v. City of Lubbock*, 59 Tex. Sup. Ct. J. 967 (2016)**

- Applies the accommodation doctrine (oil and gas) to groundwater
- Lubbock purchased groundwater rights from the ranch; question centers on the city's use of the surface to access the water
- Ranch owners filed suit, claiming that the City was required "to use only that amount of surface that is reasonably necessary to its operations" and had a duty "to conduct its operations with due regard for the rights of the surface owner"

Coyote Lake Ranch v. City of Lubbock
May 27, 2016
Texas Supreme Court

- Court finds that groundwater is similar to oil and gas, and accommodation doctrine applies
- The accommodation doctrine also presumes that the mineral/water rights are superior to the surface rights
- Did the landowner "win"? Are groundwater rights stronger now?

Miscellaneous

***Siskiyou County Farm Bureau v. Cal. Dept. of Fish and Wildlife*, 186 Cal. Rptr. 3d 141 (Cal. Ct. App. 2015), as modified on denial of rehearing (2015).**

- Cal. Ct. of Appeal overturns Superior Court ruling granting an injunction against the agency from bringing any enforcement action against agricultural water diverters for failure to notify the agency of plans to divert
- notification requirement applies to "any diversion" whether within existing water rights or not

Miscellaneous

***Texas Commission on Environmental Quality v. Texas Farm Bureau, et al.*, No. 13-13-00415-CV, 460 S.W. 3d 264 (Ct. App. Corpus Christi-Edinburg, 2015)**

- Chemical company holding a senior water right made a call on the water
- 845 permit holders had their water rights suspended, including 716 for crop irrigation users
- In accordance with its rules, plaintiff exempted junior water rights held by cities and power plants based on public health and safety concerns

Miscellaneous

Texas Commission on Environmental Quality v. Texas Farm Bureau, et al.

- Defendant challenged the validity of the rules are being arbitrary
- Appellate court affirms trial court, holding that state law strictly applies the prior appropriation doctrine to water withdrawals in the event of water shortages