

Environmental Protection and Water Allocation

Water Law – Senior College

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Endangered Species Act (ESA)

- 1970s-era legislation
- Preceded by more limited legislation in 1960s
- A moving force behind more comprehensive legislation?
 - The President we love to hate: Richard Nixon

ESA II

- Aimed at protecting endangered species
 - Against direct threats
 - And against habitat destruction
 - Section 7(a)(2) – federal agency obligations
 - Section 3 – obligations that also apply to private individuals and state governments

Tennessee Valley Authority v. Hill

- Important and controversial early case
- A strong, pro-environmental protection approach
- Key language – section 7
 - “Each Federal agency shall . . . insure that any action . . . carried out by [it] . . . is not likely to jeopardize [an endangered species] or result in the destruction or adverse modification of [its] habitat

Tellico Dam



Supreme Court's Ruling

- No dispute about dam's impact on the snail darter:
 - “operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat.”
- The issues:
 - Would TVA violate the ESA if it completes and operates the dam?
 - If so, should an injunction against completion or operation of the dam be issued?

Supreme Court's Ruling II

- Should the survival of a few tiny fish stop a \$100 million “virtually completed dam?”
 - Congress KNEW of the impact on the snail darter when it appropriated money for the dam
- YES!!!!!!
 - ESA language is clear: federal agencies may not carry out actions that threaten the existence of endangered species or destroy their habitat

Supreme Court's Ruling III

- ESA rests on a commitment to stop species extinction
- Congress believed that any species loss was a loss of our “genetic heritage,” something of “incalculable” value

Supreme Court's Ruling IV

- What's the role of courts?
 - To do what the legislature tells us to do.
- “It is not for us to speculate, much less act,” on what Congress might have done if it had anticipated this situation.
- Perhaps it isn't worth \$100 million to save this fish, but the courts lack authority “to make such fine utilitarian calculations.”

Supreme Court's Ruling V

- Should the Court interpret the Act “reasonably” and consistently with “common sense and the public weal?”
 - THAT IS NOT OUR FUNCTION
 - **Congress has spoken, it has struck the balance “in favor of affording endangered species the highest of priorities.”**

“The law, Roper, the law.”

- Quoting *A Man for All Seasons*,
- The Court concludes:
- “in our constitutional system the *commitment to the separation of powers* is too *fundamental* for us to preempt congressional action by judicially decreeing what accords with ‘common sense and the public weal.’”

Fallout of TVA v. Hill

- Congress exempted the Tellico Dam project
- But ESA remains intact, with strong protection for endangered species and habitat
- Private and state projects : section 3 of the Act
- Operation of federal projects still governed by rule in TVA v. Hill –

ESA and Water Allocation

- **Federal dams in the west provide**
 - Irrigation water; power; recreation
 - Flow control in important western rivers
- **Federal agencies**
 - Contract to supply water
 - Operate and maintain dams and reservoirs for
 - Power
 - Recreation
 - Flood control
 - In-stream flows

ESA and Water Allocation II

- What happens when there is not enough water for all?
 - Congress, through ESA, has struck the balance “in favor of affording endangered species the highest of priorities.” *TVA v. Hill*
- Stream flows protected to maintain threatened species and habitat
- Irrigation withdrawals reduced

Tulare Lake Basin (Fed Ct Claims 2001)

- Withdrawals from California's Central Valley Project
- Restrictions to protect delta smelt and winter-run chinook salmon
- Irrigators argued that denial of their water was a "taking of property" entitling them to just compensation

Fifth Amendment “takings” clause

- “Nor shall private property be taken for public use, without just compensation.”
- Is the contractual right to receive water from the CVP a “property right?”
 - Yes: a **“usufructuary” right of property** –
 - i.e. the user does not own the water itself, the user owns the right to enjoy the water

Federal “Takings” Analysis

- Physical takings: compensation always required
- Regulatory “takings” (i.e. restrictions on property use)
 - compensation may not be required
- What is ‘property?’
 - A state law matter
 - Rights may be restricted by “background” principles

Federal “takings” analysis

- **Physical takings:**
 - “physical occupation or invasion”
- “no matter how minute the intrusion,” no matter “how weighty the public interest,”
 - *compensation is due.*

Federal Takings Analysis II

- Regulatory takings:
 - Government exercise of its police power results in restrictions on use (e.g. zoning)
- A balancing test to determine whether there is a *taking* for which *compensation* is required
 - Character of government action; economic impact; reasonableness of owner's investment-backed expectations
- A denial of any productive use = categorical taking, like physical taking

Court's analysis

- A restriction on use of water “completely eviscerates the right itself,”
 - The only right plaintiffs have is to use
 - Denial of that right extinguishes all value
- Restrictions imposed by ESA are, in effect, government’s “exclusive possession of plaintiffs’ water use rights for preservation of fish”
- **This is a physical taking – compensation is due**

What about background law?

- State law defines what is ‘property’
- And background state property principles may restrict scope of plaintiffs’ rights
- In California –
 - use must be “reasonable,” and
 - state always can restrict use in the public interest (“public trust” doctrine)

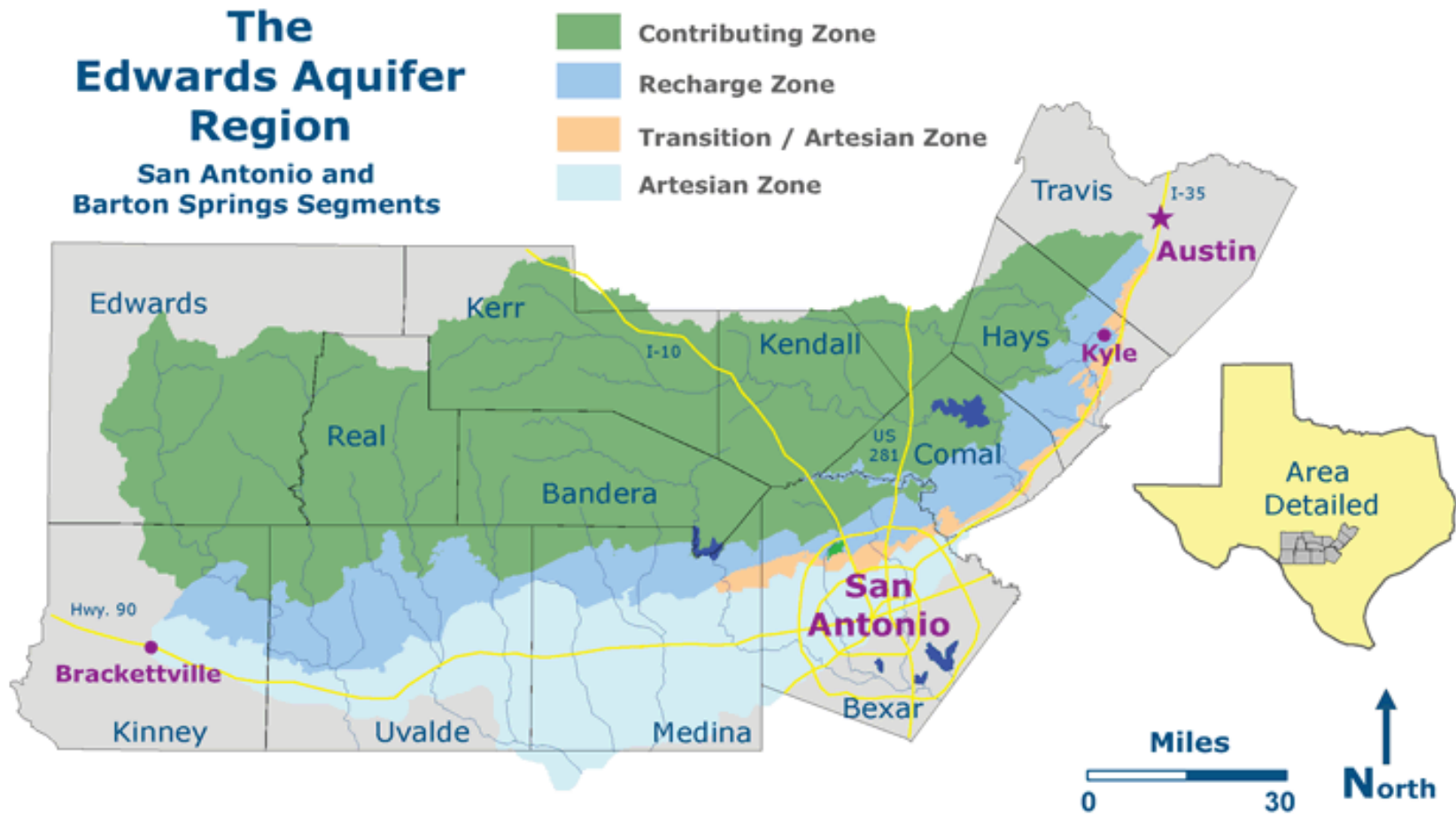
Background restrictions not applicable

- No proof that relevant state agency decided that protection of endangered species was required
- Therefore, plaintiffs right was unrestricted.
- Absent a decision by California water board, “*the federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so.*”

Four key points

- ESA affects water allocation decisions
- ESA protection may curtail private access to water
- But this could be considered a “taking” of water rights
- State law defines scope and nature of private property in water

The Edwards Aquifer



Edward's Aquifer Endangered Species

- The seven endangered species of the Edwards Aquifer system are:
 - Fountain Darter (*Etheostoma fonticola*)
 - Texas Blind Salamander (*Typhlomolge rathbuni*)
 - San Marcos Gambusia (*Gambusia georgei*)
 - Texas Wild Rice (*Zizania texana*)
 - Comal Springs Riffle Beetle (*Heterelmis comalensis*)
 - Comal Springs Dryopid Beetle (*Stygoparnus comalensis*)
 - Peck's Cave Amphipod (*Stygobromus pecki*)

A Short Video

- <http://www.edwardsaquifer.net/comal.html>

1991 ESA litigation

- Federal judge to Texas (1993):
 - Either you control use of Edwards Aquifer, or I will
- May 1993: Texas legislature passed act authorizing regulation of Edwards Aquifer system, including regulation of groundwater pumping
- Politically, it did not sit well with Texans

Edwards Aquifer Authority v. Day

- Texas groundwater law –
 - Rule of capture // law of the biggest pump
- Regulating groundwater pumping was politically unpopular, especially at behest of federal government
- EAAA provided for compensation IF regulation led to taking
- 2011 amendment to Water Code – a “landowner owns the groundwater below the surface”

EAA v. Day II

- Brings the long-brewing battle to a head
 - Landowners who want to pump groundwater
 - Versus
 - EAA-imposed restrictions
- Issue: do the restrictions on pumping amount to a “taking” of the landowner’s property without compensation?

EAA v. Day III

- Is there a “property” right in the groundwater?
 - Rule of capture and property theory: no property if no right to exclude
 - Court – you can exclude; you just cant complain about natural drainage
 - Landowners own the groundwater in place (just as they own oil and gas beneath their land)

EAA v. Day IV

- Are the regulations a taking for which compensation must be paid?
 - MAYBE
- Texas constitution permits the regulation of natural resources, including groundwater
 - Not *per se* unconstitutional to regulate
- This regulation may go too far, but facts are not clear enough for definitive decision at this stage

So, what's next?

- Does this mean all landowners are entitled to compensation if pumping is limited at all?
 - Public must now pay to maintain productivity of the Edwards Aquifer system?
- Does this mean only that EAA must find a different way to allocate the limited supply?
- What should the EAA do?

T. Boone Pickens

- Extensive landholdings on Texas panhandle (211,000 acres)
- Shopping the water rights – to San Antonio; to Dallas
- Instead – a consortium of west Texas panhandle cities paid \$103 million

Pickens's sale

- Suppose Lubbock et al.'s pumping from Pickens's land causes drainage in Oklahoma?
- Texas Climate News, September 30, 2012: *Aquifer's decline spells big changes in Panhandle farming, UT study finds*