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Edwards Aquifer Auth. v. Chem. Lime, Ltd., 2006 Tex. App. LEXIS 1127 (Tex. Ct. App. 2006)

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treatment, storage, and delivery system would connect directly to the City's water distribution system. Hence, the court held the City's water system was a regional system under the statutory scheme, and the Commission was within its statutory right to grant the certificate.

Therefore, the court affirmed the district court's findings that the Commission acted within its authority by granting the City a certificate.

Matthew Willson

Edwards Aquifer Auth. v. Chem. Lime, Ltd., 2006 Tex. App. LEXIS 1127 (Tex. Ct. App. 2006) (holding that a court's enjoining of a statute only delays its enforcement and does not alter its effectiveness).

In the 1993 Edwards Aquifer Authority Act ("Act") and the Texas state legislature ("legislature") established the Edwards Aquifer Authority ("Authority") to govern and administer the use of groundwater from the Edwards Aquifer. The legislature granted a preference under the Act's permitting system to existing users of aquifer water. Existing users had to file a declaration of historical use with the Authority by March 1, 1994, six months after the Act's effective date. Existing users were defined as persons who withdrew and beneficially used underground water from the aquifer on or before June 1, 1993.

The Act provided that the Authority's board of directors would be appointed by various governing bodies affected by the Authority. This appointment procedure was required to be submitted to the United States Department of Justice ("Department") for administrative pre-clearance under section 5 of the Voting Rights Act. The Department refused pre-clearance on the basis that the Act contemplated appointive rather than elective selection of the Authority's board. This made the appointment provision unenforceable. The legislature did not remedy the Act's section 5 problems until the 1995 legislative session. Thus, the Act's original September 1, 1993 effective date and the March 1, 1994 deadline for existing users to file declarations of historical use, both passed during a period in which the Act was made unenforceable by federal law.

In 1995, the legislature amended the Act to change the board's selection method from appointment to election. The legislature provided that the amendments would take effect on August 28, 1995, and the Department pre-cleared the amended Act. However, the legislature did not amend the Act's original March 1, 1994 historical use declarations filing deadline, or otherwise address how the expired deadline was to be adjusted.

Six days before the amendments to the Act were to take effect, a group of local underground water conservation districts and agricultural interests brought a constitutional challenge to the Act in the district court of Medina County, and sought to restrain the Act's administration and enforcement. The court, in *Barshop v. Medina County Un-*

derground Water District (“*Barshop*”), held the Act unconstitutional, and enjoined Texas from enforcing the Act. On direct appeal, the Texas Supreme Court, in an opinion issued on June 28, 1996, found the Act constitutional, and dissolved the district court's injunction.

The Texas Supreme Court in *Barshop* rejected the argument that the Act affected an unconstitutional taking of existing users' property rights by imposing a March 1, 1994 deadline to file the historical use declaration. The court construed the deadline as merely "directory" rather than "mandatory." The statutory deadline, in other words, merely manifested the broader legislative intent that declarations of historical use were to be filed six months after the Authority became effective. The court explained that the legislature "obviously intended that existing users would have preference over future users," and thus, "provided existing users the opportunity to file their declarations with the Authority after the effective date of the Act but before allocation of water to other potential users." Having construed the statutory deadline to provide existing users an opportunity to file historical use declarations, the Texas Supreme Court held that the Act did not affect a taking. The Texas Supreme Court denied rehearing of its judgment on August 16, 1996.

After *Barshop*, the Authority promulgated rules setting forth the procedures governing the filing of declarations of historical use. The proposed rule set a deadline of December 28, 1996, a Saturday, for existing users to file their declarations of historical use. The Authority understood the Texas Supreme Court to hold that the deadline for existing users to file declarations of historical use would be six months after the date the Act had become effective. The Authority concluded that the Act became effective on June 28, 1996, the same date the Texas Supreme Court issued the *Barshop* opinion. The Authority reasoned that the implementation of the amended Act had been suspended by the district court injunction, but that the injunction was dissolved by the Texas Supreme Court on June 28, 1996, and the Act thereby became effective on that date. The Authority moved the deadline to December 30, the first Monday following the 28th, to address concerns that its offices otherwise would have been closed on the Saturday deadline.

Chemical Lime produces lime, a product used in road construction, steel manufacture, water treatment, and the removal of sulfur compounds from emissions from coal-fired plants. In 1999, Chemical Lime bought APG Lime, including a lime-production plant in New Braunfels. The New Braunfels plant, in operation since 1907, used water for lime processing, dust suppression, the cooling of equipment, drinking water, and sanitation. The plant's sole water source was well water from the Edwards Aquifer. Chemical Lime filed their application with the Authority in January 1997, after attempting to locate 21 years of historical use data as required by the Authority.

In February 1997, the Authority sent Chemical Lime a letter acknowledging the receipt of Chemical Lime's application for an initial regular permit. In December, the Authority advised Chemical Lime that the Authority preliminarily found Chemical Lime's application provided sufficient evidence to substantiate a declaration of historical use. In April 1998, the Authority notified Chemical Lime that the technical review of the application was completed on March 21, and, on April 24, the Authority issued Chemical Lime an initial regular permit to withdraw water from the Edwards Aquifer, subject to the Authority's board of director's final action.

In November 2000, the Authority rejected Chemical Lime's application, finding that Chemical Lime's declaration of historical use was not filed timely (before December 30, 1996), and that Chemical Lime's historical withdrawals were not placed to a beneficial use for irrigation, municipal, or industrial use. Chemical Lime filed a notice of protest in December 2000. The Authority attributed the reversal to the discovery, in 2000, of an error in the Authority's coding of Chemical Lime's application in its database. Because of the error, the application was not coded as having been filed after the December 30, 1996 deadline, and thus escaped the Authority's notice.

Chemical Lime filed suit in the 22nd Judicial District Court, Comal County seeking declarations that: (1) the Authority's rule that established a December 30, 1996 filing deadline was invalid and that Chemical Lime's initial regular permit application was filed timely on January 17, 1997; (2) the Act, which had made the Authority subject to the Administrative Procedure Act, violated constitutional protections of due course of law, separation of powers, open courts and jury trial because it afforded inadequate judicial review of the Authority's determinations; (3) the Authority's "unlawful actions" effected an unconstitutional taking; and (4) in the alternative, assuming that the Authority's December 30, 1996 filing deadline was valid, Chemical Lime had substantially complied with it.

The district court severed the takings claim. The deadline validity issue and remaining constitutional claims were tried in district court. The substantial-compliance issue was tried to a jury, which found in Chemical Lime's favor. The district court rendered judgment that the Authority's December 30, 1996 deadline was invalid and Chemical Lime's initial regular permit application was timely filed. It also held that Chemical Lime had substantially complied with the application requirements, and that "the Authority's denial of Chemical Lime's initial regular permit application on the grounds that it was not timely was invalid, improper, and illegal." Finally, the district court awarded Chemical Lime attorney's fees and costs, and later made findings of fact and conclusions of law regarding this portion of the judgment. The Authority appealed.

The Authority presented three main issues on appeal. The Authority first contended that the district court erred in invalidating the Authority's rule setting the December 30, 1996 deadline for filing declarations of historical use. The Authority urged that the effective date of the Act was June 28, 1996, the date *Barshop* was decided, and that *Barshop* and the legislative intent underlying the Act compelled the agency to set the deadline, December 30, the first business day following six months after the *Barshop* decision. The Authority next challenged the district court's holding that Chemical Lime substantially complied with the December 30 deadline. In its second issue, the Authority contended that, as a matter of law, a party could not be in "substantial compliance" with a filing deadline when there is no dispute that the party failed to file any portion of the filing until after that deadline. The Authority asserted in its third point that Chemical Lime did not substantially comply with the December 30, 1996 deadline.

The Authority's argument was based upon two subsidiary propositions. First, the Authority interpreted *Barshop* to hold that the historical use declaration filing deadline was six months after the Act's effective date. Second, the Authority contended that the Act's effective date was June 28, 1996, at the moment when the Texas Supreme Court issued its *Barshop* opinion dissolving the injunction barring implementation of the Act. Therefore, the Authority concluded, the Authority's rule setting a filing deadline of December 30, 1996 was within its statutory powers, and Chemical Lime's January 17, 1997 filing was untimely as a matter of law. Chemical Lime did not dispute the Authority's view that *Barshop* fixed the filing deadline at six months after the Act's effective date, but Chemical Lime disagreed as to the Act's effective date. Chemical Lime argued that the Act did not become effective until at least August 16, 1996, the date the Texas Supreme Court denied rehearing in *Barshop*, because the ruling dissolving the injunction was not final until that date. Chemical Lime also suggested that the date the Texas Supreme Court issued its mandate in *Barshop*, August 31, 1996, might also control. Six months after these dates would have been February 16, 1997 or February 28, respectively. In either case, the Authority's rule setting an earlier deadline would have been invalid, and Chemical Lime's filing would have been timely.

The court agreed with the Authority that the Act became enforceable on June 28, 1996, when the Texas Supreme Court issued its *Barshop* opinion dissolving the district court's injunction barring the Act's implementation and enforcement. Specifically, the court held a court's enjoining of a statute only delays its enforcement, and does not alter its effectiveness. Thus, the effect of the section 5 delays and the district court injunction could only bar implementation and enforcement of the Act once it took effect, not change the date the legislature specified for the Act to take effect. The court stated, "[o]nce the supreme court vacated the district court's injunction on June 28, 1996,

the Act immediately could be implemented and enforced unless and until the supreme court ordered otherwise." As such, the court further held the Authority acted within its authority in promulgating the rule that set the historical use filing deadline on Monday, December 30, 1996, the first working day following six months after the Texas Supreme Court issued the *Barshop* opinion.

Further, the court refused to find that Chemical Lime substantially complied with the December 30 deadline. The court found undisputed evidence that Chemical Lime did not attempt to file its historical use declaration until after the December 30, 1996 deadline. The court stated that, "where the legislature or agency acting within the scope of its delegated powers has properly established a deadline, it is beyond our power to undermine it by applying a substantial-compliance analysis, which appears to be purely a judge-made creation of common law." As such, the court concluded that, as a matter of law, Chemical Lime's noncompliance with the December 30, 1996 deadline was not susceptible to analysis for "substantial compliance," and that the district court could not have submitted a substantial-compliance issue to the jury.

The court felt bound by *Barshop's* holding that the Act's historical use filing deadline was "six months after the Authority becomes effective," and because the Act became enforceable on June 28, 1996, the court reversed the judgment of the district court and rendered judgment that the Authority acted under its statutory authority in setting a deadline for filing declarations of historical use of December 30, 1996. The court also reversed the district court's holding that Chemical Lime substantially complied with the filing deadline.

James E. Downing

VIRGINIA

Alliance to Save the Mattaponi v. Virginia, 621 S.E.2d 78 (Va. 2005)
(holding: (1) an agency's factual findings regarding water rights adjudications are subject to the "substantial evidence" standard of review; and (2) Indian Rights treaties entered into prior to the creation of the United States are not governed by federal law).

This opinion is a consolidated appeal of three cases. The Virginia Supreme Court considered two sets of issues related to a Virginia Water Protection Permit ("Permit") issued by the State Water Control Board ("Board") to the City of Newport News ("City") for the construction of the King William Reservoir. The first set of issues required the court to consider whether the Board's issuance of the City's Permit violated any of its statutory mandates under the State Water Control Law. The second set of issues involved an attack on the Board's actions