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## Larry Koch, Inc. v. Texas Natural Res. Conservation Com'n, 52 S.W.3d 833 (Tex. Ct. App. 2001)

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bottom by adverse possession, and a prescriptive easement for public access to Echo Lake via the boat ramp. In addition, Pascoag failed to assert an inverse condemnation claim within the six-year statute of limitations, which barred any consideration of whether the State's actions constituted an unconstitutional taking of private property.

*Alan Curtis*

## TEXAS

**Larry Koch, Inc. v. Texas Natural Res. Conservation Comm'n, 52 S.W.3d 833 (Tex. Ct. App. 2001)** (holding the trial court erred in dismissing suit for want of jurisdiction for injuries to property resulting from failure of the Texas Natural Resource Conservation Commission to carry out its statutory duties).

A number of wells that drew water from the Gulf Coast Aquifer tested positive for benzene at levels that exceeded the Environmental Protection Agency's fixed safe level. As a result, the Department of Housing and Urban Development refused to provide new mortgage insurance to a subdivision in which Larry Koch, Inc. ("Koch") owned property. Koch filed suit against the Texas Natural Resource Conservation Commission ("TNRCC") for violations of statutory duties imposed on TNRCC by the Texas Health and Safety Code and the Texas Water Code ("TWC"). Koch alleged failure of the TNRCC to publish an annual registry identifying sites contaminated by hazardous substances, failure to issue notices to persons suspected of contamination of a site and failure to perform duties in a reasonable time. The trial court dismissed all of Koch's causes of action without stating grounds on which it made its decision. Koch appealed.

The Texas Court of Appeals stated sovereign immunity barred Koch's actions unless it came within the class of cases of which the legislature had consented to suit. A person affected by inaction of the Commission is authorized to file petition to compel the commission to show cause why it should not be directed to take immediate action. The court stated the legislative intent and purpose of this statute clearly waives immunity to suit brought by persons adversely affected by failure of TNRCC to perform duties. The court also stated the statute established a remedy for such suits by empowering the courts of Travis County to issue orders compelling TNRCC to show cause why it should not be directed to take immediate action to perform a required duty. Koch's allegations, according to the court, brought its actions within this class, and therefore sovereign immunity did not deprive the court of subject matter jurisdiction.

TNRCC asserted that the administrative process of considering Koch's petition requesting the agency list the contaminated area on

the state registry was not complete, therefore the court lacked jurisdiction pursuant to the exhaustion rule. The exhaustion rule deprives a court of jurisdiction if a plaintiff has not pursued all available remedies in the administrative process. The court dismissed the doctrine and stated Koch's only remedy for TNRCC's violation of Texas statute existed in not in administrative but in judicial proceedings. The court held the exhaustion rule did not preclude jurisdiction.

TNRCC's final attempt to support lack of subject matter jurisdiction rested upon the mootness doctrine. It alleged Koch's petition, asking the court to order TNRCC to consider listing the contaminated area on the state registry, was moot because TNRCC was considering Koch's request. The court explained the mootness doctrine prohibits a court from exercising jurisdiction over a controversy no longer in existence, and stated Koch's petition alleged an ongoing controversy in that TNRCC had not made a decision on the issue in a timely manner. The court held mootness did not deprive the trial court of jurisdiction.

Furthermore, the court held the trial court erred in dismissing Koch's action for lack of subject matter jurisdiction. Thus, it reversed the decision of the trial court and remanded the action.

*Rachel Sobrero*

**Mendez v. San Benito/Cameron County Drainage Dist. No. 3, 45 S.W.3d 746 (Tex. App. 2001)** (holding that sovereign immunity denies citizens standing in a case of flood damage caused by a defective drainage ditch).

Mendez and several other residents (collectively, "Residents") of the La Palma subdivision brought this action against Cameron County Drainage District and San Benito (collectively, "Drainage District") seeking damages resulting from an ineffective drainage ditch.

On April 5, 1991, an extremely heavy rain fell in San Benito and flooded the La Palma subdivision. The flooding affected approximately 700 individuals. The Residents claimed that the occurrence of rising water was due to the negligent conduct of the City of San Benito and Cameron County Drainage District by the design, placement and maintenance of a drainage ditch. Pursuant to the Texas Water Code, the Residents claimed that the City of San Benito and Cameron County Drainage District altered the natural water flow and diverted impounded surface waters near their homes and properties. The Residents further asserted that the Drainage District was negligent in the maintenance and cleaning of its drainage ditches and other permanent structures. The Drainage District denied the Residents' allegations and asserted several affirmative defenses including sovereign immunity.