

1-1-2004

City of San Marcos v. Texas Comm'n on Env'tl. Quality, No. 03-02-0072-CV, 2004 Tex. App. LEXIS 96 (Tex. Ct. App. Jan. 8, 2004)

Sean R. Biddle

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

Custom Citation

Sean R. Biddle, Court Report, City of San Marcos v. Texas Comm'n on Env'tl. Quality, No. 03-02-0072-CV, 2004 Tex. App. LEXIS 96 (Tex. Ct. App. Jan. 8, 2004), 7 U. Denv. Water L. Rev. 529 (2004).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Uncertain's motion for summary judgment, concluding that TCEQ erred in granting the amended permit without notice or opportunity for a contested-case hearing. The district court further found that under the statute, TCEQ's executive director did not have authority to issue the amended permit. TCEQ and Marshall appealed to the appellate court.

The appellate court distinguished between Marshall's inter-basin transfer request and its request to change the authorized use. Regarding the inter-basin transfer request, the court agreed with TCEQ that the statutory notice and hearing provisions did not apply to that part of Marshall's application. Thus, the court reversed the district court's decision on the point of whether the statute required TCEQ to provide notice and a contested-case hearing for Marshall's request for an inter-basin transfer. However, the court affirmed the district court's decision on Marshall's additional request to change the authorized use from municipal only to municipal and industrial, holding the statute did apply to that request for a change in use. Thus, since the notice and hearing requirements applied to part of Marshall's application, TCEQ should have complied with the statutory provisions with respect to the application in its entirety.

Uncertain also argued that TCEQ's executive director did not have statutory authority to grant Marshall's request for an amended permit. TCEQ had determined that since it was uncontested and did not require a hearing, the executive director could approve the application. However, because the court held the application was subject to the notice and hearing requirements, the application did require a hearing, and thus TCEQ's executive director did not have the authority to grant Marshall's request.

Thus, the appellate court reversed the district court on the point that Marshall's request for an amended permit to authorize an inter-basin transfer was not subject to statutory notice and hearing requirements. The appellate court affirmed the remainder of the district court's ruling.

Katharine J. Ellison

City of San Marcos v. Texas Comm'n on Env'tl. Quality, No. 03-02-0072-CV, 2004 Tex. App. LEXIS 96 (Tex. Ct. App. Jan. 8, 2004)

(holding that when a city discharges treated sewage effluent into a natural flowing stream system, the discharged water—after commingling with natural waters—may lose all characteristics distinguishing the effluent as property of the city).

The appellee, Texas Commission on Environmental Quality ("Commission"), has primary responsibility for protecting the environment and implementing any law and regulations concerning the environment in the state. On July 2, 1998, the Commission

granted the City of San Marcos a permit to convey treated sewage effluent discharged by the City into the San Marcos River to a diversion point three miles downstream. The Commission placed several limiting conditions—designed to protect downstream water users and environmental uses of the river—on the final version of the permit. The City sought judicial review contesting the imposition of the limiting provisions on the final permit. In the same action, the San Marcos River Foundation and Dr. Jack Fairchild (collectively “the Foundation”) challenged the Commission’s authority to grant the permit without requiring the City to first obtain an appropriation right. The District Court of Travis County affirmed the Commission’s final order granting the permit in its entirety. In a substituted opinion, the Texas Court of Appeals ruled in favor of the Foundation, reversed the district court, and remanded with directions to vacate the City’s permit.

The City receives the majority of its municipal water supply from groundwater from the Edwards Aquifer. For many decades, the City has discharged the ground water into the San Marcos River once the water passed through the City’s sewage treatment plant. In order to decrease dependence on groundwater, the City petitioned the Commission in 1995 for a permit to use the San Marcos River to convey and divert treated sewage effluent at a point three miles downstream from the discharge point. The City planned to augment its potable water supply by piping the water diverted from the San Marcos River along with water imported from the Guadalupe River to a drinking water treatment facility currently under construction.

During the application process, both the City and the Commission relied on the common law rule of capture as applied to groundwater to support the City’s continued ownership of the effluent after discharge into the San Marcos up to the point where the City intended to divert the water. The rule of capture as applied to groundwater provides that no ownership rights exist until the water is pumped from the ground and placed under the control of the pump owner. Maintaining ownership rights in captured groundwater requires exercising continued control over the water. Texas is the only state that still recognizes the rule of capture as applied to groundwater. Further, the Commission and the City cited Texas case law that allows the owner of groundwater to convey the water down a natural watercourse and divert the water, less any losses due to transportation, while retaining ownership of the water. Water conveyed in such a manner is still considered under control of the owner because Texas law recognizes water as a fungible resource. The exact same water molecules discharged into the watercourse do not have to be diverted at the chosen point downstream. Applying the above law, the Commission determined that the City maintained control over the discharged effluent and granted a permit to convey and divert the treated sewage effluent without requiring the City to apply for an appropriation permit with the added restrictions of priority of usage.

The appellate court agreed with the Foundation’s contention that

the City's treated effluent was not fungible with the natural waters of the San Marcos. When the effluent entered the San Marcos and commingled with the natural flowing waters, which are property of the State of Texas, the discharged effluent lost all characteristics that distinguished it as separate property of the City. Therefore, at the point of discharge, the City lost control and ownership of the formerly captured groundwater. The City provided further support to the appellate court's findings by failing to rebut contentions that the City intended the transportation of the effluent as a preliminary form of treatment because the commingling would dilute the concentrations of effluent with the clean natural waters of the San Marcos before the City treated the water for municipal use. The court continued by narrowly interpreting cases allowing for water to be treated as a fungible resource as involving waters of only the purest quality exceeding that required of sewage effluent.

Since the appellate court ruled to invalidate the City's permit to convey and divert its sewage effluent, the appellate court did not address the City's concerns with limiting provisions initially imposed on the now invalid permit. In recognizing the importance of the state's scarce water resources, the appellate court stated that similar plans to reuse effluent would have to be evaluated on a case-by-case basis. In fact, the Texas Legislature passed a statute giving the Commission the authority to approve permits exactly like the subject of this litigation, but the appellate court found the law inapplicable to the present case because the City's permit was pending prior to the effective date of the law.

Sean R. Biddle

Maverick County Water & Improvement Dist. No. 1 v. Reyes, No. 04-03-00421-CV, 2003 WL 22900914 (Tex. Ct. App. Dec. 10, 2003)

(holding trial court erred in suit for damages caused by flooding resulting from a broken canal by refusing water district's plea to the jurisdiction where, as a governmental unit, water district was immune from suit for breach of contract, promissory estoppel, inverse condemnation, and nuisance claims).

In April 2000, the manager of the Maverick County Water and Improvement District No. 1 ("District"), in order to make more water available for electricity and irrigation, increased the capacity of one of its canals. On April 8, 2000, the canal broke and released water, flooding Anita Reyes's property. The District invited Reyes to its April 12 board meeting, where the board president allegedly admitted liability and promised to pay all damages. After the District informed Reyes that it had denied her claim, she sued the District for breach of contract, promissory estoppel, inverse condemnation, and nuisance in the District Court for Maverick County. The District filed a plea to the jurisdiction alleging sovereign immunity, which the trial court denied.