July 9, 2010

Mr. Blake A. Hawthorne
Clerk, Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

RE: Amicus brief for *The Edwards Aquifer Authority and the State of Texas v. Burrell Day and Joel McDaniel,* Cause No. 08-0964

Dear Mr. Hawthorne:

Amici Texas Farm Bureau, Texas Wildlife Association, Texas and Southwestern Cattle Raisers Association, and Texas Landowners Council, jointly submit this response to several recently filed amicus briefs and letters, including the post-submission brief of Edwards Aquifer Authority ("EAA"), Texas Alliance of Groundwater Districts, and the amicus letter brief of Senator Robert Duncan.[1]

These recent filings repeat or attempt to reinforce the now familiar mantra of EAA and its supporters: if this Court affirms that landowners have a vested property right in their groundwater, the regulatory system created by the legislature will utterly fail. According to EAA, ownership is inconsistent with regulation. By case law and by example, it is not.

Neither Day and McDaniel nor their various amicus supporters contest the right of the legislature to create a regulatory scheme for groundwater in discharge of its duties under the Conservation Amendment to the Texas Constitution. However, over a half century ago this Court illustrated the proper constitutional relationship between the exercise of regulatory power and the role of the judicial branch in protecting private property rights. *See Marrs v. R.R. Comm'n*, 177 S.W.2d 941 (Tex. 1944). The decision in *Marrs* is a civics lesson that evidently bears repeating. This Court explained: "While our Constitution thus provides for the conservation of our natural resources for the benefit of the public, there are other constitutional provisions for the protection of the property rights of the individual." *Id.* at 948. The "other constitutional provisions" that protect the individuals property rights, the Court noted, are the takings clause, TEX. CONST., art. I, sec. 17; the equal protection clause, TEX. CONST., art. I, sec. 3; and the due process clause, TEX. CONST., art. I, sec. 19; as well as similar clauses in the U.S. Constitution. *Id*. (referencing all of these provisions).

To the extent the recent amicus offerings suggest that the Court should avoid injecting itself into the regulatory scheme the legislature has created, *Marrs* correctly teaches that the

[1] The expenses incurred in the preparation of this response are being paid or provided by Texas Farm Bureau, Texas Wildlife Association, Texas and Southwest Cattle Raisers Association, Texas Cattle Feeders Association, and Texas Landowners Council and its General Counsel, Marvin W. Jones.

Court is in fact a co-equal branch of the government, charged with the protection of the private property rights at issue. And to those who direly warn that ownership and regulation cannot co-exist, the Railroad Commission offers a bright example to the contrary. Its mission did not fail as a result of the decision in *Marrs.* Neither the regulatory scheme nor the public fisc was imperiled by the proper exercise of this Court's constitutional responsibility.

Of course some tension may exist between a regulatory program and the rights of property owners being regulated, particularly as the parameters of the appropriate constitutional balance are being worked out. However, neither the recognition of a single regulatory taking under the *Penn Central* standard,[2] nor a plea for legislative freedom to develop regulations presents a serious basis for suggesting that the proper balance will not or cannot be struck. The legislature surely understood that the regulation outlined in the EAA enabling legislation could, when implemented, result in a compensable taking of groundwater ownership rights, given the provisions of Section 1.07 providing "the legislature intends that just compensation be paid if implementation of this article causes a taking of private property or the impairment of a contract in contravention of the Texas or Federal Constitution."[3] Recent filings in this case demonstrate the legislature's need for reinforcement from this Court of the legitimacy of the property rights being impacted by legislative action.

As do EAA and others aligned with it, the Attorney General muddles the legal doctrines at issue. The rule of capture is not a rule of property ownership, nor does the character of ownership of underground water derive from it. The rule is merely a waiver of tort liability for drainage. The surface owner owns underground water in place, no less than he owns gravel or sand or caliche at the surface. There is no compelling basis to carve out underground water from this general principle of ownership by the surface estate. The migratory nature of underground water is urged as that basis, but that physical characteristic is recognized by the liability shield provided by the rule of capture. Effecting that liability shield does not legally or analytically require denial of ownership in place.

Opponents argue that an essential element of ownership is the right to exclude others, and that underground water cannot be owned in place because the rule of capture precludes the surface owner from preventing drainage of his property. Their underlying logic is that ownership in place is legally inconsistent with the rule of capture and that, given the vitality of the rule of capture in Texas water law, ipso facto there is not ownership in place.[4] The circularity of this argument is apparent; and, more to the point, it is belied by nearly 100 years of oil and gas law recognizing the concept of ownership in place alongside the rule of capture.

This Court has consistently recognized both the rule of capture and ownership in place for underground water. They are not contradictory legal principles, and recognition of

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[2] *See* Letter Opinion attached to EAA May 13, 2010 letter brief.

[3] Act of May 30, 1993, 73rd Leg. R.S., Ch. 626, §107, 1993 Tex. Gen. Laws 2350, 2356.

[4] This argument, moreover, suffers from a flawed inherent analogy. The surface owner *can* exclude others in an appropriate analytical sense: Drainage achieved by trespass can be precluded.

ownership in place of underground water will not negate the ability of the state to regulate underground water.

We respectfully request that the Court affirm the Court of Appeals' ruling (and the long line of cases upon which it relies) recognizing that landowners in Texas own groundwater in place.

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