



CITY OF AMARILLO

LEGAL DEPARTMENT

February 12, 2010

Honorable Supreme Court of Texas
201 W. 14th Street, Room 104
Austin, Texas 78701-1614

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

Honorable Members of the Supreme Court and Clerk of Said Court:

The City of Amarillo files this amici letter in connection with the referenced case. The City has included herewith twelve copies of this letter for submission and distribution to the Justices of the Court. No fee has been or will be charged for preparing this letter.

Statement of Interest

The City of Amarillo is a home rule municipality which is the owner of approximately 262,000 acres of groundwater and groundwater rights in seven counties across the Texas Panhandle. Specifically, the City owns a legally defined interest in groundwater (by deeds duly filed of public record at the county clerk's office) in Carson, Deaf Smith, Hartley, Ochiltree, Potter, Randall, and Roberts counties. A portion of these groundwater rights are already under active production as a municipal water supply source for over 200,000 persons, while the remainder are held in reserve for future municipal uses. The City has a vested interest in the holding of the Court in the referenced case.

The holding in the instant case could impact the City's ownership interest in its groundwater rights, the value of those groundwater rights, and the City's strategic plan for future water resources for its residents and businesses. The City has a substantial interest in protecting

it water rights to ensure continued maintenance, development and growth of its economy and indeed, the economy of the entire Panhandle region of this State.

Position

The City of Amarillo endorses the arguments and reasoning stated in the *amicus* brief filed herein by the Canadian River Municipal Water Authority. But the City is compelled to write separately in response to the spurious logic offered by appellants' and their allies: (a) if groundwater in-place is a recognized property estate or right, then every groundwater district, subsidence district, and similar agency would then be subject to paying eminent domain damages when they regulate; (b) to avoid this dreaded cost, they ask the court to find that groundwater in-place is not truly property protected by the Constitution; (c) thereby, they avoid ever paying condemnation damages groundwater in-place.

The City of Amarillo believes appellants and their allies, while running from the specter of condemnation costs sought by Mr. Day, are willing to trample cherished principles of property law, and worse, they invite this Court to join them in the stampede.

This modest *amicus curie* brief will suggest a three step path by which this Honorable Court can dispose of this appeal without doing substantial harm to either (i) groundwater owners; (ii) the authority of groundwater regulatory agencies; or, (iii) the jurisprudence of this State as to either estates in real property or the Takings clause.

Argument

I. Groundwater May be Owned in Place, Even if Not in Production

In *City of Del Rio v. Clayton Sam Coil Hamilton Trust*, this Court refused to disturb the lower court's holdings that groundwater in-place is an estate in land that may be severed from the surface and transferred or retained by the surface estate owner.¹

¹ *City of Del Rio v. Clayton Sam Coil Hamilton Trust*, 269 S.W.3d 613 (Tex. App.- San Antonio 2008, reh. pel. denied Tex. Sup. Ct., Dec. 11, 2009).

In allowing the appellate opinion to stand, this Court reminded everyone that "rule of capture" is a rule of non-liability and, a qualification of the absolute ownership rule. The rule excuses **drainage** by production on an adjacent tract, *but it does not diminish the ownership interest in groundwater any more than it does for oil and gas.*²

The City of Amarillo, as have most Texas cities, developed long range strategic plans and invested hundreds of millions of taxpayer dollars in the acquisition of groundwater rights and the development of groundwater well fields. Maintaining the legal underpinning of Texas groundwater law is necessary for the City's strategic investments in **water** to remain viable. If the Court holds that a party does not have a vested right in the nonproducing groundwater interests it has legally acquired, then Amarillo will have to make substantial additional investments to revise its strategic plans, with dire financial impacts on the taxpayers and services of the City.

Consistent with *City of Del Rio*, this Court should again affirm that ground water may be owned in place as an estate in land.

2. The **Groundwater** Estate is Subject to Reasonable Police Power's **Regulation**, and Such Regulation is Neither Inconsistent with **Private** Property Nor a *per se* **Unconstitutional** Taking or Damage to Groundwater in Place.

In *8m'shop v. Medina County Underwater Conservation District*, 925 S.W.2d 618 (Tex. 1996), this court reviewed the unique statutory authority of the EAA, which is different from that of all other groundwater conservation districts (created under Chapter 36, Texas Water Code). That difference was spurred by the narrow circumstances of the case: a readily rechargeable aquifer under threat of federal intervention and control over the Edwards Aquifer (pursuant to the

² *Id.* at 17-18.

Endangered Species Act), if the State did not move to regulate water withdrawal from the Edwards Aquifer. See *Sierra Club v. Babbitt*, 995 F.2d 571 (5th Cir., 1993).

The City of Amarillo fervently urges the court to write narrowly and clearly in the instant case, lest its ruling on the unique enabling legislation of the EAA be broadly and wrongly applied to all other owners of groundwater (and groundwater conservation districts) in other parts of the state.

The City of Amarillo's groundwater rights, in seven counties, are subject to the regulatory schemes of three different groundwater conservation districts, each established pursuant to Chapter 36 of the Texas Water Code. Per their statutory authority, these districts issue permits for water wells, set spacing requirements, establish pooling rules, production limits, and prescribe other technical and environmental requirements on all groundwater produced within their respective jurisdictions.

The City acknowledges their authority and believes that reasonable regulatory activity as set forth in Chapter 36 creates no diminution in the existence of the groundwater estate the City owns by deed from the surface owners. (In fact, reasonable regulation enhances the long term value of the groundwater rights because it assures conservation.) The exercise of reasonable regulation over groundwater is no more detrimental to the concept of groundwater in-place as private property, than is the long-recognized existence of an estate in oil and gas in-place damaged by rules of the Texas Railroad Commission.

Aside from the oil and gas model, the interplay between ownership of the surface estate and municipal zoning regulations offers another case in point. Through zoning laws, municipal governments restrict private land owners as to type, size, and density of their land use, yet such

³ Texas Local Government Code, chapter 211, codification of Municipal Zoning Enabling Act. Cities adopt local zoning ordinances pursuant to this statute and home rule authority.

reasonable zoning regulation that does not abrogate the essential character of the land as privately owned real property.

Every day, people buy and sell interests in land surface and the underground oil and gas estates, subject to the regulatory authority of state agencies and municipalities, yet no one seriously contends that there is an unconstitutional taking or damaging to that oil and gas property or the surface. There is no reasoned argument for treating any differently either the existence or regulation of the groundwater estate in-place - at least outside of the Edwards Aquifer where different hydrological, environmental, and legal principles exist.

The court should find that, pursuant to its statutory authority, the Edwards Aquifer Authority, may reasonably regulate groundwater in-place and such is not in derogation of private property nature of groundwater ownership.

3. Whether the EAA's Decision on **Day's Permit Constitutes** Permissible **Reasonable** Regulation or an Unconstitutional Taking, Depends on the **Validity** of the Rules and the Fairness of the Process Used by EAA; in Any Event, the Court Must **Write** Narrowly.

As a general proposition, outside of the EAA, groundwater owners expect every **regulatory** action to be marked by three sterling qualities. First, that regulatory rules are based upon sound scientific methods and current hydrological data. Second, that both the rules and rulings are consistent with the stated plans and goals of the district. Third, that groundwater owners are afforded an unbiased hearing, consistent with due process and traditional notions of **fair** play and justice.

As noted above the EAA exists under a wholly different legislative scheme than any chapter 36 groundwater conservation district. Property owners within the EAA own, buy, and sell groundwater subject to a unique regulatory scheme. Nonetheless, this court upheld the EAA enabling legislation against a facial challenge of unconstitutionality in *Barshop*. One basis for the

court finding the enabling act constitutional was the legislative recognition that adequate compensation be paid if implementation of the act causes a taking. *8m'shop*, at 630-31, That is an implicit, if not explicit, finding by the Legislature that groundwater in-place is private property, Nonetheless, in *Barshop* the court reserved the specific question of whether the plaintiffs had a vested property right in water beneath their land, *Id.*⁴ It is unclear, on the summary judgment record in the instant case, whether the EAA has engaged in an unlawful taking by either its ruling or manner of ruling on Day's pennit application.

Appellants and certain amici seem to have seized on the dicta in *Barshop* to argue that groundwater not in production is not a "vested property right," thereby excusing the payment of condemnation damages, First that flies in the face of established principles of real estate law, discussed above at Point One of this brief. Second, if this court is compelled to go there with appellants due to the language of the EAA legislation or other reasoning, then the City of Amarillo urges the court to please write clearly as to the limited and narrow scope of the ruling under the EAA only, lest it be wrongly applied to other aquifers, groundwater owners, and groundwater districts who are not bound by the peculiar wording and circumstances giving rise to the EAA legislation,

Summan' & Conclusion

Groundwater in-place is a recognized severable estate in real property, even when not in production, The groundwater estate, like oil and gas, is subject to reasonable police power regulations of authorized agencies. Reasonable regulation of subterranean estates in real property per chapter 36 of the Water Code does not in itself diminish the nature, value, or rights of those estates or give rise to *per se* Takings liability. Whether a different result obtains under the EAA

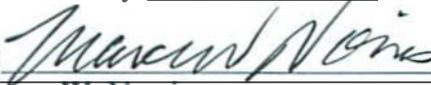
⁴ But see, *FriemJsHood Development CO. v. Smith-Southwest Industries, LLC*, 576 S.W,2d 21, 29 (Tex. 1978) (the rule of capture has become "an established rule of property law in this State, under which many citizens own land and water rights:'.) Any lingering doubt about the answer to the question was resolved to the same end in 2009, in the *Cit)' of Del Rio* case mentioned under the first point of this brief.

enabling legislation and **threat** of federal intervention, cannot turn upon the now-settled question that groundwater in-place is a recognized estate in real property,

Because this case comes to the Supreme Court on summary judgment, this case should be *reverted to the district court for a trial on the issue of whether the EAA permit limit (both the substantive basis for the decision and the process afforded to Day) was proper.*

Respectfully Submitted,

Amarillo City Attorney's Office

By: 

Marcus W. Morris

City Attorney

Texas Bar No. 15091300

Courtney Goodman-Morris

Assistant City Attorney

Texas Bar No. 24040991

509 SE 7th Ave., Suite 303

Amarillo Texas 79101

Tel. 806-378-4208 / Fax 806-378-3018

marcus.morris@amarillo.gov

courtney.goodmorris@amarillo.gov

ATTORNEYS FOR CITY OF AMARILLO, TX

CERTIFICATE OF SERVICE

I certify that on February 12, 2010, a true and correct copy of this Letter Brief was sent via First Class U.S. mail to all appellate counsel and amicus curiae of record in this proceeding as listed below,

CO/Counsel for Defendant/Appellant/Petitioner

Edwards Aquifer Authority:

Andrew S. "Drew" Miller

Kemp Smith, L.L.P.

816 Congress Avenue, Suite 1150

Austin, Texas 78701

Pamela Stanton Baron

Allomey at Law

P.O. Box 5573

Austin, Texas 78763-5573

Kristofer S. Monson

Assistant Solicitor General

Peter Hansen

Assistant Attorney General

Office of the Attorney General

MC-059

P.O. Box 12548

Austin, Texas 78711

CO/Counsel for Amicus Curiae Calladian River
Municipal Water Authority:

COU/SEL for PLAINTIFFS/APPELLEES/RESPONDENTS
BURRELL DA F ALD. JOSEPH MCDANIEL:

THOMAS JOSEPH
THOMAS JOSEPH, P.C.
909 N.W. Loop 410, Suite 600
San Antonio, Texas 78209

COU/SEL (or Third Party Defendant/Appellee/
Cross-Petitioners) in State or Texas:

Brian Berwick
Assistant Attorney General
Environmental Protection and Administrative Law
Division
Me-015
P.O. Box 12548
Austin, Texas 78711

Counsel (or Amicus Curiae) Medina County
Irrigators Alliance:

Thomas H. Crofts, Jr.
Crofts & Callaway, A Professional Corporation
4040 Broadway
Avenue, Suite 525
San Antonio, Texas 78209

Counsel for Amicus Curiae
The City of Victoria:

Michael J. Booth
Trey Nesloney
Booth, Ahrens & Werkenthin, r.c.
5151 Congress Avenue, Suite 155
Austin, Texas 78701

Counsel (or Amicus Curiae) Texas
Southern Cattle Raisers Association:

J.B. Love, Jr.
Attorney and Counselor of Law
P.O. Box 387
Marathon, Texas 79842-0387

COU/SEL for Amici Curiae Texas Farm
Bureau and Texas Cattle Feeders Association:

Mr. Douglas G. Caroom
Eno Peters
Bickerstaff Heath Delgado Acosta L.L.P.

Tom Pollan
Eno Peters
Bickerstaff Heath Delgado Acosta, L.L.P.
3711 South MoPac Expressway
Building One, Suite 300
Austin, Texas 78746

COU/SEL (or Amicus Curiae) Angela Garcia:

Marisa Perales
Brad Rockwell
Lowerre, Fredrick, Perales, Allmon &
Rockwell
707 Rio Grande Street, Suite 200
Austin, Texas 78701

Enrique Valdivia
Texas Rio Grande Legal Aid
1111 North Main Street
San Antonio, Texas 78212

COU/SEL (or Amicus Curiae) Harris-
Galveston Subsidence District:

Gregory M. Ellis
Attorney at Law
2104 Midway Court
League City, Texas 77573

Charles W. "Roek" Rhodes
South Texas College of Law
1303 San Jacinto Street
Houston, Texas 77002

COU/SEL for Amici Curiae
the Alliance or EAA Permit Holders:

Devin D. "Buck" Benson
Lance H. "Luke" Beshara
Pulman, Cappiccio, Pullen & Benson, L.L.P.
2161 N.W. Military Highway, Suite 400
San Antonio, Texas 78213

Texas Comptroller of Public Accounts

Hon. Susan Combs, State Comptroller
LBJ State Office Building
111 E. 17th St., Room 104
Austin TX 78711

3711 South MoPac Expressway
Building One, Suite 300
Austin, Texas 78746



Marcus Norris, City Attorney, City of Amarillo