No. 08-0964

TO THE
SUPREME COURT
OF TEXAS

EDWARDS AQUIFER AUTHORITY,

Petitioner

v.

BURRELL DAY AND JOSEPH McDANIEL,

Respondents

v.

STATE OF TEXAS

AMICUS CURIAE BRIEF
OF
ANGELA GARCIA

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March 6, 2009

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IDENTITY OF AMICUS CURIAE

As required by Texas Rule of Appellate Procedure 11, Texas Rio Grande Legal Aid ("TRLA") makes the following disclosure:

TRLA is a non-profit agency that specializes in providing free civil legal services to the indigent residences of Central, South and West Texas. Services range from brief legal advice and counseling to extensive litigation in state and federal court. Among TRLA's practice areas are consumer protection and environmental justice.

In this case, TRLA represents Angela Garcia, a resident and registered voter of District 7 of the Edwards Aquifer Authority. Like many municipal water users, Ms. Garcia has an interest in ensuring reasonable and cost-effective availability of groundwater in the Edwards Aquifer. Ms. Garcia has taken an active role in ensuring fair representation on the board of the Edwards Aquifer Authority, including representation of minority residents. Consequently, Ms. Garcia also has a unique and historical interest in the ability of the Edwards Aquifer Authority to continue to effectively govern the use of groundwater from the Edwards Aquifer. In addition, as a retired senior citizen on a fixed income and a San Antonio Water System ratepayer, Ms. Garcia has a particular interest in the cost and availability of water supplied from the Edwards Aquifer to her.

Annual funding for the free services that TRLA provides comes primarily from the Legal Services Corporation and the Texas Equal Access to Justice Foundation. Specialized grants are received from various federal agencies and private foundations, as well as individual donations. There are no other sources paying for the cost of this brief.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Ms. Angela Garcia submits this amicus curiae brief in support of the Petition for Review filed by the Edwards Aquifer Authority ("EAA").

SUMMARY OF THE ARGUMENT

Resolving the extent of a landowner's right to water beneath his land is of vital necessity, not just to the landowner who wishes to access it, but to municipal water users whose water source is from groundwater. Confirming that the rule of capture does not confer a vested property interest prior to the physical removal of the water from the ground is in keeping with the will of the Legislature as it has been expressed in Chapter 36 of the Texas Water Code and in the Edwards Aquifer Authority Act.

By recognizing a takings claim for water that has yet to be removed from the ground, the Fourth Court of Appeals' decision discourages regulatory oversight of groundwater and creates an exorbitant financial burden for the regulatory bodies and their ratepayers. Landowners could devise speculative quantities of future water that would be compensated as a "taking," and this windfall would fall on the backs of the ratepayers of municipal water districts that get water from the EAA. This contravenes the intent of the Legislature and the will of the public.

ARGUMENT

I. TRLA encourages the Court to take this ripe opportunity to finally resolve the nature of an individual's right to capture groundwater in place *vis-a-vis* the groundwater districts' authority to manage and regulate groundwater for the benefit of the public good.

For many years now, Texas courts have attempted to uphold and apply the common law rule of capture in an ever-changing landscape of groundwater law, without directly addressing the limits of the authority of regulatory bodies, such as the EAA, to regulate groundwater use. The Court should now take this opportunity to finally affirm the Legislature's intention: to authorize the EAA, indeed to require the EAA, to manage and regulate groundwater, and accordingly, to supplant the rule of capture as it applies to groundwater.

II. The public, through the Legislature, has chosen groundwater regulation, and this Court should affirm that choice.

The voting public and their elected representatives have long spoken in favor of resource management and conservation through regulation and other measures. Since ratification of the Conservation Amendment in 1917, the Texas Constitution conferred on the Legislature the duty to pass all "laws as may be appropriate" for "the conservation and development of all the natural resources of the State." The Texas Constitution declares the conservation and development of water to be public rights and duties. Tex. Const. XVI, § 59. Pursuant to the Conservation Amendment, the Legislature has established groundwater conservation districts, as found in Chapter 36 of the Texas Water Code, and the Edwards Aquifer Authority, as found in the Edwards Aquifer

Authority Act ("EAA Act"); these are the preferred methods of groundwater management. Tex. Water Code § 36.0015.

In creating groundwater conservation districts the Legislature intended to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater. Tex. Water Code § 36.0015. Created separately but with similar concerns, the legislature expressed in Article 1, § 1.01 of the Edwards Aquifer Authority Act that "a special regional management district is required for the effective control of the resource [the Edwards Aquifer]" to "protect" the varied natural and economic interests that use it.[1] What the Legislature did not intend was to recognize a vested property interest in groundwater in place that would allow some number of landowners (who may have never attempted to capture groundwater under their property) to pursue takings claims and demand windfalls from the EAA or the State should they be permitted less than their desired amount or not receive a permit at all.

As explained in the EAA's Petition for Review, in creating these regulatory bodies, the Legislature necessarily modified the common law rule of capture as it was historically understood to apply to groundwater. Following the mandates of the Texas Constitution, the Legislature chose regulation of groundwater for the benefit of the public good over an individual's common-law right to capture a theoretically unlimited amount of groundwater from beneath his or her property. Reflecting the public rights and duties involved, the Legislature also created a mechanism that allowed for the general public,

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[1] Article 1, Section § 1.01, Edwards Aquifer Authority Act.

via groundwater district representatives or the EAA board, to have a voice in the use and management of groundwater.

The Fourth Court of Appeals' erroneous decision runs afoul of the Constitution's and the Legislature's instruction to conserve groundwater resources for the public good. The EAA's ability to conserve and regulate groundwater will be hindered, to say the least, if every time it limits groundwater withdrawals in accordance with the clear mandates of the EAA Act, it is subject to a takings claim.

III. To establish a takings claim, one must first establish a vested property right; but the common-law rule of capture lacks the basic elements of a vested property right to groundwater in place.

Before a party may assert a taking, entitling him to just compensation, that party must establish that it has a "vested" property right entitled to constitutional protection. *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937). A vested property right is "something more than a mere expectancy based upon an anticipated continuance of an existing law." *Id.*

The Fourth Court of Appeals in this case wrongly concluded that Day and McDaniel possessed vested property rights in the groundwater beneath their property. But the Court provided little support for this conclusion. In sum, the Court held that because landowners have *some* ownership rights in groundwater, they have a *vested* right in groundwater in place that is entitled to constitutional protection. This circular logic, however, ignores the nature of the so-called right that the landowners have to groundwater in place.

A fundamental element of a property right is the power to exclude others. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Yet, this is the very element that a landowner lacks while the groundwater remains in place, under the common law. Ironically, only *after* the landowner has obtained a groundwater use permit from a groundwater conservation district, (*i.e.*, after there has been a shift away from the common law to a regulatory structure) does he or she possess the legal power to exclude others. Indeed, it is the rule of capture itself—which allows a landowner to drain all of the groundwater without liability to neighboring landowners—that prevents a landowner from claiming the power to exclude others and negates the claim of a vested property right.

IV. The Basic Problem: Inherent contradictions exist between the actual operation of rule of capture and the alleged absolute ownership of groundwater in place.

Groundwater, by virtue of its fugitive nature and, in many cases, vast extent, is a common-pool resource, and is, therefore, subject to the "Tragedy of the Commons," whereby individual actions based on rational self-interest collectively destroy the common pool resource.[2] Because this common resource—a water-bearing rock called an aquifer—is accessed through private real property (one must drill on one's land to access the water), the point at which the resource transfers from common to private property is in dispute. The issues presented by this case reflect the inherent contradictions between

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[2] Garrett Hardin, "The Tragedy of the Commons", *Science*, Vol. 162, No. 3859 (December 13, 1968), pp. 1243-1248.

promulgating a "right" of extraction unencumbered by concern for its consequences on any other user of that common resource, and support of a purported doctrine of "absolute ownership" that presumes that a landowner owns all that is in the heavens above and below the earth that is his property. These concepts are inherently contradictory because they are not mutually enforceable.

Moreover, the rule of capture encourages individuals to capture as much groundwater as they desire without regard for others' needs or uses. One must capture as much groundwater as he can get before his neighbor drains the water available to them both. This policy of self-interest is the very policy that the public's enactment of the Conservation Amendment and the Legislature's creation of the EAA and groundwater districts were intended to counter. It follows that ensuring the longevity of the resource requires limitations on individual use. In addition, the suggestion of ownership arguably raised by language found in judicial opinions must give way to the actual enactments and to the intent of the Legislature and the people of the State of Texas expressed through statutes and the Texas Constitution.

V. The rule of capture was never intended to create a vested property right; it is instead a rule of non-liability.

This Court has not directly addressed the issue of vested property rights in groundwater in place. Caselaw regarding the rule of capture does not resolve this issue. Typically, the rule of capture is used in the context of liability (or lack thereof) for drainage. That is, under the rule of capture, a landowner who, in capturing groundwater from his own land, drains his neighbor's land is not liable for causing the neighbor's well

to go dry. *See Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955). But the rule of capture says nothing of the landowner's "vested property right" to any quantifiable amount of groundwater. Indeed, a landowner could drill a well, encounter no groundwater, and under the rule of capture, that landowner would have no remedy.

To the extent that a property owner can claim a property right in groundwater beneath his land, it is arguably a groundwater permit issued by a groundwater district such as the EAA that would create such a right. It is not until a permit is issued that a landowner (or permittee) is entitled to withdraw a certain quantity of groundwater. Indeed, the issuance of groundwater permits has created a market in which one can sell this right to withdraw a known quantity of groundwater and the concomitant right to exclude others from possessing that amount of groundwater.

Where, as here, a party is complaining, not about the EAA's taking of a permit, but about the quantity of water granted under the permit, a taking of a vested property right has not occurred. This is so because without the permit, the party could not exclude others from taking his groundwater. He had no entitlement to it.

That is not to say that the landowner has no adequate remedy. Indeed, this case illustrates that a remedy does exist. That remedy is achieved by seeking review of the

EAA's decision to ensure that any right created by the issuance of a groundwater permit was based on correct evidentiary standards and the correct application of relevant law.[3]

VI. The creation of a vested property right in groundwater in place will create impractical and unworkable effects.

There are some practical considerations if one is to determine that groundwater "in place" is vested private property and, therefore, subject to takings claims. Perhaps the most obvious example is that such a proclamation would open the floodgates to limitless litigation. Many landowners will have the right to seek compensation in court, leading to significant costs to the EAA or other groundwater conservation districts ("GCDs"), which would ultimately be borne by taxpayers and ratepayers.

Moreover, recognition of a vested property right to groundwater in place would result in a quagmire, likely leading to an impractical and unworkable standard for determining adequate compensation for such a taking. Barring drought and diminished aquifer levels, every landowner would be capable of claiming practically limitless amounts of potential capture that could put the longevity of the water resource in serious doubt and the financial stability of the EAA and any GCD in dire straits. Future groundwater withdrawals are always speculative and never guaranteed – they are subject

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[3] It is worth noting that the EAA Act, its implementing rules, and Chapter 36 of the Texas Water Code all provide for the ability of a landowner to operate a domestic or livestock well below a certain capacity – in this case, a well with a capacity of 25,000 gallons per day or less (other criteria must also be met within the EAA) – without a permit. It is arguable that this provision provides the base amount of water that can be assured a landowner, ensuring, if you will, a "correlative right" to a certain, limited amount of water from a particular piece of property if certain conditions are met. But to say that the water is "assured" is only to say that the landowner will not be barred or otherwise prevented from attempting to secure those amounts through withdrawals. It is important to remember that groundwater is not secure and in-place, and future amounts cannot be guaranteed.

not only to permit limitations but to drought and the use and potential depletion of the shared, unexcludable resource by all other groundwater users. It is the limitation on pumping (provided by a permit) that supports the possibility of the aquifer as a sustainable resource for the near and distant future.

The EAA and GCDs would have to anticipate payments on some undefined "taking," including legal fees, and would pass that financial burden onto its rate-payers. The landowner would get a windfall profit merely for anticipating and legally pursuing a future desire to withdraw an undefined amount of water. It is the general public that will bear the financial burden of paying landowners for water that might never have materialized under unregulated "rule of capture" conditions. A municipal rate-payer would be left footing the bill for another landowner's windfall profits.[4] It is simply irrational to conclude that in authorizing groundwater conservation districts to regulate the withdrawal of groundwater, the Legislature intended for the taxpayers and ratepayers to pay for this windfall.

CONCLUSION & PRAYER

This Court should grant the EAA's Petition for Review and affirm the Legislature's decision and recognize the right, indeed duty, of the EAA and other groundwater conservation districts to conserve and regulate groundwater for the benefit of the public good by reversing the portion of the Court of Appeals' judgment regarding

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[4] *See* Susana Canseco, *Landowner's Rights in Texas Groundwater: How and Why Texas Courts Should Determine Landowners Do Not Own Groundwater in Place*, 60 Baylor L. Rev. 491 (2008).

Day and McDaniel's constitutional takings claim and rendering judgment affirming the trial court's dismissal of the takings claim.

Respectfully submitted,

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Certificate of Service

I, Marisa Perales, hereby certify that a true and correct copy of the foregoing has been sent via certified mail, return receipt requested, to the following parties on this 6th day of March, 2009.

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