NO. 08-0964

* * *

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

* * *

EDWARDS AQUIFER AUTHORITY AND STATE OF TEXAS,

Petitioners

V.

BURRELL DAY AND JOEL McDANIEL,

Respondents

* * *

BRIEF OF AMICUS CURIAE
MEDINA COUNTY IRRIGATORS ALLIANCE
IN SUPPORT OF THE PETITION FOR REVIEW
FILED BY THE EDWARDS AQUIFER AUTHORITY

* * *

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Medina County Irrigators Alliance respectfully submits this amicus brief in support of the Edwards Aquifer Authority's Petition for Review. Landowners have no vested property right in below-surface groundwater; thus, the usage limitations imposed by the Edwards Aquifer Authority Act do not result in a taking of property for which the Texas Constitution would require compensation. Because the court of appeals wrongly reversed a summary judgment that denied the so-called "takings" claim, the Edwards Aquifer Authority's Petition for Review should be granted.

STATEMENT OF INTEREST

The Medina County Irrigators Alliance is an association of landowners in Medina County, Texas, most of whom are engaged in irrigation farming. Each member of the Alliance currently holds (directly or indirectly) a permit issued by the Edwards Aquifer Authority to withdraw groundwater from the Edwards Aquifer.

As permit holders, the members of the Medina County Irrigators Alliance have a significant interest in the constitutional issue presented in the Edwards Aquifer Authority's Petition for Review. The Alliance members believe that resolution of this issue is of extreme importance to the viability of the Edwards Aquifer Authority.

The Medina County Irrigators Alliance has made arrangements to pay for the preparation of this brief. The names of the members of the Medina County Irrigators Alliance are listed on the roster appended to this brief.

ARGUMENT

I. The rule of capture came into existence because the nature of underground water in place makes it incapable of being a vested property right.

A. In holding that the "absolute" right to capture equated to a vested property right in below-surface groundwater, the court of appeals misunderstood the East case.

The court of appeals ultimately purported to rely on *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904), in which this Court adopted the rule of capture, to support the illogical conclusion that a landowner has a vested property right in water beneath the parameter of the landowner's surface metes and bounds. The result is an ironic contradiction, because, as explained below, the rule of capture itself arose from the Court's conclusion that the nature of underground waters was such that "an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible." *Id.* at 281.

The court of appeals actually cited its own decision in *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App.--San Antonio 2008, pet. filed), for the proposition that landowners have "some ownership rights in the groundwater beneath their property" and thus "a vested right therein." *Edwards Aquifer Authority v. Day*, No. 04-07-00103-CV, 2008 WL 4056321, *9 (Tex. App.--San Antonio, Aug. 29, 2008, pet. filed). The court had perpetrated that notion in *City of Del Rio* by misunderstanding and misapplying the historic rule of capture articulated by the Court in *East*. 269 S.W.3d at 617.

This is what the court of appeals said about the *East* case in *City of Del Rio*: "The Texas Supreme Court has stated that percolating water is a 'part of, and not different from, the soil' and the landowner is the 'absolute' owner of it." *Id.* But that is not really what the Court said in *East*. Quoting an excerpt from a New York opinion, the Court's exact words in *East* were:

> An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface.

81 S.W. at 281.

What the Court was describing in *East* through the New York opinion was, of course, a landowner's right to capture -- not a landowner's below-ground right to be protected from capture by another. The right to capture is indeed an attribute of surface ownership. But the very existence of the right to capture necessarily means that a landowner suffers no invasion of a vested property right when a neighbor exercises the right by extracting groundwater from beneath the landowner's surface.

In piggy-backing its *City of Del Rio* misunderstanding of the *East* case, the court of appeals wrongly transposed the right to capture into an absolute ownership interest below ground. But the right to capture and a kind of "ownership" beneath the surface cannot *both* be absolute. If a landowner has a vested property right in below-surface groundwater, capture through a neighbor's well would necessarily be wrongful. Since

extraction through a neighbor's well is not wrongful under the rule of capture, the extraction would not be invasive of a vested property right.

This is how the court of appeals got it wrong. The truly operative right is the right to capture, which could not exist if there were a vested right in water below the ground.

B. The reasons for the rule of capture amount to reasons against recognition of a vested property right in below-surface groundwater.

Formulating the rule of capture from its adoption by English courts and by most of the other states (at that time), the Court described the doctrine in *East* with these words:

> That the person who owns the surface may dig therein and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action.

81 S.W. at 280. Obviously, the neighbor's inconvenience in the Court's hypothetical would not be *damnum absque injuria* if, as the court of appeals held, the neighbor had a vested property right in the water beneath his or her surface.

Even more determinative of this issue are the reasons why the Court adopted the rule of capture. In *East*, the Court expressed its reasons for being satisfied that the rule of capture was necessary. *Id.* Among them is this:

> Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible.

Id. at 281. This nature of underground water, which necessitated the rule of capture, could not be descriptive of an interest capable of being a vested property right. Indeed, the Court continued in *East* to observe that "any such recognition of correlative rights" would detrimentally interfere with all manner of public and commercial works. *Id.*

II. Unless reversed, the court of appeals' decision that a landowner has a vested property right in below-surface groundwater would undermine the settled balance struck by conservation enactments like the Edwards Aquifer Authority Act.

A. Legislation like the Edwards Aquifer Authority Act maintains a reasonable balance of competing interests without intruding on any vested property right.

In *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999), the Court reaffirmed the common law rule of capture, again explaining the necessity of choosing it in *East* over "its counterpart, the rule of reasonable use" and characterizing the doctrine as one of non-liability "absent malice or willful waste." *Id. at 76.* At the same time, the Court emphasized "the Legislature's broad powers to regulate use of groundwater." *Id.* at 78.

The legislature's constitutional authority to regulate groundwater led the Court in *Sipriano* to conclude that resolution of the tension between the rule of capture and usage regulation was best left for the legislature. *Id.* at 80. And, the legislature exercised this constitutional authority by passing the Edwards Aquifer Authority Act and by imposing the restrictions on capture that gave rise to this suit.

The issue presented by the Edwards Aquifer Authority's Petition for Review arises from the same historical context as the question decided in *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996):

> The aquifer is the primary source of water for residents of the south central part of this state. It is vital to the general economy and welfare of the State of Texas. *See* Act of May 30, 1993 (full citation omitted). Because of anticipated increases in the withdrawal of water from the aquifer and the potentially devastating effects of a drought, the Legislature determined it was "necessary, appropriate, and a benefit to the welfare of this state to provide for the management of the aquifer." *Id.* The Legislature thus enacted the Edwards Aquifer Act in 1993 to manage the aquifer and to sustain the diverse economic and social interests dependent on the aquifer water.

Id. at 623-24.

The Edwards Aquifer Authority Act's fulfillment of this goal by restricting withdrawal of groundwater from the Edwards Aquifer does not intrude on vested property rights. Instead, these provisions regulate what would otherwise be the common law freedom to withdraw with impunity. *See Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d at 76 (characterizing the freedom to withdraw as a common law defense to liability).

B. *The practical effect of the court of appeals' decision would jeopardize years of transactions and future agriculture plans that have been made in reliance on the current permit system.*

It is not difficult to envision the uncertainty and instability that would result from the court of appeals' decision on this issue. The emerging "rights" of the many landowners who did not apply for permits or who were denied permits (because they

could not prove a use of groundwater during the historic period) would overwhelm the system economically through a requirement to provide compensation for restricted use and by consumption that would jeopardize the health and capacity of the aquifer.

This change to the established permit system would also cause substantial economic harm to the landowners who hold permits. Farmers would be unable to rely on the efficacy of their permits, which would adversely impact not only crop production but also the ability to obtain financing essential to future production. Moreover, thousands of permits issued by the Authority over the past ten years have been traded, leased or sold. The validity and effect of these transactions likewise would be called into question.

The Edwards Aquifer Authority Act's regulation of groundwater usage is essential to the stability of the agriculture that depends on the vitality of the Edwards Aquifer. The court of appeals' concept of vested property rights would unnecessarily dismantle a working system to the detriment of those who have relied on it.

CONCLUSION

There can be no doubt that the issue presented by the Edwards Aquifer Authority's Petition for Review is of paramount importance to Texas jurisprudence. The Medina County Irrigators Alliance therefore joins in asking that the petition be granted. This amicus curiae also urges, upon review, that the court of appeals' judgment on the "takings" claim be reversed and that the trial court's judgment be affirmed in that respect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Amicus Brief of Medina County Irrigators Alliance was on this 2nd day of March 2009 mailed by U.S. Mail, postage prepaid, to the following attorneys of record for the petitioners and respondents:

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