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May 6, 2010

Via First Class Mail
Blake A. Hawthorne, Clerk
Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Room 104
Austin, Texas 78701

Re: No. 08-0964; *The Edwards Aquifer Authority and the State of Texas v. Burrell Day and Joel McDaniel*; In the Supreme Court of Texas

Dear Mr. Hawthorne:

This letter serves as a reply by amici curiae Glenn and JoLynn Bragg to certain arguments raised in the Edwards Aquifer Authority's letter of March 5, 2010. As the Braggs pointed out in their amicus brief, the question of the character of the taking of Burrell Day's and Joel McDaniel's water rights is not presently before the Court, and the issue is not necessary to resolving the issues that the parties have raised. In light of the procedural posture of the case and the significant factual disputes that the district court identified as remaining to be resolved concerning the EAA's taking of Day's and McDaniel's water rights, this case presents a particularly inauspicious vehicle for resolving this question and announcing a rule that would govern all future water-rights takings claims, as EAA asks the Court to do. Accordingly, the Court should decline as premature EAA's invitation to decide this issue.

But if the Court were to reach out to decide the question, it should unequivocally hold that water-rights takings can constitute physical or per se takings and, indeed, the physical takings analysis will, in many situations involving takings worked by the EAA Act, be the most appropriate method of analysis. Justice O'Neill astutely noted precisely this point at oral argument when she discussed the per se taking analysis that should apply to instances in which EAA entirely denied a permit for withdrawing aquifer water. But that specific scenario is not the only one that would properly trigger a physical or per se analysis.

In particular, the forced diversion of water from one who has rights to use the water and who would otherwise have captured and withdrawn the water from the aquifer to a different, downstream public use clearly falls within the logic adopted and approved

en banc by the U.S. Court of Appeals for the Federal Circuit in *Casitas Municipal Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, 556 F.3d 1329 (2009) (*en banc*). As the Braggs have already argued, the effective ouster of Day, McDaniel, and other Texas landowners from any enjoyment of their rights to capture and beneficially use groundwater by EAA establishes both the physical-diversion and permanent-loss elements of the test propounded in *Casitas*.[1] And a brief perusal of the text of the EAA Act itself serves to demonstrate that one principal goal of the Act was to direct aquifer water to preserve wildlife habitat and sustain flow levels at Comal, San Marcos, and other outflow springs. Although factual complexities and dissimilarities between cases might preclude the automatic use of such an analysis in every EAA Act case—the reason that the Braggs believe resolving the question in this case, on this record, would be inappropriate—the Court should recognize and affirm the applicability of the *Casitas* analysis to water-rights takings in Texas generally.

By copy of this letter, all counsel of record have been served.

Cordially,

Gregory S. Coleman

cc: Andrew S. Miller
Pamela Stanton Baron
Tom Joseph
Brian Berwick
Kristofer S. Monson

[1] *Casitas*'s application to takings of Texas landowners' groundwater is not undercut by either trial-court ruling relied upon by EAA in its letter brief. Judge Rodriguez of the Western District of Texas did not have the benefit of Federal Circuit's ruling in *Casitas* and so did not consider its application to the facts in the Braggs' case. In fact, EAA's quotation is somewhat misleading, in that Judge Rodriguez did not actually *decide* whether any taking under the Texas constitution—of whatever stripe, regulatory or physical—had taken place, instead declining to exercise supplemental jurisdiction over that claim. EAA similarly fails to note an important part of Judge Lee's ruling on summary judgment in the Braggs' state case in Medina County District Court—that Judge Lee has ruled, as a matter of law, that EAA's actions denying the Braggs access to aquifer water clearly constitutes a taking. The Braggs have requested that Judge Lee reconsider part of the reasoning underlying his order granting the Braggs summary judgment on their takings claim against EAA and recognize that the effect of preventing landowners from withdrawing aquifer water is to physically divert that water to "downstream" outflow springs, like Comal and San Marcos Springs, making the Braggs' taking a physical taking like *Casitas*.