NO. 08-0964

In The
Supreme Court of Texas

EDWARDS AQUIFER AUTHORITY
AND THE STATE OF TEXAS,
Petitioners,

v.

BURRELL DAY AND JOSEPH McDANIEL,
Respondent.

From the Fourth District of Texas, San Antonio, Texas
No. 04-07-00103-CV

BRIEF OF *AMICUS CURIAE*
MESA WATER, L.P.

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Mesa Water, L.P. ("Mesa") respectfully submits this *amicus curiae* brief in support of Respondents Burrell Day and Joseph McDaniel:

INTEREST OF THE *AMICUS CURIAE*

Mesa, whose president is Mr. Boone Pickens, owns or controls the groundwater rights under more than 200,000 acres of ranchland in Carson, Hutchinson, Gray, Wheeler, Roberts, Hemphill, Ochiltree, and Lipscomb Counties in the Texas Panhandle. Mesa has contracts to purchase groundwater rights in other Panhandle Counties. Mesa's groundwater and contract rights lie within the boundaries of three groundwater conservation districts. It is vitally important to Mesa that Texas law continue to recognize, as it has for more than a century, that Texas landowners have vested ownership of the percolating groundwater in place on and under their lands.

Mesa recognizes that many of the issues in this matter have been thoroughly and correctly briefed by the landowners and various amici. Mesa will focus here on the untenable position of the Edwards Aquifer Authority ("EAA"), the State of Texas, and their supporters that, though a landowner may have ***some*** interest in groundwater, that property interest is not ***vested.***

In compliance with Texas Rule of Appellate Procedure 11(c), Mesa advises the Court that it will pay the attorneys' fees for preparing this *amicus curiae* brief.

SUMMARY OF THE ARGUMENT

Petitioners and their various amici posit that the Fourth Court of Appeals erred in concluding that landowners have a vested property interest in groundwater. Unfortunately, they have couched their arguments in terms that confuse rather than illuminate the issue in this case. As a recent example, the Harris-Galveston Subsidence District claims the issue is "whether landowners have a vested property right in the groundwater flowing underneath their land necessitating compensation under the takings clause when the government restricts groundwater withdrawals."[1] Several amici for EAA advance the extreme notion that holding that landowners own groundwater in place will lead to "unregulated and limitless withdrawals" of water.[2] EAA's supporters state their premise in stark and absolute terms: if this Court holds that landowners have a vested property interest, then groundwater districts cannot regulate at all. This is false. As noted below, landowners do have a vested property right in groundwater in place. Like all other property, however, groundwater is subject to the police power of the State and is, therefore, subject to regulation. Contrary to the inference created by EAA and others, not all regulation will lead to a takings claim—only regulation that crosses the line drawn by the Constitution. Contrary to EAA's claims, landowners do not advocate that their

[1] Brief on the Merits of Amicus Curiae The Harris-Galveston Subsidence District (filed February 1, 2010) ("HGSD Amicus") at 1.

[2] HGSD Amicus is particularly striking in its repetitive use of the phrase "unlimited groundwater withdrawals" or some variant. *See* HGSD Amicus at 1, 15, 17, 19, 25, 28, 29, 30 and 31. In short, HGSD builds a strawman, asserting that Day and McDaniel are claiming a constitutional right to unlimited production of groundwater. Nothing could be further from the truth. Moreover, it is quite silly even to suggest, as HGSD does, that the right to extract groundwater would include the right to harm the surface estate.

constitutionally protected interest in groundwater means that groundwater is free from any regulation. And contrary to the assertions of the EAA and the State, the issues raised in this case have been settled for decades in cases relating to fugacious substances in Texas. There is no need to bring confusion to an issue that has long been crystal clear, and this Court should affirm the result of the court below.

I. THE COURT SHOULD TREAD CAUTIOUSLY BEFORE REMOVING A CONSTITUTIONAL CHECK ON GROUNDWATER REGULATION.

The EAA and the State ask this Court to rule that no landowner, under any circumstances, can ever bring a takings claim against a groundwater district. This is so, they maintain, because whatever interest a landowner may have in the water beneath his or her soil, that interest, as a matter of law, is not vested.

Mesa urges the Court to tread cautiously before adopting this sweeping argument. The Texas groundwater market is significant. Groundwater regulation and groundwater transactions throughout the State are far more varied than might be readily apparent from the EAA's and State's briefing to this Court. Although it might be tempting to issue a decision that appears to protect the Edwards Aquifer—comprising only 4 percent of the State's existing groundwater supplies and with quite unique attributes—or the EAA itself—with its distinct governance—any ruling against the landowners in this case that is not narrowly crafted would have implications for the millions of acre feet owned

elsewhere in Texas, either unregulated or regulated by groundwater districts that operate quite differently than the EAA.[3]

Moreover, despite the ultimate holding it seeks, even the qualified language EAA chooses throughout its briefing counsels against a broad, untested holding that a landowner may never bring a takings claim as a matter of law. For example, the EAA states that so long as "historical use is protected" then there is no taking. *See* Brief on the Merits of Petitioner The Edwards Aquifer Authority ("EAA BOM") at 38. What if historical use is not protected? Later, the EAA adds that there is "no vested right to the intended future use of property unbacked by reasonable and existing investment." EAA BOM at 39. What if a landowner has made reasonable investments for future use? The EAA would also distinguish between situations in which the subsurface water is "immobile" from its own aquifer, where "water follows quickly from one place to another," EAA BOM at 28 n.28, as well as disputes "outside a groundwater district" and "within a district's boundaries," EAA BOM at 18.[4] It is these very factual distinctions

[3] *See generally* Texas Water Development Board, 2007 State Water Plan, Vol. II, Ch. 7, at 235 http://www.twdb.state.tx.us/wrpi/swp/swp.htm (last visited Feb. 11, 2010). Specifically, the Edwards Aquifer is hydrologically distinct from other aquifers in the state. Groundwater levels within it generally rise and fall much more precipitously than other aquifers in the State, and thus distinct regulatory authority is required with respect to it.

[4] The State's briefing shows a similar disregard for the procedural context of this case. The State argues there can be no taking is this case because a regulatory taking "is available only if the value taken away is objective, verifiable, and would be the basis of a reasonable investor's interest in the property. The State of Texas's Reply Brief on the Merits ("State's Reply") at 20-21 (citing ***Mayhew v. Town of Sunnyvale***, 964 S.W.2d 922 (Tex. 2004)). But the Court's examination of these factors in *Mayhew* followed a bench trial; they were not being considered on summary judgment. *Mayhew*, 964 S.W.2d at 926-27. In fact, the case was tried on remand after the Dallas court of appeals found material fact questions existed on the landowner's constitutional claims, including his takings claim. *Id.* at 926.

that call for rejecting a categorical approach to preclude this takings claim as a matter of law and counsels in favor of maintaining the principle that regulatory takings claims must be evaluated on a case-by-case basis.

A. The Arguments Against Recognition of Vested Rights in Groundwater Are Unpersuasive and, If Adopted, Would Apply Equally to Interests in Oil and Gas.

The EAA and its amici argue that groundwater cannot represent a vested property right in place because it lacks certain fundamental indicia of ownership, specifically exclusivity and enforceability. *See, e.g.*, EAA BOM at 23-26; HGSD Amicus at 10-20. The EAA argues that these missing elements from the "bundle of rights" deprive Day and McDaniel (and all other landowners in the State) of the type of absolute ownership that would support constitutional protections. *Id.* Instead of turning to Texas well-developed oil and gas law—the most obvious analogy[5]—the EAA turns to cases that do not even involve real property rights, but rather public rights of ways and pensions. Moreover, not one regulatory takings case is considered in their briefing. These omissions do not serve the EAA well.

The EAA has crafted their "bundle of rights" argument on the premise that the rule of capture operates to prevent a landowner from enforcing property rights against a

[5] The leading oil and gas cases trace their roots on both the rules of capture and ownership-in-place to Texas's seminal groundwater case, *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904). *See, e.g.*, *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 940 (Tex. 1935); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290, 292 (Tex. 1923). As others have explained in greater detail, "[i]n this sense, oil and gas law is an offshoot of groundwater law, but oil and gas law developed more quickly because of the rapidity with which an oil and gas market emerged." Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH. L. REV. 1, 59 (2004).

draining neighbor. Therefore, the argument goes, because the landowner cannot prevent his neighbor from taking groundwater from under his land, he lacks a critical element of ownership. But the landowner's rights are *enforceable* in that the landowner has the right to offset in order to protect his fair chance to produce. The rights are *exclusive* in that the nature of the property interest—contrary to clever characterizations otherwise—is nothing more than the current interest in the *surface* of the land. This right includes all that lies beneath it. Thus, the landowner—and *only* the landowner—has the right to possess all that lies beneath his soil. He has the exclusive right to drill for or mine any substance found under his soil. He may prevent another from bottoming a well beneath his property, just as he could prevent someone from coming onto the land to mine coal. This is true whether a fugacious substance is present under his land or not; but, if present, oil and gas (and groundwater) are part of the realty. As this Court has explained:

> With the land itself capable of absolute ownership, everything within it in the nature of a mineral is likewise capable of ownership, so long as it constitutes a part of it. If these minerals are a part of the realty while in place, as undoubtedly they are, upon what principle can the ownership of the property interest, which they constitute while they are beneath or within the land, be other than the ownership of an interest in the realty?

Texas Co. v. Daugherty, 176 S.W. 717, 720 (Tex. 1915). ***The interest being "an interest in the realty," a landowner's right to it vests when the real property is acquired.*** The same is true for groundwater:

> We think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which *gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil,*

> *part water*; 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.…*

Acton v. Blundell, 152 Eng. Rep. 1223, 1235 (1843) (relied on in Texas's seminal groundwater case *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904)).

At its essence, the EAA's argument hinges on the fugacious nature of the resource: because it may migrate, it cannot be "owned." But this Court has examined the ownership of fugacious substances—oil and gas—and has never swayed from the decision that those substances are owned in place by the landowner and that those ownership rights are entitled to constitutional protection.

Starting in 1915, in the *Daugherty* case, this Court held that the landowner has a vested ownership of oil and gas in place, despite their fugitive nature. 176 S.W. at 719-20. The Court expressly rejected the argument that landowners own only usufructuary rights in oil and gas in place, ***i.e.***, the argument that oil and gas "are incapable of ownership as property until severed or extracted from the ground" and that an oil and gas lease confers on the lessee "no more than a mere use of the surface of the ground and the right to take [oil and gas] from it, . . . but vesting [the lessee] with the title to no property whatever." 176 S.W. at 719.

After a lengthy discussion of the fugitive nature of oil and gas, the Court held in *Daugherty* that a Texas oil and gas lease conveyed a "vested interest in the minerals in the ground, forming in their natural state a part of the land, with absolute dominion over them while in that state." *Id.* at 720. As described by the Court in *Daugherty*, the landowner's interest in the oil and gas "plainly constitute[s] property and all that is

recognized in proprietorship, and equally amount[s] to an interest in the land itself." *Id.* The Court added that "the right to the oil and gas beneath his land is an exclusive and private property right in the landowner, inhering by virtue of his proprietorship of the land, and of which he may not be deprived without a taking of private property." *Id.*

In 1923, the Court rendered similar holdings about oil and gas in place in *Stephens County v. Mid-Kansas Oil & Gas Co.*, one of the most important early cases in Texas oil and gas law. 254 S.W. 290 (Tex. 1923). The Court wrote:

> We do not regard it as an open question in this state that gas and oil in place are minerals and realty, subject to ownership, severance, and sale, while embedded in the sands or rocks beneath the earth's surface, in like manner and to the same extent as is coal or any other solid mineral.

Id. at 292.

Then, addressing the argument that landowners have no vested interest in oil and gas in place because those substances may be drained by neighboring wells without remedy, this Court responded:

> *The objection lacks substantial foundation that gas or oil in a certain tract of land cannot be owned in place, because subject to appropriation, without the consent of the owner of the tract, through drainage from wells on adjacent lands.* If the owners of adjacent lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own. Ultimate injury from the net results of drainage, where proper diligence is used, is altogether too conjectural to form the basis for the denial of a right of property in that which is not only plainly as much realty as any other part of the earth's contents, but realty of the highest value to mankind and often worth far more than anything else on or beneath the surface within the proprietor's boundaries.

Id. (emphasis added) (citations omitted).

Thus, the Court *rejected* "the proposition that there is no such thing as ownership or conveyance of gas or oil in place, because, until the gas or oil is brought to the surface and reduced to possession, any owner of land adjacent to that containing the gas or oil may lawfully appropriate same." *Id.* at 291.

Over the years, this Court consistently has described a landowner's ownership of oil and gas as a property right. In *Brown v. Humble Oil & Refining Co.*, an early decision about the courts' role in reviewing the actions of the Railroad Commission regulating oil and gas production, the Court wrote: "Texas recognizes the ownership of oil and gas in place, and gives to the lessee a determinable fee therein." *Id.* at 940. In another landmark oil and gas case, the Court wrote: "In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land." *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex. 1948).

Given the nature of oil and gas (*i.e.*, it is subject to migration), every argument made by EAA and its amici regarding groundwater could apply with equal force to oil and gas: *Oil and gas* rights lack exclusivity and enforceability. A landowner has no legal remedy against his neighbor for draining *oil and gas*. The exercise and use of an *oil and gas* interest is subject to future unpredictable events, such as drainage by a neighbor. The future production of *oil and gas* is therefore subject to future events. To use EAA's own words: "Because the common law in Texas gives landowners over a common [*oil and gas*] supply an equal right to capture as much of that [*oil and gas*] as can be beneficially used, each landowner has no meaningful ownership interest in that [*oil and gas*] until he captures it by physically bringing it to the surface by means of a well, and

then has an interest only with respect to the molecules of [*oil and gas*] actually captured." EAA BOM at 25. Clearly, these arguments have not persuaded this Court to hold that a landowner's vested interest in ***oil and gas*** is not absolute, or that it is not entitled to constitutional protection.

The EAA is advocating a position in this case that would, if extended to its logical conclusion, alter the ownership of oil and gas in place, changing the law as well as the industry itself. Trillions of dollars of transactions and rights would be affected. Because there is no reason to radically alter the law concerning groundwater, oil, or gas, EAA's position must be rejected.

B. Oil and Gas Law Belies Arguments That Texas's Conservation Amendment Precludes a Vested Property Interest.

EAA and its amici also argue that any interest a landowner may have in groundwater is not vested because it is "subordinate to" the public interest in conservation. EAA BOM at 34; HGSD Amicus at 20-21 (citing TEX. CONST. art. XVI, § 59). The Conservation Amendment, as this constitutional provision is commonly called, applies to "all of the natural resources of this State," not just water. TEX. CONST. art. XVI, § 59 (emphasis added). This includes oil and gas, *see, e.g.*, *Brown*, 83 S.W.2d at 938 ("Oil and gas should be, and generally are, treated as being natural resources."), and even Texas's forests, TEX. CONST. art. XVI, § 59 (referencing, among other things, "conservation and development of its forests").

Yet the Conservation Amendment has never been used to preclude, as a matter of law, takings claims based on regulation of other natural resources. One oil and gas case

is particularly instructive on this point. *See Marrs v. R.R. Comm'n*, 177 S.W.2d 941, 948 (Tex. 1944). In *Marrs*, certain mineral rights owners challenged a ruling by the Texas Railroad Commission concerning production allowances in a field long shown to be productive of oil. *Id.* at 943. In somewhat simplified terms, a group of mineral owners in the northern portion of the field had established early production from numerous wells, thereby establishing a "pressure sink" that would cause oil to migrate toward the area. *Id.* at 943-45. Owners in the southern portion of the field had developed wells at a slower pace, but were able to demonstrate that substantial reserves of oil existed in their area, particularly as compared to the northern area which had been subject to greater depletion over the years. *Id.* Before the regulatory action in question, the owners in this southern area had established a line of wells between the two areas that produced at maximum capacity and essentially established a "shield" protecting them from drainage from the northern area. *Id.* at 945, 949. The Railroad Commission then established field rules which prevented this line of "shield" wells from producing their maximum capacity. *See, e.g., id.* at 945-46. These field rules effectively permitted oil from the southern area to migrate once again toward the pressure sink in the north area. *Id.* at 945. The owners in the southern portion alleged that production in the southern portion was so restricted by the Commission's proration orders that they were unable to recover their oil before it drained away to the more densely drilled section to the north. *See id.* at 946.

The questions presented were whether the Commission's orders were subject to judicial review, and if so, whether the actions of the Railroad Commission were arbitrary,

unjust and discriminatory, and deprived plaintiffs of their just property rights. *Id.* at 946-47. Answering those questions in the affirmative, the Texas Supreme Court stated:

> Under the settled law of this State oil and gas form a part and parcel of the land wherein they tarry and belong to the owner of such land or his assigns and such owner has the right to mine such minerals subject to the conservation laws of this State. Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation.

Id. at 948 (citations omitted) (emphasis added).

As to the practical implications of this "confiscation," the court continued:

> As the oil is taken from the depleted Church-Fields area it is replaced by oil drained from petitioners' property. If petitioners were free to fend for themselves they could mine the oil under their land and thus prevent its escape to the adjoining area. But the orders of the Railroad Commission here complained of prevent petitioners from so doing. As a result, petitioners are being forever deprived of their property. It is the taking of one man's property and the giving it to another.

Id.

The Court then elaborated at length concerning how the takings provision of the Texas Constitution co-exists with the conservation provisions:

> Our Constitution authorizes the conservation of our natural resources. The authority to execute this constitutional provision in so far as it applies to oil and gas has been vested by the Legislature in the Railroad Commission of the State. Undoubtedly, in carrying out this constitutional purpose, the Commission must, as far as possible, act in consonance with the vested property rights of the individual. 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. (citations omitted) (emphasis added). The "other constitutional provisions" that protect individuals' property rights, the Court specifies, are the takings clause (Article I,

Section 17), the equal protection clause (Article I, Section 3), and the due process clause (Article I, Section 19), as well as similar clauses in the United States Constitution.

Thus, this Court has made clear that the public's conservation interests are not "superior to" the rights provided elsewhere in the Texas and United States constitutions. The Court in *Marrs* opened the door to determine "to what extent the State may confiscate one's property, or deprive him of the use thereof, without compensation, where this is necessary in order to conserve the natural resources of the State." *Id.* at 948. And this decision refutes any notion advanced by the State or EAA that unreasonable regulation of groundwater cannot amount to a taking because of a public conservation purpose. Rather, the public purpose of the statute should be weighed in the regulatory takings analysis itself. *See Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004) (determining when a regulation has gone "too far" for regulatory takings purposes "requires a careful analysis of how the regulation affects the balance between the public's interest and that of the private landowner" with special consideration given to the three factors articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). The EAA's and its supporters' "superior rights" argument is without merit.

Marrs also highlights a fallacy running throughout the EAA's and State's briefing. The government's position is that since "a property owner's use of water can always be limited by the actions of his neighbors without legal recourse . . . it can likewise be limited by the government without takings liability." The State of Texas's Petition for Review at 13; *see also* HGSD Amicus at 14 ("As the plaintiffs here would have lost

everything that belonged to them and would have absolutely no recourse if the government [as a neighboring landowner] completely drained their wells from a neighboring property, it is unfathomable that the government owes them compensation by establishing groundwater withdrawal limits that benefit all Texans.")

This logic could not be more absurd. The rule of capture shields *a fellow private property owner* from liability to *adjoining private property owners* for lawful production of oil and gas or water. The State of Texas is not a fellow private property owner and does not occupy a position even remotely similar to the railroad company in *East.* The State's involvement here is not by virtue of ownership of the groundwater, but by virtue of the exercise of its police power—the power to regulate natural resources, a power both created and limited by the Texas Constitution. The EAA is a party because the Legislature delegated its police power to the EAA under the Edwards Aquifer Act.[6] Comparing the liability of the State of Texas for wrongful exercise of its police power to the non-liability of a private property owner under the rule of capture is fallacious; it is a comparison that ignores one of the most fundamental limitations on the exercise of governmental power over private property. It is a comparison that impermissibly blurs the line between the state and private action. And, as the *Marrs* decision makes clear, no desire, however sincere, to protect a natural resource—be it oil, gas, or water—necessarily and automatically trumps these constitutional restraints on the power of the State.

[6] Similarly, the Legislature has delegated its police power to groundwater districts under Chapter 36 of the Water Code.

C. Anti-Ownership Advocates Offer Vacant Distinctions—of No Legal Import—Between Groundwater and Oil and Gas.

Recognizing the compelling analogy provided by oil and gas cases, EAA and the State attempt to distinguish oil and gas law from that applicable to the equally fugacious groundwater. They advance several supposed distinctions between oil and gas, on the one hand, and groundwater, on the other, to claim that oil and gas cases are inapposite. *See* Reply Brief on the Merits of EAA at 6-10; State's Reply at 18-19. These are distinctions without a difference, wholly vacant of any legal import.

Vacant Distinction #1: "Groundwater Is Not a Mineral" In its most recent briefing, the State claims that oil and gas cases are inapplicable to the ownership of groundwater because "water is not a mineral." State's Reply at 19.[7] According to the State, dispositive cases such as *Daugherty* should be ignored in the groundwater context because *Daugherty* held that oil and gas are owned by the surface owner only because they are legally classified as "minerals." *Id.* at 18.[8] The State then reasons that because groundwater has never been legally classified as a mineral, oil and gas cases on ownership miss the mark. *Id.* at 19. This analysis is flawed. First, *Daugherty* does not hold that oil and gas are owned by the surface owner <u>because</u> they are minerals. The

[7] Ironically, the Attorney General previously conceded in his Petition for Review that oil and gas law provides guidance in this situation. "While there are some differences in the rules governing groundwater and hydrocarbons, at heart both are governed by the same fundamental principle . . . ." State of Texas, Petition for Review at 11.

[8] Curiously, the State adds the words "de jure" in front of "minerals" to try to create an inference of some legal distinction. State's Reply at 18. This new word choice offers no discernible legal difference. Worse, the expression "de jure minerals" is absent from Texas jurisprudential holdings. It is as though the State wants to create a new class of minerals to avoid the holdings of dozens of Texas cases on this subject.

question involved there was whether oil and gas in place was subject to taxation as "real property" under the following definition:

> Real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same.

Daugherty, 176 S.W. at 718 (emphasis added).

The surface owners, seeking to avoid taxation, argued that oil and gas in place is incapable of ownership until extracted and removed, *i.e.*, produced at the surface. *Daugherty*, 176 S.W. at 718. This Court correctly reasoned that oil and gas in place have always been held to be "minerals" and therefore the property of the surface owner and subject to taxation, even though they are fugacious substances and may be subject to drainage. *Id.* at 719.

The Court also answered the argument made by some in this proceeding that the fugitive nature of groundwater renders it incapable of ownership in place:

> Conceding that they are fluent in their nature and may depart from the land before brought into absolute possession, will it be denied that, so long as they have not departed, they are a part of the land? Or when conveyed in their natural state, and they are in fact beneath the particular tract, that their grant amounts to an interest in the land? The opposing argument is founded entirely upon their peculiar property, and therefore the risk of their escape. But how does that possibility alter the character of the property interest which they constitute while in place beneath the land?

Id. at 720.

This Court did not say that a substance must be a "mineral" in order to belong to the landowner, nor did it say that it is only the characterization of oil and gas as minerals that justifies the result that they should be deemed to belong to the landowner. The State

reads far too much into the opinion in that regard, and far too little in terms of the actual rationale for the *Daugherty* holding.

Beyond the inconvenient circumstance that *Daugherty* does not stand for the proposition advocated by the State, is the fact that "water is not a mineral" dispositive? In other words, is there something in the molecular composition of water that should cause the law of ownership in place to be different for oil and gas? The answer is "no" for several reasons. First, in many instances, oil, gas, and water are produced from the same formation, with the water often being contaminated by the hydrocarbons. Is this Court willing to hold that the hydrocarbons in such a formation belong to the landowner but that the water in that same formation belongs to the State or a neighboring landowner? Is the lack of a carbon atom in the molecular structure somehow <u>legally</u> significant? The State offers no reason that the mere difference in molecular structure should be momentous from a property law standpoint.

Taking the analysis further, is brackish water, which is full of minerals of various kinds, owned by the surface owner in place? Or are the minerals contained in brackish water the property of the landowner while the water molecules belong to the State? Where saltwater exists in formations under a landowner's property, is the salt (a mineral by definition) owned by the surface owner while the water in which it is dissolved owned by the State? Again, no compelling analysis is offered upon which to stake any such legal distinction.

On the other hand, do oil and gas share any characteristic with groundwater that would make the same legal principles applicable to both? In *East*, this Court opined that

groundwater belongs to the surface owner because it is "part of the soil" and not distinguishable from it. *East*, 81 S.W. at 281. That holding relied on *Acton,* which recognized, based on millennia of authoritative holdings, that the landowner possesses "that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water." *Acton*, 152 Eng. Rep. at 1236. Similarly, in oil and gas cases, this Court has held that oil and gas are the property of the landowner because they are part of the soil. *See, e.g.*, *Daugherty*, 176 S.W. at 718-19. Neither *East* nor *Acton* drew the distinction advocated by the State here, nor have any other courts since. No court has ever held that the mere chemical composition of groundwater is dispositive in terms of its legal status as a substance lying beneath the surface and "part of the soil."

Further, oil, gas and groundwater move according to the same physical principles. In *East*, this Court applied the rule of capture to groundwater because it is fugacious. *See* 81 S.W. at 280-81. Similarly, the rule of capture applies to oil and gas because they are fugacious—they tend to move according to certain physical laws—not because they are "minerals." *See Elliff*, 210 S.W.2d at 561 ("The migratory character of oil and gas has given rise to the so-called rule of law of capture."). In 1856, Henry Darcy described the movement of liquids through porous materials, laying the groundwork for the formulas used today to describe the movement of groundwater and oil and gas.[9] Thus, it is the fugitive nature of oil, gas and groundwater that dictates the legal result articulated in the

[9] Henry Darcy, *Les Fontaines Publiques de la Ville de Dijon* ("The Public Fountains of the Town of Dijon"), Dalmont, Paris (1856).

rule of capture. It is this characteristic that is legally significant, not the presence or absence of a particular molecule in the chemical makeup of the substances.

Vacant Distinction #2: "You Can't Drink Oil" EAA and others contend that groundwater in place should not belong to the surface owner because it is more important than oil and gas, postulating simplistically that "you can't drink oil." *See* EAA Reply at 9. Thus, they reason, oil and gas law should not apply to groundwater cases. *Id*. at 9-10. Again, the analysis is flawed. First, the perceived social utility of a substance cannot be the basis for determining its ownership; real property law, not sociology, must be consulted when it comes to determining the ownership of real property. Second, by what scale of importance to society should property principles be weighed? Oil and gas issues are vital to national security and the future of our country.[10] Should these underground fugacious substances therefore be afforded a different property status than groundwater? The importance of groundwater or oil and gas is reflected in and drives its value; it does not determine its ownership. If the State is going to claim ownership of a substance heretofore privately owned, should not it be a substance with national security implications? Salt is imperative to human life and has, in the past, been used as currency. Should its importance to life determine its ownership? Mesa respectfully submits that ownership of both groundwater and oil and gas has long been determined to be vested in

[10] "And for the sake of our economy, our security, and the future of our planet, I will set a clear goal as president: In 10 years, we will finally end our dependence on oil from the Middle East." President Barack Obama, Acceptance Speech, Democratic National Convention (Aug. 28, 2008) (transcript available at http://www.nytimes.com/2008/08/28/us/politics/28text-obama.html?_r=1&pagewanted=all)

the landowner, and the mere social utility, economic value or even national importance of either should not determine its ownership.

Vacant Distinction #3: "Oil and Gas Don't Replenish" Several briefs submitted in support of the EAA take the position that oil and gas case law is inapt because oil and gas are non-replenishing resources, unlike groundwater. The various proponents of state ownership fail to explain how the general sustainability of a resource bears on its legal ownership. That aside, the argument advanced by these parties fails to recognize that not all aquifers share the same characteristics of the Edwards Aquifer. *See* n.3, *supra*. Some, like the Edwards, generally recharge quickly; others are not subject to such rapid recharge. *Id.* Those that recharge less frequently are much more akin to oil and gas reservoirs. Thus, even if replenishment were a basis for legal differentiation of ownership, not all aquifers in Texas replenish in the same manner as the Edwards Aquifer.

Vacant Distinction #4: "Oil and Gas Have Correlative Rights" Finally, EAA argues that oil and gas cases cannot apply to groundwater because the law does not recognize "correlative rights" in groundwater as it does in oil and gas. EAA Reply at 7. For this proposition, EAA ironically cites language from *East*, which clearly holds that groundwater is absolutely owned by the landowner. 81 S.W. at 280-81. And the language cited is: "In the absence of . . . positive authorized legislation . . . the law recognizes no correlative rights in respect to underground waters." EAA Reply at 7 (citing *East*, 81 S.W. at 280). The Legislature has now created a regulatory scheme that implicitly relies on and recognizes correlative rights in groundwater. Acting pursuant to

this "positive authorized legislation," most groundwater districts employ regulatory means that recognize the correlation between the rights of landowners, such as production limits based on the number of acres owned.[11] Although no court has ever expressly denominated the resultant rights as "correlative," the effect is clearly the same because these rights are relative to some recognized and equally applicable standard, such as acres of land owned.

More to the point, as used by the EAA, the phrase "correlative rights" derives from the opinion in *East*, where the Court quoted from the Ohio Supreme Court in *Frazier v. Brown*, 12 Ohio St. 294, 1861 WL 32 (Ohio 1861). A review of the actual language quoted in *East* reveals that the phrase "correlative rights" as used by the Ohio court does not have the meaning ascribed to that phrase in Texas oil and gas law. In quoting from the *Frazier* opinion, the *East* decision was drawing a distinction between the application of the rule of capture, on the one hand, and the "reasonable use" approach then used only in New Hampshire. 81 S.W. at 280-81. Under the reasonable use standard, the right of a landowner to draw underground water from his land was not absolute, but limited to the amount necessary for the reasonable use of his land, and the rights of adjoining landowners are "correlative" and limited to reasonable use. Under the rule of capture, by contrast, the owner may withdraw and use as much water as he wants,

[11] To the extent that the EAA uses a scheme of regulation based on historic use, it has created correlative rights of sorts among landowners. Mesa does not opine here on whether such regulatory scheme results in the deprivation of substantive rights of those who were exercising sensible conservation during the historic use period. In essence, however, the historic use scheme awards those who were taking water from the aquifer during an arbitrary period of time and punishes those who were not. Thus, the scheme essentially takes private property from one class of landowners and gives it to another.

absent waste or malice (and in the absence of regulation). *Id.* Accepting the rule of capture approach, the *East* court said:

> The practical reasons upon which the courts base their conclusions fully meet the more theoretical view of the New Hampshire court, and satisfy us of the necessity of the doctrine. Those reasons are thus summarized by the Supreme Court of Ohio in *Frazier v. Brown*: "In the absence of express contract and a positive authorized legislation, as between proprietors of adjoining land, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (1) 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. (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility."

Id. Note that the first reason articulated by the *Frazier* court for adopting the rule of capture is that the flow groundwater is such as to make it impractical to determine how much groundwater underlies a particular tract or in what manner it may flow, rendering it difficult to ascertain how much water is being diverted by a neighbor, if any. *Id.* Closely related to the first, the second reason was that a reasonable use rule would interfere with commerce, whereas the rule of capture would prove to be more practicable in the development of the interests of the commonwealth. *Id.* Thus, the *East* decision, again quoting *Frazier,* discusses correlative rights in the context of the reasonable use alternative to the rule of capture.

By contrast, the phrase "correlative rights," when used in Texas oil and gas cases has been described to refer to an entirely different legal premise:

> Decisions imposing liability for wasteful or tortious destruction of oil and gas drained from neighboring lands are almost invariably predicated upon the correlative rights doctrine. This doctrine is a recognition that owners of interests in a common source of supply stand in a special relationship with each other in that any production by one owner will necessarily affect all the others. Thus each operator has an obligation to the other owners not to produce in such a way as to injure the common source of supply or to interfere unduly with the interests of other owners.

Ernest E. Smith & Jacqueline L. Weaver, *Texas Law of Oil and Gas*, § 1.1(B) at 9-10 (1998). As described by Professor Smith, the correlative rights doctrine in oil and gas law describes a rule of liability for harm caused by wasteful or negligent practices, not a principle of real property law regarding ownership. *See also Elliff*, 210 S.W.2d at 562-63. EAA thus misses the point entirely in claiming that no analogy can be drawn from oil and gas cases on ownership because "correlative rights" are not recognized in groundwater. At best it can be said that the Ohio Supreme Court's understanding of the phrase "correlative rights" does not entirely comport with Texas oil and gas law.

Other Texas cases describe the "correlative rights" doctrine in oil and gas law in terms very similar to the rule of capture in groundwater law. For example, in *Stephens County*, the Court stated:

> If the owners of adjacent lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own.

254 S.W. at 292 (emphasis added). Thus described, the "correlative right" is simply the right to offset production, which is the common law right and remedy afforded as a corollary to the rule of capture, whether applicable to oil and gas or to groundwater.

Used in this sense, in view of *East,* owners of groundwater do in fact have correlative rights, dispelling the argument that oil and gas cases are inapposite.

Perhaps most importantly, it is not the correlation of rights in oil and gas law that created ownership rights in landowners. Oil and gas, like groundwater, are owned by the landowner because they are part of the soil, and indistinguishable from it. *See East*, 81 S.W. at 281; *see also Daugherty*, 176 S.W. at 719-20; *Ellif*, 210 S.W.2d at 561. Ownership rights existed long before the regulatory scheme that began to correlate production limits with some standard such as number of acres owned. "Correlative rights" does not create ownership; an absence of correlative rights would not divest ownership.

This latter principle is made clear in *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21 (Tex. 1978), a case relied on by the EAA for the dubious proposition that because there are no correlative rights in groundwater, therefore landowners have no vested property interest in groundwater in place. EAA BOM at 30. In *Friendswood,* a subsidence case, this Court explored the clash between the "reasonable use" rule and the rule of capture as articulated in *East,* questioning whether under the latter rule a user could be liable for negligently pumping so much water out that his neighbor's property subsided. 576 S.W.2d at 24, 25. EAA quotes a portion of a paragraph from the opinion in *Friendswood,* claiming that the case established that unless correlative rights exist, there can be no protection of a property interest in a migratory resource. EAA BOM at 30. This is patently a misreading of *Friendswood.* The EAA only selectively quotes from the opinion. Reading the entire

paragraph shows that this Court never imagined that it was calling into question the issue of ownership:

> For similar recognition that percolating ground waters belong to the landowner and may be produced by him at his will, absent waste or malice, *see Pecos County Water Control & Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503 (Tex. Civ. App.—El Paso, writ ref'd n.r.e.)[;] *City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd[,] Carr v. City of Altus*, 385 U.S. 35 (1966); *U. S. v. Shurbet*, 347 F.2d 103 (5th Cir. 1965). *See also Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935 (Tex. 1935), one of the basic cases recognizing private ownership of oil and gas in place, which cites *East* as the earliest case establishing the "law of capture" in Texas. Other writers have traced both the Texas ownership and capture theories to the English rule relating to underground percolating waters, and it is interesting to note in this connection that the courts did not attempt to afford protection against the rule of capture of oil and gas until the Legislature enacted policy guidelines for the prevention of waste and protection of correlative rights.

576 S.W.2d at 26. The *Friendswood* opinion specifically explores the development of case law since *East,* and reiterates the "absolute ownership" holdings of the various courts since 1904. *Id.* at 25-26. It is difficult to fathom how the EAA could interpret *Friendswood* to cast any doubt on the issue of ownership of groundwater.[12]

Mesa respectfully submits that the term "correlative rights" has varying meanings as used in oil and gas cases, but it is never linked to a determination of ownership of oil and gas, and should not be considered as dispositive or even very interesting in the current analysis.

[12] Even more difficult to fathom is the EAA's footnote 33, claiming that oil and gas law and groundwater law have followed different paths "as the correlative rights discussion above demonstrates." EAA BOM at 31 n. 33. *Friendswood,* upon which HGSD relies, dispels this erroneous notion by correctly observing that the oil and gas case of *Brown v. Humble Oil* derives its rule of capture holding from *East*, 576 S.W.2d at 26.

D. Ownership and Regulation Are Not Mutually Exclusive.

EAA and its supporters seem to be of the view that groundwater in place cannot be regulated at all if it constitutes a vested property right. One amicus takes the position that the consequence of absolute ownership of groundwater would be that the landowners could not be stopped from "unlimited groundwater withdrawals." *See, e.g.*, HGSD Amicus at 9-22. Conversely, they argue that because groundwater is regulated by Legislative action, *therefore* landowners cannot have a vested property interest. But the fact remains that regulation and ownership are not mutually exclusive. The best evidence of this simple truth is the development of regulatory takings jurisprudence for the last century. *See, e.g.*, *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (acknowledging a regulation can reach the level of a takings if the regulation goes "too far" in interfering with property rights); *see also Sheffield*, 140 S.W.3d at 669 (same).

In fact, regulation of our natural resources has never been thought to convert them to state ownership. (To be sure, the position that underpins the petitioners' briefing in this case should not be missed: if ownership does not vest in landowners, it must, it seems, vest in the State.) The Railroad Commission has regulated oil and gas for decades, but not even the EAA suggests that oil and gas in place do not belong to the surface owner.[13]

[13] However, the State's Brief on the Merits does seem to suggest that oil and gas in place are not subject to private ownership because "hydrocarbons are not subject to 'absolute ownership' until they are removed from the ground." The State of Texas's Brief on the Merits ("State BOM") (filed Sept. 18, 2009), at 22.

EAA asserts that, if landowners are held to have a vested property right in groundwater in place, then the groundwater conservation districts cannot discharge their legislatively mandated duty to regulate. EAA BOM at 46-47. This, it claims, would leave groundwater unprotected from unlimited production because groundwater conservation districts would be unable to regulate at all. *Id.* Therefore, it says, this Court should protect groundwater resources by declaring that landowners have no such vested ownership interest. *Id.* at 50. Following the EAA's argument to its logical conclusion would leave groundwater districts without constitutional restraint of any kind.[14] Groundwater districts must recognize that regulation, while allowed under the Texas Constitution, must be reasonable, must recognize and respect private property rights, and must be subordinate to the equal protection and due process rights guaranteed by that same Constitution. Regulation and private property rights are not antithetical; they can and do co-exist across nearly every aspect of our society. Groundwater regulation is not unique in that regard.

EAA and some amici stridently argue that the recognition of a vested ownership of groundwater in place would destroy the "carefully crafted" regulatory scheme of the EAA, and would further render meaningful regulation of groundwater in Texas impossible. EAA BOM at 46-50; HGSD Amicus at 25-28; Amicus Curiae Brief of

[14] The EAA assures the Court that it need not vex about groundwater districts going "too far." Leaving the door open for a takings claim is unnecessary, the EAA maintains, where, as here, the Legislature has given a permit applicant the right to judicial review, which includes the right to challenge whether the district has acted within its statutory authority. EAA BOM at 48-49. Having a statutory claim does not preclude a constitutional one. Moreover, takings claims are not simply a check on the ***district***; they also serve as an important check on the ***legislature***.

Angela Garcia and Environmental Defense Fund, Inc. ("Garcia Brief") (filed Jan. 26, 2010) at 9-12. They predict massive lawsuits that would bankrupt not just groundwater districts but the State itself.[15] Nothing could be further from the truth. Again, the Railroad Commission, operating under the authority of the same Conservation Amendment that enables groundwater districts to regulate, seems to be able to exercise its authority without jeopardizing the public treasury or the very structure of government. At its essence, EAA's argument is that, if government violates private property rights in such an egregious manner that its violations would threaten the public fisc, then the courts should circumvent that consequence by holding there was no property interest subject to a taking in the first place. This basically argues that EAA is "too big to fail." Mesa respectfully submits that this Court should keep inviolate the Constitutional barriers that prevent the uncompensated taking of private property, regardless of whether a particular governmental entity like EAA has engaged in such widespread violations of property rights that redress might be expensive.

II. A DECISION ALTERING GROUNDWATER OWNERSHIP WILL UNDOUBTEDLY IMPACT TEXAS'S DIVERSE, EXPANSIVE GROUNDWATER MARKET.

In addition to departing completely from established precedent, the positions of both Edwards Aquifer Authority and the State of Texas have far reaching implications

[15] Ms. Garcia takes the position that the recognition of a landowner's private property rights in groundwater in place would have a chilling effect on governmental regulation of groundwater, disrupt the balance of power between the courts and the Legislature, impose a fatal financial burden of districts and threaten endangered species. Garcia Brief at 2, 9-12. It is noteworthy that one of the authors of the Garcia Brief, Enrique Valdivia, serves as the Secretary of the Board of Directors of the Edwards Aquifer Authority.

that, as a practical matter, would unsettle established real property and oil and gas principles and wreak havoc on groundwater transactions throughout the state.

First, to hold that the "rule of capture" stands for the proposition that a landowner only owns groundwater once it is reduced to possession at the surface, or allows the government unbridled discretion in limiting a property owner's access to groundwater, would unhinge and disrupt over 100 years of established case law concerning both water and oil and gas. As mentioned earlier, the decision in ***East*** is the starting point for the rule of capture in both oil and gas and water law. ***See East***, 81 S.W. at 280-81; ***Brown v. Humble Oil***, 83 S.W.2d at 940. Because of the fugitive nature of the substances, a landowner is not liable to his neighbor for drilling on his land even though some fugitive substances may have flowed from neighboring lands. ***Elliff***, 210 S.W.2d at 561-62. These fugacious characteristics are shared by groundwater, oil and gas alike. It is because of these fugacious characteristics that the rule of capture governs these two sets of resources. Re-defining the ownership of groundwater would necessarily call into question the ownership of oil and gas. Simply put, construing the rule of capture to create only a usufruct right would not only change established groundwater law, but also change established oil and gas law.

Second, accepting EAA's argument would wreak havoc on groundwater transactions throughout the State. Millions upon millions of dollars have been spent in groundwater transactions in the Texas Panhandle alone.[16] And this does not even begin

[16] For example, the Canadian River Municipal Water Authority has purchased 212,100 acres of water rights at a final cost of ***$76,293,681***, making it one of the largest water rights holders in the

to describe the far reaching consequences to all of the groundwater transactions that have occurred throughout the State. Nor does it answer the plethora of legal issues necessarily springing from such a radical departure from private ownership concepts. If the landowner did not own the groundwater in place under her land, would the landowner be unjustly enriched by the sale of a right she never owned? Would the City of Amarillo and the Canadian River Municipal Water Authority find themselves the owners of a groundwater right that never existed? What of the billions of dollars spent on oil and gas leases? Would this indistinguishable fugitive substance now belong to the State as well? These questions, left unanswered by the Edwards Aquifer Authority and the State, demonstrate the disastrous consequences of their proposed change in the law.

Instead, the EAA and its supporters represent to the Court that these issues are not implicated by this decision at all. *See* EAA Reply at 14 n.8 ("[A] holding in this case that D&M have no vested ownership in the groundwater beneath their property prior to capture would not affect the abilities of landowners to sever—and of parties to transfer—groundwater rights."); HGSD Amicus at 7 ("The issue is not whether groundwater rights can be severed, conveyed, transferred, assigned, pledged, bequeathed, or taxed, but only whether groundwater withdrawal limits interfere with a landowner's protected property rights under the takings clause."). Yet these same parties rely on non-Texas

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state. CRMWA-History, http://www.crmwa.com/History.htm (last visited Feb. 10, 2010). Further, the City of Amarillo has purchased over 155,000 acres of unused water rights in the Texas Panhandle. City of Amarillo, http://www.ci.amarillo.tx.us/departments/utilities.html (last visited Feb. 10, 2010). Mesa owns 210,000 acres of groundwater rights at a cost of approximately $100,000,000.

jurisprudence, including *Davis v. Agua Sierra Res., L.L.C.*, 203 P.3d 506 (Ariz. 2009), which suggests a contrary forecast. In fact, severance was the only issue in *Davis*: "This case involves deeds that purported to reserve to the grantor, and to sever from the surface estate, rights to the potential future use of groundwater. Because a landowner has no real property interest in the future use of groundwater, we hold that the attempted reservation is invalid." 203 P.3d at 507.

To support their assurances about the limited nature of this Court's holding, EAA and its supporters reference this Court's recent opinion in *Southwestern Bell Telephone, L.P. v. Harris County Toll Road Authority*, 282 S.W.3d 59 (Tex. 2009). *See* EAA BOM at 32; HGSD at 28. The "interest" at stake in *Southwestern Bell* was simply the right to use the public right-of-way. 282 S.W.3d at 60. The Court does not even *mention*—much less *decide*—whether Southwestern Bell's rights "were still conveyable [or] transferable." *See* HGSD Amicus at 28. And the only discussion of whether they were "taxable" was to distinguish a 1930s Fifth Circuit case because it dealt with ad valorem taxation, not inverse condemnation. *Sw. Bell*, 282 S.W.3d at 67-68. Thus, *Southwestern Bell* offers Mesa very little comfort that a holding by this Court that its rights in groundwater are not vested property rights will apply only to the constitutional takings analysis. Mesa respectfully posits that a *Davis* holding is far more likely.

CONCLUSION

What Edwards Aquifer Authority and the State of Texas seek is not clarification of the law, but a dramatic change in the law that would unsettle property rights that repeatedly have been recognized both by this Court and the Texas Legislature. This

paradigm shift in the law would re-define the fundamental relationship between government and the citizens of Texas by eliminating all restraints on regulation by groundwater districts. The Texas Comptroller, in her cover letter for the recently issued report "Liquid Assets: the State of Texas's Water Resources," recognized the importance of water resources to the State and warned against disrupting how ownership of water is defined:

> Important financial decisions have been based on the belief by landowners that the water under their land is in fact their "property." A change in this system could have very significant and adverse financial consequences for individuals as well as for the economic vitality of the state.[17]

More recently, the Comptroller filed an amicus letter with this Court in which she concluded: "Any action that calls into question the absolute ownership theory of groundwater will wreak havoc with any agreements to transfer groundwater in Texas and have a dramatic impact on Texas's economy." Amicus Letter Brief of Susan Combs, Comptroller, at 3.

Mesa respectfully submits that the law in Texas—that landowners own the percolating groundwater in place beneath their land—is not unsettled, confusing or in need of clarification. For more than 100 years, Texas law has been that landowners own percolating groundwater in place in and under their land. The Fourth Court of Appeals correctly decided this issue and this Court should affirm that decision.

[17] Available at http://www.window.state.tx.us/specialrpt/water/ (Feb. 4, 2009).

Respectfully submitted,

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