No. 08-0964

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

EDWARDS AQUIFER AUTHORITY AND THE STATE OF TEXAS

PETITIONERS/CROSS-RESPONDENTS,

V.

BURRELL DAY AND JOEL MCDANIEL

RESPONDENTS/CROSS-PETITIONERS.

AMICUS CURIAE BRIEF OF THE ALLIANCE OF EAA PERMIT HOLDERS

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ATTORNEYS FOR THE ALLIANCE OF EAA PERMIT HOLDERS

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STATEMENT OF INTEREST

Amici are identified as the following: (1) 13095, Ltd., a Texas limited partnership; (2) Rio Perla Properties, Ltd., a Texas limited partnership; (3) Verstraeten Parents Farm Trust; (4) Vaerstraten Brothers Farm, Inc., a Texas corporation; (5) Woodley Water, Ltd., a Texas limited partnership; (6) Lone Star Growers, Ltd., a Delaware limited partnership; and (7) L&H Leasing Co., Ltd., a Texas limited partnership. Each of the amici hold EAA permitted water rights. For purposes of this brief and this appeal, the foregoing are collectively referred to as the "Alliance of EAA Permit Holders." The sole sources of the fee paid or to be paid for the preparation of this brief are the Alliance of EAA Permit Holders.

Counsel for the Alliance of EAA Permit Holders is the law firm of Pulman, Cappuccio, Pullen & Benson, LLP, and its attorneys Devin D. "Buck" Benson and Lance H. "Luke" Beshara, 2161 N.W. Military Hwy., Suite 400, San Antonio, Texas 78213.

SUMMARY OF ARGUMENT

Certainty is the mother of quiet and repose, and uncertainty the cause of variance and contentions.

– Sir Edward Coke (1552-1634)

The Court should grant the petition for review to give certainty to the issue left open in the decision of *Barshop v. Median Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996) – "the clash between property rights in water and regulation of water." *Id.* at 626.

Citing its own recent holding in *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App. – San Antonio 2008, pet. filed October 30, 2008), the Fourth Court of Appeals held property owners have some vested property right in the groundwater beneath the surface of their property and thus reversed and remanded the summary judgment denying the Respondents' constitutional takings claims.

The Fourth Court of Appeals committed error because groundwater, being in the nature of *ferae naturae*, is public property, and no vested individual property rights exist in groundwater until such time as it is "removed from [its] natural liberty and made [the] subject[] of man's dominion." *See Jones v. State*, 45 S.W.2d 612, 613-14 (1931); *see also City of San Marcos v. Tex. Comm'n on Envtl. Quality*, 128 S.W.3d 264, 270-71 (Tex. App. – Austin 2004, pet. denied).

By granting the petition for review, this Court will not be changing the law of Texas but rather embracing the opportunity to finally and clearly articulate that real property owners do not have a vested ownership interest in groundwater in place; that is, groundwater

that has not been captured, extracted, and reduced to possession at the surface. Such a holding will be in line with the law of numerous other jurisdictions. By declaring that a landowner does not have constitutionally-protected interest in groundwater in place, this Court will insure that the state of Texas and its subdivisions have the ability to regulate the most precious of natural resources.

ARGUMENT

A. Sovereign Immunity Bars the Claims of Burrell and Day

Sovereign immunity protects the state of Texas and its subdivisions and agencies both from suit and liability. *See Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). It is the sole province of the Texas Legislature to waive or abrogate sovereign immunity. *Id.*

Article I, section 17 of the TEXAS CONSTITUTION reads that "[n]o person's property shall be taken, damaged or destroyed or applied to public use without adequate compensation being made[.]" Thus, sovereign immunity does not pretermit a claim based on an unconstitutional taking of property. *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007).

For the reasons described below, however, Burrell and Day have failed to plead a set of facts that would allow recovery under the takings clause of the TEXAS CONSTITUTION. Moreover, Burrell and Day have failed to plead any other waiver of sovereign immunity. Therefore, the courts of this state lack subject-matter jurisdiction to entertain their claims.

B. Takings Jurisprudence

The TEXAS CONSTITUTION provides a claim for the taking of or damage to "property." TEX. CONST., art. I, § 17. When the government allegedly takes private property without first

paying for it, the owner can bring a cause of action for inverse condemnation. *Tarrant County Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004).

The issue of whether a taking has occurred is a question of law for the court to decide. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 644 (Tex. 2004); *Mayhew v. Town of Sunnydale*, 964 S.W.2d 922, 932-33 (Tex. 1998). The facts necessary to decide whether a taking has occurred are not in dispute. Therefore, the appeal for which this petition for review has been filed presents a purely legal question ripe for consideration.

Burrell and Day claim the EAA has deprived them of their purported ownership interest in groundwater, and thus, in part and for purposes of this petition for review, seek recovery in this lawsuit for inverse condemnation. To recover on an inverse condemnation claim, a property owner must establish that: "(1) the State intentionally performed certain acts, (2) that resulted in a 'taking' of property, (3) for public use." *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001).

A taking may be physical or regulatory. *Gragg*, 151 S.W.3d at 554.

Physical takings are relatively rare, easily identified, and usually represent a greater affront to individual property rights. *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 801 (Tex. 2005). Physical takings occur when the government authorizes an unwarranted physical occupation of an individual's property. *Mayhew*, 964 S.W.2d at 933. There can be no legitimate argument that the EAA has effected a physical taking because there has been no physical occupation of the real property of Burrell and Day. Instead, Burrell and Day must necessarily argue that the EDWARDS AQUIFER ACT, as implemented, effects a regulatory taking.

Regulatory takings are ubiquitous and most of them impact property values in some tangential way. *Lowenberg*, 168 S.W.3d at 801. Regulatory takings claim can result if the regulation imposes restrictions that either: (1) deny landowners of all economically viable use of their property; or (2) unreasonably interfere with landowners' rights to use and enjoy their property. *Mayhew*, 964 S.W.2d at 935. A regulation denies all economically viable use of a property only where it renders the property valueless. *Id.* There can be no legitimate argument, and Burrell and Day have not pled, that their real property has no remaining value on account of the EAA's groundwater regulation or permit system. Thus, Burrell and Day cannot base their taking claim on the first prong.

The second potential basis for a regulatory taking requires a consideration of two factors: (1) the economic impact of the regulation; and (2) the extent to which the regulation interferes with distinct investment-backed expectations. *Id.* The first factor merely compares the value that has been taken from the property with the value that remains in the property. *Id.* at 935-36. The loss of anticipated gains or potential future profits is not usually considered in analyzing this factor. *Id.* The second factor, the investment-backed expectations, are based upon existing and permitted uses of the property. *Id.* Knowledge of existing restrictions is to be considered in determining whether the regulation interferes with investment-backed expectations. *Id.*

"All property is held subject to the valid exercise of the police power and thus not every regulation is a compensable taking, although some are." *Seagull Energy E&P, Inc. v. R.R. Comm'n of Tex.*, 226 S.W.3d 383, 389 (Tex. 2007). A police power regulation does not constitute a taking if: (1) it is adopted to accomplish a legitimate goal that is substantially

related to the health, safety, or general welfare of the people; and (2) it is reasonable, not arbitrary. *See City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984). Even assuming Burrell and Day had a constitutionally-protected property interest in groundwater, the EAA Act is a reasonable and non-arbitrary exercise of police power adopted to insure the continued vitality of the most precious natural resource.

(1) Burrell and Day Do Not Have Standing Because They Did Not Have a Vested Property Right at the Time of the Alleged Taking

Standing is a constitutional prerequisite to maintaining suit. *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001).

To have standing to sue for inverse condemnation, a party must have a vested property interest at the time of the alleged taking. *See Hollywood Park Humane Soc'y v. Town of Hollywood Park*, 261 S.W.3d 135, 140 (Tex. App. – San Antonio 2008, no pet.); *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 644 (Tex. 2004) ("It is fundamental that, to recover under the constitutional takings clause, one must first demonstrate an ownership interest in the property taken."); *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 56 (Tex. 2006); *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1013-15 (Tex. 1937) ("A right, to be within the protection of the Constitution, must be a vested right. It must be something more than a mere expectancy based upon an anticipated continuance of an existing law.").

A vested property right requires "ownership," a necessary element of which is the right to exclude others. *See College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999); *see also* BLACK'S LAW DICTIONARY 997 (5th ed. 1979). Stated differently, a vested property right is one that has been fixed by a court's final

judgment or that has some definitive, not merely potential, existence. *See Hollywood Park Humane Soc'y*, 261 S.W.3d at 140; *LeCroy v. Hanlon*, 713 S.W.2d 335, 343 (Tex. 1986) ("mere expectancy" is not enough).

(a) Texas Has Adopted the English Rule Regarding Groundwater

There are two competing rules respecting groundwater in American jurisprudence. The "American rule", also referred to as the "reasonable use rule", provides that 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 that the rights of adjoining landowners are correlative and limited to reasonable use as well. *See Friendswood Dev. Co. v. Smith-Southwest Indus.*, 576 S.W.2d 21, 24-25 (Tex. 1978).

The "English rule", also regrettably referred to as the "absolute ownership rule", provides only that the law recognizes no correlative rights in groundwater. *Id.* at 25. Texas has elected to subscribe to the English rule, and thus to the corollary rule of capture, which provides that, absent malice or willful waste, landowners have the right to take all the water they can capture under their land and do with it what they please, and they will not be liable to neighbors even if in so doing they deprive their neighbors of the water's use. *See Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999).

Notwithstanding the adoption of the English rule, Texas common law has never held that a real property owner enjoys a vested property right in groundwater that has not yet been captured. *See City of San Marcos v. Tex. Comm'n on Envtl. Quality*, 128 S.W.3d 264, 270-71 (Tex. App. – Austin 2004, pet. denied). Only after a land owner extracts the groundwater and captures the same does the land owner obtain a vested property right in the water. *Id.*

(b) Groundwater Should Be Governed by Doctrine of *Ferae Naturae*

Long ago, minerals were held to constitute real property (as being indistinguishable from the real property under which they lie) owned "in place", which means only that the owner of real property should have the reasonable opportunity to produce his fair share from the common pool. *See Ellfin v. Texon Drilling Co.*, 210 S.W.2d 558, 561-62 (Tex. 1948).[1]

Texas law has never given to groundwater the same imprimatur of ownership accorded to minerals. *See* Susana Canseco, *Landowners' Rights in Texas Groundwater: How and Why Texas Courts Should Determine Landowners Do Not Own Groundwater in Place*, 60 Baylor L. Rev. 491, 512 (2008). There are important reasons for this, which rest upon the many critical distinctions between minerals and groundwater.

Water has never been considered to be a "mineral." *See Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865, 867 (Tex. 1973). Thus, that a mineral can be owned as part of the real property is of no moment to the issue of whether groundwater is owned as part of the real property.

Unlike groundwater, real property owners have correlative rights in minerals. *Compare Ellfin*, 210 S.W.2d at 562, *with Houston & T. C. Ry. Co. v. East*, 81 S.W. 279, 280 (1904).[2] This distinction indicates Texas law has historically viewed ownership of groundwater differently than ownership of minerals.

---

[1] Even then, however, this rule of ownership is qualified by the law of capture and administrative regulation. *See Ellfin v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex. 1948). Therefore, even if groundwater were considered identically with minerals (which it should not be), the ownership of the groundwater would still not be unqualified.

[2] By virtue of correlative rights, a mineral owner has the legal privilege to remove minerals from a common supply but also a legal duty not to exercise said privilege in a manner that damages the common supply. *See Ellfin*, 210 S.W.2d at 562-63.

Unlike groundwater, minerals such as oil and gas are not a renewable resource; that is, minerals are not part of a system that allows constant regeneration. Karst aquifers, including the Edwards Aquifer, constitute dynamic systems of endless inflow, collection, and outflow that are part of what is known as the water or hydrologic cycle. *See generally Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 623 (Tex. 1996). Precipitation first falls to the surface of the Earth on one person's real property.[3] Diffuse surface water belongs to the owner of the real property on which it collects. *See City of San Marcos v. Tex. Comm'n on Envtl. Quality*, 128 S.W.3d 264, 271-72 (Tex. App. – Austin 2004, pet. denied).

Upon entering a watercourse, all surface water, including formerly diffuse surface water, becomes the property of the state of Texas. *Id.* at 272. From its point of contact with the surface of the Earth, this surface water (if not evaporated or lawfully diverted) then meanders over, across, and under the real property owned by countless other persons in what are known as "drainage areas." At some point, this surface water plunges underground through "recharge zones" that are located on real property owned by still other persons. At this point, surface water transforms into groundwater.

This groundwater then collects, at least for at time, in the underground aquifer. It is at this point, and on this basis, that persons owning the real property overlying the aquifer, such as Burrell and Day, attempt to claim a vested right of ownership in these transient waters themselves (as opposed to a usufructuary right to use this water). But, these waters collecting underground do not long remain under the real property owned by such persons.

[3] *See* http://www.edwardsaquifer.org/pages/geology.htm.

Instead, the groundwater continues its migration through the system to the artesian zone, where impervious subterranean rock formations force the water back to the surface as a result of incoming pressure from new surface water entering the aquifer system in the recharge zone. And the cycle continues in perpetuity.

The cyclical nature of the Edwards Aquifer mandates that it be treated differently than mineral reservoirs, which are not part of a dynamic, regenerative system. The cyclical nature of aquifer water lends itself to doctrine or *ferae naturae*. Unlike wild game, minerals are not part of a continuous cycle, at least measurable within even 100 human lives. Once minerals are extracted, the reservoirs are forever depleted. Unlike water, oil and gas do not precipitate from the heavens and eventually journey back into the reservoir. Water, like wild game, constantly appears anew and journeys back into and then out of the aquifer. Groundwater, unlike minerals such as oil and natural gas, does not simply or usually come to rest underground until artificial forces effect its release. The dynamic aquifer system ensures constant migration through natural input and output zones. Because of these shared characteristics, water and wild game should be subject to the same rules of ownership; that is, neither is "owned" until actually captured and reduced to possession.

(c) <u>Alternatively, State Has a Superior Property Interest</u>

Even assuming real property owners have some vested interest in groundwater migrating below the surface of their estate, the state of Texas has a superior property interest. This Court has previously dismissed taking claims when one party has a superior ownership interest to that of the person claiming the taking. *See Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 644-45 (Tex. 2004).

Though this Court has never definitively addressed who owns migratory groundwater (much less whether the state of Texas has a superior ownership interest in the event more than one person can claim an ownership interest in migratory groundwater), the Court can take this opportunity to declare, on this matter of grave importance to the welfare of all citizens of the state of Texas, that the ownership interest of the state of Texas is superior to that of private real property owners, even assuming private real property owners have some ownership interest in groundwater migrating below the surface of their estate.

(d) Burrell and Day Fail to Plead a Taking of Groundwater They Own

Burrell and Day do not seek recovery on the basis that the EAA appropriated water that they had captured, extracted, and reduced to possession from the Edwards Aquifer. Instead, Burrell and Day claim a taking based upon groundwater that they speculate they might at some unknown time in the future extract and capture (which in all likelihood is groundwater that has not yet even entered the aquifer system). However, Burrell and Day have no vested property rights in groundwater they only hope to reduce to absolute ownership at some unspecified point in the future. As other amici have noted, their mere expectancy can be destroyed by any number of causes, including drought or other land owner's exercising their right of capture. If other causes can accomplish the same result, then regulation cannot be said to effect a taking.

(2) The EDWARDS AQUIFER ACT Does Not Recognize an Ownership Interest That Is Capable of Being Constitutionally Taken

Burrell and Day place great reliance on the language of the EAA Act in which the ownership and rights of a property owner in underground water are "recognized." EAA Act

at § 1.07. Notwithstanding this language, the EAA Act is wholly silent with respect to the scope of the ownership rights in groundwater that are "recognized." Thus, this recognition can and should be construed to mean only that the ownership and rights in groundwater are recognized to the extent they are recognized prior to the enactment of the statute, which means recognition at common law – a question left unresolved by prior caselaw.

Further supporting this interpretation, immediately after recognizing ownership and rights in groundwater, the EAA Act states that no action taken pursuant to the EAA Act can be construed as depriving or divesting the property owner of such ownership and rights. *Id.* In other words, what the Texas Legislature actually recognized was immediately limited in scope. Due to this limitation, even assuming the EAA Act recognized ownership rights not founded in common law, this language of the EAA Act cannot be said to authorize suit for a constitutional takings claim or otherwise.

(3) TEX. WATER CODE § 11.021 Does Not Vest Burrell or Day with Constitutionally-Protected Property Rights in Uncaptured Groundwater

TEX. WATER CODE § 11.021 is titled "State Water" and subpart (a) reads:

> The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.

Based upon the omission of the word "groundwater" from this statute, Burrell and Day argue that the state of Texas cannot own groundwater. Their inference is unjustified. The omission of the word "groundwater" from this statutory decree does not mean that groundwater is not owned by the state of Texas. The ownership of groundwater by the state

of Texas flows from its status as the sovereign; statutory acknowledgment would be redundant and is not required. *Cf. Sterrett v. Gibson*, 168 S.W. 16, 19 (Tex. 1914) (noting statute merely declared the natural right of the sovereign to ownership of birds and wild animals). Such a holding is consonant with other states' views on the subject. *See Figgie Int'l, Inc. v. Bailey*, 25 F.3d 1267, 1271 n.15 (5th Cir. 1994).

(4) Even Assuming Burrell or Day Had Constitutionally-Protected Property Rights in Uncaptured Groundwater, Neither Has Suffered a Regulatory Taking

The Edwards Aquifer Act does not deny a property owner of all rights to withdraw water from the aquifer. Even in the absence of a permit, all property owners retain the right to withdraw up to 25,000 gallons of water per day from the aquifer so long as certain conditions are met, such as that the water be used for domestic or livestock use. EAA Act § 1.33. Water captured for domestic or livestock use is extracted through wells characterized as "exempt" under EAA regulations. That is, each and every owner whose real property lies within the jurisdiction of the EAA has the right to extract significant quantities of groundwater from beneath their real property, so long as certain conditions are met. The permitting system promulgated under the EAA Act does not affect this right.

Even assuming Burrell and Day have a vested property interest in uncaptured groundwater beneath the surface of their real property, then the reason for such property interest is because the groundwater cannot be considered separate from the real property. Even assuming this somehow creates a vested property interest, there can be no regulatory taking unless the owner is deprived of all economically viable uses of the real property, not simply the groundwater that is a part of the real property. Burrell and Day have failed to

plead such allegations. Moreover, the EAA Act is a reasonable exercise of police power designed to protect a natural resource that is the most critical to the welfare of Texas citizens. Therefore, no claim for a regulatory taking can withstand scrutiny.

(5) Conservation Amendment Trumps Takings Clause

In 1917, the TEXAS CONSTITUTION was amended to give the Texas Legislature both the right and the duty to conserve and develop the natural resources of Texas, including groundwater:

> The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes,...and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

TEX. CONST. art. XVI, § 59(a) (1917, amended 1964, 1973, 1978).

Article I, § 17 of the TEXAS CONSTITUTION was included as part of the original enactment in 1876 of the current constitution of Texas

The same rules of construction used to interpret statutes are used when construing the TEXAS CONSTITUTION. *See Meador v. EMC Mortg. Corp.*, 236 S.W.3d 451, 452 (Tex. App. – Amarillo 2007, pet. denied). An elementary rule of construction is that when two provisions conflict, the later enacted provision controls. *See City of San Antonio v. Butler*, 131 S.W.3d 170, 176-77 (Tex. App. – San Antonio 2004, pet. denied). In addition, a specific provision controls over a more general provision. *Id.*

Article XVI, § 59(a) was enacted subsequent to Article XVI, § 17, and is more specific regarding the rights and obligations associated with Texas' natural resources.

Therefore, Article XVI, § 59(a) limits the scope of Article XVI, § 17 and controls on the issue of whether regulation of groundwater effects a compensable taking.

C. Policy Considerations

Article XVI, § 59 of the TEXAS CONSTITUTION makes it clear that the Texas Legislature is the body charged with regulating groundwater in Texas. As this Court recently reiterated:

> The Amendment was not self-enacting. By the very terms of the Amendment the duty was enjoined upon the Legislature to implement the public policy found therein. It was said: " . . . and the Legislature shall pass all such laws as may be appropriate thereto." No such duty was or could have been delegated to the courts. It belongs exclusively to the legislative branch of the government.

Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 78 (Tex. 1999).

The Texas Legislature passed the EAA Act in furtherance of these constitutionally-mandated duties. Specifically, the Texas Legislature passed the EAA Act "because it was 'necessary, appropriate, and a benefit to the welfare of this state' to provide for the management of" the Edwards Aquifer. *Id.*

In rejecting a facial constitutional challenge to the EAA Act, this Court stated:

> The [Edwards] 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.
>
> * * * * *
>
> Water regulation is essentially a legislative function. The [Article XVI, § 59 of the TEXAS CONSTITUTION] recognizes that preserving and conserving natural resources are public rights and duties. The Edwards Aquifer Act furthers the goals of the [Article XVI, § 59 of the TEXAS CONSTITUTION] by regulating the Edwards Aquifer, a vital natural resource which is the primary source of water in south central Texas. The

> specific provisions of the Act, such as the grandfathering of existing users, the caps on water withdrawals, and the regional powers of the Authority, are all rationally related to legitimate state purposes in managing and regulating this vital resource.

Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 623, 633 (Tex. 1996).

In 1999, this Court again emphasized the point:

> Today, again, we reiterate that the people have constitutionally empowered the Legislature to act in the best interest of the State to preserve our natural resources, including water. We see no reason, particularly because of [Article XVI, § 59 of the TEXAS CONSTITUTION], for the Legislature to feel constrained from taking appropriate steps to protect groundwater.

Sipriano, 1 S.W.3d at 79.

Because of expanse of Article XVI, § 59 of the TEXAS CONSTITUTION, this Court has recognized that challenges regarding to legislative attempts to conserve and manage natural resources must be viewed through a forgiving prism. *Id.*

PRAYER

Amici pray that this Court grant the petitions for review filed by the Edwards Aquifer Authority and the state of Texas, enter an opinion declaring that landowners do not have a constitutionally-protect property interest groundwater in place, deny the petition for review filed by Burrell Day and Joel McDaniel, and grant to amici such other and further relief, both general and special, at law or in equity, to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 8th day of June, 2009, a true and correct copy of this Amicus Curiae Brief of the Alliance of EAA Permit Holders was served in accordance with TEX. R. APP. P. 11 on each party or the attorney for such party indicated below:

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