No. 08-0964

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

THE EDWARDS AQUIFER AUTHORITY AND THE STATE OF TEXAS,

Petitioners,

v.

BURRELL DAY AND JOEL MCDANIEL,

Respondents.

On Petition for Review
from the Fourth Court of Appeals at San Antonio
No. 04-07-00103-cv

AMICUS CURIAE BRIEF OF ANNE WINDFOHR MARION AND THE TOM L. AND ANNE BURNETT TRUST

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

RULES AND STATUTES:

TO THE HONORABLE SUPREME COURT OF TEXAS:

Ms. Anne Windfohr Marion and the Tom L. and Anne Burnett Trust (the "Amici") respectfully submit this amicus curiae brief in support of Respondents Burrell Day and Joseph McDaniel:

INTEREST OF THE AMICI

The Amici are the owners of the 6666 Ranch located in King County, Texas, and the Dixon Creek Ranch located in Carson and Hutchinson Counties, Texas. Collectively, these ranches (the "Burnett Ranches") cover over 275,000 acres of land. The Burnett Ranches maintain large and well-respected cattle operations that would simply not exist but for the availability and use of subsurface water. Since the recording of the 6666 brand in King County in 1903 and in Carson County in 1908, the Burnett Ranches have been dedicated to superior water management practices and have worked to restore and improve natural water resources. This Court's decision in this cause regarding the nature of groundwater rights will inevitably affect the Burnett Ranches.

No person other than the Amici will pay the costs of preparing this brief.

SUMMARY OF THE ARGUMENT

Ownership of groundwater in place, like ownership of minerals in place, is a constitutionally protected, vested property right. The rule of capture reflects this ownership right, allowing landowners to extract and use groundwater that is brought to the surface on their property.

Despite vested, private ownership, the extraction and use of groundwater, like the production of oil and gas, is subject to reasonable state regulation. Certainly the state has

the authority to regulate groundwater extraction and consumption to prevent the waste of a valuable resource and to protect the correlative rights of owners in a common source of groundwater, such as the Edwards Aquifer. Reasonable regulations would include establishing allowables for water wells and defining the circumstances under which water wells might be shut in. The state does *not* have the authority, however, to appropriate landowners' long-settled, time-honored, and constitutionally protected ownership interests in the groundwater underlying their land without providing compensation to the landowners.

In this case, the Court should reconfirm that ownership of groundwater in place is a vested property right. The Legislature then will be in a position to empower the state's water agencies to adopt a regulatory scheme that effectively provides for the preservation, extraction, and consumption of groundwater.

ARGUMENT

I. Ownership of groundwater in place, like ownership of minerals in place, is a vested property interest, and the rule of capture protects rather than defeats this interest.

A. Landowners owned all of the natural resources underlying their land, including groundwater, before this Court adopted the rule of capture.

Landowners in Texas have long owned the groundwater underlying their land. Even before this Court announced the rule of capture, a landowner in Texas owned a present possessory interest in all parts of the realty extending from the surface to the center of the earth. *See Williams v. Jenkins*, 25 Tex. 279, 1860 WL 5835, at *6 (1860) ("We may, with confidence, appeal to the time-honored legal maxim, *Cujus est solum,*

ejus est usque ad caelum; which has given to the term *land* an extension bringing within its scope everything which exists naturally, or has been fixed artificially, between the center of the earth and the confines of the atmosphere.") (emphasis in original).[1] Groundwater, just like oil and gas, constituted a part of the "realty." *Compare Houston & Tex. Cent. Ry. Co. v. Cluck*, 31 Tex. Civ. App. 211, 72 S.W. 83, 86-87 (Tex. Civ. App.—Austin 1903, writ ref'd) ("The spring and the soil from which it flows . . . is a part of the realty . . . ."), *with S. Oil Co. v. Colquitt*, 28 Tex. Civ. App. 292, 69 S.W. 169, 171 (Tex. Civ. App.—Dallas 1902, writ ref'd) ("[O]il in place under the soil is a mineral, and . . . minerals in place are land.").

B. This Court retained the law of ownership of groundwater in place when it adopted the rule of capture.

This Court adopted the rule of capture in *Houston & Texas Central Railway Company v. East*, 98 Tex. 146, 81 S.W. 279, 280 (Tex. 1904). At issue in *East* was whether a landowner could be liable for draining groundwater from beneath a neighbor's land. *Id.* at 280. In deciding the applicable tort framework for such a suit, this Court chose to apply the rule of capture as a correlative measure intended to protect the ownership interest a landowner possesses in groundwater. *Id.* at 280–81.

Importantly, this Court recognized that the ownership of the groundwater in place formed the foundation for the applicability of the rule of capture:

> The courts in New York, by previous decisions, had unequivocally accepted the [rule of capture] in this language: 'An owner of soil may divert

[1] Further, the Court declared: "A conveyance of *the land* passes to the grantee everything--the woods, waters and houses, as well as the fields, meadows, and all mines of metals, fossils, etc., beneath the surface, etc." *Id.* (emphasis in original). Some one-and-a-half centuries later, the rule remains the same with respect to everything beneath the surface – including groundwater in place.

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

Id. at 281 (quoting *Pixley v. Clark*, 35 N.Y. 520 (1866)).

Additionally, in adopting the rule of capture, this Court gave effect to its determination that courts are poor arbiters of groundwater disputes. The rule of capture leaves the creation of liability standards where they belong – in the hands of the legislature and private contracting parties. *Id.* (noting that the rule of capture applies "[i]n the absence of express contract [or] positive authorized legislation").

C. The function of the rule of capture is to protect landowners' interests in the groundwater beneath their land.

The rule of capture works in harmony with the doctrine of ownership of groundwater in place. Much of the precedent explaining the relationship between these two doctrines arises in oil and gas cases, a much more active field of law in the last century. The rationale of the oil and gas cases applies equally to groundwater, however, because this Court applies in both contexts the same two underlying legal maxims – ownership of the natural resources in place and the rule of capture.

Some years after this Court announced in *East* that the rule of capture applies to groundwater, it applied the rule of capture to oil and gas. In 1915, in *Texas Co. v. Daugherty*, 176 S.W. 717 (Tex. 1915), this Court held that, because property owners own oil and gas in place, the property right conveyed by an oil and gas lease is a fee simple determinable.

Soon thereafter, this Court decided *Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290, 292 (Tex. 1923), which considered whether an oil and gas estate could be taxed separately from the surface estate. 254 S.W. at 292. The mineral interest owner argued that oil and gas in place could not be a vested ownership interest subject to taxation because that interest was subject to appropriation without the consent of the owner through drainage. *Id.* The mineral interest owner then argued – like the groundwater district now argues – that any "ownership" interest in the minerals was illusory until the minerals were produced and possessed in accordance with the rule of capture. *Id.*

This Court disagreed. After explaining that ownership of oil and gas in place remains settled law in Texas, the Court explained that the rule of capture works to protect this ownership interest, not defeat it. *Id.* The rule of capture allows for ownership of oil and gas in place because it enables the owner of the oil and gas in place to protect its interest in that estate from its neighbor – by drilling its own well to offset its neighbor's well – and vice versa. *Id.* It allows each owner to exclude the other by producing minerals from the land.[2] The rule of capture is a protective rule of expedience made necessary by the fugacious nature of liquid and gaseous natural resources:

> But it is said that the oil and gas are unlike the solid minerals, since they may move through the interstitial spaces or crevices, in the sand rocks in search of an opening through which they may escape from the pressure to

[2] EAA's argument that the rule of capture makes the ownership interest of water-in-place illusory ignores the fact that the landowner's neighbor benefits from the same rule. EAA's further argument that the rule of capture *creates* the sole ownership interest – the water produced – ignores the fact that landowners may recover damages for appropriation of groundwater in place when the appropriation is not the result of drainage from a neighboring landowner's well. The property interest in the groundwater in place exists, and the rule of capture only protects it.

> which they are subject. This is probably true. It is one of the contingencies to which this species of property is subject. But the owner of the surface is an owner downward to the centre, until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature. The air and the water he may use. . . . The oil and gas he may bring to the surface and sell in like manner to be carried away and consumed. His dominion is, upon general principles, as absolute over the fluid, as the solid minerals.

Id. at 293 (quoting *Hague v. Wheeler*, 157 Pa. 324, 27 A. 714 (1893)).

The Court's pronouncement in *Stephens County* remains no less relevant today. Contractual remedies and regulation have largely replaced the rule of capture in the oil and gas context, as foreshadowed in *East*. But still, the harmonious relationship between ownership of fugacious natural resources in place and the rule of capture remains.

This Court recently reaffirmed the existence of this harmonious relationship in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 15 (Tex. 2008). There, the Court held that ownership of minerals in place is a real property interest despite the fact that ownership does not attach to the *specific* molecules beneath the property. Rather, the owner is vested with the right to a fair chance to recover the minerals underlying his land "*or* their equivalents." *Id.*

The rule of capture's function, therefore, is multi-faceted. It allows for the production of equivalents, as opposed to the actual molecules underlying the land, which relieves courts and regulatory bodies from the task of ensuring that each owner actually produces its own minerals. *Id.* In so doing, and because each owner has the same right, the rule of capture ensures that each owner has the right and opportunity to produce his fair share of the minerals underlying his land – or the equivalent in kind – from the

common reservoir. *Id.* The ownership of the resource provides the entitlement; the rule of capture provides correlative rights of neighbors and, thus, the necessary check against confiscation by a neighboring mineral interest owner.

D. Where the rule of capture is inapplicable, courts protect the landowner's ownership interest through typical tort remedies.

Like ownership of minerals in place, ownership of groundwater in place exists independently from the rule of capture. This Court has yet to hold expressly that landowners own the groundwater underlying their land[3] in a case not involving the rule of capture, but it implicitly made this determination a mere two years after it first announced the rule of capture. In 1906, in *Couch v. Texas & Pacific Railway Co.*, this Court ruled that a landowner could recover damages for appropriated groundwater when an interloper, as opposed to a neighboring landowner, captures that groundwater. 99 Tex. 464, 90 S.W. 860 (Tex. 1906). In *Couch*, John Couch sued a railway company for the appropriation of groundwater from a well the railroad company allegedly dug on his property. Before this Court, disagreement persisted regarding whether the railroad company, which owned a right of way across his property, had dug the well on Mr. Couch's property or on property that Mr. Couch had previously sold to another individual. *Id.* at 860–61. In remanding the case for a determination of whether Mr. Couch owned the land upon which the well was situated, this Court held that, if he owned the land, he was entitled to damages for the appropriation of the water. *Id.* at 861. Critically, Mr. Couch did not allege that the stolen water depleted the available resource

[3] Of course, as noted above, this Court has pronounced generally that the owned realty consists of everything existing between the surface and the center of the earth.

or that the absence of it diminished the value of his land – only that he should be entitled to recover for the unlawful appropriation of his water.

Similarly, in *Brown v. Lundell*, 344 S.W.2d 863 (Tex. 1961), this Court held that a landowner was entitled to damages when an oil and gas operator polluted the groundwater under her property with saltwater. Because, at that point, the water was still part of the subsurface, the measure of damages was the diminished value of the property. *Id*. at 865. The landowner would not have been entitled to damages, however, had she not had a property interest in the groundwater.

In instances in which a landowner has *only* the right to capture some natural resource, but no ownership interest in the natural resource before capture, the landowner cannot recover damages for an appropriation of that resource unless the appropriation causes damage to the value of the land. For example, a landowner cannot recover damages for the value of a wild animal that is taken from his land. Wild animals belong to the state. Tex. Parks & Wild. Code Ann. § 1.011 (Vernon 2002); *Jones v. State*, 119 Tex. Crim. 126, 45 S.W.2d 612, 613 (1931). Individual ownership arises only after the wild animal is reduced to possession through killing or capture. *Runnels v. State*, 152 Tex. Crim. 268, 213 S.W.2d 545, 547 (1948). Thus, even if an interloper on the land takes the wild animal, the landowner cannot recover damages for the value of the animal. *Harrison v. Petroleum Surveys, Inc.*, 80 So. 2d 153, 158 (La. App. 1 Cir. 1955) ("Petroleum Surveys correctly urge that the Harrisons cannot recover for the muskrats killed in the ground . . . . The property right of the landowners' damage is not the muskrats themselves (which do not belong to them) . . . ."). Instead, the landowner's

damages are limited to the amount by which the loss of the right to capture diminishes the value of his land. *Id.*

In *Couch*, this Court continued to treat groundwater in place like minerals in place, not like wild animals. If groundwater is stolen from beneath the surface by a trespasser – as opposed to being drained by a property owner under the rule of capture – damages for the loss of groundwater may be recovered. Because, in *Couch*, the Court looks only to the value of the lost groundwater, as opposed to the diminished value of the land resulting from the lost right to capture the groundwater, its ruling implicitly recognizes a landowner's ownership interest in the groundwater beneath its land. Such recognition comports with this Court's earlier pronouncement that a landowner owns everything existing between the surface of the land and the center of the earth – including groundwater in place. *See Jenkins*, 25 Tex. 279, 1860 WL 5835, at *6.

II. Ownership in place and the rule of capture are not detrimental to effective conservation regulations, and reaffirming those rights will not harm the State or the EAA.

Oil and gas jurisprudence demonstrates clearly that Texas' system of ownership in place, acting in concert with the rule of capture, allows for effective, conservation-oriented regulation. As this Court recognized in *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999), any shortfall in the context of groundwater law stems from the absence of effective regulation. This need not be the reality. Groundwater law simply needs its own authority – a case like *Texas Co. v. Daugherty* – in which this Court can confirm and explain the concept of ownership in place, subject to

the rule of capture, and the State's right to impose reasonable regulations to prevent waste and to protect the owners' correlative rights.

A. The Railroad Commission has long operated effectively under a legal framework that expressly recognizes ownership of oil and gas in place.

In 1915, this Court recognized that a landowner owns the fugacious minerals underlying his property. *Daugherty*, 176 S.W. at 717. Two years later, the people of Texas approved a constitutional amendment declaring the conservation and preservation of natural resources existing within the State to be public rights and duties and requiring the Legislature to enact laws to meet those goals. Tex. Const. art. XVI, § 59(a). Two years after that, the Legislature promulgated laws requiring the conservation of oil and gas, forbidding waste, and charging the Texas Railroad Commission (the "Commission") with enacting and enforcing regulations consistent with those goals. Oil and Gas Conservation Laws Act of March 31, 1919, 36th Leg., R.S., ch. 155, art. 1, 1919 Tex. Gen. Laws 285.

In obedience to this legislative directive, the Commission has actively and effectively regulated the oil and gas industry ever since. Some of its more important rules include regulating between-well spacing, regulating the spacing between oil and gas wells and neighboring property lines, regulating the density of oil and gas wells, and setting the allowable amount of production (both globally and on an individual well basis) from these wells. 16 Tex. Admin. Code §§ 3.31, 3.37, 3.38, 3.45, & 3.52 (2010). In over 90 years of heavy regulation of oil and gas, the Commission's rules have rarely been found to work an impermissible confiscation.

One of the few notable exceptions occurred when the Commission promulgated field rules for the Normanna Gas field that disproportionately rewarded the owner of a .3-acre tract of land. *See Atlantic Refining Co. v. Railroad Commission of Texas*, 346 S.W.2d 801 (Tex. 1961). The Commission established a 320-acre spacing pattern and created a proration formula for production on the basis of 1/3 per well and 2/3 per acre. *Id.* at 802–03. As a result, the .3-acre well owner's anticipated production ($2.5 million worth) greatly exceeded the value of the gas in place under his land ($7,000 worth). *Id.* at 803. This Court struck down the proration rule, finding that it failed "to come close to ratable production" and that it failed "to provide each producer in the field an opportunity to produce his fair share of the gas from the reservoir." *Id.* at 811.[4]

Significantly, this is the exception rather than the rule. The rule has been one of effective regulation. Even in the extremely rare case in which a court has stricken Commission rules for working an impermissible confiscation, solutions have existed. For example, the Legislature adopted the Mineral Interest Pooling Act to remedy the unique problem created by small tract owners whose oil and gas in place beneath their property was insufficient to justify paying the high cost of an oil and gas well. *See* Mineral Interest Pooling Act, Tex. Nat. Res. Code Ann. § 102.001 *et. seq.* (Vernon 2001).

Much of the success of the Commission's regulations is attributable to the rule of capture. Because of the rule of capture, a landowner is entitled to a reasonable opportunity to produce the oil and gas beneath his property or its equivalents – not the

[4] A second notable exception is the case of *Marrs v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944). Because Mesa Water, L.P. fully details this case in its brief, the Amici do not discuss it here. *See* Brief of *Amicus Curiae* Mesa Water, L.P., at 10–13.

specific molecules underlying the property. *Coastal Oil*, 268 S.W.3d at 15; *Seagull Energy E & P, Inc. v. R.R. Comm'n*, 226 S.W.3d 383, 388–89 (Tex. 2007). As a result, the rule of capture frees the Commission from the duty to protect each landowner's real property interest in the specific minerals beneath the landowner's property. *Id.* While regulations may not confiscate a mineral owner's real property interest, the rule of capture qualifies the nature of that interest by redefining when a regulation works an impermissible confiscation of a vested interest—only when the regulation deprives a landowner of the reasonable opportunity to produce its fair share of the minerals in place. *Id.* Accordingly, "[t]he rule of capture makes it possible for the Commission, through rules governing spacing, density, and allowables of wells, to protect correlative rights of owners with interests in the same mineral deposits while securing 'the state's goals of preventing waste and conserving natural resources.'" *Coastal Oil*, 268 S.W.3d at 15 (quoting *Seagull Energy*, 226 S.W.3d at 389).

B. Groundwater districts can operate effectively under a legal framework that expressly recognizes ownership of groundwater in place.

Certainly landowners' vested rights to the groundwater underlying their land are subject to regulation – so long as those regulations respect the landowners' property interests. Many of the solutions found to be so workable in the oil and gas context already have been proven to work in the groundwater context. While the state's goals differ in developing its groundwater policy and its oil and gas policy, regulations addressing such issues as well spacing and density rules, pooling, and production allowables would also serve the state's groundwater goals because they allow the state to

control the amount of production and the number and location of wells drilled into an aquifer to ensure that production does not exceed its ability to recharge. As proven in the oil and gas context, the state may enact such reasonable regulations without infringing upon constitutional rights so long as the regulations do not work to confiscate a landowner's groundwater.

The call to abandon 100 years of settled law to the potential detriment of thousands of ranch owners across the state ignores the proven solution already existing within the framework of that law. The better approach is to leave the law as it has always existed, but to expressly reconfirm its contours: The landowner owns the groundwater in place, and the rule of capture entitles the landowner to a reasonable opportunity to produce its fair share of that groundwater or its equivalent. This ownership interest is subject to reasonable regulation, but a regulation that is confiscatory is invalid. Dusting off and clarifying this picture is likely to enable legislation and regulation similar in form and effectiveness to that currently existing in and benefitting the state's oil and gas jurisprudence.

CONCLUSION

Ownership of groundwater in place, like ownership of minerals in place, is a vested property right protected by the United States and the Texas Constitutions. The rule of capture does not make this right illusory. To the contrary, it is a mechanism for protecting this right. Because effective regulation is both possible and proven under this long-standing legal framework, this Court should not overturn these well-settled legal principles.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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