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No. 08-0964

May 13, 2010

Mr. Blake Hawthorne
Clerk, Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

Re: *The Edwards Aquifer Authority and the State of Texas v. Day and McDaniel*

Dear Mr. Hawthorne:

The Edwards Aquifer Authority submits this letter to bring to the Court's attention a recent court ruling that impacts the issues in this cause.

On May 7, 2010, the trial court in *Bragg v. Edwards Aquifer Authority*, No. 06-11-18170-CV, 38th District Court, Medina County, issued a letter ruling following a bench trial on the Braggs' takings claims. Despite the fact that the Braggs were treated like every other irrigator and permit applicant within the jurisdiction of the Authority and issued a permit based on their historical use of Edwards Aquifer water, as required by the Edwards Aquifer Authority Act, the trial court ruled that the Authority had effected a regulatory taking of the Braggs' property under *Penn Central* and awarded the Braggs $732,493.40 in takings damages. A copy of the letter ruling is attached.

The trial court's award in the Bragg case of significant damages to the plaintiff landowners, who were granted one permit (based on their historical use), and denied another permit (based on their lack of use during the historical period), in strict accordance with the requirements establish by the Texas Legislature in the EAA Act, vividly underscores what is at issue before the Court in this case. At issue is whether landowners have vested property rights in groundwater beneath their property prior to capture and, if so, whether those rights belong to landowners without regard to whether they have exercised or invested in the use of that groundwater.

With approximately two million acres of land overlying the Aquifer, and with the great majority of landowners overlying the Aquifer having no right to permitted withdrawals under the terms of the EAA Act because they cannot demonstrate historical use, the number of potential claimants is enormous. Allowing takings claims and awarding compensation as in the *Bragg* case, to even a fraction of these potential

claimants will render continued regulation of withdrawals from the Edwards Aquifer financially impossible.

Respectfully submitted,

Pamela Stanton Baron
Co-counsel for Petitioner
The Edwards Aquifer Authority

By signature above, I certify that, on May 13, 2010, I served a copy of this letter by first class United States mail to counsel for all parties as indicated below. Courtesy copies are also being provided to counsel for amici.

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May 7, 2010

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Re: *Glenn and JoLynn Bragg v. Edwards Aquifer Authority;*
Cause No. 06-11-18170-CV in the 38th District Court of
Medina County, Texas

Dear, Mr. Aelvoet, Mr. Nunley, Mr. Terrell, Ms. Trejo and Mr. Osborn:

I have reviewed the evidence and testimony presented during the March 22nd trial of Cause Number 06-11-18170-CV and studied your closing argument briefs, and I find as follows:

A. This cause of action is not barred by statute of limitations or latches. Plaintiffs Glenn and JoLynn Bragg have standing and the legal capacity to bring this law suit.

B. The enactment and implementation of the Edwards Aquifer Authority Act did substantially advance the government's legitimate interest.

C. The enactment and implementation of the Edwards Aquifer Act did not deprive the Plaintiffs of all economically viable use of their property.

D. The implementation of the Edwards Aquifer Act, and the denial of a Initial Regular Permit (IRP) on February 8, 2005, for an amount less than requested or needed by the Plaintiffs to operate their Home Place Orchard, unreasonably impeded the Plaintiff's use of the Home Place Orchard as a pecan farm, causing them a severe economic impact; interfered with their investment-backed expectations, and constituted a regulatory taking of the Plaintiff's property by the Edwards Aquifer Authority as set forth in the balancing test of *Penn Central Transportation Company v. New York City,* 438 U.S. 104 (1978), and *Sheffield Dev. Co. v. City of Glenn Heights,* 140 S.W. 3d 660 (Tex. 2004). The taking by the Edwards Aquifer Authority is subject to the provision of the Texas Constitution, Art. I, Section 17, and the Fifth Amendment of the United States Constitution, and the Plaintiffs are entitled to be compensated for their loss.

C. The implementation of the Edwards Aquifer Act, and the denial of a Initial Regular Permit (IRP) on September 21, 2004, for any irrigation rights from the Edwards Aquifer on the D'Hanis Orchard, unreasonably impeded the Plaintiff's use of the D'Hanis Orchard as a pecan farm, causing them a severe economic impact; interfered with their investment-backed expectations, and constituted a regulatory taking of the Plaintiff's property by the Edwards Aquifer Authority as set forth in the balancing test of *Penn Central Transportation Company v. New York City,* 438 U.S. 104 (1978), and *Sheffield Dev. Co., v. City of Glenn,* 140 S.W. 3d 660 (Tex. 2004). The taking by the Edwards Aquifer Authority is subject the provision of the Texas Constitution, Art. I, Section 17 and the Fifth Amendment to the United States Constitution, and the Plaintiff's are entitled to be compensated for their loss.

D. The issue of compensation is the difficult part of this case. The Plaintiff's theory is that the water is to be valued as a distinct property item, separate from the surface. Using this theory Plaintiff believes they should be paid the price of $7,500 for "at least" the 108.65 acre-feet of water they didn't get in their IRP on the Home Place ($814,875.00), and "at least" 193.12 acre-feet of water as requested in their IRP application on D'Hanis ($1,448.400). A total of $2,263.275. I don't believe the law supports the Plaintiff's approach for determining their loss.

On the other hand, the Defendant believes the Edwards Aquifer Act actually increased the value of the Plaintiff's property and the Braggs should get nothing. According to the Defendant, the most the Plaintiff can claim is what they have suffered in a direct loss in value of the D'Hanis Orchard of $44,000.00. I also decline to accept the Defendant's approach to determining Plaintiff's loss.

I believe that this is as much about the taking away of a lifestyle as it is about the decrease in value of land. The Braggs invested their lives,

labor and money in a good family farm that could be passed on to their heirs. That life plan has been undermined, and their investment severely devalued.

I find that the Home Place Orchard and D'Hanis Orchard are worth less today than they were worth before the Edwards Aquifer Act came into effect. However, in determining the diminution in value of each farm I have to work with the evidence I have been given, and that means I will have to apply a different approach to determine the loss in value of each farm. The proper method of determining compensation on the D'Hanis Orchard is the difference between the general price per acre from a dry land farm in Medina County and the value per acre for an irrigated farm in Medina County. I find that figure to be $134,918.40 on the D'Hanis Orchard.

The Home Place Orchard is still an irrigated farm, and therefore I must use a different method to determine diminution in value of that property. If the Braggs asked for 228.85 acre-feet of water to operate their farm, but only got 120.2 acre-feet, then they are 108.65 acre-feet short of efficiently operating their farm. Accepting the defendant's market value of $5,500.00 an acre-foot for water (which I think is reasonable), the Bragg's loss is $597,575.00. Therefore, I find that the compensation owed the Plaintiffs is $732,493.40.

I enclose a proposed Final Judgment for your consideration. I suggest that Mr. Terrell, Mr. Nunley and Mr. Aelvoet, prepare a Final Judgment to reflect these rulings and submit the judgment to Ms. Trejo and Mr. Osborn for approval as to form. If you will mail that judgment to me in Hondo, I will see that it is signed and filed with the District Clerk.

You have each submitted proposed Findings of Facts and Conclusions of Law and I have studied those findings, along with the pleadings in the case, and have adopted many of those findings in preparing my proposed findings. However, I cannot make findings unless you request findings as provided by Texas Rules of Court, Rule 296. If the request is made, I will respond immediately.

I am sure you all know that an appellate court is not bound by my conclusions of law. I also accept the proposition that they may disagree about some of my findings on the evidence, and I want to allow those appellate judges the freedom to evaluate this evidence in trying to determine the best way to deal with these very important legal issues.

Sincerely,

Thomas F. Lee