PAMELA STANTON BARON
ATTORNEY AT LAW

POST OFFICE BOX 5573
AUSTIN, TEXAS 78763
TELEPHONE: 501/479-8480
TELECOPIER: 501/479-8070

BOARD CERTIFIED,
CIVIL APPELLATE LAW,
TEXAS BOARD OF LEGAL
SPECIALIZATION

No. 08-0964

March 5, 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 brief to provide additional information with respect to four areas of questioning by the Court at the oral argument.

1. The Authority's alternative non-use argument recognizes that landowners over the Edwards Aquifer have a vested right to continued or future withdrawals of groundwater based on existing or historical use. As this Court recognized in *Elliff*, in those states applying a pure rule of capture analysis, oil and gas is not owned until captured. *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex. 1948). This is also the common-law rule of groundwater. *Id.* ("courts have sought by analogy to compare oil and gas to other types of property such as . . . subterranean waters and other migratory things, with reference to which the common law had established rules denying any character of ownership prior to capture"). The Authority believes that, under the rule of capture as adopted in *East*, there can be no vested right in groundwater prior to capture.

At the argument, several members of the Court expressed concern with this approach. In its briefing and in the argument before the Court, the Authority has also suggested a more narrow alternative under which there can be some vesting of a right to continuing and future withdrawals of groundwater from the Edwards Aquifer where the landowner has existing use. Authority's Br. on the Merits at 37-46. Because the EAA Act protects existing and historical use, it does not effect a taking.

The view that a landowner has a vested right to continuing or future withdrawals where water has been previously withdrawn and placed to beneficial use is not novel, but has been employed by the highest courts of other states. Each of the courts that has examined the effect on vested rights of a transition from the common law of groundwater to a statutory permitting system has held there was no taking when existing use was protected. *See, e.g., Williams v. City of Wichita*, 374 P.2d 578, 593 (Kan. 1962); *Town of Chino Valley v. City of Prescott*, 628 P.2d 1324, 1327-29 (Ariz. 1981); *Knight v. Grimes*, 127 N.W.2d 708, 711

(S.D. 1964); *Baeth v. Hoisveen*, 157 N.W.2d 728, 731 (N.D. 1968). This Court adopted this same approach in concluding that the transition in Texas from a common-law riparian rights system to surface water management and permitting did not effect a taking when claims of use exceeded the available supply and historical users were protected. *In re Adjudication of Water Rts. of Upper Guadalupe Segment*, 642 S.W.2d 438, 444-45 (Tex. 1982). These decisions place value on, and protect, reasonable investment-backed expectations that are objectively demonstrated by past investment in infrastructure to appropriate water and by prior withdrawal and application of water to beneficial use. To the extent that Day and McDaniel have demonstrated existing use of Edwards groundwater, their interest has been protected. They received a permit from the Authority – a firm commitment for future withdrawals – based on their historical use. This alternative approach is consistent with this Court's decision in *Barshop* upholding the historical-use provisions of the EAA Act. *Barshop v. Medina Cty. Underground Water Conserv. Dist.*, 925 S.W.2d 618, 631-32 (Tex. 1996).

2. Ownership of groundwater as part of the soil is not the same as ownership in place. A number of questions at the argument related to the nature of a landowner's interest in groundwater beneath the property. Day and McDaniel and their amici have confused the answer to this question by incorrectly equating the *Pixley* quote in *East* that the owner of the land owns percolating groundwater as "a part of, and not different from, the soil," with ownership in place as used with respect to oil and gas.

Ownership as part of the soil and ownership in place are two completely different concepts. Ownership in place is a special term used in oil and gas cases to refer to "title in severalty to the oil and gas in place." *Elliff v. Texon Drilling Co.*, 210 S.W.2d at 561; *see Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 14 (Tex. 2008) ("But the rule of capture determines title to gas that drains from property owned by one person onto property owned by another. It says nothing about the ownership of gas that has remained in place."). The terms "title," "severalty," and "ownership in place" have never been used by this Court in describing a landowner's interest in groundwater.

Although relying on the *Pixley* quote that the landowner owns groundwater as part of and not different from the soil, Day and McDaniel at the argument asserted that groundwater is its own estate separate from and different from the soil. Groundwater is not a separate estate under *East* and *Pixley*, and it is not a separate estate for takings purposes. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129-31 (1978) (rejecting argument that superadjacent air rights constituted a separate estate for takings purposes, as "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated"); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002) (destruction of one strand of a bundle of property rights is not a taking).

3. This Court has never recognized the remedy of self-help in the groundwater context. At the argument, Justice O'Neill asked whether the remedy of self-help makes a landowner's interest in groundwater enforceable. In order for self-help to be available in the groundwater context, there must be actual withdrawal of groundwater and application to beneficial use. Absent a current beneficial use, any withdrawal and use of the groundwater would be wasteful. As the Authority indicated at the argument, this Court has never recognized the drilling of an offset well as a self-help remedy with respect to groundwater, and leading commentators have explained that the remedy is not effective or available as a practical matter when groundwater is being drained from beneath the property. As Professor Johnson has observed, the remedy of self-help in the *East* case would require "construction of a well powerful enough to pull water from the railroad's well – a prohibitively expensive remedy for one who needs water only for household uses." Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY'S L. J. 1281, 1282-83 (1986). Because there has not historically been a ready market for groundwater, the remedy of self-help would not be economically feasible. A. W. Walker, Jr., *Theories of Ownership and Control of Oil and Gas Compared with Those of Ground Water,* Univ. of Tex. School of Law, WATER LAW CONFERENCE 121, 132 (1956) ("The only remedy [in the absence of correlative rights] is one of self-help. This non-judicial remedy is usually much more effective in the case of oil and gas than of ground water because of the ready marketability of oil and gas."). The ineffective remedy of self-help does not make a landowner's interest in groundwater enforceable.

4. The Court should reject the argument made by Day and McDaniel at the argument, and by several amici in briefs to this Court, that the EAA Act effects a physical taking. At the argument, Day and McDaniel asserted that the EAA Act, in limiting the amount they can withdraw from the Aquifer and place to beneficial use, constituted a physical, per se taking not subject to a *Penn Central* regulatory takings analysis. Several amici have also advanced this argument in briefs to the Court.

This issue has been raised in the *Bragg* case and has been rejected by both the federal and state district courts. Two years ago, Judge Xavier Rodriguez issued an opinion holding that "if Defendants' actions constitute a taking, they constitute a regulatory, not a physical taking." *Bragg v. Edwards Aquifer Auth.*, No. SA-06-CV-1129-XR, 2008 WL 596862, *2 (W.D. Tex. Jan. 9, 2008). Very recently, the state district judge in the *Bragg* case granted summary judgment for the Authority, holding that the EAA Act did not effect a physical taking:

> The Plaintiff contends that a physical taking of property has occurred in this case, and further asserts that the Defendant, in stopping the flow of water from the Edwards Aquifer formation up the well pipe to the surface of the Bragg's land, was a physical act of removing water from one place and putting it in another. *Casitas Municipal Water District v. United States*, 543 F.3d 1276, rehearing at 556 F.3d 1329 (2009). I conclude Glenn and JoLynn Bragg have suffered no direct

> governmental appropriation or physical invasion of their private property, and the Defendant's actions is not the "functional equivalent of a practical ouster" of their property. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). Our case is not like the *Casitas* case or the supporting decisions in that case, where water was physically moved from one place to another. *International Paper Co. v. United States*, 282 U.S. 399, 51 S. Ct. 176, 75 L. Ed. 410 (1931). I do not believe enacting a regulation to manage and conserve water in an underground water formation is the same as taking water from one owner and giving it to another. I overrule p.2(1) of the Plaintiff's motion for summary judgment and grant p.4 "no physical taking" portion of Defendant's motion.

Bragg v. Edwards Aquifer Auth., No. 06-11-18170-CV (38th Jud. Dist., Medina County, Tex.) (Letter Ruling of Judge Thomas F. Lee, Feb. 20, 2010, at 7) (emphasis deleted). The decisions of the federal and state district courts in the *Bragg* case are correct – the EAA Act, in regulating withdrawals from the Aquifer, does not effect a physical taking.

Respectfully submitted,

/s/ Pamela Stanton Baron

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

By signature above, I certify that, on March 5, 2009, I served a copy of this letter brief by first class United States mail to counsel for all parties as indicated below. Courtesy copies are also being provided to counsel for amici.

Kristofer S. Monson
Assistant Solicitor General
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 12548 (MC 059)
Austin, Texas 78711-2548
Counsel for The State of Texas

Tom Joseph
TOM JOSEPH, P.C.
909 N.E. Loop 410, Suite 600
San Antonio, Texas 78209-1309
Counsel for Respondents
Day and McDaniel