NO. 08-0964

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TO THE
SUPREME COURT
OF TEXAS

EDWARDS AQUIFER AUTHORITY,

Petitioner/Cross-Respondent

v.

BURRELL DAY AND JOSEPH McDANIEL,

Respondents/Cross-Petitioners

v.

STATE OF TEXAS

EDWARDS AQUIFER AUTHORITY'S REPLY TO RESPONSE TO PETITION FOR REVIEW AND *AMICI CURIAE* BRIEFS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The issue presented — whether a landowner, within the boundaries of the Edwards Aquifer Authority, has a vested property interest in groundwater in place entitled to protection against being "taken" — is long overdue for resolution by this Court. The importance of the issue is demonstrated by the participation of numerous amici[1] supporting both the Authority and Respondents. The need for review and a definite resolution of the issue by this Court is made evident by the arguments advanced by Respondents and their amici that are based on a misunderstanding of this Court's prior decisions, state statutes, and the fundamental characteristics of groundwater.

The arguments of Respondents and their amici that property owners have a vested property right in groundwater in place should be rejected by this Court because:

- Rather than supporting ownership-in-place, the cases cited by Respondents and their amici demonstrate that groundwater cannot be owned-in-place under the common law.

- Oil and gas and groundwater are physically and economically distinct resources that mandate different treatment; these critical distinctions preclude the wholesale application of oil and gas common law to groundwater as urged by Respondents and their amici.

- The question of ownership has not been resolved by statute. Provisions in the Water Code and the Edwards Aquifer Authority Act do no more than acquiesce in the common law, however it may be determined by Texas courts. Provisions in the Property Code support the Authority's argument that groundwater is not a separate property interest under the common law.

Each of these points is discussed below.

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[1] Amicus briefs supporting the Authority have been submitted by Medina County Irrigators Alliance, Angela Garcia, and Harris-Galveston Subsidence District. Amicus briefs supporting Respondents have been submitted by Texas Farm Bureau, City of Victoria, and Texas and Southwestern Cattle Raisers Association.

A. The relevant case law does not settle the ownership question in Respondents' favor.

Relying on, and quoting repeatedly from, the same half dozen or so cases, Respondents and their amici assert that the law unambiguously gives landowners "absolute ownership" of groundwater-in-place. In not one of these cases, however, was ownership-in-place of groundwater critical to the court's disposition.[2] For that reason, the ownership references must be approached with caution: "One must be careful not to read into the words 'ownership' and 'property' meanings that are not there."[3]

What is revealed on closer examination is that these cases use the term "absolute ownership" not to describe a property right but to distinguish two rules of tort liability. The term originated with this Court's decision in *Houston & T. C. Ry. v. East*, 98 Tex. 146, 81 S.W. 279 (1904), a tort case, and it has subsequently been used as a shorthand reference for the rule of non-liability. Thus, in *So. Plains Lamesa R.R. v. High Plains Underground Water Conserv. Dist No. 1*, 52 S.W.3d 770, 779 (Tex. App.—Amarillo 2001, no pet.), cited by Respondents, the court explains, *twice*, that the use of the word "absolute" is intended to distinguish the rule of capture (or "absolute") right to pump from a right to pump limited by the "reasonable use" rule. Similarly, the Court in *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 24-26 (Tex. 1978), repeatedly explains that the word "absolute" was used to distinguish the rule of capture from the other tort concept of reasonable use.

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[2] 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, 503 (2008) ("Canseco") (examining decisions and explaining why ownership not critical to disposition).

[3] Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?* 17 ST. MARY'S L.J. 1281, 1295 (1986) ("*Groundwater Voids*").

In addressing the EAA Act, this Court recognized that the question of groundwater ownership is not resolved by earlier decisions. In *Barshop v. Medina Cty. Underground Water Conserv. Dist.*, 925 S.W.2d 618, 631 (Tex. 1996), the Court noted that, in any future takings litigation, the *landowner* would bear the "burden to establish a vested property right in the underground water." The Court should address the ownership issue in this case, and hold that a landowner does not own groundwater in place.

B. The reasons why oil and gas have been deemed to be owned-in-place are absent with respect to groundwater.

Because no case resolves ownership of groundwater in place, Respondents and their amici rely on Texas case law holding that oil and gas is owned-in-place, and assert that the common law ought to similarly endow a landowner with vested ownership of groundwater-in-place.[4] The law of oil and gas and the law of groundwater have not, however, followed the same path. Moreover, they are physically and economically distinct resources, and these critical distinctions preclude the wholesale application of oil and gas common law to groundwater as urged by Respondents and their amici.

1. Ownership-in-place cannot exist without correlative rights, which have never existed with respect to groundwater.

Texas does not recognize common-law correlative rights in groundwater: "In the absence of . . . positive authorized legislation . . . the law recognizes no correlative rights in respect to underground waters." *East*, 81 S.W. at 280. To the contrary, the "recognition of correlative rights" in groundwater would "interfere" and work a "material detriment" with all manner of public and commercial works. *Id.* at 281.

[4] *See* Tex. Farm Bureau Amicus Br. at 9-10 ("[N]o reason exists that groundwater should be treated [differently from oil and gas] and neither petitioner nor amici have suggested one.").

In contrast, Texas has long recognized correlative rights among landowners over a common oil and gas reservoir to produce their fair share of the minerals under their property. *Elliff v. Texon Drilling Co.*, 146 Tex. 575, 581-82, 210 S.W.2d 558, 562 (1948). For many decades, case law, statutes, and regulations such as the Railroad Commission's Rule 37 have sought to ensure that "each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land." *Brown v. Humble Oil & Refining Co.,* 126 Tex. 296, 312, 83 S.W.2d 935, 944 (1935). The recognition of correlative rights by statute and regulation has thus substantially altered the common-law rule of capture as applied to oil and gas.[5]

While Texas recognizes that a landowner owns oil and gas in place, that ownership is premised on the existence of correlative rights:

> This reasonable opportunity to produce his fair share of the oil and gas is the landowner's common law right under our theory of absolute ownership of the minerals in place.

Elliff, 210 S.W.2d at 562. As the Farm Bureau points out in its amicus brief, this Court held in *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923), that oil and gas can be owned-in-place despite the fact that, under the rule of capture, they are subject to appropriation by neighbors. However, the basis for the Court's holding was the assumption that each landowner held correlative rights to the minerals beneath the owner's property.[6]

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[5] *See* Robert A. McCleskey, *Comment*, 1 TEX. WESLEYAN L. REV. 207, 216 (1994).

[6] 1 Ernest E. Smith & Jacqueline L. Weaver, TEXAS LAW OF OIL AND GAS 1-16 (2d ed. 2008) ("Smith and Weaver") (the Court "relied upon the correlative rights doctrine and the conjectural nature of the claim of injury resulting from net drainage to reject the rule of capture as a sound argument against the

When correlative rights are not recognized and protected, any claim of ownership "would be illusory." Canseco, 60 BAYLOR L. REV. at 515. That is the case with respect to groundwater, where the common law recognizes no correlative rights and a neighboring well can drain groundwater from the property without recourse. Because the groundwater under the property has no legal protection, it is not owned-in-place by the landowner. *See* Petition for Review of the Edwards Aquifer Authority at 14-15.

2. The overarching objective of oil and gas law is very different from the overarching objective of groundwater law.

Unlike water, oil and gas are non-renewable, and any production irretrievably depletes the resource. And, unlike water, the primary goal is to deplete an oil and gas reservoir *to the maximum extent possible.* Oil and gas law thus has two primary objectives: foremost, to prevent waste for the purpose of "maximizing the size of the oil and gas 'pie' available;" and secondarily, to protect correlative rights when "distributing the 'pie' among its owners." Smith & Weaver at 8-30. "Waste" is defined to mean activities that might impair the ability to extract as much oil as possible from a given reservoir. *See, e.g.,* TEX. NAT. RES. CODE § 85.046(a).

By contrast, the objective of groundwater law has never been to maximize withdrawals and profits among overlying landowners. Almost universally, the guiding principle of water resources management is to ensure the long-term availability of this renewable, life-sustaining resource. Thus, an overarching goal of water law is to ensure

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ownership-in-place doctrine."). Moreover, these "early [oil and gas] cases adopting the ownership-in-place doctrine involved disputes *over the ability of a local authority to tax oil and gas while still in the ground.*" *Id.* at 1-17; *see also Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (1915). The failure of taxing units to treat groundwater as owned-in-place supports the Authority's argument. *See also* City of Del Rio's Pet. for Rev. at.11-12, *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, No. 08-0755.

that only that amount of water is appropriated as is necessary for a recognized beneficial use, and that appropriate conservation measures are utilized to avoid waste. To accomplish this goal, legislation such as the EAA Act is designed "to control increased demand on the aquifer while protecting historical users of aquifer water." *Barshop*, 925 S.W.2d at 632.[7] The EAA Act thus seeks to *stabilize* the size of the aquifer pie available to ensure sustainability, and to distribute the pie among historic users. Because the objectives with respect to recovery of oil and gas and groundwater are so fundamentally different, the courts should not look to oil and gas law to resolve groundwater property issues.

Beyond this primary difference in objective, commentators have noted a number of physical and economic differences between oil and gas and groundwater – including characteristics of underground motion and historical differences in development, local use, and marketing of the resources.[8] These distinctions preclude the wholesale application of oil and gas common law to groundwater urged by Respondents and amici.

C. Legislation does not answer the ownership question.

The question of ownership has not been resolved by statute. Neither the EAA Act nor the Texas Water Code creates a vested ownership interest in groundwater in place. Section 1.07 of the EAA Act provides:

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[7] Unlike with groundwater, at the advent of oil and gas regulation there was no need to protect historic use because *there was no historic use of oil and gas to protect*. *See* Canseco, 60 BAYLOR L. REV. at 522.

[8] *See, e.g.*, A.W. Walker, Jr., *Theories of Ownership and Control of Oil and Gas Compared with Those of Ground Water*, Water Law Conference 121, 130-31 (1956) (attached as App. A); *id.* at 133 ("The physical and economic differences in the nature and use of these substances may well justify the recognition of different types of legally protected property interests in them . . .."); Canseco, 60 BAYLOR L. REV. at 511, 516, 518, 522 ("Groundwater serves different purposes than oil and gas, and the reasons we regulate the resources differ.").

> The ownership and rights of the owner of the land . . . in underground water . . . are recognized. However, action taken pursuant to this Act may not be construed as depriving or divesting the owner . . . of these ownership rights . . . subject to the rules adopted by the Authority . . .

Section 36.002 of the Water Code has similar language:

> The ownership and rights of the owners of the land . . . in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a [groundwater conservation] district.

These provisions do not create an independent basis for ownership separate from the common law and do not define the "rights" they refer to. Instead, they are, in essence, statements by the Legislature that: "Whatever ownership and rights in groundwater a landowner may have, we recognize them." Respondents and their amici also cite to Section 2007.002(4) of the Government Code, but again that section does not create or define a property right in groundwater. Like the Water Code and the EAA Act, it merely references whatever rights might exist at common law. *See Groundwater Voids*, 17 ST. MARY'S L.J. at 1293 (landowners cannot claim statutory right in groundwater because "the pertinent statutes do no more than acquiesce in the court decisions").

Not only do these provisions fail to create any ownership right, they recognize that whatever interest may exist is subject to regulatory action. Sections 1.07 and 36.002 clarify that, so long as the Authority's actions are taken pursuant to the EAA Act, those actions may not be viewed by the courts or landowners as a taking of ownership rights. Accordingly, in this case there can be no taking because the Authority's permitting decision is consistent with the EAA Act.

Finally, Respondents and their amici cite to an eminent domain provision, TEX. PROP. CODE § 21.0421, as proof of a vested right to groundwater in place. That section requires admission of evidence of the market value of groundwater rights apart from the land in addition to the value of the real property in only very limited circumstances: proceedings where a political subdivision is condemning the fee title to real property "to develop or use the rights to groundwater for a public purpose." This section supports the Authority's ownership argument in three ways. First, if the law were clear as to groundwater ownership, then it would hardly have been necessary for the Legislature to specify that its value must be accounted for in condemnation proceedings. Second, if groundwater was a vested property interest, its value would have to be considered in *all* condemnation proceedings, not merely those in which a political subdivision was seeking to develop or use groundwater.[9] Third, the statute, while valuing the groundwater interest separately in certain limited condemnation proceedings, does not treat it as a vested property interest for ad valorem tax purposes. TEX. PROP. CODE § 21.0421(e).

The statutes cited by Respondents and their amici do not create a vested property right in groundwater in place. Instead, it is for this Court to determine the nature and scope of any such right under the common law.

Prayer

This Court should grant review and hold that Respondents do not have a vested property right in groundwater in place and affirm the dismissal of the taking claim.

[9] The Cattle Raisers ask: "If a property owner does not own the groundwater, why would they be compensated [under Section 21.0421]?" Br. at 4. Yet, if a property owner *does* own the groundwater, why would the owner be compensated only in: (a) condemnation cases, (b) initiated by political subdivisions, (c) to take the fee title, (d) in order to develop the groundwater rights?

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Certificate of Service

I certify that, on May 20, 2009, I served a copy of this reply by first class United States mail to all counsel as indicated below.

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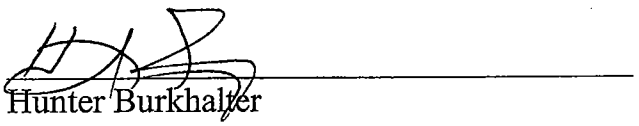

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