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May 25, 2010

Via First Class Mail
Blake A. Hawthorne, Clerk
Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Room 104
Austin, Texas 78701

Re: No. 08-0964; *The Edwards Aquifer Authority and the State of Texas v. Burrell Day and Joel McDaniel*; In the Supreme Court of Texas

Dear Mr. Hawthorne:

Amici curiae Glenn and JoLynn Bragg are responding to arguments raised in the Edwards Aquifer Authority's letter of May 13, 2010. Contrary to the misimpression EAA seeks to leave with the Court, the Medina County District Court's ruling in *Bragg v. Edwards Aquifer Authority*, No. 06-11-18170-CV, does not threaten an impending tsunami of water-rights takings claims. If anything, the ruling demonstrates precisely the opposite. The Court should not countenance EAA's scare tactics; rather, it should recognize that a thoughtful, case-by-case approach provides the correct method of determining whether, in application, the Edwards Aquifer Authority Act and EAA's rules and regulations implementing it work a taking in a particular instance.

There is no support for EAA's hyperbolic assertions that "the number of potential claimants is enormous" and "awarding compensation . . . even to a fraction of these" would be "financially impossible." Unlike the vast majority of landowners whose properties overlay the aquifer, the Braggs had distinct, investment-backed expectations that, as their pecan orchards matured, they would in the future be able to use more aquifer water than they had used historically. The EAA Act expressly provides for landowners who could demonstrate historical use, and EAA fails to distinguish between the overwhelming majority of landowners without historical use—who will not have valid takings claims—and the comparatively tiny category of owners like the Braggs who can prove distinct, investment-backed expectations in the future use of aquifer water despite a lack of the historical use that would qualify them for permits. That error highlights the wrongheadedness of the categorical denial of groundwater rights EAA seeks from the Court: the only way to determine which landowners have legitimate expectations and

claims, as the Braggs do, is on a case-by-case basis under the well-established rules of analysis for takings claims. (Nor is EAA likely to be overwhelmed by a tide of frivolous takings claims, given the severe disincentive provided by its claim of statutory authorization to collect attorney's fees in any takings case it wins. *See* TEX. WATER CODE §36.066.) *Bragg* demonstrates that district courts can—and should be allowed to—determine the mode of takings analysis most appropriate on a given set of facts, and the Court should not reach out to decide that question, given that it is not actually present in this case.

By copy of this letter, all counsel of record have been served.

Cordially,

Gregory S. Coleman

cc: Andrew S. Miller
Pamela Stanton Baron
Tom Joseph
Brian Berwick
Kristofer S. Monson