OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

KRISTOFER S. MONSON
ASSISTANT SOLICITOR GENERAL

(512) 936-1820
KRISTOFER.MONSON@OAG.STATE.TX.US

June 10, 2010

**VIA HAND DELIVERY**

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

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

Dear Mr. Hawthorne:

Please file this letter on behalf of the State of Texas in the above-captioned case. Please file-mark the extra copy and return it to me for my files. By copy of this letter, opposing counsel is being served. Thank you for your assistance in this matter.

TO THE HONORABLE SUPREME COURT OF TEXAS:

This letter responds to the various *amicus* briefs and post-submission letters and to Justice Willett's question regarding the State's briefing in prior cases. It also reminds the Court that it can resolve this case under its police-power jurisprudence.

## Introduction

This case need not turn on the nature of groundwater ownership in Texas. All three parties and multiple *amici* have offered their theories as to the nature of landowners' property interests in groundwater—the Authority argues that landowners have no property interest in the water beneath their fee simple property, and the State counters that while there is some property interest in the groundwater, this case does not implicate that interest. For a landowner to recover on a takings claim, he would have to assert a valid takings claim, as a matter of fact and law. In this case, the record plainly shows that no taking occurred.

First, plaintiffs' petition—which bases their taking claim on either (1) the "unlimited" availability of aquifer water at 900 gallons per minute or (2) their "entitle[ment]" to "at least two acre feet per acre annually," 1.CR.14-15—does not on its face state a valid takings claim.

Plaintiffs seek money damages for a particular amount of water the permit hypothetically prevents them from withdrawing, even though the basis of their takings claim is inconsistent with the law and facts of this case. For over a century, Texas law has allowed a landowner to drill and capture water from below his land. As a result of that rule, he cannot depend on any particular amount of water, because his neighbor—or a landowner a hundred miles away—has the right to drain the same water from a well located on property the landowner does not own. Thus, no landowner can meaningfully describe a legally-enforceable interest in a particular amount of groundwater, because his neighbor has an equal right to the *same* water. Plaintiffs, in effect, are asking to be compensated for something to which they never had an established legal right: the hypothetical amount of water they would be able to produce in the future but for the Authority's permit.

Second, as set out in the merits briefing, the detailed evidence presented in the administrative proceeding is more than sufficient to support the Authority's permit and foreclose any takings claim. Under the Court's oil and gas precedent, if a regulatory statute does not on its face effect a taking and is reasonably applied in a permitting process, there is no taking. *See Seagull Energy E&P, Inc. v. RR Comm'n*, 226 S.W.3d 393, 388-89 (Tex. 2007). There is no taking in this case because (1) the Court has already held that the Edwards Aquifer Act does not effect a facial taking and (2) the administrative record demonstrates that the Authority was reasonable in issuing its permit

Given these well-established legal and common-sense principles, the Court should hold that plaintiffs' petition fails to state a takings claim. The Court need not address the circumstances under which property owners can bring takings claims based on groundwater regulation.

## I.

The plaintiffs' argument and post-submission letter and their supporting *amici*'s briefs reflect confusion and the misperception that the State seeks (1) ownership and control over ground water for itself, or (2) to preclude takings claims based on groundwater regulation in every circumstance. In fact, the State's position is based on the "rule of capture" doctrine adopted in *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904). That rule is simple: your neighbor can pump water out from under your property, for any purpose, and you have no legal recourse for his use of that water. *See* Merits Reply Br. at 10-11. The right to exclude others is the core of ownership. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). The resulting principle is also simple: if you can't exclude your neighbor from taking your water, you do not have the requisite vested property right necessary to plead a valid claim under the Texas Constitution. *See* State's Merits Br.

at 12-14; Merits Reply Br. at 9-14.[1] A taking may occur as a result of the regulation—the surface estate, after all, has a property interest in the water as it does in the surface property—but the claim must be based on a reduction in property value, and that reduction must be measured by something other than the hypothetical cash value of a particular amount of water. *See* State's Merits Br. at 24-27; Merits Reply Br. at 16-17. The rules for establishing the change in value of the property itself, as opposed to the value of a particular amount of groundwater, would determine when such a taking occurs. The State asks merely that the Court apply these longstanding principles of Anglo-American property law.

## II.

At oral argument, Justice Willett asked whether the State's current legal analysis is at odds with that articulated by a prior administration in *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996). In both *Barshop* and the present case, the State reasoned that even a total deprivation of the right to produce groundwater will not, by itself, effect a taking under established law. As counsel pointed out at oral argument, this position is substantively consistent. *See* State Reply Merits Br. at 23, n.9 (explaining that the State's current position is consistent with *Barshop*'s description of the State's position in that case). And it is fair because the mere regulation of groundwater production does not itself constitute a compensable taking, although a compensable taking can occur if regulation impacts a property's value in another way.

Notwithstanding this substantive consistency, there is a difference between the two briefs. In *Barshop*, a previous administration ignored the holdings of several cases when it used the term "absolute ownership" and did so in a manner that appeared to establish a principle, then carve out the rule of capture as an exception. By contrast, the current briefing describes the rule of absolute ownership as part of the rule of capture. The second reading is a more accurate statement of the common law.

The prior administration's use of the term "absolute ownership" in its *Barshop* briefing evinced two legal errors: it (1) failed to recognize that the term "absolute ownership"

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1. Plaintiffs and the Bragg post-submission letters assert, for the first time, that plaintiffs' live petition attempts to state a physical-takings claim. Not so. Plaintiff's live petition alleges lack of access to some water, not that title to the water has been transferred to the State. 1.CR.14-15. And it recognizes that their property has not been stripped of all economic use because it recognizes that they are still entitled to pump at least some water. *Id.* Thus, plaintiffs allege the existence of a partial—not total—limitation on their ability to use their parcel of land. Accordingly, under the relevant Texas and federal precedent, the taking asserted is regulatory, not physical. *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669-670 (Tex. 2004); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005); *see* State Merits Brief at 9-10.

is a term of art distinguishing between groundwater rights and riparian water rights and (2) ignored the holding of *Texas Co. v. Daugherty*, in which the Court recognized that oil and gas are owned in place because they are minerals even though they would not be owned in place under the rule of capture, 107 Tex. 226, 235, 176 S.W. 717, 719 (1915).

Groundwater is "absolutely owned" in that, once produced, it can be sold or transmitted off the property. *E.g.*, *Friendswood Dev't Co. v. Smith-SW Industs., Inc.*, 576 S.W.2d 21, 25-26 (Tex. 1978) (rule of "absolute ownership" means that "a landowner has the absolute right to sell percolating ground water for industrial purposes off the land"); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 294-95, 276 S.W.2d 798, 801-02 (1955) (distinguishing between use of groundwater and riparian water). This is in contrast to traditional principles of riparian ownership, because at common law riparian users were limited to using water on riparian property. *E.g.*, *Friendswood*, 576 S.W.2d at 25. When *East* used the words "absolute ownership," it invoked the common-law meaning of that phrase. *East*, 98 Tex. 146, 149 (recognizing that the rule of capture was set out in *Acton v. Blundell*,12 M & W 324, 354, 152 ENG. REP. 1223, 1235 (1843) (Tindal, C.J.)); *see Acton*, 12 M&W at 350 (contrasting ownership of groundwater with riparian water rights based on knowledge and permissible use of groundwater). Treating the words "absolute ownership" as though they describe the nature of ownership below the ground, rather than the uses to which water can be put once it is reduced to ownership, ignores the plain meaning of *East*.

Moreover, in *Daugherty* the Court recognized that oil and gas is not owned in place by virtue of the rule of capture but, instead, is owned in place because oil and gas are minerals and subject to different common law rules. 107 Tex. at 235, 176 S.W. at 719. Thus, water, or any other non-mineral subject to the rule of capture, is not owned in place. *See* Reply Br. at 6-8, & nn. 2 & 3.

## III.

To reiterate a point made at oral argument in response to Justice O'Neill's question, this case need not turn on the ultimate scope of property rights in ground water. Rather, the Court can simply find there is no takings claim under these facts. Even assuming for the sake of argument that plaintiffs' property-rights arguments are correct, under analogous oil-and-gas law the Authority's issuance of a permit in this case would still not effect a taking. An administrative order entered under a statute that is, itself, a valid exercise of the police power cannot be the basis of an Article I, §17 claim, so long as the administrative order is not determined to be arbitrary and capricious in a suit for judicial review. *Seagull Energy E&P, Inc. v. RR Comm'n*, 226 S.W.3d 393, 388-89 (Tex. 2007). As *Seagull* made clear, the protection provided by judicial review actually provides a better remedy than a tag-along

takings claim could provide—in the place of money damages, successful appellants get a chance to get the permit they wanted in the first place. *Id.* at 389.

*Seagull*'s logic applies by analogy in this case:

- The Court has already held that the Edwards Aquifer Act is a valid exercise of the police power, *Barshop*, 925 S.W.2d at 633-34;

- the Authority's briefing and the administrative record establish that the court of appeals correctly held that the order was neither arbitrary nor capricious; therefore

- no tag-along takings claim should be allowed based on the record in this case.

This does not mean a plaintiff could never bring a takings claim against the Authority. If one of the Authority's permitting decisions damaged the value of the surface estate some other way than limiting production of water, Article I, §17 would still provide a remedy under *Seagull*'s reasoning.

Sincerely,

/s/ Kristofer S. Monson

Kristofer S. Monson

KSM/lmo

cc: Thomas E. Joseph (via *U.S. Certified Mail, Return Receipt Requested*)
Pamela Stanton Baron (via *U.S. Certified Mail, Return Receipt Requested*)
Andrew S. (Drew) Miller (via *U.S. Certified Mail, Return Receipt Requested*)