No. 08-0964

In the Supreme Court of Texas

EDWARDS AQUIFER AUTHORITY AND THE STATE OF TEXAS,
Petitioners,

v.

BURRELL DAY AND JOEL MCDANIEL,
Respondents.

On Petition for Review from the
Fourth Court of Appeals in San Antonio, Texas

REPLY IN SUPPORT OF PETITION FOR REVIEW

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General

KRISTOFER S. MONSON
Assistant Solicitor General
State Bar No. 24037129

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1820
[Fax] (512) 474-2697

COUNSEL FOR PETITIONER
THE STATE OF TEXAS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions, Statutes and Rules

No. 08-0964

In the Supreme Court of Texas

EDWARDS AQUIFER AUTHORITY AND THE STATE OF TEXAS,
Petitioners,

v.

BURRELL DAY AND JOEL MCDANIEL,
Respondents.

On Petition for Review from the
Fourth Court of Appeals in San Antonio, Texas

REPLY IN SUPPORT OF PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

The legal issues in this appeal are tied to the facts alleged in the petition and established at summary judgment. The plaintiffs were not summarily deprived of the right to access groundwater—rather, they applied for a historical-use permit to pump a certain amount of groundwater and were awarded a permit for a smaller amount. Under regulatory-takings jurisprudence, the issuance of this smaller permit is not a taking, as a matter of law. Because that additional takings claim is the only reason the State has been made a party to this lawsuit, the State should be dismissed as a defendant. And because the State's only direct interest in the current appeal is whether a taking has occurred based on the facts

alleged—an issue that was introduced by the court of appeals's judgment—the State's issues presented are preserved by its petition for review.

ARGUMENT

I. PLAINTIFFS ACKNOWLEDGE THE IMPORTANCE OF THIS CASE, BUT MISCHARACTERIZE THE STATE'S ARGUMENTS.

Plaintiffs concede the importance of this case. *See* Resp. at 4. Yet they mischaracterize the State's position as being that property owners have no property rights in groundwater. Resp. at 5-6. Not so. The State argues that a property owner's interest in groundwater is not violated if he is granted a smaller historical-use permit than he requested. If no government entity has violated a property right, there is no compensable taking and no basis for jurisdiction over the third-party claims against the State. *E.g.*, *State v. Holland*, 221 S.W.3d 639, 642-43 (Tex. 2007); *see* State's Pet. at 9-10.

Plaintiffs erroneously suggest that the State's brief frustrates the Legislature's supposed belief that implementation of the Edwards Aquifer Act would effect a taking. Resp. at 5-6. Again, not so. The Act states that the Legislature "intends that just compensation be paid *if* implementation of [the Act] causes a taking of private property or the impairment of a contract in contravention of the Texas or federal constitution." EDWARDS AQUIFER ACT § 1.07 (emphasis added).[1] The requirement of payment is

1. The Act is contained in a number of general-law enactments. Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350; as amended by Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of May 28, 2001, 77th Leg., R.S., ch. 966, §§ 2.60-.62 and

conditional—it does not presuppose that a taking will occur. Nor did *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996), resolve the issue; the *Barshop* court merely concluded that the stated intent that compensation be paid if a taking occurred was sufficient to defeat a facial, rather than an as-applied, takings claim. *Id.* at 630-31.

Finally, the State does not argue that property owners' rights should be ignored based on expediency. Rather, Texas common law does not recognize a sufficiently concrete right to groundwater to support a takings claim under these facts. The State discusses the practical impact of the rule to underscore the importance of the issue, which is a statutory factor in the Court's disposition of the State's petition. *See* TEX. GOV'T CODE § 22.001(a)(3). The fiscal impact of a given case is an objective, readily-determined measure of importance. That the potential practical impact of the court of appeals's decision would be devastating for the State—resulting in potential liability in the area of 11% of Texas's available budget for 2010-2011, *see* State's Pet. at 4—goes to the importance of the case, not the merits of the State's arguments.

6.01-.05, 2001 Tex. Gen. Laws 1991, 2021-22 and 2075-76; Act of June 1, 2003, 78th Leg., R.S., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01-.12, 2007 Tex. Gen. Laws 4612, 4627; and Act of May 28, 2007, 80th Leg., R.S., ch. 1430, §§ 12.01-.12, 2007 Tex. Gen. Laws 4612, 4627. For convenience, this filing will refer to it as the EDWARDS AQUIFER ACT.

II. THE SCOPE OF A PROPERTY OWNER'S INTEREST IN GROUNDWATER DOES NOT EXTEND TO A VESTED RIGHT TO PRODUCE AN UNLIMITED AMOUNT OF WATER.

Because plaintiffs misunderstand the State's position, they fail to respond to it. No court has ever held that property owners have an interest in a particular amount groundwater that is interfered with by government regulation that requires pumping less groundwater. As the State pointed out it in its petition, *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904), and its progeny all dealt with suits *between private parties*. *See* State Pet. at 7-8. Thus, the question in this case is whether *East*'s description of the property interest in groundwater as "absolute" makes that property right superior to the public interest in groundwater. But *East* itself—in contradistinction to its use of the adjective "absolute"—concludes that property owners' rights to groundwater are anything but absolute. 81 S.W.2d at 280 (recognizing that there are no correlative rights in water absent "positive authorized legislation"). A property owner does not have the right to exclude his neighbor from draining groundwater from underneath the property in question. *E.g.*, *id.* The right recognized in *East* is not, in substance, absolute.

Nor is it "vested" within the meaning of regulatory-takings jurisprudence, which developed long after *East*'s discussion of the respective rights of private persons. To be vested for regulatory-takings purposes, the use of the property must be certain, ongoing, and underpinned by investment-backed expectations. *E.g.*, *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 56 (Tex. 2006). None of those characteristics appear in this case; if groundwater production can always be reduced by drainage, the right to produce a certain

amount can never be vested for regulatory-takings purposes. *See* State's Pet. at 11-14. And without a taking, there is no jurisdiction over the takings claim on which the State has been impleaded.

III. NO FURTHER RECORD IS NECESSARY TO ADDRESS THE ADEQUACY OF PLAINTIFFS' PETITION.

Plaintiffs misunderstand the procedural posture of the State's argument. If, based on the undisputed facts alleged in plaintiffs' petition, no taking has occurred as a matter of law, then there is no jurisdiction over the takings claims on which the State has been impleaded.[2] *See* Pet. at 10-11. Plaintiffs cite no contrary authority, but merely suggest that whether a taking has occurred depends on the facts of a given case. This argument makes little sense in the context of this particular challenge to an administrative proceeding, because plaintiffs were in fact granted a historical use permit. *See* State's Pet. at 14-15. The record already makes clear how much water plaintiffs believe they are entitled to, how much the Authority permitted them to pump, and the circumstances of that dispute.

IV. THERE IS APPELLATE JURISDICTION OVER THIS LAWSUIT, AND THE STATE HAS NOT WAIVED ANY ISSUES.

There is appellate jurisdiction over this case, and the Court has jurisdiction to render judgment based on the State's arguments, all of which are preserved. Plaintiffs argue that (1) there is no appellate jurisdiction because the State did not file a brief in the court of appeals, *see* Plaintiffs' Pet.at 2, and (2) that a party who does not challenge the trial court's

---

2. And, as the State will explain in its brief on the merits, even if a taking has occurred the proper defendant would be the Edwards Aquifer Authority, not "the State of Texas" as a whole.

judgment forfeits the right to complain of error introduced by the court of appeals, *id.* at 3. Both assertions are wrong as a matter of law.

The Court has appellate jurisdiction because this lawsuit arises from a final judgment. TEX. GOV'T CODE § 22.001. The trial court's various orders both (1) granted the Authority's motion for summary judgment on the takings claim and (2) granted the plaintiffs' claim for a larger historical-use permit. 1.CR.245, 2.CR.483-85. Plaintiffs and the Authority each filed cross appeals, invoking the court of appeals's jurisdiction. Because the State was impleaded in the case only for the takings claim, 1.CR.227-28, it was a prevailing party on the issues relevant to it and had no reason to file a notice of appeal. Regardless, the court of appeals's jurisdiction is invoked when any party challenging the judgment files a notice of appeal. TEX. R. APP. P. 25.1(b). Thus, the court of appeals's appellate jurisdiction was appropriately invoked by the cross-appeals.

This Court's appellate jurisdiction is invoked when any party who seeks to change the court of appeals's judgment files a petition for review. TEX R. APP. P. 53.1. The State's petition for review seeks to reverse the portion of the court of appeals's judgment remanding the case for further proceedings on plaintiffs' takings claim because there is no jurisdictional basis for that claim. *See* State's Pet. at x. Accordingly, the State has properly invoked the Court's jurisdiction.

Nor has the State waived any point under the briefing rules. As a prevailing party in the trial court, the State was an appellee and had no burden to raise any issue attempting to

change the underlying judgment at the court of appeals. *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 668 n.23 (Tex. 2008) (citing *Williams v. Khalaf*, 802 S.W.2d 651, 658 (Tex. 1990)). It was not until the court of appeals remanded the case for consideration of the takings claims that the State had a judgment to contest. And the State may now raise the that complaint under the exception to the preservation rules when error is introduced into a case by the court of appeals's judgment. *E.g.*, *Bunton v. Bentley*, 153 S.W.3d 50, 53 (Tex. 2004) (per curiam) (citing *Larsen v. FDIC/Manager Fund*, 835 S.W.2d 66, 74 n.12 (Tex. 1992)). Moreover, the State's petition is restricted to jurisdictional issues. Jurisdictional issues can be raised for the first time in a petition for review to the Supreme Court and the Court has an obligation to resolve those issues. *E.g.*, *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993).

PRAYER

The Court should grant the petition and render judgment dismissing the State from this case.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General

KRISTOFER S. MONSON
Assistant Solicitor General
State Bar No. 24037129

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1820
[Fax] (512) 474-2697

COUNSEL FOR PETITIONER
THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I certify that on May 20, 2009, a true and correct copy of the foregoing document was served by certified U.S. mail, return receipt requested, on:

Thomas E. Joseph
Attorney at Law
Alamo Tower East
909 NE Loop 410, Suite 600
San Antonio, Texas 78209-1309

COUNSEL FOR RESPONDENTS/CROSS-PETITIONERS

Pamela Stanton Baron
Attorney at Law
Post Office Box 5573
Austin, Texas 78763

Hunter Wyatt Burkhalter
KEMP SMITH, LLP
816 Congress Avenue, Suite 1150
Austin, Texas 78701

COUNSEL FOR PETITIONER
EDWARDS AQUIFER AUTHORITY

KRISTOFER S. MONSON