No. 08-0964

In the Supreme Court of Texas

THE 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

RESPONSE TO PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case:	This appeal arises from a suit for judicial review of the Edwards Aquifer Authority's order granting plaintiffs a historical-use permit.
Trial Court:	218th Judicial District Court, Atascosa County, The Honorable Donna S. Rayes, presiding.
Trial Court Disposition:	The trial court reversed the Authority's order on the theory that plaintiffs were entitled to claim previous use of water from the well and lake as historic use of groundwater for the property. 1.CR.245.[1]
Parties in the Court of Appeals:	Burrell Day and Joseph McDaniel, Appellants The Edwards Aquifer Authority, The State of Texas, Appellees.
Court of Appeals:	Fourth Court of Appeals at San Antonio, Texas.
Court of Appeals's Disposition:	The court of appeals reversed the trial court's judgment in part, affirming the administrative order granting the reduced groundwater amount but reversed the denial of plaintiffs' takings claim. *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742 (Tex. App.—San Antonio 2008, pet. filed) (Hilbig, J., joined by Angelini, J., and Speedlin, J.).

1. Record citations appear as "__.CR.__", with the first numeral indicating the volume and the second the page number. Citations to the supplemental clerk's record appear as "__.SCR.__."

ISSUES PRESENTED

1. Whether water drawn from an artesian fed well, conveyed through a natural watercourse, and stored in a lake retains its nature as groundwater while it is so stored.

2. Whether Section 36.066(g) of the Water Code, which provides attorney's fees to local districts when they prevail in court is consistent with equal protection. [UNBRIEFED].

3. Whether the Edwards Aquifer Act is otherwise constitutional. [UNBRIEFED].

4 Whether the contested-case provisions of the Administrative Procedure Act satisfy the open courts and due course of law provisions of the Texas Constitution. [UNBRIEFED].

5. Whether a "substantial evidence de novo" standard applies to this dispute even though no statute supports the application of that standard. [UNBRIEFED].

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Does a property owner who owns land from which artesian water flows maintain ownership of that water when it enters a watercourse? The answer to this, the primary question raised in plaintiffs' cross-petition, is no. Plaintiffs' view of groundwater entering watercourses would mean that the property owners who owned the headwaters of an artesian-fed stream or river would own much of the water throughout the river's course. That result both (1) contravenes well-established surface-water regulation law and (2) demonstrates the fundamental impracticality of plaintiffs' legal position.

Because plaintiffs' view of water ownership would undermine Texas's surface-water regulation regime, the issue is important to the jurisprudence of the State. Accordingly, to the extent it is necessary to fully resolve the issues raised in the State's petition for review, the State acquiesces to the grant of plaintiffs' petition. The Court should grant both the State's petition and the plaintiffs' petition to resolve the parameters of ground- and surface-water regulation and put to rest the uncertainty evidenced by this lawsuit.

STATEMENT OF FACTS

I. THE EDWARDS AQUIFER AUTHORITY ACT

The Edwards Aquifer Authority Act,[2] enacted in 1993, created the Edwards Aquifer Authority and gave it the power to regulate withdrawals of groundwater by well from the Edwards Aquifer. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 625 (Tex. 1996). Under the Act, applicants can seek initial regular use permits for withdrawals by showing "beneficial use" of Edwards groundwater during the "historical period" between 1972 and 1993. 14.SCR.3512, 3532-33.

Implementation, however, was delayed. First, the Department of Justice refused to preclear the Act under the federal Voting Rights Act. *Barshop*, 925 S.W.2d at 625.

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2. 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 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.

Following preclearance, plaintiffs unsuccessfully challenged the facial constitutionality of the act. *Id.* at 638. The Act was implemented by the end of 1996.

II. THE PERMIT APPLICATION

Plaintiffs purchased the parcel involved in this dispute in September of 1994, after the Act was passed, but before it was implemented. 1.CR.163. During the historical period, the parcel had been used for grazing cattle. 6.SCR.2003. Plaintiffs now want to use the parcel to grow oats and peanuts. 6.SCR.1867. In December of 1996, they applied to the Authority for a permit to withdraw 700 acre feet of water. 1.CR.140, 142. The court of appeals correctly stated the facts of the case with regard to the groundwater/surface water issue: the claimed water was produced from an artesian-fed well for which there was no operating pump or meter; water flowed from the well to a nearby lake; and, according to plaintiffs' own evidence, most of the water on which plaintiffs base their claimed historical use was produced from the lake, as opposed to the well.[3]

The Authority gave preliminary approval, but then determined that plaintiffs' evidence did not establish beneficial use of groundwater during the historic period. 6.SCR.1878; 7.SCR.2196; 11.SCR.2878-80.

Plaintiffs requested a contested-case hearing. 1.SCR.714. The Administrative Law Judge found that, except for five to seven acres, plaintiffs' predecessor-in-interest had

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3. Plaintiffs suggest, in their statement of facts, that evidence included in the administrative record conclusively establishes several legal conclusions regarding the nature of previous use of the water in question. Not so. That evidence must be analyzed under the governing legal standards to determine ownership of the water.

irrigated with state surface water from a lake, and not Edwards groundwater. 1.CR.52, 58. The Authority adopted the Administrative Law Judge's recommendation and granted plaintiffs a permit to withdraw fourteen acre-feet of groundwater per year. 2.CR.316, 353.

III. PROCEDURAL HISTORY

Plaintiffs sought review in district court, adding a takings claim, and the Authority brought a third-party action against the State for indemnification and contribution on the takings claim. 1.CR.1, 227-28. Plaintiffs claimed deprivation of a property right in groundwater without compensation, 1.CR.13, and the district court granted the Authority summary judgment on the ground that there was no property right. 1.CR.245. The court of appeals reversed, reasoning that plaintiffs have a vested right in the groundwater beneath their property because they have "some ownership rights in the groundwater" and remanded for further proceedings. *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742, 756 (Tex. App.—San Antonio 2008, pet. filed).

SUMMARY OF THE ARGUMENT

The main issue raised in plaintiffs' petition—whether landowners have a property interest in groundwater that survives when the water comes to the surface in an artesian-fed well and enters a watercourse—is the other side of the coin from the issue raised by the State—whether property owners' rights are "taken" when the government regulates artificial groundwater production. The scope of groundwater rights is important: Texas's population is growing, and its access to water is shrinking. Certainty regarding the proper scope of

water-use regulation is critical. Accordingly, the State acquiesces to the grant of plaintiffs' petition so that the Court can fully address the underlying legal issue.

The court of appeals got the surface-water issue right. Surface water belongs to the State. And water that bubbles out of the ground and becomes part of a watercourse necessarily becomes surface water, owned by the State, regardless of whether a property owner had some hypothetical degree of ownership. The water in question flowed into a lake that was created by a federally-funded dam in the 1950s. Once that water entered the lake, it became state water subject to regulation by the Texas Commission on Environmental Quality. Any property interest a landowner has in groundwater is extinguished by operation of law when that water enters a watercourse.

ARGUMENT

I. UNIFORM, PRACTICAL REGULATION OF SURFACE WATER IS IMPORTANT TO THE STATE OF TEXAS.

Water regulation, surface and ground, is of utmost importance. Perhaps because they seek to avoid the application of the surface-water regulatory system that has been in place in Texas since the Nineteenth Century, plaintiffs do not underscore the fundamental importance of this lawsuit in their petition for review.

Water in watercourses is held by the State in trust for the people of Texas. *See In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438, 444 (Tex. 1982) (*Upper Guadalupe*). As a result, and because the State has the constitutional obligation to preserve this common resource, the Court has already

concluded that a surface-water regulation program in which riparian property owners are limited to the levels of water use demonstrated during a previous test period does not violate the Texas Constitution—despite the fact that those rights are "vested." *Id.* at 445 (citing *Tex. Water Rights Comm'n v. Wright,* 464 S.W.2d 642, 648 (Tex. 1971) (in turn citing TEX. CONST. art. XVI, §59, the "Conservation Amendment")).

The concerns at play in *Upper Guadalupe*, and underpinning the Conservation Amendment, are magnified today by Texas's accelerated population growth. The surface water supply in Texas is dwindling due to deposit of sediment and depletion of aquifers, and the total water supply is expected to decrease 18% by 2060. *See* 2 TEX. WATER DEV. BD., WATER FOR TEXAS, vol. II, at 120 (2007).[4] According to the same report, population growth in Texas is expected to increase the demands on the water supply by 27% by 2060. *See id.* Vol. II, at 121. At the time the latest state water plan was issued, it was estimated that future impact of drought on businesses and workers in the State would hit $9.1 billion for year by 2010 and $98.4 billion per year by 2060. *Id.* vol. II, at 246.

II. ALLOWING GROUNDWATER TO RETAIN SOME SPECIAL CHARACTER WHEN IT IS DISCHARGED INTO A WATERCOURSE WOULD FRUSTRATE THE LEGISLATURE'S PURPOSE AND RENDER REGULATION OF SURFACE WATER IMPRACTICAL.

The court got it right when it resolved the issues raised in plaintiffs' petition. By statute, water of any type, in any watercourse, is property of the State of Texas. TEX. WATER CODE §11.021(a). Water that accumulates in a watercourse becomes the State's water,

4. Chapters 4 and 9 of volume II of the report are excerpted as an appendix to this brief.

regardless of whether it originated as groundwater, from rainfall, or as surface water. *Goldsmith & Powell v. State*, 159 S.W.2d 534, 535 (Tex. Civ. App.—Dallas 1942, writ ref'd) (citing the predecessor to §11.021 and TEX. CONST. art. XVI, §59). A watercourse requires (1) a defined bed and banks, (2) a current of water—it need not be continuous, and (3) a permanent source of supply. *Hoefs v. Short*, 114 Tex. 501, 506, 273 S.W. 785, 786-87 (1925). Accordingly, when artesian water enters a stream bed or lake, even intermittently, the water becomes surface water, subject to TCEQ regulation and permitting.[5]

There is no other reasonable reading of the relevant statutes and case law.

Plaintiffs' argument appears to be based entirely on the presupposition that, because §11.021(a) does not include the word "groundwater" in its definition of "state water," water that has previously been groundwater can never become state water. This argument is illogical; if the water has flowed into a watercourse it has already become "state water" within the meaning of §11.021 because it is on the surface and contained within a watercourse. Plaintiffs' argument is also impractical. As the court of appeals correctly pointed out, if water retained some special capacity as "groundwater" when it entered a water course, then the owners of artesian water sources from which Texas rivers arise would own

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5. The court of appeals noted that some authorities suggest that, in some circumstances, groundwater may be placed in a river, transported downstream, and subsequently withdrawn. *See Day*, 274 S.W.3d at 753 (discussing *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 297, 276 S.W.2d 798, 803-04 (1955); *City of San Marcos v. Tex. Comm'n on Evnt'l Quality*, 128 S.W.3d 264, 277-78 (Tex. App.—Austin 2004, pet. denied); and *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235, 238-39 (Tex. App.—Austin 1989, writ denied). The court of appeals correctly stated that none of these cases directly addresses whether the transported water retains its character as groundwater. Moreover, even if a common-law right to transfer groundwater existed previously, transfers of groundwater and groundwater effluent must now be made pursuant to TCEQ license. TEX. WATER CODE §11.042(b).

the water in those rivers and little, if anything, would be left for the public. *See Day*, 274 S.W.3d at 754. Plaintiffs' argument is completely at odds with the system of surface-water regulation countenanced by the Court in *Upper Guadalupe*. *See supra*, Part I.

III. THE CHARACTERIZATION OF GROUNDWATER IN THIS CASE IS LINKED TO THE ISSUES PRESENTED IN THE STATE'S PETITION FOR REVIEW—THE LEGAL CONCLUSION THAT THE WATER AT ISSUE WAS STATE WATER PRECLUDES ANY TAKINGS CLAIM.

The legal character of groundwater that has been placed into a watercourse is not only important in its own right, but it provides an additional basis for the State's petition for review: if the water in this case became state water at the moment it was produced—by virtue of the fact that the casing had disappeared and the water was all produced directly from the plaintiffs' artesian fed well and funneled into the watercourse and the lake—then there is no legally relevant basis for the plaintiffs' takings claim.

As plaintiffs' live petition makes clear, their takings claim is based on a regulatory limitation that prevents them from claiming and using water that issues from an artesian-fed well. 1.CR.1-10. As a matter of law, that water became state water the moment it entered the watercourse. Thus—in contrast to the water used for flood irrigation that supported plaintiffs' historical-use exception—the water on which they base their additional claim was never, and is not now, their property.

A taking occurs only when the government, by affirmative action, uses or burdens private property to effect a public good. *E.g.*, *DuPuy v. City of Waco*, 396 S.W.2d 103, 108-09 (Tex. 1965). If the private landowner has no relevant property right, no taking can

occur. *E.g.*, *GAR Assocs. III v. State*, 224 S.W.3d 395, 401-02 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The water in this case becomes state water by operation of law when it entered the watercourse, without government action. Any property right plaintiffs might otherwise assert is extinguished at that point. Accordingly, any takings claim based on the facts alleged in plaintiffs' petition is barred because the water entering the lake has never, as a matter of law, been "taken" within the meaning of Article I, §17 of the Texas Constitution. *Cf.* State's Pet. at 10-14 (explaining that plaintiffs' rights to groundwater were not taken because the Authority did not act contrary to them).

PRAYER

The Court should grant plaintiffs' petition and affirm the portion of the court of appeals's judgment it addresses. The Court should grant the State's petition and reverse the court of appeals's judgment on the issues raised therein.

Respectfully submitted,

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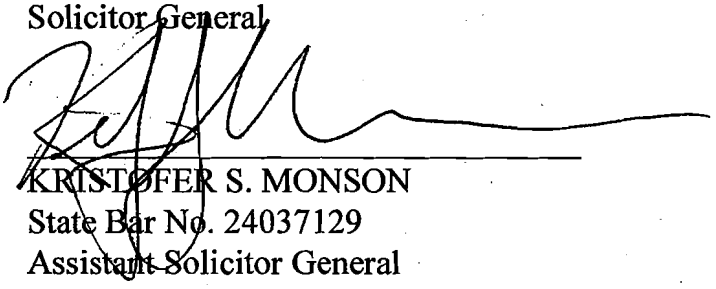

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CERTIFICATE OF SERVICE

I certify that on May 6, 2009, a true and correct copy of the foregoing document was served by certified U.S. mail, return receipt requested, on:

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