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The Honorable Supreme Court of Texas
201 W. 14th St., Room 104
Austin, Texas 78701-1614BLAKE HAWTHORNE, Clerk
BY _____ DeputyRe: Edwards Aquifer Authority and The State of Texas v. Burrell Day and Joel McDaniel,
Cause No. 08-0964

Honorable Members of the Supreme Court:

As the Texas Comptroller of Public Accounts, I am filing the amicus letter brief in connection with the above-referenced case. I have included 12 copies of the letter for submission and for distribution to the Justices of the Court for their consideration. I have also sent a copy of this letter to all parties of record. No fee has been or will be charged for preparing this letter.

Statement of Interest

The Court's holding in the above-styled cause could impact the flow of the state's revenues if the holding in any way casts doubt on the status of groundwater rights held by Texas landowners. Groundwater and the rights of landowners associated therewith play a fundamental role in the strength of the Texas economy.

To cite but one example, agriculture, Texas' second largest resource-based industry, has an economic impact on the Texas economy of approximately \$100 billion.¹ The vast majority of our state's total land area, almost 80 percent, involves some type of agricultural production.² Critical to the continued strength of agriculture in our economy is groundwater and it is the source of 73 percent of the water used in Texas' irrigated agriculture industry.³

In addition, communities across the state have invested a great deal of time and money in acquiring groundwater rights from landowners to support the water supply needs of their vibrant and growing economies. The continued sustainability and development of these water projects are important to our state's economic success.

Texas has a substantial interest in protecting its economy by ensuring continued acknowledgment of established groundwater rights.

¹ Texas Department of Agriculture, Texas Agricultural Facts, 2009, *available at* www.agr.state.tx.us/gt/channel/render/items/0,1218,1670_1693_0_1692,00.html

² *Id.*

³ Texas Water Development Board, Agricultural Water Conservation Best Management Practices Overview, *available at* www.twdb.state.tx.us/publications/AgConsBMPoverview.pdf



Argument

Texas Landowners Have Vested Rights in Groundwater

As acknowledged by the lower court in this case, landowners have vested rights in the groundwater beneath their property.⁴ This holding is consistent with the lower court's prior precedent⁵ and with the well-settled and longstanding common-law rule of capture that this Court has consistently recognized – and upon which Texans have relied – for over 100 years.⁶ The Fourth Court of Appeals' holding is also consistent with the Texas Legislature's acknowledgement of landowners' interests in groundwater and protection of their rights.⁷

Maintaining this legal framework continues a structure in place that plays a role in the market value of property, facilitates groundwater acquisition for water supplies and provides water for economic engines of the state. By continuing to recognize a landowner's vested property right in groundwater, entities across the state can have certainty in making economic decisions related to groundwater.

The Texas Legislature is Charged with the Responsibility to Regulate Groundwater

As acknowledged by this Court, “[w]ater regulation is essentially a legislative function.”⁸

By constitutional amendment, Texas voters made groundwater regulation a duty of the Legislature. And by Senate Bill 1, the Legislature has chosen a process that permits the people most affected by groundwater regulation in particular areas to participate in democratic solutions to their groundwater issues. It would be improper for courts to intercede at this time by changing the common-law framework within which the Legislature has attempted to craft regulations to meet this state's groundwater-conservation needs. Given the Legislature's recent actions to improve Texas' groundwater management, we are reluctant to make so drastic a change as abandoning our rule of capture and moving into the arena of water-use regulation by judicial fiat. It is more prudent to wait and see if Senate Bill 1 will have its desired effect, and to save for another day the determination of whether further revising the common law is an appropriate prerequisite to preserve Texas' natural resources and protect property

⁴ *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742, 756 (Tex. App. – San Antonio 2008, pet. filed).

⁵ *City of Del Rio v. Hamilton Trust*, 269 S.W.3d 613 (Tex. App. – San Antonio 2008, pet denied)

⁶ See e.g., *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999); *Barshop v. Medina County Underground Water Cons. Dist.*, 925 S.W.2d 618 (Tex. 1996); *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21 (Tex. 1978); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798 (Tex. 1955); *Houston & Texas Central Railway Co. v. East*, 98 Tex. 146, 81 S.W. 279 (Tex. 1904).

⁷ See e.g., Texas Water Code, § 36.002, Ownership of Groundwater (“The ownership and rights of the owners of the land and their lessees and assigns 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 district.”)

⁸ *Sipriano*, 1 S.W.3d at 78.

owners' interests We are not persuaded that it is appropriate today for this Court to insert itself into the regulatory mix⁹

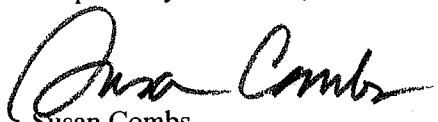
These words are as wise and considered now as they were when this Court first authored them.

Any action that calls into question the absolute ownership theory of groundwater will wreak havoc with any agreements to transfer groundwater in Texas and have a dramatic impact on Texas' economy.¹⁰

Conclusion

Within the context of the rule of capture, and with the understanding that groundwater is subject to reasonable regulation by local groundwater control districts and that groundwater ownership rights can be severed from the estate when the property is sold, ownership rights of groundwater by Texas landowners are an essential component of a healthy economy. Any ruling by the Court that in any manner destabilizes groundwater ownership rights could have dire consequences for Texans and the Texas economy.

Respectfully submitted,



Susan Combs
Texas Comptroller of Public Accounts
LBJ State Office Building
111 E. 17th St., Room 104
Austin, Texas 78711
(512) 463-4444
(512) 475-0450 - fax

⁹ *Id.* at 80.

¹⁰ Changing existing law and destabilizing common understanding regarding title to groundwater captured and stored in retaining ponds and similar receptacles would have a dramatic impact as well. However, it is not addressed herein as the parties' briefs in this case do not raise the issue. Indeed, the State of Texas has made special note of the factually distinguishable nature of this case with regard to the issue. *See* The State of Texas' Cross-Respondent's Brief on the Merits, p. 12, n. 7. ("The Court therefore need not reach the more difficult question of title to groundwater diverted into a retaining pond or similar receptacle created without the use of natural features.")



Certificate of Service

I certify that on Dec. 15, 2009, a true and correct copy of this Letter Brief was sent via First Class U.S. mail to all appellate counsel and amicus curiae of record in this proceeding as listed below:

Counsel for Defendant/Appellant/Petitioner

Edwards Aquifer Authority:

Andrew S. "Drew" Miller
Kemp Smith, L.L.P.
816 Congress Ave., Suite 1150
Austin, Texas 78701

Pamela Stanton Baron
Attorney at Law
P.O. Box 5573
Austin, Texas 78763-5573

Counsel for Plaintiffs/Appellees/Respondents

Burrell Day and Joseph McDaniel:

Tom Joseph
Tom Joseph, P.C.
909 N.E. Loop 410, Suite 600
San Antonio, Texas 78209

Counsel for Third Party

Defendant/Appellee/Cross-Petitioners The State of Texas:

Brian Berwick
Assistant Attorney General
Environmental Protection and Administrative Law
Division
MC-015
P.O. Box 12548
Austin, Texas 78711

Kristofer S. Monson
Assistant Solicitor General
Peter Hansen
Assistant Attorney General
Office of the Attorney General
MC-059
P.O. Box 12548
Austin, Texas 78711

Counsel for Amicus Curiae Canadian River

Municipal Water Authority:

Tom Pollan
Eno Peters
Bickerstaff Heath Delgado Acosta, L.L.P.

3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746

Counsel for Amicus Curiae Angela Garcia:

Marisa Perales
Brad Rockwell
Lowerre, Frederick, Perales, Allmon & Rockwell
707 Rio Grande St., Suite 200
Austin, Texas 78701

Enrique Valdivia
Texas Rio Grande Legal Aid
1111 N. Main St.
San Antonio, Texas 78212

Counsel for Amicus Curiae Medina County

Irrigators Alliance:

Thomas H. Crofts, Jr.
Crofts & Callaway
A Professional Corporation
4040 Broadway Ave., Suite 525
San Antonio, Texas 78209

Counsel for Amicus Curiae Harris-Galveston

Subsidence District:

Gregory M. Ellis
Attorney at Law
2104 Midway Court
League City, Texas 77573

Charles W. "Rocky" Rhodes
South Texas College of Law
1303 San Jacinto St.
Houston, Texas 77002

Counsel for Amicus Curiae The City of Victoria:

Michael J. Booth
Trey Nesloney
Booth, Ahrens & Werkenthin, P.C.
5151 Congress Ave., Suite 155
Austin, Texas 78701

Counsel for Amicus Curiae

The Alliance of EAA Permit Holders:

Devin D. "Buck" Benson
Lance H. "Luke" Beshara
Pulman, Cappuccio, Pullen & Benson, L.L.P.
2161 N.W. Military Highway, Suite 400
San Antonio, Texas 78213

Counsel for Amicus Curiae

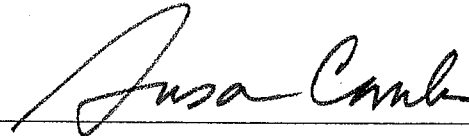
Texas Southern Cattle Raisers Association:

J.B. Love, Jr.
Attorney and Counselor at Law
P.O. Box 387
Marathon, Texas 79842-0387

Counsel for Amici Curiae

Texas Farm Bureau and Texas Cattle Feeders Association:

Mr. Douglas G. Caroom
Eno Peters
Bickerstaff Heath Delgado Acosta, L.L.P.
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746



Susan Combs
Texas Comptroller of Public Accounts