No. 08-0964

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

EDWARDS AQUIFER AUTHORITY
Petitioner

V.

BURRELL DAY AND JOSEPH McDANIEL
Respondents

On Petition for Review to the Court of Appeals for the Fourth District of Texas

BRIEF OF AMICUS CURIAE TEXAS FARM BUREAU

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STATEMENT OF INTEREST OF TEXAS FARM BUREAU

Texas Farm Bureau respectfully submits this brief on behalf of its members. Texas Farm Bureau will pay all attorneys' fees incurred in the preparation of this amicus brief.

Texas Farm Bureau is a Texas non-profit membership corporation committed to the advancement of agriculture and prosperity for rural Texas. Texas Farm Bureau has over 422,159 members and is associated with independent county Farm Bureau corporations in 207 counties across the state. Texas Farm Bureau and its members - who are property owners and irrigators - believe the protection of property rights generally, and groundwater ownership as private property in particular, is of critical importance to the State of Texas, and to Texas Farm Bureau members.

The Edwards Aquifer Authority's legal theories in this case – that there are no vested rights in the landowner until and unless he has himself produced water from the specific tract in question – contradict established law regarding private ownership of the groundwater in Texas. Texas Farm Bureau is concerned that, if credited by the court, the Edward Aquifer Authority's approach would substantially impair the ability of landowners to exercise their private property rights to use or market groundwater.[1]

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[1] *See* STATE POLICIES OF THE TEXAS FARM BUREAU 2007, *Groundwater*, 49-50 (adopted at the 73rd Annual Convention, Texas Farm Bureau, Dec. 2006).

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I. The Issue Of The Ownership Of Groundwater Is Currently Before The Court In The *City Of Del Rio* Case.

The Court does not have to resolve the issue of the ownership of groundwater in this case because this issue is currently before the Court in the *City of Del Rio* case. In *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, the Fourth Court of Appeals held that because a landowner is the absolute owner of the groundwater beneath his property, a warranty deed conveying the surface estate but reserving "all water rights" did not give the surface estate holder ownership of, or the right to capture, the groundwater beneath the landowner's property. *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613, 617-18 (Tex. App. – San Antonio 2008, pet. filed). The City of Del Rio has filed a petition for review and has asked the Court to determine, *inter alia*, whether a landowner has a vested property interest in the groundwater beneath his property. *See* CITY OF DEL RIO PET FOR REV., at 8-12. The Court has requested briefing of the issues. Petitioner's brief is due May 27, 2009.

The Fourth Court of Appeals in the *Day* case relied on its opinion in the *Del Rio* case in holding that the applicants in this case had a vested interest in the groundwater beneath their land. *See Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742, 756 (Tex. App. – San Antonio 2008, pet. filed). Thus, once this Court resolves the issues in the *Del Rio* case, there will be no need for the Court to again address these same issues in the *Day* case.

II. The Fourth Court Of Appeals In The *Day* Case Correctly Held That Landowners Own The Groundwater Beneath Their Properties.

A. Landowners have a property right to pump water lying beneath their land.

The Court should refuse the Edward Aquifer Authority's ("EAA") petition for review in this case because the appellate court's judgment that landowners own the groundwater beneath their properties is correct and the legal principles announced in the opinion are likewise correct. *See* TEX. R. CIV. P. 56.1(c). The Texas Supreme Court first recognized that underground water is private property in 1904. In *Houston & T.C. Railway v. East*, the Court adopted the "English Rule", a common law doctrine of "absolute ownership," where "the owner of the land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil." *Houston & T.C. Ry v. East*, 98 Tex. 146, 81 S.W. 279, 281 (1904). That rule applies today, and Texas landowners have a vested right to capture and withdraw water from under their land, in whatever manner and at whatever rate, subject only to restrictions not to waste water, wantonly or maliciously drain their neighbor's water, or, recently, negligently to cause subsidence. *See Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21, 25-26 (Tex. 1978).

In *East*, the Texas Supreme Court explained the Texas rule of ownership as applied to underground water this way:

> That the person who owns the surface may dig therein and apply all that there is to be found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the

> underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action.

East, 81 S.W. at 280.

It is the latter part of the Court's statement that embodies the rule of capture that is the rule of non-liability,[2] that is, the absence of a basis for an action by his neighbor if, during the exercise of the landowner's right to drill and produce water from beneath his land, he drains his neighbor's lands. *The predicate part of the Court's statement, however, is not subsumed into the statement of non-liability, because it defines the underlying right of the landowner – the right to drill and produce from under his land.* The *East* Court characterized this right as one of "absolute" ownership. *Id.* at 281.

B. Although the rule of capture shields landowners from liability for production that drains adjacent lands, there is more to groundwater ownership than the rule of capture principle.

Landowners are shielded from liability for drainage of water from adjacent lands by their pumping. *See East,* 81 S.W. at 282; *Friendswood*, 567 S.W.2d at 26. This principle of non-liability for drainage has come to be known in some quarters as the "rule of capture." Others apply the term more expansively to include the entire articulation of common law ownership adopted by the Texas Supreme Court in *East*. The rule of non-liability is necessary because of the migratory character of underground water, but the principle that virtually unlimited production of groundwater is protected does not define the entire character of ownership of underground water.

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[2] There is inconsistency if not confusion among courts and commentators about what is meant by the "rule of capture." Some mean to refer to the entire ownership doctrine stated in *East*, while some refer to it as the part of the ownership doctrine that acts merely as a rule of non-liability for drainage of a neighbor's lands.

The role and effect of the rule of capture may be viewed in two ways: First as a defining element of ownership, that is, permitting a producing landowner the right to produce as much water as may be pumped from beneath his land without limitation by duty to neighboring landowners to limit that production except to prevent waste or for non-beneficial use. Or it may be viewed as a limiting aspect of ownership of underground water, that is, the landowner is the absolute owner of water underlying his land, but his water is subject to being drained by production on neighboring lands. The EAA has emphasized only the first perspective of the rule when it characterizes the rule as the basis for ownership of water in Texas, and reads in a requirement that, for ownership rights to exist, there must be production and reduction to possession.

In *East*, the Texas Supreme Court rejected the proposition that use of underground water on tracts other than that from under which it had been pumped was unreasonable. *East,* 81 S.W. at 279. The only limitation on the use of underground water recognized by the *East* Court is that the Texas rule of capture does not protect waste, or wanton or malicious conduct. *Id.* at 281. In *Friendswood*, the Court's most recent discussion of the nature of groundwater ownership rights, the Texas Supreme Court added to this list the negligent pumping of underground water that causes subsidence of neighboring lands. *Friendswood*, 576 S.W.2d at 30. The Court declined to apply this new standard to defendants retroactively, however, on the basis that basic considerations of justice and the Court's tradition of recognizing stare decisis in cases involving property rights. *Id.* at 28-29.

The *Friendswood* Court recognized that *East* had adopted a rule of "absolute ownership" and not merely a rule of non-liability. In its discussion of common law limitations on the right to produce water, the *Friendswood* Court makes its only mention of the "rule of capture."

> *See also Brown v. Humble Oil & Ref. Co.*, . . . [126 Tex. 296] 83 S.W.2d 935 (1935), one of the basic cases recognizing private ownership of oil and gas in place, which cites East as the earliest case establishing the "law of capture" in Texas. Other writers have traced *both the Texas ownership and capture theories* to the English rule relating to underground percolating waters, ...

Id. at 26 (emphasis added). The Court clearly recognizes that the "ownership theory" is distinct from the "capture theory."[3] Later, in announcing the new limitation on production without liability, the Court notes that the Legislature had begun to regulate groundwater withdrawals and subsidence:

> With a rule that recognizes ownership of underground water by each individual under his own land, but with no limitation on the manner and amount which another individual landowner might produce . . ., legislative action was essential[.]

Id. at 29. This again recognizes the dichotomy between the underlying ownership principle and the rule of non-liability that shields the neighboring landowner from necessity of limiting his production to protect or guarantee that ownership right.

In announcing the prospective standard that there would no longer be a legal shield for landowners to cause subsidence of neighbors' lands, the *Friendswood* Court noted it was afforded an "opportunity to discard an objectionable aspect of the court-made English rule as it relates to subsidence . . . . We refer to the past immunity from

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[3] In this same statement, the Court went on: "It is interesting to note . . . that the courts did not attempt to afford protection to the rule of capture of oil and gas until the Legislature enacted policy guidelines for the prevention of waste and the protection of correlative rights."

negligence which heretofore has been afforded ground water producers because of their 'absolute' ownership of the water." *Id.* at 30.

Thus, the Supreme Court's most recent discussion of the ownership of underground water consistently referred to and discussed the ownership standard as more than the "rule of capture" right of unfettered production. The Court recognized the distinct functional roles of the two aspects of the "English rule," and in each discussion of it, gave credence to the concept of "absolute ownership" as something more than merely an abstract or latent right that requires production and reduction to possession to perfect.

C. Ownership of fugitive substances, such as underground water, oil, and gas has been recognized by the Supreme Court since the adoption of the Texas rule in *East*.

The Texas rule that underground water is private property has been recognized repeatedly by the Texas Supreme Court since the adoption in *East* of the English rule of absolute ownership tempered by the rule of capture. *See, e.g., Sipriano v. Great Spring Waters of America, Inc.,* 1 S.W.3d 75 (Tex. 1999) (declining to substitute rule of reasonable use of groundwater for current common law framework applying rule of capture); *Friendswood*, 576 S.W.2d at 25 (noting that "this Court adopted the absolute ownership doctrine of underground percolating waters"); *City of Corpus Christi v. City of Pleasanton,* 154 Tex. 289, 276 S.W.2d 798, 800 (1955) ("percolating waters are regarded as the property of the owner of the surface"). The ownership of groundwater has been recognized by the Court as recently as 1996, in the *Barshop* case, in which the Texas Supreme Court recognized the concept of ownership of groundwater traced back to *East*.

See Barshop v. Medina County Underground Water Cons. Dist., 925 S.W.2d 618, 625-26 (Tex. 1996).

The EAA argues that the Edwards Aquifer Act displaces the rule of capture because the rule of capture allows a landowner to "drill and pump as much water as he pleases, whenever he pleases, for whatever use and location of use he pleases" while the Act provides such detailed regulation that it "leaves no room for the rule of capture to operate within the boundaries of the Authority for the Aquifer."[4] EAA PET FOR REV., at 12-13. However, as noted previously, the rule of capture does not give a landowner the unlimited right to drill and pump as much as he pleases as the EAA suggests: the Texas rule of capture does not protect waste, or wanton or malicious conduct or the negligent pumping of underground water that causes subsidence of neighboring lands. *See Friendswood*, 576 S.W.2d at 30; *East*, 81 S.W. at 281.

Furthermore, EAA's argument that the Edwards Aquifer Act displaces the rule of capture and a landowner's common law vested property interest in groundwater is not supported by the text of the Act itself. *See* EAA PET FOR REV. at 11-12. Section 1.07 of the Act provides that the "ownership and rights of the owner of the land and the owner's lessees and assigns, including holders of recorded liens or other security interests in the land, in underground water . . . are recognized." Act of May 30, 1993, 73rd Leg., R.S., ch. 626, § 1.07, 1993 Tex. Gen. Laws 2350, 2356. The ownership of the rights of a landowner in underground water, as recognized by Section 1.07, is derived from common

[4] Angela Garcia similarly argues that "the rule of capture encourages individuals to capture as much groundwater as they desire without regard for others' needs or uses." *See* AMICUS CURIAE BRIEF OF ANGELA GARCIA, at 7.

law. *See East*, 81 S.W. at 281. Thus, not only does the EAA Act not displace common law property interests, it implicitly recognizes them.

The EAA essentially argues that the regulation of groundwater means that landowners have no common law rights to water. The EAA and Angela Garcia also argue that because a landowner does not have the right to exclude others from capturing water beneath his land, there can be no property right in groundwater. *See* EAA PET FOR REV., at 14-15; AMICUS CURIAE BRIEF OF ANGELA GARCIA, at 5-6.

The Texas Supreme Court has had no problem recognizing both a landowner's ownership rights in groundwater and the need for legislative regulation of water. *See Sipriano,* 1 S.W.3d at 77-80; *Barshop*, 925 S.W.2d at 626. The interrelationship between a landowner's ownership rights in groundwater and a groundwater conservation district's regulation of groundwater is comparable to the legal theories applied in oil and gas cases.

In Texas, a landowner has absolute title in severalty to the oil and gas in place beneath his land. *Elliff v. Texon Drilling Co.*, 146 Tex. 575, 210 S.W.2d 558, 561 (1948). The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. *Id.* A landowner acquires title to the oil or gas which he produces from wells on his land, although part of the oil or gas may have migrated from adjoining lands. *Id.* The landowner may appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands, and without incurring liability to him for drainage. *Id.* The non-liability is based on the theory that after the drainage, the title or property interest of

the former owner is gone. *Id.* Although this rule seems to conflict with the view of absolute ownership of the minerals in place, the following analysis shows otherwise:

> We do not regard it as an open question in this state that gas and oil in place are minerals and realty, subject to ownership, severance, and sale, while [embedded] in the sands or rocks beneath the earth's surface, in like manner and to the same extent as is coal or any other solid mineral.
>
> The objection lacks substantial foundation that gas or oil in a certain tract of land cannot be owned in place, because subject to appropriation, without the consent of the owner of the tract, through drainage from wells on adjacent lands. If the owners of adjacent lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own.

Id. (quoting *Stephens County v. Mid-Kansas Oil & Gas Co.,* 113 Tex. 160, 254 S.W. 290, 292 (1923)). The *Stephens County* court further noted,

> Ultimate injury from the net results of drainage, where proper diligence is used is altogether too conjectural to form the basis for the denial of a right of property in that which is not only plainly as much realty as any other part of the earth's contents, but realty of the highest value to mankind kind and often worth far more than anything else on or beneath the surface within the proprietor's boundaries.

Stephens County, 254 S.W. at 292.

When the oil or gas is removed from the soil, it becomes personalty. *Ryan Consolidated Petro. Corp. v. Pickens,* 155 Tex. 221, 285 S.W.2d 201, 208 (1955). "The conservation statutes and the regulations of the [Railroad] Commission made thereunder have not abolished the ownership of oil in place nor the right to capture without liability to adjoining owners." *Id.* Thus, notwithstanding the fact that oil and gas beneath the surface are subject both to capture and administrative regulation, the fundamental rule of absolute ownership of the minerals in place is not affected. *Elliff,* 210 S.W.2d at 562. No

reason exists that groundwater should be treated otherwise and neither petitioner nor amicii have suggested one.

D. The Texas Legislature has repeatedly recognized that landowners have ownership rights in groundwater in place.

Three examples of the Texas Legislature's recognition of the ownership rights in groundwater in place are the Private Real Property Rights Preservation Act, legislation regarding condemnation of water rights, and provisions of the Texas Water Code regarding groundwater conservation districts. The Private Real Property Rights Preservation Act was enacted in 1995 and defines "private real property" as "an interest in real property recognized by common law, *including a groundwater or surface water right of any kind*, that is not owned by the federal government, this state, or a political subdivision of this state." TEX. GOV. CODE ANN. § 2007.002(4) (Vernon 2008) (emphasis added). The Act recognizes that a governmental action that affects private real property, such as a common law groundwater right, may be subject to a taking claim under the Texas and federal constitutions. *See id.* § 2007.002(5).[5]

In 2003, the Legislature amended the eminent domain statutes and enacted guidelines that must be followed when a political subdivision files a condemnation petition to acquire rights to groundwater or surface water. *See* TEX. PROP. CODE ANN. § 21.0121 (Vernon 2003). The political subdivision must submit "evidence related to the market value of groundwater rights as property apart from the land at the time of the hearing" when the subdivision proposes to condemn the "fee title of real property" and

[5] The Edwards Aquifer Act, which also recognizes the ownership right to groundwater, also provides the same protections against the taking of property rights, including groundwater rights. *See* Act of May 30, 1993, 73rd Leg., R.S., ch. 626, § 1.07, 1993 Tex. Gen. Laws 2350, 2356.

there is evidence that the subdivision plans to use the "rights to groundwater for a public purpose." *Id.* § 21.0421(a), (b). If the fee owner does not own groundwater beneath his property, there would be no logical basis to include the value of groundwater as a separate element of compensation a landowner receives for his condemned land.

Furthermore, Section 36.002 of the Water Code expressly recognizes a landowner's ownership rights in groundwater by stating:

> 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.

TEX. WATER CODE ANN. § 36.002 (Vernon 2008) (emphasis added). The Court has cited this statute, or its predecessors, as confirming "private rights in underground water." *See City of Sherman v. Pub. Util. Comm'n of Tex.*, 643 S.W.2d 681, 686 (Tex. 1983); *Friendswood*, 576 S.W.2d at 27.

III. The District Court Is The Proper Court To Resolve The Takings Issue

A. The *Day* Court relied on the *Del Rio* case in reversing the district court's grant of summary judgment.

The district court in this case granted summary judgment in favor of the EAA on Day's and McDaniel's constitutional takings claim based on its holding that they had no constitutionally protected vested interest in groundwater. *See Day,* 274 S.W.3d at 756. The appellate court relied on the *Del Rio* case in noting that "[t]his court recently held landowners have some ownership rights in the groundwater beneath their property." *Id.* (citing *City of Del Rio*, 269 S.W.3d at 617). The appellate court reversed the trial court's

judgment and remanded the constitutional taking claim to the trial court because "the Authority moved for summary judgment only on the ground Applicants have no vested property right." *Id.* As stated previously, the issue with regard to the ownership of groundwater will be resolved in the Court's disposition of the petition for review in the *Del Rio* case. Thus, the final disposition of the *Del Rio* case will be crucial in the district court's analysis of this issue on remand.

B. Whether there has been an unconstitutional taking of water rights subject to compensation is a factual question to be resolved by the district court.

The Edwards Aquifer Act provides, "The legislature intends that just compensation be paid if implementation of this article causes a taking of private property or the impairment of a contract in contravention of the Texas or federal constitution." Act of May 30, 1993, 73rd Leg., R.S., ch. 626, § 1.07, 1993 Tex. Gen. Laws 2350, 2356. The Texas Supreme Court has held that a restriction in the permissible uses of property or a diminution in its value, resulting from regulatory action within the government's police power, may or may not be a compensable taking. *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 670 (Tex. 2004). All property is held subject to the valid exercise of the police power, thus not every regulation is a compensable taking. *Id.*

Whether a regulatory taking has occurred depends on a complex set of factors including the economic impact of the regulation on the claimant; the extent to which the regulation has interfered with distinct investment-backed expectations; and the character of the governmental action. *Id.* at 672 (citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)); *see also AVM-Hou,*

Ltd. v. Capital Metro. Transp. Auth., 262 S.W.3d 574, 582 (Tex. App. – Austin 2008, no pet.) (Generally whether a particular type of harm is compensable may involve considerations such as the nature of and reason for the government's act, the type and extent of injury suffered by the property owner, and policy considerations.). The analysis "necessarily requires a weighing of private and public interests" and a "careful examination and weighing of all the relevant circumstances in this context." *Sheffield,* 140 S.W.3d at 672. The Texas Supreme Court has stated that there must be a consideration of all the surrounding circumstances in applying a fact-sensitive test of reasonableness. *Id.* at 672-73.

In this case, the district court erroneously granted summary judgment in favor of the EAA because it held that landowners do not have a vested property interest in groundwater. If the Court upholds the *Del Rio* holding that landowners do in fact have a vested property interest in groundwater, as it should, the district court can apply that holding to the facts of this case on remand. If the Court reverses *Del Rio*, this also can be taken into account by the district court on remand. Thus, the Court need not undertake the factually intensive analysis of whether there has been an unconstitutional taking of Day's and McDaniel's water rights because the district court will be in the better position to resolve this issue.

IV. Conclusion

This is not a case this Court should accept for review. This case does not raise novel or even serious questions about the Texas law applicable to underground water. The issue is already before the Court in the *Del Rio* case. The law is clear, and has been

the same for over a hundred years: a landowner has vested property ownership of the groundwater beneath his property. The rule of capture is a rule of non-liability for drainage, however, it also reflects a rule of ownership. Nothing requires this Court to revisit *East* and all the other cases decided since 1904 that recognize absolute ownership. Furthermore, because a regulatory takings claim involves a complex and factual analysis, the Supreme Court should allow the district court to apply the final disposition in the *Del Rio* case to the facts of this case, and provide appropriate guidance by its ruling in the *Del Rio* case, which served as the basis for the appellate court's decision in this case.

Respectfully submitted,

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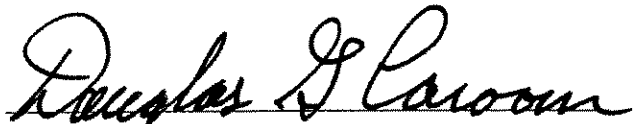
By: 
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Amicus Curiae Texas Farm Bureau has been served on counsel of record indicated below on this 28th day of April 2009 by Federal Express or first class regular mail:

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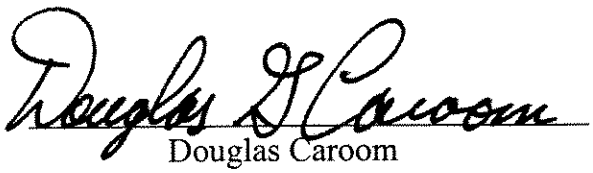
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