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November 18, 2021

Blake A. Hawthorne  
Clerk of the Court  
The Supreme Court of Texas  
Supreme Court Building  
201 W. 14<sup>th</sup>, Room 104  
Austin, Texas 78701

Re: Cause No. 21-0049; Pape Partners, Ltd., Glenn R. Pape, and Kenneth W. Pape v. DRR Family Properties, LP, on Petition for Review from the Court of Appeals, Tenth District of Texas, Waco, Texas, Cause No. 10-17-00180-CV

**LETTER BRIEF OF *AMICUS CURIAE* TEXAS AND SOUTHWESTERN  
CATTLE RAISERS ASSOCIATION IN SUPPORT OF  
PETITION FOR REVIEW**

Dear Mr. Hawthorne:

To the Honorable Justices of the Supreme Court of the State of Texas:

Amicus Curiae Texas and Southwestern Cattle Raisers Association submits this letter brief in support of Petitioners. We ask that copies of this letter be circulated to the chambers of the Justices of the Supreme Court as they consider the pending case. In accordance with Rule 11 of the Texas Rules of Appellate Procedure, I certify that copies of this Letter Brief of Amicus Curiae have been served on all parties.

The Texas and Southwestern Cattle Raisers Association (TSCRA) is a 144-year-old trade association and is the largest and oldest livestock organization based in Texas. TSCRA has more than 17,000 beef cattle operations, ranching families, and businesses as members. These members represent approximately 55,000 individuals directly involved in ranching and beef production who manage 4 million

head of cattle on 76 million acres of range and pastureland primarily in Texas, Oklahoma, and throughout the Southwest. TSCRA is not a party to the case and will pay all attorneys' fees incurred in the preparation of this letter brief.

The membership of TSCRA is comprised of agricultural operators, growers, and producers in the State of Texas who are concerned with the Court of Appeals' decision to assign exclusive jurisdiction to the Texas Commission on Environmental Quality for determining ownership disputes over water rights. The negative impacts of this decision to the agricultural economy in Texas, which has grown to more than \$21 billion annually, cannot be overstated. TSCRA seeks to provide important context concerning the far-reaching implications of the Court of Appeals' decision in this case, which could have lasting negative impact to Texas agriculture and landowners who will be left without an adequate forum for determining property disputes over water rights.

## **I. Introduction**

Water is the lifeblood of agriculture. It nourishes land, irrigates crops, and sustains livestock. Without adequate and reliable access to water, agriculture cannot survive. The protection of water rights as private property is, therefore, of critical importance to Texas agriculture.

Water scarcity is a growing problem in Texas. As the Texas population grows, the demands on water are increasing. Add an unpredictable Texas climate that oscillates between drought and flood conditions to these increasing demands, and the strain on water resources is significant. The ownership of water rights and the ability to have ready and continuing access to water, therefore, is highly valuable. As with any other valuable property right, disputes arise as to ownership of these rights and interests. Maintaining certainty, fairness, and stability in how these disputes are determined is essential. Whether disputes over ownership of land or water rights, Texas courts are the only proper forum.

As land values continue to rise and water grows scarcer, the need for this clarity and consistency is paramount. Texas is at the forefront of the nation in population growth with at least 7 of the 15 fastest growing cities in the U.S. Tex. A&M Nat. Res. Institute, Texas Land Trends: Status Update and Trends of Texas Working Lands 1997-2017 ("Texas Land Trends"), Dec. 2019, at 2, *available at* [https://txlandtrends.org/media/qzpb1z2j/texas-land-trends\\_status-update-and-](https://txlandtrends.org/media/qzpb1z2j/texas-land-trends_status-update-and-)

[trends-of-tx-working-lands.pdf](#). From 1997 to 2017, the Texas population increased by 48%. *Id.* By 2050, Texas is expected to be home to over 40 million residents. *Id.* The 2022 State Water Plan projects that statewide water demand will increase by approximately 9 percent by 2070. 2022 State Water Plan, at A-46 (2021), *available at* <https://www.twdb.texas.gov/waterplanning/swp/2022/index.asp>. As a result of the exploding population, land values are increasing and with it, the value of water rights. Cities across the state are looking for additional sources of drinking water to supply their citizens. While irrigation is currently the largest water demand category in Texas, municipal demand is projected to surpass irrigation by 2060. *Id.* Consistent and reliable access to water is a growing commodity. As these transactions increase, the potential for disputes over ownership will rise as well.

The Waco Court of Appeals' decision in this case turns longstanding property and water rights precedent on its head. The implications of this decision to agriculture and Texas landowners are disastrous. Not only does it threaten reliable access to surface water, but it injects chaos into the law and process concerning water law in Texas. The ripples of this impact will be felt far beyond the context of water rights. TSCRA joins other *amici curiae* Texas Commission on Environmental Quality (TCEQ) and Texas Water Conservation Association in supporting the grant of the Petition for Review in this case, and urge the Court to reverse the Court of Appeals' decision in this case.

## **II. TCEQ is Neither Authorized Nor Equipped to Determine Property Disputes, and Texas Law Does Not Support TCEQ's Jurisdiction Over Water Rights Ownership Disputes**

At its heart, this case is a property dispute. It is an ownership dispute over who owns certain water rights. This is not a case seeking issuance of a water right. This is not a case involving an application for a permit to use or divert water, either of which is unquestionably within the jurisdiction of TCEQ. It is a property dispute, and the property at issue is a water right.

As an administrative agency, TCEQ is a creature of the Legislature and wields only those powers and authority expressly granted to it by the Legislature. *See Tex. Mun. Power Agency v. Pub. Utility Com'n of Tex.*, 253 S.W.3d 184, 193 (Tex. 2007). The Legislature has given TCEQ exclusive jurisdiction over certain matters. *See, e.g.,* Tex. Water Code § 58.027 (granting Texas Natural Resource Conservation Commission (predecessor to TCEQ) "exclusive jurisdiction" concerning petitions for creation of irrigation districts). In such instances, the term

“exclusive jurisdiction” was expressly used. Significantly, the Legislature declined to reference “exclusive jurisdiction” concerning TCEQ’s role with water rights, referring only to “general jurisdiction.” *See* Tex. Water Code § 5.013. The courts may not read an alternative interpretation into the statute. *See Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) (reasoning “we believe every word excluded from a statute must also be presumed to have been excluded for a purpose. Only when it is necessary to give effect to the clear legislative intent can we insert additional words or requirements into a statutory provision”). Moreover, general jurisdiction to issue water rights does not confer any authority to TCEQ with respect to determining disputes over ownership of previously issued surface water rights.

The Court of Appeals concedes that the statute at issue, Tex. Water Code § 5.013, does not expressly grant exclusive jurisdiction over water rights to the TCEQ. *Pape Partners, Ltd. v. DRR Family Props. LP*, 623 S.W.3d 436, 440 (Tex.App.—Waco 2020, pet. filed). Nonetheless, the court improperly infers such exclusive jurisdiction from TCEQ’s general jurisdiction over Texas surface water. The court cites to statutes and case law that address water quality, wastewater discharge permits, and water and sewer utility rates in support—none of which have any bearing on whether TCEQ is authorized to determine property disputes. The Court of Appeals’ leap that because the dispute concerns water rights TCEQ has exclusive jurisdiction is akin to saying that because a contract concerns oil and gas, any dispute over that contract must be adjudicated by the Railroad Commission of Texas. Neither situation is supported by Texas law.

This Court long ago settled the matter of whether a state agency could determine property rights. In *Board of Water Engineers v McKnight*, this Court considered what is required to adjudicate property rights, pointing to an analysis of the “most intricate questions of law and fact—questions with respect to the validity and superiority of land titles, questions of contract, questions of boundary, questions of limitations, and questions of prescription.” 299 S.W. 301, 307 (Tex. 1921). These questions, the Court concluded, were “strictly judicial” and such inquiries belonged solely in the courts. *Id.*

The fact that TCEQ plays some role in the issuance of water rights under the Adjudication Act is of no consequence. It does not supply any authority or basis for allowing a state agency to interpret contracts or deeds or to make a binding determination on who owns a previously issued water right in Texas. This dispute sounds squarely in property law and falls solely within the jurisdiction of the courts. *See id.*

### **III. The Court of Appeals' Decision Sows Uncertainty, Confusion, and Disorder that Will Have Far-reaching Implications**

The Court of Appeals' grant of exclusive jurisdiction to TCEQ over water rights ownership disputes injects significant chaos into Texas law. Surface water rights are but one stick in the property "bundle of sticks." Landowners may hold rights in the land, minerals, surface water, and groundwater. It is not uncommon for landowners to challenge ownership as to multiple types of property rights in suits regarding contracts and affecting title in Texas courts.

Traditionally, these disputes over ownership and property rights would fall squarely within the purview of Texas courts. Under the Court of Appeals' decision, however, the current clarity over the proper forum to resolve such disputes breaks down entirely. TCEQ may have some authority as to surface water, but not groundwater. Following the Court of Appeals decision in this case, a landowner who is challenging ownership of land, surface water rights, and groundwater rights would be in a position of having to file suit in court for the land and groundwater issues and separately seek administrative remedies before TCEQ for surface water rights. Such a system is not only wholly inefficient but places a significant burden on landowners—one that few can afford to bear.

Moreover, TCEQ has long taken the position across the board that it does not have any jurisdiction over private property issues. This often comes up in water quality or air permitting cases. Protestants consistently raise the issue of diminution of property values, and TCEQ always declines to consider that issue, stating that it does not have jurisdiction over property issues. Should the Court of Appeals' decision stand in this case, it merits consideration of what impact it may have on these other regulatory processes. First, there is good reason that TCEQ and other similar permitting agencies do not decide questions of property rights—Texas courts do that. Second, if TCEQ were to delve into deciding claims of property rights, it would open a wide door and change the work of TCEQ entirely. Would TCEQ (and other agencies as well) now have not only the ability but the obligation to consider these complaints as to property values? Would permit applicants be required to obtain appraisals to demonstrate no diminution in value to surrounding property as a part of its application? Would protestants be able to claim and seek damages before a state agency for injury to their property from permits issued by state agencies? Historically the answer to each of these questions has been unequivocally "no." The Court of Appeals' decision in this case, however, makes the answer less certain.

Notably, TCEQ itself decidedly and firmly declines jurisdiction over water rights ownership disputes. *See Amicus Curiae* Brief of the Texas Commission on Environmental Quality in Support of the Petition for Review (filed Aug. 26, 2021), at 3 (stating “the Commission’s authority does not extend to adjudicating private disputes simply because they involve water rights. Once a water permit is issued and vested in the holder, it can be bought and sold like any other property. And, like any disagreement about the ownership of property, a dispute about who owns the water rights is properly adjudicated in court”). If this Court endorses the Court of Appeals’ expansion of TCEQ’s jurisdiction and assigns the obligation to an agency that itself disputes such jurisdiction, landowners are left in a vacuum.

The Court of Appeals and Respondent rely solely on inferences and the purported absence of any direct prohibition of TCEQ’s jurisdiction. Neither the Court of Appeals nor the Respondent point to any case where TCEQ has decided a private property rights dispute over a water right. There is no express delegation of such authority by the Legislature. TCEQ itself disavows such jurisdiction and authority, drawing a clear distinction between general jurisdiction over water rights and jurisdiction over property disputes. In the face of the Court of Appeals’ decision, clarity is now needed from this Court to ensure Texas landowners have continued and reliable access to Texas courts for the resolution of property disputes.

Finally, TCEQ is not equipped to be the arbiter of property disputes. As the *McKnight* court reasoned, property rights disputes involve intricate questions of law, evidence gathering, and fact-finding. Under the Court of Appeals’ decision, TCEQ would now be responsible for reviewing and interpreting countless contracts, deeds, and conveyances for any and every dispute concerning surface water rights. TCEQ itself disclaims this role and authority. As water grows scarcer, the value of these water rights increases. The errant decision in this case places landowners at the mercy of an agency ill-equipped and unwilling to adjudicate these high-dollar disputes. TSCRA urges this Court to grant the Petition for Review and reverse the Court of Appeals’ decision.

#### **IV. Conclusion**

Texas law is well-settled that property disputes are within the purview of the courts. Texas landowners depend on a consistent, fair, and thorough process before the courts to ensure the protection of important property rights. Water rights are quickly becoming among the most highly-coveted and highly-valued property

rights. The Court of Appeals' decision upends decades of law concerning how these rights are considered, interpreted, and protected. TSCRA supports the Petition for Review in this case and respectfully prays that the Court grant the Petition for Review and reverse the Court of Appeals.

Respectfully submitted,

/s/ James D. Bradbury

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**ATTORNEYS FOR AMICUS  
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**CERTIFICATE OF COMPLIANCE WITH TRAP 9.4(i)**

This is to certify that the foregoing Letter Brief of Amici Curiae consists of 2,249 words, in accordance with the Texas Rule of Appellate Procedure 9.4(i)(2).

/s/ James D. Bradbury

James D. Bradbury

## CERTIFICATE OF SERVICE

On this 18th day of November, 2021, a true and correct copy of the foregoing document was served on all parties of record indicated below in accordance with the Texas Rules of Appellate Procedure through electronic service by the electronic filing manager.

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*/s/ James D. Bradbury*

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