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FILED
IN THE SUPREME COURT
OF TEXAS
12 January 24 P3:11
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January 24, 2012

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

RE: *No. 11-0790; In the Supreme Court of Texas; Cemex Construction Materials South, LLC, Petitioner, v. The State of Texas, Respondent; On Appeal from the Court of Appeals for the Eighth Judicial District of Texas at El Paso, No. 08-10-00082*

AMICUS OF TEXAS FARM BUREAU, TEXAS AND SOUTHWESTERN CATTLE RAISERS ASSOCIATION, TEXAS WILDLIFE ASSOCIATION, TEXAS CATTLE FEEDERS ASSOCIATION, TEXAS FORESTRY ASSOCIATION, TEXAS POULTRY FEDERATION, TEXAS NURSERY & LANDSCAPE ASSOCIATION, TEXAS COTTON PRODUCERS, INC., TEXAS PORK PRODUCERS ASSOCIATION, TEXAS ASSOCIATION OF DAIRYMEN, INDEPENDENT CATTLEMEN ASSOCIATION OF TEXAS, SOUTH TEXANS' PROPERTY RIGHTS ASSOCIATION AND THE EXOTIC WILDLIFE ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

Dear Mr. Hawthorne:

To The Honorable Supreme Court of the State of Texas:

Texas Farm Bureau, Texas and Southwestern Cattle Raisers Association, Texas Wildlife Association, Texas Cattle Feeders Association, Texas Forestry Association, Texas Poultry Federation, Texas Nursery & Landscape Association, Texas Cotton Producers, Inc., Texas Pork Producers Association, Texas Association of Dairymen, Independent Cattlemen Association of Texas, South Texans' Property Rights Association and The Exotic Wildlife Association and their collective members jointly submit this letter brief in support of the Petition for Review filed by Cemex Construction Materials South, LLC. We ask that copies of this letter be circulated to the chambers of the Justices of the Supreme Court as they consider the pending Petition for Review. In accordance with Rule 11 of the Texas Rules of Appellate Procedure, I certify that copies of this amicus letter have been served on all parties.

FORT WORTH

AUSTIN

I. Statement of Interest.

Texas Farm Bureau is a Texas non-profit membership corporation committed to the advancement of agriculture and prosperity for rural Texas. Founded in 1933, Texas Farm Bureau has over 469,000 members and is associated with 206 organized county Farm Bureaus across the state. Texas Farm Bureau and its members – who are property owners and farmers - believe the protection of property rights is of critical importance to the State of Texas and all property owners in the State of Texas.

The Texas and Southwestern Cattle Raisers Association (“TSCRA”) is a 134 year-old trade association and is the largest and oldest livestock organization based in Texas. TSCRA has over 15,000 beef cattle operations, ranching families and businesses as members. These members represent approximately 50,000 individuals directly involved in ranching and beef production that manage 4 million head of cattle on 76 million acres of range and pasture land primarily in Texas and Oklahoma, but throughout the southwest.

The Texas Wildlife Association was formed in 1985 by a group of ranchers, wildlife managers and hunters dedicated to the conservation, management, and enhancement of wildlife and wildlife habitat on private lands. TWA is committed to serving Texas wildlife and its habitat, while protecting property rights, hunting heritage, and the conservation efforts of those who value and steward wildlife resources. TWA has over 5,700 members who own or manage nearly 40 million acres of private land in Texas.

The Texas Cattle Feeders Association (TCFA) is a non-profit, agricultural trade association serving the interests of individuals and companies that feed cattle in Texas, Oklahoma and New Mexico. TCFA has over 5,000 individual members and 200 feedyard members, which annually market more than 6.5 million head of cattle, comprising approximately 30% of the nation’s beef supply. Most of our stocker, feeder and feedyard members reside in Texas and own and lease millions of acres of range and pasture in the state. Additionally, many TCFA members also own and operate farms that produce feed grains, silage and other commodities used to feed their cattle.

The Texas Forestry Association was founded in 1914 to enhance and perpetuate Texas forest resources through tree planting, education, training, and political action. The Association has approximately 2,855 members which include private landowners, professional loggers, consulting foresters, and processing mills. In East Texas alone forest lands are 94% privately owned and cover more than 12 million acres.

The Texas Poultry Federation (TPF) is a non-profit corporation that is the only statewide poultry organization in Texas working for the poultry industry. Founded in 1923, the TPF has over 500 members and 13,500 member employees. The TPF and its members believe the protection of property rights is of critical importance to the State of Texas and all property owners in the State of Texas.

The Texas Nursery & Landscape Association (TNLA) is a non-profit corporate trade association which enhances its member's business success through legislative/regulatory advocacy, education, networking and promotion of professionalism. TNLA represents over 1,500 growers, landscape professionals, allied suppliers, retail nurseries and garden centers. The protection of private property rights is imperative to the sustainability of our industry and these rights are critical to all residents of Texas.

The South Texans' Property Rights Association (STPRA) is a non-profit membership corporation that educates the public about the rights of property owners to enjoy the use of their lands as guaranteed by federal, state, and local laws and the Constitutions of the United States of America and the State of Texas. Established in 2006, STPRA continues to educate its over 500 members and the public on groundwater conservation, government regulations, border security & trespassing, eminent domain and many other property owner issues and concerns.

Texas Cotton Producers, Inc. is an umbrella organization representing nine regional cotton producer organizations in the State of Texas. Formed in 1982, the organization works to promote and protect the interests of Texas cotton producers.

Established in 1889 as the Texas Swine Breeders Association and with a name change in 1967, the Texas Pork Producers Association is the second oldest livestock organization in Texas. Today, with membership across the entire state, TPPA represents individuals and companies that account for the production of over 95% of the 1.4 million commercial hogs raised in Texas. These operations include diversified farming and ranching which depend on thousands of acres of Texas land.

The Texas Association of Dairymen is a non-profit organization founded in 1991 for the purpose of representing the interests of dairy families across Texas, regardless of their cooperative affiliation. The more than 500 members of the Association operate dairies throughout Texas. The Association focuses specifically on issues significant to dairies, including environmental regulation, operational practices, legislative issues and private property rights.

Established in 1974, the Independent Cattlemen's Association of Texas is a nonprofit association of ranching families living and working in Texas. Our primary mission is to represent Texas ranchers on issues concerning ranching, livestock, private property, and the preservation of our industry. With over 8,000 members, the protection and preservation of our private property rights is foremost with our organization.

The Exotic Wildlife Association (“EWA”) is a non-profit organization whose mission is to encourage and expand the conservation of both native and non-native hoofstock, and to help members develop and strengthen the markets for their animals. Founded in 1967 the motto of EWA is to promote conservation through commerce. The EWA represents game breeders and sportsmen all across the U.S. and 4 foreign countries. Its members own more numbers of rare and endangered species than any other association in the world. Texas is home to more than 125 different species with a total of 750,000 non-indigenous animals. The EWA has 4700 members with 75 percent them living in Texas. EWA believes that private property rights and their constant application are vital for landowners and the prosperity of the state.

Collectively the membership of the amici comprises more than a half million landowners in the State of Texas who are concerned with the protection of private property rights and the related agricultural economy in Texas, which has grown to be more than \$21 Billion annually. The amici are not parties to the case and will collectively pay all attorneys’ fees incurred in the preparation of this amicus letter brief. Well beyond the important legal issues between the parties below, the Court has before it critical policy questions regarding the ownership and integrity of 100 years of conveyances by the State of Texas to more than 7,500,000 acres of private property. The amici request the opportunity to present these unique policy concerns affecting agriculture and private property interests.

II. Introduction.

The case arises out of a suit filed against Cemex by the General Land Office seeking over \$550,000,000 in damages related to the mining of sand, gravel, caliche, limestone and granite from tracts originally conveyed as public school lands. The Court of Appeals reversed the summary judgment in favor of Cemex and rendered partial summary judgment in favor of the State concluding that the public school lands mineral reservation included not only sand, gravel, limestone and granite, but also mineral substances of any kind or character having commercial value. *State v. Cemex Constr. Materials South, LLC*, -- S.W.3d --, 2011 WL 3841290, at *11 (Tex. App.—El Paso Aug. 31, 2011). The El Paso court moved too swiftly to its conclusion. By relying on a principle of deference to the State, the court turned the innocuous “other valuable materials” contained in the Mining Act of 1895 to a limitless definition of materials having commercial value, including common dirt. *Id.* at *11.

The ruling by the El Paso court and the GLO’s newly devised definition of minerals carry broad ramifications to the owners of the more than 7,500,000 acres of public school lands. Should the lower court’s interpretation remain unchanged, the State of Texas would claim ownership to a broad list of materials, including the sand, gravel, caliche and limestone making up the surface and subsurface of a vast section of the state, thus blurring, if not eliminating the long-recognized distinction between the surface and mineral estates. *See Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971) (recognizing that “a grant or reservation of minerals by the fee owner effects a

horizontal severance and the creation of two separate and distinct estates: an estate in the surface and an estate in the minerals”). It follows that the General Land Office could thereafter enter into mining leases for the production of these substances substantially impairing the existing surface use of millions of acres.

III. Important Policy Questions For Agriculture.

The right to private ownership of property remains one of the most recognized and highest principles in Texas. *See DuPuy v. City of Waco*, 396 S.W. 2d 103, 106 (Tex. 1965); *see also* Tex. Attorney General Greg Abbott, *Understanding Eminent Domain: Texas Landowner’s Bill of Rights*, (Mar. 2008), <https://www.oag.state.tx.us/agency/weeklyag/2008/0308eminentdomain.pdf>. It is a keystone to the history, strength and politics of Texas. Even more so to agricultural and ranching interests that rely almost entirely on the land they own. Private owners hold more than 7,500,000 acres of former public school lands. The reservation of traditional mineral interests such as oil and gas in favor of the Permanent Fund is well known, and the production and scope of those minerals has been recognized and taken place for nearly a century. *See, e.g.*, Act of April 30, 1895, 24th Leg., R.S., ch. 127, § 14, 1895 TEX. GEN. LAWS 197, 201 (“Any such sale or disposition of said lands shall be understood to be, with the reservation of minerals thereon....”). Broadening the scope of historical state reservations to include virtually all components of the surface and subsurface poses a grave threat to the existing surface ownership of these lands.

Beyond the legal issues between the parties to the case, important policy questions for agriculture interests and surface owners should be considered by the Texas Supreme Court upon review. These potential issues include:

A. Continuity of Surface Ownership.

Of paramount importance is the substantial impact the El Paso court’s ruling will have to the continuity of the surface estate. Given the strict dominance of the mineral estate, the definition of minerals cannot shift, but the GLO has done so by recently redefining the scope of its reserved minerals.

The GLO would, under the El Paso court’s interpretation, be entitled to enter into large scale leases with third parties for the production of these surface materials. Because the surface use must yield to the production of reserved minerals in Texas, surface owners would have little ability to influence or stop the use of their land. If the GLO’s current interpretation is upheld, no meaningful surface estate remains in these lands. Legal principles will be set aside and the property interests of 7,500,000 acres will be left to a game of chance of whether the State will exercise its newly-expanded power to claim the surface as minerals. The policy of the State of Texas, as it affects the

integrity of more than 7,500,000 acres of land in the form of ranches, open range, farms and other commercial operations cannot waver in the wind of elected officials or change with market demands of the modern era. It must remain a constant, as it has for more than a century, in recognition of the conveyances made by the State.

B. Certainty of Title and Ownership.

Combined with the threat to the existence of the surface estate is the broad instability that will be created in record title and ownership interests. If the State of Texas is empowered to claim such an expansive list of common materials, existing property valuations will be detrimentally impacted. Title policies, prior conveyances and loan agreements could be negatively affected by this interpretation. The uncertainty alone could create risks to the ability to make future loans or conveyances, including those made for purposes of estate planning.

C. Validity and Integrity of State's Conveyance.

While the State of Texas did make reservations in these lands it also made conveyances of the tracts. The mineral reservations cannot be given priority at the expense of the conveyances, but the El Paso court's decision opens the door for the state to do just that. The essence of ranching and life in west Texas is land. The land must be relied on because there is little else, save a vast horizon and sparse water. There was a significant interest to Texas served by the conveyances in settling the region, creating agricultural operations and grazing cattle. *See Greene v. Robison*, 210 S.W. 498, 499-504 (Tex. 1919). It was not the reservation of minerals alone that encouraged the sale of these lands to private citizens.

By law, the State's reservation is to be construed in its favor, but its sale and conveyance to the many purchasers must also be similarly honored and recognized. *See State v. Houston Oil Co.*, 194 S.W. 422, 434 (Tex. Civ. App.—Austin 1917, writ ref'd). Deference to the State is not a means to alter or nullify the conveyances. If the State's original reservation had been for such a broad array of surface-like materials, purchasers were only making a naked bet that the State would never come for the minerals. If so, the State's conveyances would have been illusory and amounted to no more than long term range leases. Common sense suggests that neither the State of Texas nor so many purchasers would have committed to such a meaningless gamble. The relation of these private owners to the State is fundamental and must be clearly and fairly defined. The State of Texas, through the GLO, must stand behind its conveyance to the property owners of these lands and cannot by century-late litigation renegotiate the conveyances to be mere terminable leases.

D. The GLO Changed the Rules.

The conveyances at issue in the Cemex case were made at or around the turn of the century. Over the decades since, the State of Texas has opined that the public school lands reservations were far narrower than the GLO now contends. See Tex. Att’y Gen. Op. No. 197 (1937) (excluding granite found on the surface from the ordinary meaning of “mineral”); Tex. Att’y Gen. Op. No. 0-6838 (1945) (excluding soil taken from the surface of the land from the meaning of “mineral”). Notwithstanding the GLO’s position that the meaning of the original mineral reservations was “clear”, the GLO attempted to bolster its footing by enacting a new definition of minerals in 2009 as:

Any naturally occurring inorganic or organic substance formed through geological processes having a definite chemical composition or a range of characteristic chemical compositions, and distinctive physical properties or molecular structure, or an aggregate thereof that may be extracted from the earth with an expectation of profit. This includes, ***but is not limited to***, base and precious metals; industrial minerals, such as gypsum, sulfur, talc, etc.; coal and lignite; construction materials such as granite, limestone, rhyolite and other rock that may be quarried for dimension stone or crushed for aggregate; or sand, gravel, caliche, clay and borrow material.

31 TEX. ADMIN. CODE § 10.1(a)(5) (emphasis added) (adopted 34 TEX. REG. 8777 (Dec. 4, 2009)). No materials escape this definition. The facial scope alone is problematic, but creating a new rule in the middle of the game a century after the conveyances should not be permitted to stand. The State cannot remake these conveyances by retroactive application of a new rule. The State must honor and abide by the terms of the original conveyances alone. The GLO’s reliance upon a newly made rule to re-determine conveyances made more than 100 years ago poses a grave risk of a taking prohibited by Art I, § 17 of the Texas Constitution. All Texas landowners are to be protected from the State changing the rules to the detriment of private property interests.

E. Impacts to Mineral Reservations in Private Conveyances.

While the law suggests that interpretations of mineral reservations in public conveyances should not have application to private conveyances, that risk necessarily exists. By advocating for such a broad definition of minerals, including a new 2009 GLO rule, the State of Texas is setting a standard for minerals and reservations. The millions of past and future conveyances in Texas containing mineral reservations could be reinterpreted in light of the now court-endorsed GLO definition of minerals. The lower court’s finding of

ambiguity and inclusion of sand, gravel, limestone and caliche in its definition of minerals could inform or interpret the meaning of reserved minerals in private conveyances in all parts of the State. The El Paso court's ruling broadly defining the scope of mineral reservations could very well cascade into private claims because it will be viewed as the State's definition of minerals.

IV. Conclusion.

At stake in this case are issues of critical importance to the integrity of public land conveyances and the continued existence and productive use of surface estates in Texas. More than a mere royalty dispute between the State and a private party, these matters stand to impact millions of acres of land and thousands of landowners across Texas. The State must be held to the terms of the original conveyances. The leap taken by the El Paso Court of Appeals by its ruling in this case is overbroad and should be overturned. The amici respectfully request that the Texas Supreme Court grant Cemex Construction Materials South, LLC's Petition for Review and reaffirm the State's historic recognition of private ownership in public school lands.

Respectfully Submitted,

/s/James D. Bradbury

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Amicus in Support of Petition for Review has been served upon the following counsel of record on the 24th day of January, 2012, by certified mail, return receipt requested:

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