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June 3, 2010

Via Hand-Delivery

Mr. Blake A. Hawthorne  
Clerk, Supreme Court of Texas  
201 West 14th Street, Room 104  
Austin, Texas 78701

RE: Amicus brief for *The Edwards Aquifer Authority and the State of Texas*  
*v. Burrell Day and Joel McDaniel*, Cause No. 08-0964

Dear Mr. Hawthorne:

I respectfully submit this amicus letter brief in the above referenced and numbered cause. I certify that no fee has been or will be charged for preparing this letter and that a copy has been served on all parties.

My goal for this brief is not to advocate a particular result. Instead, I prefer to write today on a perspective I urge the Court to consider in its decision.

The Conservation Amendment to the Texas Constitution creates an obligation on the legislature to affirmatively manage this state's natural resources, the most important of which arguably is water. TEX. CONST. art. XVI, § 59(a). The legislature has worked diligently to fulfill this constitutional obligation by developing a comprehensive statutory framework for groundwater management and conservation in five of the last eight legislative sessions. See H.B. 2294, 74th Leg., R.S. (Tex. 1995); S.B. 1, 75th Leg., R.S. (Tex. 1997); S.B. 2, 77th Leg., R.S. (Tex. 2001); H.B. 1763, 79th Leg., R.S. (Tex. 2005); and S.B. 3, 80th Leg., R.S. (Tex. 2007). However, the work has been far from easy. As varied as are the characteristics of the many aquifers across the state, so too are the constituencies represented in the legislature. Accordingly, the legislature's challenge has been to establish and refine a carefully

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balanced policy for groundwater management and conservation that recognizes this diversity.<sup>1</sup>

We have accomplished this while acknowledging a common-law doctrine announced by this Court many years ago--the rule of capture. This court-made rule serves as a background principle outside of the dynamic regulatory structure for groundwater management and conservation enacted by the legislature pursuant to the mandates of the Conservation Amendment. It is a rule that sounds in tort liability for drainage and is, as I understand and have seen applied throughout the years, distinct from the issue of groundwater ownership in place. Indeed, it seems clear the property ownership question is one of first impression before the Court. It was not a component of the holding in *Houston & Texas Central Railway Company v. East*, 81 S.W. 279 (Tex. 1904), and it was certainly not addressed in the Court's more recent decision in *Sipriano v. Great Spring Waters of America*, 1 S.W.3d 75 (Tex. 1999).

In *Sipriano*, the Court appropriately deferred to the legislature--the branch of government with the exclusive responsibility of managing and conserving groundwater resources in our state--out of recognition of the legislature's refusal to abdicate its constitutional responsibilities in the area. 1 S.W.3d at 78 and 79-80. The Court resisted pleas to alter even the common law due to its constitutionally-based reticence to intervene in the legislature's exclusive domain. *Id.* at 79. I would suggest that the Court is confronted with the same scenario today. The legislature recently enacted House Bill 1763, which advances management and conservation objectives by requiring groundwater conservation districts to develop goals for the future condition of groundwater resources and directing enactment and enforcement of regulations to achieve those goals. See TEX. WATER CODE ANN. §§ 36.101(b), 36.108(d), (o), and 36.1132. Just as the *Sipriano* Court was confronted with the then-recent implementation of Senate Bill 1, this Court is also faced with the imminent full implementation of House Bill 1763. See *id.* at §§ 36.108(d), (o), and 36.1132.

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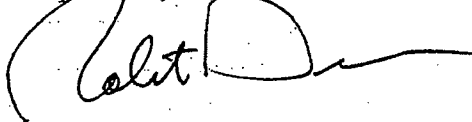
<sup>1</sup> While this case involves the Edwards Aquifer Authority Act (the "EAA Act"), I focus my comments today on the comprehensive groundwater regulatory structure enacted by the legislature not only through the EAA Act, but also through Chapter 36 of the Texas Water Code, as the Court's decision in this case will likely be used to interpret and apply provisions of Chapter 36 in legislative, judicial, and administrative decision-making across the state. See Edwards Aquifer Authority Act, Act of May 30, 1993, 73rd 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, §§ 2.60-2.62 and 6.01-6.05, 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 23, 2007, 80th Leg., R.S., ch. 510, 2007 Tex. Gen. Laws 900; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01-2.12, 2007 Tex. Gen. Laws 4612, 4627; Act of May 28, 2007, 80th Leg., R.S., ch. 1430, §§ 12.01-12.12, 2007 Tex. Gen. Laws 5848, 5901; and Act of May 21, 2009, 81st Leg., R.S., ch. 1080, 2009 Tex. Gen. Laws 2818.

(requiring groundwater conservation districts by September 1, 2010, to establish "desired future conditions," Texas Water Development Board to develop managed available groundwater ("MAG") quantities based on conditions, and districts to permit based on MAG levels to the extent possible).

There are concerns that the significant work the legislature has accomplished over the past several legislative sessions could be compromised by the decision in this case. As imperfect as the legislative process may be, it is no less perfect than the judicial process. This is true especially when framing policy for the purpose of designing and implementing changes that operate prospectively and require flexibility due to local, diverse geographic demands. *See Watkins v. Southcrest Baptist Church*, 399 S.W.2d 530, 533 (Tex. 1966). Thus, I believe it is important for the Court to anticipate consequences to long-term groundwater management policy and would caution against an outcome that would necessitate wholesale changes to the deliberate decisions made by the legislature pursuant to its exclusive constitutional obligations.

Therefore, I respectfully urge the Court to resolve this issue in a manner that gives credence to the legislature's past and continued efforts to satisfy its duties under the Conservation Amendment and the diverse interests that the amendment was intended to serve. Along with the air we breathe, there is no more critical component to life, and the quality of it, than water. Its significance promises only to increase in the years ahead.

Respectfully submitted,



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