NO. 08-0964

IN THE SUPREME COURT OF TEXAS

EDWARDS AQUIFER AUTHORITY,

Petitioner,

vs.

BURRELL DAY AND JOSEPH McDANIEL,

Respondent.

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

AMICUS CURIAE BRIEF OF TEXAS LANDOWNERS COUNCIL

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

CASES **Page**

STATUTES AND RULES

MISCELLANEOUS

AMICUS CURIAE BRIEF OF TEXAS LANDOWNERS COUNCIL

TO THE HONORABLE SUPREME COURT OF TEXAS:

Amicus Curiae Texas Landowners Council respectfully submits this *amicus curiae* brief to assist the Court with briefing on one point of law – that Texas landowners have absolute ownership of percolating groundwater beneath their lands. Texas courts have recognized this principle for over a century, and the Attorney General has recognized it for at least two decades. The court of appeals' recognition of groundwater as a vested right is indisputably correct on this point. *See Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex. App.—San Antonio 2008, pet. granted). Consequently, the Court should affirm the decision of the Court of Appeals.

INTEREST OF THE *AMICUS CURIAE*

Texas Landowners Council is a group of landowners organized to protect private property rights in the State of Texas. As landowners, Texas Landowners Council members own groundwater rights all throughout the State of Texas. It is vitally important to Texas Landowners Council that Texas law continue to recognize, as it has for more than a century, that Texas landowners have vested ownership of the percolating groundwater in place in and under their lands.

In compliance with TEX. R. APP. P. 11(c), Texas Landowners Council advises the Court that the attorneys' fees for preparing this *amicus curiae* brief are donated by its General Counsel, Marvin W. Jones. It should be noted, however, that Mr. Jones serves as counsel for Mesa Water, L.P., and as such has briefed and become familiar with many of

the issues addressed herein; to that extent, Texas Landowners Council has indirectly benefitted from prior work performed for Mesa Water, L.P. by Mr. Jones.

SUMMARY OF THE ARGUMENT

Contrary to the assertions of Edwards Aquifer Authority ("EAA") and the State of Texas ("State"), it is settled that Texas landowners own a vested property interest in groundwater in place beneath their land. Nevertheless, from time to time, some (as in this appeal) attempt to resurrect an erroneous theory, which is without support in Texas law, that landowners do not own a vested interest in groundwater in place. This erroneous argument states that landowners own only a usufructuary right to reduce groundwater to possession and thereby may "own" groundwater only after it is reduced to possession at the surface.[1] Those making this erroneous argument contend, as the EAA and various amici do in their respective briefs, that the State may regulate groundwater without concern for Constitutional constraints on governmental regulation of private property. Texas Landowners Council respectfully submits that EAA and the State fail to properly recognize the basis for real property ownership of groundwater. Further, the position now taken by the State is extirpated by a prior Attorney General's Opinion in which the law is correctly stated: "landowners have 'absolute ownership' of percolating groundwater beneath their lands." Op. Att'y Gen. JM-827 (Nov. 25, 1987).

[1] The question that is left unanswered by both the EAA and the State is this: if the landowners do not have absolute ownership of groundwater in place, who owns the groundwater in place? Title must vest somewhere. The State repeatedly refers to groundwater as a "shared public resource." Thus, embedded in the argument that the landowner does not own groundwater in place is the proposition that the State of Texas does.

I. TEXAS LANDOWNERS OWN PERCOLATING GROUNDWATER IN PLACE IN AND UNDER THEIR LAND.

A. Texas Courts and Legislature have Recognized Absolute Ownership of Groundwater

Since 1904, Texas law has recognized the landowner as the absolute owner of percolating groundwater beneath her land. *See Houston & T. C. Railway Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904) (describing the landowner as "absolute owner of the soil and of percolating water, which is a part of, and not different from the soil"). This Court has previously described percolating groundwater as "the exclusive property of the owner of the surface of the soil." *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 278 (1927). In *City of Corpus Christi v. City of Pleasanton*, this Court stated that "percolating waters are regarded as the property of the owner of the surface . . . ." 154 Tex. 289, 276 S.W.2d 798, 800 (1955). And again, in 1978, this Court affirmed that "percolating ground waters belong to the landowner." *Friendswood Development Company v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21, 26 (Tex. 1978). As explained by commentators, "Texas courts are committed to the rule that, apart from statutory or contractual restriction, percolating water is the property of the landowner." Edward P. Woodruff, Jr. & James Peter Williams, Jr., Comment, *The Texas Groundwater District Act of 1949: Analysis and Criticism*, 30 Tex. L. Rev. 862, 865 (1952).

The Texas Legislature has also recognized that landowners own groundwater in place beneath their land. In 1995, the Legislature defined "private real property" to mean "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'T CODE § 2007.002(4) (Vernon 2008). In Texas Water Code § 36.002, the legislature acknowledges absolute ownership of groundwater by stating that "[t]he ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized." TEX. WATER CODE § 36.002 (Vernon 2008). This statute "confirms private rights in underground water." *City of Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681, 686 (Tex. 1983).

Texas case law and statutes addressing ownership of groundwater over the last century has been thoroughly cited and briefed by the parties and amici.[2] Accordingly, this section will focus on the historical context of the rule adopted in *East* in order to resolve any "spawned confusion about the property implications of the rule" by the EAA and the State.[3]

B. The Edwards Aquifer Authority and State of Texas Confuse the Rule of Capture and Ownership Issues

Both the EAA and the State confuse the tort law rule of capture and the property law concept of absolute ownership. In *East*, this Court recognized two separate, distinct principles pertaining to ownership of fugacious substances. *See East*, 81 S.W. at 281. First, this Court recognized the surface owner as the absolute owner of percolating water. *Id.* The *East* Court describes the owner of the land as the "*absolute owner* of the soil and of *percolating water*, which is a part of, and not different from the soil." *Id.* (emphasis

[2] *See* City of Victoria's Amicus Brief; Canadian River Municipal Water Authority's Amicus Curiae Brief; Texas Farm Bureau and Texas Cattle Feeders Association's Joint Amicus Brief; Texas Comptroller of Public Accounts' Amicus Letter; Texas Wildlife Association's Amicus Brief; Burrell Day and Joel McDaniel's Brief on the Merits; *see also* Ernest E. Smith, *Wind, Water, Oil, Gas and Whitetails: A Comparison of Property Rights and Theories*, WIND, SOLAR AND RENEWABLES INSTITUTE, U.T. School of Law (2010).

[3] *See* Edwards Aquifer Authority Petition for Review at 8. The Edwards Aquifer Authority contends that the past century of precedent which recognizes the landowner as the "absolute owner" of groundwater was unnecessary dicta that spawned confusion.

added). This absolute ownership principle, which was later discussed in *Texas Co. v. Burkett*, makes "percolating waters . . . the exclusive property of the owner of the surface of the soil." 296 S.W. at 278; *see City of Sherman*, 643 S.W.2d at 686 (stating that "[t]he absolute ownership theory regarding groundwater was adopted by this Court in *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904)"). Second, recognizing both the absolute ownership principle and the peculiar nature of fugacious substances, the Court adopted the rule of capture. *East*, 81 S.W. at 280. The rule of capture provides that a landowner may capture the water underneath her land without liability, even if in doing so, she intercepts water from a neighbor's well. *Id.* The inconvenience to the neighbor is described as "damnum absque injuria," an injury without a loss. *Id.* Accordingly, *East* linked the nonliability under the rule of capture with ownership of the land. Importantly, this Court recently declined to review the correctly decided *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, wherein the San Antonio Court of Appeals accurately described the relationship between these two distinct rules. *See* 269 S.W.3d 613, 617-18 (Tex. App.—San Antonio 2009, pet. denied).

The EAA and various amici assert that the rule of capture creates ownership rights, then opine that such rights attach only when water is reduced to possession, or "captured." As seen from the cases above, this view is simply wrong and wholly misapprehends the holdings of *East* and its progeny.

C. Two Thousand Years of Correct Legal Analysis Support Ownership of Groundwater in Place

1. *Acton v. Blundell* unambiguously recognizes ownership of groundwater in place

All parties have pointed to this Court's pronouncement in *East* as the starting point of Texas jurisprudence on the issue of groundwater ownership. From there, the EAA, the State and several amici in support take a drastic departure from the holding in *East* and its historical roots to arrive at the conclusion that the landowner does not own groundwater in place beneath the land.

East has been thoroughly briefed in this matter. As noted in several briefs filed, the *East* court adopted the absolute ownership rule in *Acton v. Blundell.* However, these briefs fail to fully address the holding in *Acton* and its roots.[4] *Acton* described the ownership of groundwater as follows:

> We think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which *gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water*; that the person who owns the surface may dig therein, and apply all that is there 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 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.

Acton v. Blundell, 152 Eng. Rep. 1223, 1235 (1843) (emphasis added).

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[4] Texas Landowners Council acknowledges that the State quoted an isolated passage from *Acton v. Blundell*, which the State contends supports their "shared underground resource" theory. State of Texas' Brief on the Merits at 19. However, a further reading of the case directly refutes the State's argument that groundwater is incapable of ownership because it is a shared resource.

The structure of the *Acton* court's holding is telling and warrants a closer examination. The *Acton* court begins its analysis by specifically acknowledging that the landowner owns all that lies beneath his surface, including water. *Id.* *Acton* did not classify the water beneath the land as a "shared public resource"[5] incapable of ownership, nor did *Acton* qualify this right upon the landowner first bringing the water to the surface. *See id.* Rather, the *Acton* court clearly acknowledged absolute ownership of what lies beneath the land, regardless of whether it is soil, rock, or water. *Id.* Accordingly, the landowner "may dig therein, and apply all that is there found to his own purposes." *Id.* The court then ties this rule of property ownership (absolute ownership) with immunity from tort liability (rule of capture). The *Acton* court states that "if, in the *exercise of such right*, he intercepts or drains . . . his neighbor's well, this inconvenience to his neighbor . . . [is] damnum absque injuria." *Id.* (emphasis added). The "such right" referenced in the preceding sentence is, of course, the landowner's ownership of groundwater in place. The surface owner has immunity from tort liability because the surface owner owns the groundwater beneath the surface. If in exercising his ownership of that right by drilling he drains his neighbor, his neighbor has no judicial remedy. His neighbor is unable to enjoin production, obtain an accounting, or obtain other equitable relief. Rather, the neighbor's remedy is the right to offset production by drilling his own well.

[5] *See* State of Texas's Brief on the Merits at 25-26, where the Attorney General refers to groundwater as "a shared and public resource" under a "commonality" of ownership.

2. *Acton v. Blundell* was based on legal thought dating back over two millennia

Acton's pronouncement that the landowner owns groundwater beneath his land was not a fleeting reference void of historical roots. In reaching its decision, the *Acton* court turned to Roman law for guidance because "it affords no small evidence of the soundness of the conclusion which [the court] arrived at." *Id.* Specifically, the *Acton* court found the 2,000-year-old writings of a Roman jurist named Marcus Claudis Marcellus to be "decisive upon the point." *Id*; *see also* DIG. 39.3.1.12 (Ulpian, Ad Edictum 53) (as translated in 3 THE DIGEST OF JUSTINIAN 396 (Theodor Mommsen & Paul Krueger Trans., Alan Watson ed., 1985)).

Marcellus' *Digest of Justinian* again specifically ties ownership of the land to the rule of non-liability. Marcellus explains as follows: "[N]o action, not even the action for fraud, can be brought against a person who, while digging on his own land, diverts his neighbor's water supply." DIG. 39.3.1.12 (emphasis added). As explained by a legal commentator, Marcellus was not theorizing of some unattached super-right of tort immunity. Dylan O. Drummond, *Groundwater Ownership Rights: Fact or Fiction?*, 2008 TEXAS WATER LAW INSTITUTE, U.T. School of Law (2008). Rather, "Marcellus expressly tied the nonliability of someone who diverts the water supply of a neighbor to ownership of the land upon which one digs. More specifically, the reason why no action could lie against the digger was that he was digging in his own land. . ." *Id.* Thus, the "decisive" legal authority relied upon by *Acton* recognized that a landowner is not liable to a neighbor in tort because the landowner owns that which lies beneath his land. The

ownership of groundwater is again not premised upon first withdrawing the water from the ground.

It is with this background that *East* adopted the rule of absolute ownership of groundwater in place.[6] When discussing *Acton*, the *East* court specifically states that "[i]n all that has been said in subsequent discussions little, if anything, has been added to the argument of counsel and of the court." *East*, 81 S.W. at 280. This still holds true today.

Although advancing slightly different arguments, both the EAA and the State misstate the rule of capture to distort absolute ownership of groundwater in place. Both argue that because the rule of capture provides for nonliability, therefore groundwater cannot be owned until reduced to possession by production from the ground. "[T]his wholesale discounting of the jurisprudential record requires labeling every prior decision that links its nonliability holding to property-ownership rationale as errant sloppy dicta at best, or meaningless recitation of 'magic words about property rights in groundwater in place' at worst." Drummond, *supra*, at 2.

Finally, the position taken by the EAA and the State concerning the rule of capture is manifestly illogical. If there is no vested property right in groundwater in place, then there is no need for a tort rule of non-liability for drainage of a neighbor's in place water. While the rule of capture is a distinct concept from the rule of absolute ownership, its

[6] Importantly, the Texas Legislature adopted the common law of England in 1840. *See* Act approved Jan. 20, 1840, 4th Cong., R.S., *reprinted in* 2 H.P.N. Gammel, The Laws of Texas 1922-1987, at 177-78(Austin, Gammel Book Co. 1989 (recodified as amended at Tex. Civ. Prac. & Rem. Code Ann. § 8.001 (Vernon 2002)). As such, the Texas Legislature also adopted the holding in *Acton* as the law in Texas.

very articulation over the millennia is recognition of ownership in place. It is necessitated only by ownership in place. If the EAA is right, there is no need for tort protection regarding drainage of an underground resource. But as demonstrated above, the EAA, State and amici in support are millennially mistaken. Their request that this Court overturn Texas law amounts to a request that the Court ignore well-reasoned property principles pre-dating Christ.

II. THE STATE OF TEXAS NOW CLAIMS LANDOWNERS DO NOT OWN GROUNDWATER IN PLACE

In its various briefs, the State of Texas, through the Office of its Attorney General, takes the position that groundwater is not owned in place by the owner of the surface estate. The State now claims that groundwater ownership has never fully been addressed by this Court. This assertion is based upon *Barshop*, wherein this Court reserved the issue of whether State regulation of groundwater constitutes an "as applied" taking under the Texas Constitution. *Barshop v. Medina County Underground Water Conservation*, 925 S.W.2d 618 (Tex. 1996). The State is evidently taking the position that because the issue of as applied taking was reserved in *Barshop*, this Court's recognition of absolute ownership of underground percolating waters over the past century is sloppy dicta. However, it is important to note that then Justice Abbott, the current Attorney General, authored the *Barshop* opinion for the Court. Accordingly, General Abbott's suggestion that Texas law has not previously decided the issue is the ultimate *ipse dixit*.

In fact, this Court has, for the past century, recognized that landowners own groundwater in place beneath their land. This legal doctrine is embedded in Texas law

and has been relied upon by courts, commentators, legislators, landowners, and even the Attorney General.[7]

III. THE CURRENT LITANY OF ARGUMENTS

The State, through its Attorney General, advances several arguments in support of its current position in various briefs filed with this Court. First, the State contends that the Conservation Amendment allows the Legislature unfettered discretion to limit a landowner's ability to produce water beneath the surface because groundwater is a "shared public resource" owned by the State. *See* State of Texas, Petition for Review at 4 & Brief on the Merits at 25.[8] Second, the State misconstrues the rule of capture by suggesting that the rule prevents a landowner from owning the groundwater beneath her land. Petition at 13, Merits at 21-22. Third, the State erroneously argues that the Legislature is able to change the absolute ownership doctrine followed by this Court for over a century without implicating takings liability. Petition at 5. Finally, the State cautions this Court against turning to oil and gas law because of "history" and "differing uses to which water and oil are put." Merits at 22. These positions are fallacious and contrary to not only a century of Texas precedent, but wholly inconsistent with the prior position taken by the Attorney General. *See* Op. Att'y Gen. JM-827 at 12 (Nov. 25,

[7] As discussed in greater detail below, the Attorney General previously issued an opinion, which has not been overruled or withdrawn, that correctly states the landowner owns the percolating groundwater beneath her land and that government regulation can potentially constitute a taking. This previous opinion also refutes the majority of all the arguments now raised by the Attorney General. His recent departure from this position can only be explained by the prospective realization that taking citizens' property requires just compensation. In an effort to avoid justly compensating the landowners of Texas, the Attorney General is now backtracking and arguing that the landowner never really owned anything of value.

[8] Texas Landowners Council will be citing extensively to the various arguments raised by the State of Texas throughout the remainder of this amicus brief. Accordingly, the State of Texas' Petition for Review will hereinafter be cited as "Petition", and the State of Texas' Brief on the Merits will hereinafter be cited as "Merits".

1987) ("[H]owever, a landowner's 'absolute ownership' right to groundwater may not be characterized so easily as merely 'usufructary.'").

The State now argues that the "Authority's actions with regard to plaintiffs can never, as a matter of law, constitute a regulatory taking." Petition at 6. The State's current argument suggests that despite the countless landowners who would be deprived of their property, the State, as a matter of law, is permitted to divest landowners of valuable, vested property rights without recourse. This position, in light of Attorney General Opinion No. JM-827, is disingenuous.

IV. THE ATTORNEY GENERAL'S NEW POSITION IS INCONSISTENT WITH ATTORNEY GENERAL OPINION NO. JM-827

In 1987, the Attorney General was called upon by Representative Smith to address whether certain groundwater regulation constitutes a taking in violation of article I, section 17, of the Texas Constitution. *See* Op. Att'y Gen. JM-827. The position taken by the Attorney General in Opinion No. JM-827 is drastically different from the position the Attorney General, on behalf of the State, currently advances. *See id.* In fact, the arguments now raised in the Petition for Review and Brief on the Merits can be addressed by turning to the language of the correctly decided 1987 Attorney General Opinion.

As noted above, the Attorney General now argues that the Conservation Amendment in the Texas Constitution permits the State of Texas to regulate groundwater without ever becoming liable for damages. Specifically, the Attorney General states that "legislation limiting access to public resources for the purpose of preserving those resources can be enjoined—when it in fact violated due process—but it cannot be the

basis for damages against the government." Petition at 12. As explained further in the State's brief on the merits, the Attorney General now claims "[b]ecause the rule of capture is a rule for dividing up a shared resource, the exercise of Conservation Amendment authority . . . is not a taking of private property." Merits at 25. This argument suggests that the State is permitted to regulate any natural resource which falls under the gambit of the Conservation Amendment without takings liability – whether water, oil and gas, salt, lumber, etc. This position, unsupported by any authority, runs afoul of the previous position of the Attorney General.

In Opinion No. JM-827, the Attorney General recognized that Article XVI, section 59(a), of the Texas Constitution directs the legislature to pass laws to conserve natural resources. Op. Att'y Gen. JM-827 at 14. However, the Conservation Amendment does not absolve the State from takings liability. The Attorney General stated in Opinion No. JM-827 that "a statute could not be enacted in Texas that has the direct effect of appropriating groundwater without an eminent domain provision to prevent a taking of private waters without just compensation and due process of law." *Id.* at 13. Whether legislation limiting access to public resources "constitute[s] a taking involves a reasonableness or balancing test." *Id.* at 14. A taking, as explained in the opinion, is one without compensation. *Id.* at 10. The unfettered discretion now proposed by the Attorney General could have the direct effect of apportioning groundwater without providing just compensation and due process of law. Consequently, this new-found position, as explained in Opinion No. JM-827, implicates takings liability.

Second, the Attorney General now suggests that a taking of groundwater cannot occur because the rule of capture allows a landowner to drain his neighbor without liability. As the argument goes, because the landowner has no recourse against his neighbor for drainage of groundwater beneath her land, the landowner should also have no recourse against the government for regulations which effectively constitute a taking. Petition at 13. Thus, a property owner who has the right to capture obtains "'absolute ownership' of a fugacious subterranean material only after he has removed the material from the earth." Merits at 12-13. This argument, of course, misconstrues the rule of capture and wholly ignores the landowner's right to prevent drainage of her underground water through offset.

The Attorney General, in his previous opinion, more accurately explained the relationship between the rule of capture and absolute ownership of groundwater:

> The Texas Supreme Court recently reaffirmed that, under Texas law, landowners have "absolute ownership" of percolating groundwater beneath their lands. A corollary to this "absolute ownership" is the landowners' right to capture the groundwater beneath their lands. The right of landowners to groundwater beneath their land is an incident to their ownership of the land—a part of the land. *Because groundwater is considered to be the property of the overlying landowner*, under the common-law rule, the landowner may withdraw it regardless of the effect of the withdrawal on other wells.

Op. Att'y Gen. JM-827 at 11-12 (emphasis added and internal citations omitted). This description of the rule of capture, pulled directly from the opinion by the Attorney General, certainly does not contemplate access to groundwater being limited by the government without takings liability. As mentioned above, the 1987 Opinion stated that

government action which effectively appropriates groundwater constitutes a taking of private property.

In addition, the Attorney General now states that the "Legislature can change non-vested common law property rights without incurring liability." Petition at 14. After describing the landowner as the "absolute owner" of the groundwater beneath her land in Opinion JM-827, the Attorney General now suggests that the right to groundwater is a "mere expectation of future value" which, without an investor-backed interest in future water production, can be altered by the legislature without recourse. *Id.* This conclusion can only be reached by overlooking a century of case law and conveniently forgetting the language of the opinion penned by the Attorney General which stated that the right of landowners to groundwater beneath their land is an incident to ownership of the land—a part of the land. In 100 years of precedent, absolute ownership of groundwater in place has not once been qualified upon the basis that the landowner must have an investor-backed interest in future water production. "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). The State of Texas' current position distorts the case law and perverts the doctrine of stare decisis.

The Attorney General today warns this Court not to "confuse the rule of capture in groundwater cases with the rule as applied in the oil and gas context." Merits at 22. The Attorney General argues that an analogy between water and oil disregards the history and differing uses to which water and oil are put. *Id.* This again is contrary to the Attorney

General's previous opinion, wherein the Attorney General turned to oil and gas law for guidance. Specifically, the Attorney General stated that "[t]he law with regard to the state's regulation of oil and gas provides a helpful analogy for water regulation because the common-law property rights are similar." Op. Att'y Gen. JM-827 at 12. This similar property right is a landowner's absolute ownership of oil and gas beneath her land. *Id*; *see also Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 83 S.W.2d 935, 940 (Tex. 1935). As such, the Attorney General's current attempt to distance oil and gas law from water law must fail.

Texas law regarding ownership of groundwater has not changed since the Attorney General issued Opinion JM-827 in 1987. The Attorney General of Texas is authorized by the Texas Constitution and required by the legislature to issue formal legal opinions on questions affecting the public interest or concerning the official duties of certain authorized public officials. TEX. CONST. ART. IV, § 22; TEX. GOV'T CODE ch. 402. Attorney General opinions are given great weight by the courts. *See, e.g., Royalty v. Nicholson*, 411 S.W.2d 565, 572 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.). It is incongruous for the Attorney General to take a position in litigation that is directly opposed to his own interpretation of the law, as set forth in a formal Attorney General opinion, when that opinion has not been overruled, modified or withdrawn.[9]

[9] It is not uncommon for an Attorney General to overrule, modify, clarify or withdraw an earlier legal opinion. *See, e.g.,* JC-0314 (2000) (overruling DM-208 (1993)); JC-0236 (2000) (clarifying JC-0155 (1999)).

CONCLUSION

The Edwards Aquifer Authority and the State of Texas argue for a position that is contrary to well-settled Texas law. For over a century, this Court has recognized that the landowner owns the percolating groundwater beneath his land. Texas Landowners Council respectfully submits that the law in Texas – that landowners own the percolating groundwater in place beneath their land – is not unsettled, confusing or in need of clarification. For more than 100 years, Texas law has been that landowners own percolating groundwater in place in and under their land. The Fourth Court's opinion correctly decided this issue and should be affirmed.

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