NO. 08-0964

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IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

EDWARDS AQUIFER AUTHORITY and
STATE OF TEXAS
Petitioners/Cross-Respondents

v.

BURRELL DAY and JOEL McDANIEL
Respondent/Cross-Petitioners

BURRELL DAY AND JOEL MCDANIEL'S RESPONSE TO PETITION FOR REVIEW BY THE STATE OF TEXAS

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**ATTORNEY FOR RESPONDENTS/CROSS-PETITIONERS
BURRELL DAY AND JOEL MCDANIEL**

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ATTORNEY FOR RESPONDENTS/CROSS-PETITIONERS
BURRELL DAY AND JOEL MCDANIEL

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EDWARDS AQUIFER AUTHORITY and
STATE OF TE4XAS

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BURRELL DAY AND JOEL MCDANIEL'S RESPONSE TO PETITION FOR REVIEW BY THE STATE OF TEXAS

TO THE HONORABLE SUPREME COURT OF TEXAS:

BURRELL DAY and JOEL McDANIEL's Response to Petition for Review by the State of Texas, will show the Court the following:

OBJECTION TO JURISDICTION

This Court has no Jurisdiction to Entertain the Petition for Review Filed Herein by the State of Texas

1. V.T.C.A. Government Code, Section 22.001(a) vests jurisdiction in the Supreme Court "in the following cases when they have been brought to the Courts of Appeals from appealable judgment of the Trial Courts." Without the conditions of Section 22.001(a) having been met, its Subsections (3) and (6) have no relevance nor vitality.

2. The State of Texas (hereinafter referred to as "State") filed an Answer in the Trial Court asserting the sole defense of "Sovereign Immunity," and a denial of all Plaintiffs' claims. (Appendix Tab 1). The Trial Court denied the State any relief in its final judgment. (Appendix Tab 2, Day/McDaniel's Petition for Review). No appeal from such decision was taken by the State, nor were points being raised before this Court raised or pursued by the State in the Trial Court, nor the Court of Appeals. The State, therefore, is only an amicus curiae in this cause.

RESPONSE TO "ISSUES PRESENTED" (p. x, STATE'S PETITION)

None of the Issues Presented by the State Were Adequately Presented by the State in the Trial Court or the Court of Appeals

Since the State was not impleaded as a third party by Day/McDaniel and the State chooses not to brief its standing to now appear before the Supreme Court, Day/McDaniel consider the issues being presented by the State are not properly before this Court. However, subject to this objection, a response is here submitted.

SUMMARY OF THE ARGUMENT

The State Claims There is a Jurisdictional Defect, Because it has Sovereign Immunity.

Such defense, it is alleged, may be raised at any time. P. 4. However, no authority is cited authorizing the raising of the defense in the Trial Court, unsuccessfully, and not complaining to nor participating in an appeal to the Court of Appeals complaining of the Trial Court's action; and to now come before this Court with such defense.

While the issue of Sovereign Immunity may be raised at any time, no authority is cited which permits neutralizing the requirement of "an appeal from the Court of Appeals" and attempting to expand the jurisdiction of the Supreme Court. Indeed, as the State says, such defense is jurisdictional, but that does not give the State the power to enlarge the jurisdiction of the Supreme Court to address an issue that was not appealed to the Court of Appeals . This Court's jurisdiction is by Statute of the Legislature, not by opinion of the Executive Branch.

The State further attempts to conclude that because of the Conservation Amendment to the Constitution (Art. XVI, §59), it is impossible for the Edwards Aquifer Act to constitute a taking of private property and thus, no further record is necessary. This conclusion is not supported by case law.

ARGUMENT AND AUTHORITIES

1. Day/McDaniel Agree the Issue Reserved for Decision by the "*Barshop*" Court is an Extremely Important Legal Question.

Day/McDaniel do not agree, that as a matter of law, the Authority's action can never

constitute a regulatory taking of their asserted property rights. Such an empirical statement contradicts what the *Barshop Court* itself said:

> "Assuming without deciding that Plaintiffs possess a vested property right in the water beneath their land, the State still can take the property for a public use as long as adequate compensation is provided. The Act expressly provides that the Legislature "intends that just compensation be paid if implementation of [the Act] 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, supra, §*1.07. Based on this provision in the Act, we must assume that the Legislature intends to compensate Plaintiffs for any taking that occurs. As long as compensation is provided, the Act does not violate Article I, Section 17. *Barshop v. Medina County Underground Water Conservation Dist.,* 925 S.W. 2d 618, 630-31, (Tex. 1996).

Obviously, the *Barshop Court* does not agree with the State vis a vis, that under no circumstances can the actions of the EAA be considered a "taking."

A. The State's Attempt to Gain a Review of its Issues Before This Court Finds No Legal Anchor.

V.T.C.A. Government Code §22.001(a) clearly requires the State's issues to have been presented to the Court of Appeals:

Jurisdiction exists (for) "all questions of law arising in the following cases when they have been brought to the Courts of Appeals from appealable judgment of the Trial Courts."

This Court has reaffirmed this condition on several occasions. *Pope v. Ferguson,* 445 S.W. 2d 950, 952 (Tex. 1969).

> "This court was created by the Constitution of the State of Texas and has only such jurisdiction as is conferred upon it by the Constitution and statutes of the State. The court has no 'inherent power,' *Ex Parte Hughes*, 133 Tex. 505, 129 S.W. 2d 270, 273 (1939)."

See also: *Chenault v. Phillips,* 914 S.W.2d 140, 141, (Tex., 1996).

This Court's jurisdiction, like that of all Texas courts, is conferred solely by the Texas Constitution and state statutes. This Court does not have jurisdiction to decide any case absent an express constitutional or statutory grant. *See Pope v. Ferguson*, 445 S.W. 2d 950, 952 (Tex. 1969), cert. denied, 397 U.S. 997, 90 S. Ct. 1138, 25 L.Ed. 2d 405 (1970). See also *Collins v. Ison-Newsome*, 73 S.W. 3d 178, 180, (Tex. 2001). "Our jurisdictional analysis begins with the basic principle that we do not have jurisdiction in the absence of an express constitutional or legislative grant. *Chenault v. Phillips, supra.*"

No provision is found in this Court's jurisdictional investiture which permits an appeal to it on issues not presented to the Court of Appeals. *See Willis v. Donnelly,* 199 S.W. 3d 262, 270., (Tex. 2006).

As a general rule, a petitioner's complaint about the trial court's judgment must be raised in the Court of Appeals to preserve error in the Supreme Court. C.f.

Nichols v. Smith, 507 S.W. 2d 518, 521, (Tex. 1974). *Alexander v. Turtur & Associates, Inc.,* 146 S.W. 3d 113, 122, (Tex. 2004). *Ontiveros v. Flores,* 218 S.W. 3d 70, 71, (Tex. 2007). *City of Galveston v. State*, 217 S.W. 3d 466, 470, (Tex. 2007).

B. <u>The Attorney General's Position in this Case is Mystifying</u>.

The State argues the Court should not hold that groundwater is owned by the landowner. The reasons given are based upon a supposed liability for a multiple of suits and a cost of $550,000.00 million dollars, or even $10 billion dollars. P. 8. Nothing is found in the State's Petition for Review which requests this Court to honor the Edwards Aquifer Act when it declares groundwater to be private property and any taking shall be compensated.

No mention is made of a dollar limit in this clause. No concern is given that this is an express mandate from the Legislative Branch.

It is disappointing to these Texans that the Executive Branch is taking an official position that will destroy private property rights clearly delineated in all available laws and authorities for the sake of expediency, that it will cost too much to recognize the right of private property. There is a trail of blood from the venerable Alamo to the San Jacinto Monument 200 miles away that resulted in our Texas Constitution. How much was that cost?

Day/McDaniel, with the permission of the Court, incorporate herein, as though fully set forth, the portion of their Response to the Edwards Aquifer Authority Petition for Review which addresses the question of expediency and its impact on "disposable portions" of the Constitution. (p. 13-14). (T.R.A.P. 9.7)

Indeed the Constitution stands in the way of government. It is supposed to. Otherwise, only the Government is left standing.

C. The State Contends the Day/McDaniel Petition Negates Any Potential Takings Claim; and, therefore, no Jurisdiction Exists Over the State.

In short, the Trial Court never reached the issue of whether a taking of the Day/McDaniel groundwater occurred, because it decided Day/McDaniel did not own the groundwater. The Court of Civil Appeals did not decide regulation was a taking. Indeed, the law is that regulation can be a taking, but only if it goes too far. *Mayhew v. Town of Sunnyville,* 774 S.W. 2d 284, 289 (Tex.Civ.App-Dallas, 1989). Because of the Trial Court's

ruling, no evidence was heard regarding whether a taking occurred. As the State has stated, it is an ad hoc matter. (p. 10). Again, the State made no effort to "present"[1] its current issues to the Trial Court, nor to the Court of Appeals. One could conclude this is, in fact, an Amicus Brief.

2. THE EXPEDIENCY OF OUR CONSTITUTION

A. The State Argues the Cost of Constitutional Rights as Being Too Expensive, p. 8.

This Court should always be aware in its deliberations that Day/McDaniel made every effort to comply with the regulatory authority of the State, only to be twisted around and denied their ownership of groundwater. Day/Mc Daniel offered their cooperation, but the EAA abused such cooperation and attempted to convert it into a non-compensable taking of private property under the guise of the authority to regulate. An action expressly prohibited by the statute which spawned it. (Edwards Aquifer Act, Section 1.07). Day/McDaniel, as life-long cattle ranchers and stewards of their land, have an affinity much more for water than for cash.

In concluding comments on this issue, the State argues (p.9) that it could encourage many more lawsuits to challenge groundwater regulation (taking?), if the Court holds the landowner owns the groundwater. However, the costs of this type of litigation, funded by a private person, against not one but now two government agencies with bottomless pockets

[1]The State made no motion of any kind in the Trial Court to obtain a ruling in the issues before this Court.

is extremely intimidating. Would that such "hundreds of thousands" of landowners who have been deprived of their groundwater ownership under the guise of regulation had the funds, the encouragement is already in place.

3. Plaintiffs' Petition Adequately States the Causes of Action They Allege.

Without detailing the alleged defects of the Plaintiff's Petition, the State requests it be dismissed, though no Court has so ruled, nor has any preceding court been offered this opportunity to do so. P. 9-10. Day/McDaniel represent their pleadings are viable.

A. The State Contends the Plaintiffs' Petition Negates any Potential Taking Claims and Therefore, this Suit Must be Dismissed.

The State's attempt to justify this contention is unfounded.

The State is incorrect in asserting Day/McDaniel contend the regulation of groundwater automatically constitutes a taking. p. 10. Nowhere in the record or briefs do Day/McDaniel contend the regulation of groundwater is automatically a taking, nor does the State direct this Court to where it may find such contention. It is the manner in which and the degree to which, Day/McDaniel have lost the use of their groundwater, that forms their complaint about the governmental taking of their groundwater. (Day/McDaniel's Response to Petition for Review of EAA, p. 9).

B. The State Contends This Court Needs no Further Evidence or Record to Decide the Action of the EAA Was Not a Taking

The State alleges that the action of the EAA was not a taking, because it is an "ad hoc" determination while at the same time asserting it is a "question of law." p. 10. Which

is it? Obviously, an "ad hoc" determination requires a factual consideration. However, Day/McDaniel contend they never had a chance to demonstrate the factual side of their loss of the use of their groundwater. *See Day/McDaniel's Petition for Review - Table of Contents, p. iii-iv.*

The State apparently concludes no further record is necessary in adjudicating the "taking" claim, since it can be done as a "matter of law" by this Court. The State's contention in regard to both premises is allegedly supported by this Court in *Hallco Texas, Inc. v. McMullen County,* 221 S.W.3d 50, 56 (Tex. 2006). While the Court sets forth several axioms, the axiom which embraces the case before this Court is "Lesser interferences, however, may also result in a taking. These types of regulatory actions require an 'essentially ad hoc,' factual inquiry. (citing). A regulation may go so far in imposing public burdens on private interests as to require compensation. (citing). In deciding whether regulatory action goes 'too far,' we carefully weigh 'all the relevant circumstances' including:

(1) The economic impact of the regulation on the claimant;

(2) The extent to which the regulation has interfered with distinct investment-backed expectations; and

(3) The character of the governmental action.

The governmental intrusion may be a question for the trier of fact, but whether the facts constitute a taking is a question of law. (citing)."

Day/McDaniel suggest that the two premises urged by the State are interdependent in this case, and one cannot exist without the other. As was stated in *Rowlett/2000 Ltd. v. City of Rowlett,* 231 S.W.3d 587, 590 (Tex.App.–Dallas, 2007):

> "The constitutionality of a regulatory taking involves the consideration of a number of factual issues, but the ultimate question of whether a zoning ordinance is a compensable taking is a question of law. Nonetheless, an appellate court must consider all of the factual circumstances and rely on the trial court's findings on disputed facts to determine these legal questions. *See Sheffield Development v. City of Glenn Heights*, 140 S.W. 3d 660, 673 (Tex. 2004); *2218 Bryan Street, Ltd. v. City of Dallas,* 175 S.W. 3d 58, 65 (Tex.App.-Dallas 2005, pet. denied)."

C. <u>The State Again Re-Positions the Day/McDaniel Complaint to fit its Answer.</u> p. 11.

DayMcDaniel do not challenge the Government's authority to limit (regulate) groundwater production for present or future use.

1) <u>A Word About the Conservation Amendment.</u>

> Article XVI, Section 59 of the Texas Constitution is referred to as the Conservation Amendment. The State, as well as other relevant entities, attempt to utilize this Amendment to rationalize the taking of private property without compensation, alleging groundwater is a shared resource. p. 11.

The Amendment was passed in 1917. The subject of groundwater has been visited enumerable times by the Legislature (*See Day/McDaniel's Response to Petition for Review of the EAA, at pgs. 6-10).* At each visit, the people of Texas, through their Legislature, the same people who passed the Amendment, have chosen to reiterate the law: <u>The landowner owns the (underground) groundwater</u>. The State points to no judicial or legislative event which declares to the contrary. <u>It is the law of the land</u>. The Attorney General is advocating the wrong side of this issue.

2) **The State Continues Upon its Erroneous Theory and Concludes the Conservation Amendment Works Hand in Hand With Art. I, Sec. 17 (our Texas Constitution Amendment), which Protects Private Property Against Uncompensated Takings and Deduces That The State Has "SUPERIOR TITLE" to Private Property. p. 12.**

This is rather loose language resulting from a previous statement of the "Sovereign's Right to Property,"(p. 12). The sovereign's right to property comes from the sovereign right to acquire property through condemnation proceedings for which it pays just compensation. *McInnis v. Brown County Water Improvement Dist. No. 1,* 41 S.W.2d 741, 744 (Tex.App.-Austin, 1931, writ ref'd.), p. 12. The holding in *Lingle* (p. 12) referred to is to the same effect. It is an oxymoron to conclude the interaction of Article I, Section 17 of the Texas Constitution, which clearly sanctifies the ownership of private property, and warns the State against taking it without paying compensation, works with the Conservation Amendment to give up private property without compensation. No authority is cited. Indeed, none exists.

The State attempts to conclude that legislation limiting access to public resources (percolating groundwater is not a public resource, but a private resource), for the purpose of preserving those resources can be enjoined but cannot be the basis for damages against the Government. p. 12.

The Legislature, as the State is aware, required that damages should be paid if the implementation of the Act takes private property. That issue, the Legislature. (eighty years after the Conservation Amendment was passed) continues to declare is the liability of the Government for the taking of private property while exercising its responsibility to conserve and regulate the natural resources of the State. Section 1.02, Edwards Aquifer Act.

3. The State Has Concluded That if a Property Owner's Use of Water can be Limited by the Actions of His Neighbors, it can Likewise be Limited by the Government Without Liability.

The Constitution's avowed purpose is to limit the powers of Government, "to guard against transgressions of the high powers delegated to the State Government by the Texas Constitution." *Satterfield v. Crown Cork & Seal Company, Inc.,* 268 S.W.3d 190,205 (Tex.App.-Austin 2008). No authority is found in our Constitution which limits the high powers of our neighbors vested in them by the Texas Constitution.

While the State attempts to define what this Court should do in a setting conjured by it regarding the value of the future use of groundwater, Day/McDaniel represent to this Court that the Legislature has likewise attended to that detail in the passage of V.T.C.A. Property Code, Section 21.0421 addressing the value of a groundwater estate and its evaluation.

4. The State Argues the Legislature can Change Non-Vested Common Law Property Rights Without Incurring Takings Liability

This begs the question:

1) Ownership of groundwater has already been determined to be a vested right. Day/McDaniel's Response to EAA Petition for Review, pgs. 4-8.

2) Ownership has been determined to be absolute. *Id.*

3) V.T.C.A. Property Code, Section 21.0421 makes no such requirement. Among other criteria, none of which are as stated in the State's Petition (p. 14), Section 21.0421(c) sets the following criteria for valuing the groundwater estate:

    a) the local market value of the real property, excluding the value of groundwater in place, at the time of the hearing; and

b) the market value of groundwater rights as property apart from the land at the time of the hearing.

There follows eight additional considerations for determining such value, none of which remotely resemble the standard relied upon by the State.

4. The State Argues the Record is Complete, and the Lack of Judicial Standard for Determining the Plaintiffs' Property Rights Creates an Urgency of the Court.

This is not entirely correct. For the issues presented by Day/McDaniel in their Petition for Review, the record is complete.

In regard to the issues raised by the State, the record is not complete. The facts to determine if some regulations go "too far" are not before this Court, nor any Court before it, and this Court cannot make the requested determinations.

Additionally, Plaintiffs are at ease with the knowledge of their ownership of their groundwater and await the opportunity to be restored their 300 acre feet, or present their evidence in a Trial Court that will evaluate how much of their private property has been taken and the value thereof.

CLOSING

In closing, Day/McDaniel repeat the words of *Davis v. State*, 21 S.W. 2d 509, 511 (Tex.Crim.App.-1929) in addressing the protections of the Constitution:

> The Constitution holds too sacred the privacy of home to permit this. As was said by Lord Chatham: "The poorest man in his cottage may bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind May blow through it; the storm may enter; the rain may enter; but the King may not enter, and all his forces dare not cross the threshold of the ruined

tenement.' We cannot believe in the doctrine that **Constitutions** may be enlarged, amended, or repealed by interpretation, and whenever the provisions of the **Constitution** are violated, and officials, either ministerial, executive, or legislative, attempt the enforcement of rules and regulations violative of its provision, the courts, anchored close to the **Constitution**, have never hesitated to call them back to the limits of that instrument."

PRAYER

The Petition for Review by the State of Texas should be in all things **DENIED.**

Respectfully submitted,

TOM JOSEPH, P.C.
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BY: _____
TOM JOSEPH
State Bar No. 11030000
ATTORNEYS FOR BURRELL DAY and JOEL McDANIEL

CERTIFICATE OF SERVICE

I, TOM JOSEPH, hereby certify that a true and correct copy of the foregoing Response to Petition for Review by the State of Texas has been served by certified mail-return receipt requested, or regular mail, on counsel of record/interested parties as shown below on the on the 5th day of May, 2009.

TOM JOSEPH

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ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 8, 2005

Mr. Jerome T. Brite
District Clerk
One Courthouse #4B
Circle Drive
Jourdanton, TX 78026

Re: *Burrell Day and Joel McDaniel v. The Edwards Aquifer Authority v. State of Texas*, Cause No. 04-04-0294-CVA, In the 218th District Court of Atascosa County, Texas

Dear Mr. Brite:

Please file the following enclosed papers: Original Answer of Defendant State of Texas.

Enclosed is an extra copy for filemarking and return to me in the enclosed self addressed envelope.

Thanks you for your cooperation in this matter.

Sincerely,

Brian E. Berwick

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Cause No. 04-04-0294-CVA

BURRELL DAY AND JOEL McDANIEL, Plaintiffs, V. THE EDWARDS AQUIFER AUTHORITY, Defendant, V. STATE OF TEXAS, Third Party Defendant.	§ § § § § § § § § § § § § §	IN THE DISTRICT COURT ATASCOSA COUNTY, TEXAS 218TH JUDICIAL DISTRICT

STATE OF TEXAS'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

The State of Texas, third-party defendant in the above case, responds to the claims in the plaintiffs' petition and the third-party plaintiff's petition that allege liability under article I, § 17, of the Texas Constitution ("the taking allegations"). The State denies all of the taking allegations and demands strict proof thereof.

As to the balance of the allegations of the plaintiffs and the third-party plaintiff, if and to the extent they are directed against the State, the State asserts the defense of sovereign immunity. Subject to this defense, the State denies all of the allegations and demands strict proof thereof.

The State of Texas requests that the parties' allegations (other than their takings allegations), if and to the extent they are directed against the State, be dismissed for want of court jurisdiction. The State of Texas requests that the plaintiffs and the third-party

plaintiff take nothing by their taking allegations. The State requests that the plaintiffs and the third-party plaintiff pay all costs.

Respectfully submitted,

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ATTORNEYS FOR THE STATE OF TEXAS

CERTIFICATE OF SERVICE

On July 8, 2005, I served the above and foregoing on each person on the list below, by the method shown.

Brian E. Berwick

Brian E. Berwick

LIST OF PERSONS SERVED

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