

Tom Joseph, P.C.

Attorneys at Law
909 N.E. Loop 410, Suite 600
San Antonio, Texas 78209-1368

(210) 828-9092

Facsimile (210) 828-2363

TOM JOSEPH, General Practice and
Board Certified-Civil Trial Law
Board Certified Commercial Real Estate Law
Board Certified Farm & Ranch Real Estate Law
Board Certified Residential Real Estate Law
Texas Board of Legal Specialization
MEDIATOR and Member of the Texas
Association of Mediators

WES HOLLAND, General Practice

Marcy Leigh Wells, Paralegal

June 9, 2010

The Supreme Court of Texas
Blake A. Hawthorne, Clerk
P.O. Box 12248
Austin, Texas 78711

Re: Cause No. 08-0964
The Edwards Aquifer Authority and State of Texas v. Burrell Day and Joel McDaniel

Dear Mr. Hawthorne:

This letter is written in reply to the Amicus Brief filed in the above referenced cause, by the Honorable Robert Duncan, State Senator from District 28.

Day/McDaniel agree “the legislative challenge has been to establish and refine a carefully balanced policy for groundwater management and conservation that recognizes (aquifer diversity).”

Day/McDaniel do not agree that the only rule established by *Houston & Texas Central Railway Company v. East*, 81 S.W.279 (Tex. 1904), was the rule of capture. Indeed, as Justice Barrow stated in *City of Sherman v. Public Utility Commission*, 643 S.W.2d 681, 686, there are two rules established by the *Houston v. East* case; that of absolute ownership of groundwater, and the corollary rule of capture. Senator Duncan’s Brief does not address the prior, only the latter. Both have already been fully addressed in the Day/McDaniel Briefing before the Court, detailing the manner in which the two rules work in tandem. Groundwater belongs to the landowner, and once it leaves the landowner’s property, it is subject to the ownership of others by capture.

Senator Duncan in his Brief, does not address §1.07 of the Edwards Aquifer Act which clearly recognizes landowner ownership of groundwater, even though it required at least the consent of a majority of the august body of the Legislature in which he sits.

Indeed, this Court in confirming landowner ownership of groundwater, will not create “wholesale changes to the deliberate decision made by the legislature pursuant to its exclusive constitutional obligations,” since immediately preceding §1.07 of the Act, the Legislature recites that the Act is authorized by Texas Constitution Art. XVI, §59(a) (the Natural Resource Conservation clause), and proceeds to declare the ownership of groundwater by the landowner, the taking of which requires compensation. (Day/McDaniel Brief on the Merits, pg. 9).

Page -2-
June 9, 2010

Day/McDaniel rely upon the sanctity given the Texas Constitution by its Courts, and its Legislature.

Respectfully submitted,


TOM JOSEPH, P.C.

TJ:mw

cc: Andrew S. Miller
Pamela Stanton Baron
Kristofer S. Monson
Brian Berwick
Senator Robert Duncan