NO. 08-0964

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

EDWARDS AQUIFER AUTHORITY and
STATE OF TEXAS

Petitioners/Cross-Respondents

v.

BURRELL DAY and JOEL McDANIEL

Respondents/Cross-Petitioners

PETITION FOR REVIEW OF BURRELL DAY AND JOEL MCDANIEL

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3) Does Tex. Water Code Ann. §36.066(g)(Vernon 2008), which mandates attorney fees only to the District, should it prevail, violate the "equal protection" provision of the Texas Constitution?

Issues 4 & 5 are not briefed.

4) Did the District act arbitrarily and unreasonably in reversing its findings the application for an Initial Regular Permit by Day/McDaniel which met all technical and administrative requirements for an IRP (Initial Regular Permit) for 600 acre feet from date of filing on December 30, 1996, until November 8, 2000, while in the interim permitting the construction of a new irrigation well at a cost of $95,000.00? The Court of appeals erred in failing to consider whether the denial of a 600 acre feet permit, after approving the construction of a new well with authorization to pump 600 acre feet, was an arbitrary or unreasonable act of the EAA since the matter was raised at all levels of this controversy including the administrative hearing; CR 762-766; CR 3116; CR 419-420, 425, 437; CR 3172-3174: at the trial of the Cause; RR 74-78: in the appellate brief, pages 38-40.

   a. This is not a re-litigation of the interlocutory opinion since the statute in question, TEX. GOV'T CODE ANN. § 2001.174(2)(A-F) (Vernon 2000) has viability, after the application of the substantial evidence rule during the receipt of evidence, as it addresses matters such as arbitrariness which can be determined only after final judgment of the trial court.

   b. Did the EAA Board act arbitrarily and unreasonably in denying the 600 acre feet permit when for 46 months its staff had approved a 600 acre feet permit and in reliance thereon, Day/McDaniel drilled the well authorized at a cost of $95,000.00? CR 725.

5) Does the Act in requiring proof of historic use, which may not or did not exist, unconstitutionally deny the citizen ownership of property in which a vested right exists, and which existed prior to the enactment of the Act. *Note*: The Court of Appeals' decision holds that certain of the constitutional issues identified here were not raised in the Trial Court, and therefore, could not be raised for the first time on appeal. Excerpts from the Clerk's record, showing the opportunity of the Trial Court to consider same are found at. CR 254-256; 259; 260; 421; CR408, 410; 245; 5-6; *El Paso Natural Gas Co. v. Minco Oil and Gas, Inc.,* 8 S.W.3d 309, 316 (Tex. 2000); *Perry v. Cohen,* 52 Tex.Sup.Ct. J. 105, 107 (Tex. Nov. 14, 2008).

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Plaintiffs that their application was determined to be administratively and technically complete.

b) Letter from General Manager of EAA (dated 1 December 1999) approving change of point of withdrawal for initial regular permit application.

c) Letter from General Manager of EAA (dated 10 December 1999) advising Plaintiffs of determination by EAA to permit construction of new well.

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11. Affidavit of Billy T. Mitchell and Bret D. Mitchell, which was attached to application to EAA as proof of water withdrawal during historical period.

a) Affidavit of Robert Kurz, attached to application to EAA as proof of water withdrawal and beneficial use during historical period.

b) Affidavit of Tommy Fey, attached to application to EAA as proof of water withdrawal and beneficial use during historical period.

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STATEMENT OF THE CASE

Nature of the Case:	Burrell Day and Joel McDaniel (Day/McDaniel) filed suit for judicial review of an Edwards Aquifer Authority (EAA) permitting decision, which granted Day/McDaniel an initial regular permit to pump fourteen acre-feet of water from the Edwards Aquifer, and alternatively, for damages arising from an unconstitutional taking of property without compensation. CR 1-16.
Trial Court:	Hon. Donna Rayes, 218th Judicial District Court, Atascosa County, Texas.
Disposition by Trial Court:	Granted Day/McDaniel's motion for summary judgment, holding that as a matter of law, substantial evidence did not support the EAA's conclusion that the water in question was state water rather than groundwater. Granted EAA's motion for summary judgment on Day/McDaniel's constitutional claims. CR 483-485.
Parties in the Court of Appeals:	Edwards Aquifer Authority, Appellant/Cross-Appellee; Day/McDaniel, Appellees/Cross-Appellants; State of Texas, Appellee.
Court of Appeals:	Fourth Court of Appeals District, San Antonio, Texas. Opinion by Justice Steven C. Hilbig, joined by Justice Karen Angelini and Justice Phylis Speedlin. *Edwards Aquifer Auth. v. Day*, ___ S.W.3d ___, 2008 WL 4056321 (Tex.App. – San Antonio Aug. 28, 2009, pet. filed).
Court of Appeals Disposition:	Trial court's judgment reversing EAA's final order reversed and judgment rendered affirming final order; judgment that Day/McDaniel take nothing on their unconstitutional taking claim reversed; cause remanded for consideration of EAA's request for attorney's fees and further proceedings on Day/McDaniel's unconstitutional taking claim.

JURISDICTION

The Texas Supreme Court has jurisdiction of this cause by virtue of Tex. Gov't Code Ann. § 22.001 (a), (3), (6) (Vernon 2004).

The decision in this case necessarily involves the interpretation and application of Tex. Water Code Ann. §§ 11.021(a) (Vernon 2008) and 36.066(g) (Vernon 2008)); Tex. Gov't Code Ann. §§2001.061, 2001.090, and 2003.0412 (Vernon 2000); Tex. CONST. article 1, §§ 3, 13, 16, 17, and 19. No case could be found which considered the interplay of these three provisions of the Government Code and how they deprive the citizen of due process and open Courts under the Texas Constitution in an appeal from an administrative decision. Likewise, no case could be found that declared groundwater becomes state water while entirely contained by the landowner.

While attorney fees were not authorized by the Act at the onset of this matter, they subsequently became mandatory in favor of the governmental agency only through the Water Code for the sole purpose of dissuading private citizens from challenging the act of the agency although the privilege of an appeal is given, thereby discrediting one of the pillars of the opinion in *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 633, 637 (Tex. 1996) which relied upon free and financially unencumbered access to judicial appeal.

ISSUES PRESENTED

1) Was the water used in the irrigation of the tract in question during the historic period Edwards Aquifer water or surface water?

2) Were Day/McDaniel denied their constitutional rights as a result of (a) being prohibited from presenting their claims at the Administrative level; (b) being required to participate in an Administrative hearing which permitted ex parte communication between the EAA and the Administrative Law Judge; (c) again being prohibited from presenting their claims in the Trial Court by the interlocutory mandate of the Fourth Court of Appeals that the "substantial evidence" rule must control the trial: which again resulted in excluding Day/McDaniel's claims, as applying the "substantial evidence" rule to the trial of the case prevented the introduction of any evidence not submitted at the Administrative hearing. Additionally, this rule further prevented the introduction of evidence of damages that had accrued to Day/ McDaniel from the loss of use of irrigation from the date of the decision of the EAA in April of 2003, to the date of trial, December, 2006. This was a denial of due process and their entitlement to open courts.

3) Does Tex. Water Code Ann. §36.066(g)(Vernon 2001), which mandates attorney fees only to the District, should it prevail, violate the "equal protection" provision of the Texas Constitution? CR 439-441.

Issues 4 & 5 are not briefed.

4) Did the District act arbitrarily and unreasonably in reversing its findings the application for an Initial Regular Permit by Day/McDaniel which met all technical and administrative requirements for an IRP (Initial Regular Permit) for 600 acre feet from date of filing on December 30, 1996, until November 8, 2000, while in the interim permitting the construction of a new irrigation well at a cost of $95,000.00? The Court of appeals erred in failing to consider whether the denial of a 600 acre feet permit, after approving the construction of a new well with authorization to pump 600 acre feet, was an arbitrary or unreasonable act of the EAA since the matter was raised at all levels of this controversy including the administrative hearing; CR 762-766; CR 003116; CR 419-420, 425, 437; CR 3172-3174: at the trial of the Cause; RR 74-78: in the appellate brief, pages 38-40.

   a. This is not a re-litigation of the interlocutory opinion since the statute in question, TEX. GOV'T CODE ANN. § 2001.174(2)(A-F) (Vernon 2000) has viability, after the application of the substantial evidence rule during the

receipt of evidence, as it addresses matters such as arbitrariness which can be determined only after final judgment of the trial court.

b. Did the EAA Board act arbitrarily and unreasonably in denying the 600 acre feet permit when for 46 months its staff had approved a 600 acre feet permit and in reliance thereon, Day/McDaniel drilled the well authorized at a cost of $95,000.00? CR 725

5) Does the Act in requiring proof of historic use, which may not or did not exist, unconstitutionally deny the citizen ownership of property in which a vested right exists, and which existed prior to the enactment of the Act. *Note*: The Court of Appeals' decision holds that certain of the constitutional issues identified here were not raised in the Trial Court, and therefore, could not be raised for the first time on appeal. Excerpts from the Clerk's record, showing the opportunity of the Trial Court to consider same are found at. CR 254-256; 259; 260; 421; CR408, 410; 245; 000005-06; *El Paso Natural Gas Co. v. Minco Oil and Gas, Inc.,* 8 S.W.3d 309, 316 (Tex. 2000); *Perry v. Cohen,* 52 Tex.Sup.Ct. J. 105, 107 (Tex. Nov. 14, 2008).

STATEMENT OF FACTS

Petitioners Day/McDaniel disagree with the recitation of facts in the Court of Appeals' decision in the following particulars:

Page 4 of the Opinion, the Court is incorrect in asserting there was no pumping of groundwater during the historic period. The Trial Court was presented with evidence that during 1972, the well in question pumped 39 million gallons and in 1973, 13.1 million gallons, CR1504-1505, and the Court of Appeals received the same evidence by way of Day/McDaniel's Cross Appellant's Appendix 1 at Tab 26. Both years were in the historic period. The evidence reflected it was a record of a federal governmental agency, the United States Geological Survey Department. Thus, there was proof of historic use.

Page 4: Proof of the amount of pumpage in support of an application was not mandatory. Edwards Aquifer Act §1.16(e) authorized the Authority to calculate usage of water in the event an entire year's usage had not been measured, or if the Applicant was an irrigator, two acre feet would be awarded as a minimum. Plaintiffs' Original Petition is attached hereto at Apx. 2, tab 1, CR 1-16 which further addresses the fact.

The Court of Appeals' opinion fails to state the water in question was used entirely on the landowner's property on which the well was located, on which the ditches existed, on which the reservoir was constructed, and on which land the water was used to irrigate. The water never left the control of the landowner, and the landowner made no claims of ownership of groundwater after it left the property. CR 2-5; CR 773-777. It is undisputed that while the water was located on the Day/McDaniel tract, it never left control of the landowner.

SUMMARY OF ARGUMENTS

Issue 1

Groundwater under the facts of this case did not become state water because:

A) It originated as well water from the Edwards Aquifer through a Day/McDaniel water well.

B) The groundwater remained under the control of the landowner throughout its use for irrigation on Day/McDaniel property.

C) The Legislature has opted not to include groundwater in its classification of what constitutes state water. Tex. Water Code Ann. § 11.021(a)(Vernon 2008).

D) The Legislature has specifically recognized the co-mingling of groundwater and surface water to achieve maximum benefits of each. Tex. Water Code Ann. § 36.001(21)(Vernon 2008).

Issue 2

Day/McDaniel have been denied their constitutional right to due process, because the EAA prohibited their hired Administrative Law Judge from hearing any evidence relating to the Day/McDaniel's claims of damages and denial of constitutional rights, and upon authorized appeal from the EAA ruling, the EAA with the affirmance of the Court of Appeals, constricted the Trial Court to hear only such evidence as had been presented to the Administrative Law Judge whose "Proposal for Decision" was adopted en toto by the EAA.[1] This Court should not allow a Conservation District to determine what issues exclusively will be heard administratively, and thereafter mandate the judiciary not hear matters which were excluded by the District. This Court should announce the Rule in

[1] At the time the EAA adopted the proposal for decision, its rules provided only 5 minutes per side for hearing. Edwards Aquifer Rules § 707.619(e).

such matters to be "substantial evidence de novo." This likewise would also permit evidence of damage which accrued in the interim between the District's decision and the Trial Court's judgment, should the District's decision be reversed, as was the case here.

Issue 3

Day/McDaniel contend Tex. Water Code Ann. § 36.066(g)(Vernon 2008) is designed to intimidate all citizens from challenging the decision of the District, even though Edwards Aquifer Act § 1.07 itself trumpets its shield of the constitutional rights of landowners. No valid exercise of legislative power can justify Tex. Water Code Ann. § 36.066(g)(Vernon 2008) mandatory attorney fees only for the District should it prevail and not the citizens should the citizens prevail. When the appeal was taken by Day/McDaniel in this cause it was fully authorized by the Texas Water Code and the Act itself. Day/McDaniel are now faced with returning to the Trial Court, which is mandated to award attorney's fees, which exceed hundreds of thousands of dollars, and at the same time the trial court will hear their taking claims which may result in an award of damages but no attorney fees.

This Court needs to clarify the entitlement to attorney's fees by the EAA under the Fourth Court's ruling, which attorney's fees were incurred in the wrongful denial of Day/McDaniel's demands that their "takings" claims be heard. Had such claims been heard on the Administrative level, the entire law suit may have been obviated.

ARGUMENT AND AUTHORITIES

1. Day/McDaniel contend that the groundwater did not become state water.

The Fourth Court does not credit Tex. Water Code Ann. §11.021(a) (Vernon

2008) with its clear intent. It was not, and is not the legislative intent to include "groundwater" in the definition of state water. The Legislature has had numerous occasions over 40 plus years, and different amendments to include "groundwater" as state water. Tex. Water Code Ann. §11.021(a)(Vernon 2008) historical and statutory notes. Water emanating from a drilled well has not been included as "state water" and as of this writing, such water remains "groundwater," not state water.

The Court in the *City of San Marcos v. Tex. Comm'n on Envtl Quality,* 128 S.W.3d 264, 277 (Tex.App.-Austin 2004, pet. denied) which the Fourth Court has cited, quoted with approval the language found at footnote No. 15:

> The common law has long recognized that continued ownership rights over property acquired by capture depends on maintaining a degree of control. According to the Supreme Court of Pennsylvania: Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturne.* In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner...They belong to the owner of the land, are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone.

Id. at 277 (emphasis added).

The Fourth Court's opinion relies heavily on the fact that the Mitchells (predecessors in title) did not have any gauge or means of knowing how much water they used in the irrigation process. While the case above cited refers to measurements, the Act itself recognized users may not have measured the water used and as a result, mandated two acre feet for each acre irrigated in the historic period. Edwards Aquifer Act § 1.16(e). Diligent search revealed no law or regulation which required measurement of

water used to irrigate bermuda grass upon which to graze cattle during the historic period. In *Bartley v. Sone*, 527 S.W.2d 754, 755, 760-761 (Tex.Civ.App.-San Antonio 1975, writ ref'd n.r.e.), underground water was discussed:

> Plaintiff specifically pleaded that the springs were located wholly on his land, and the trial court expressly so found. Under the doctrine applied in Burkett, in the absence of evidence to the contrary, it must be presumed that the springs were of such character that plaintiff had the right to use their waters for any purpose.

Id at 760.

As here, the ditch and the water were all on the same land. And, the Court addressing specifically the need for an appropriation permit asserted by the opposition, stated:

> Plaintiff's claim to exclusive ownership of the water because the springs are located wholly on his land is established without resort to the doctrine of implied findings.
>
> Defendants presented several points based on alleged defects in CF 885, filed by Hutcherson in 1916. These contentions are without merit, in view of our conclusion that plaintiff was the exclusive owner of the water flowing from the springs and that his rights do not depend on compliance with the statutes concerning appropriation.

Id at 761.

If the question is control, no party in any of the court opinions can or could show more control over groundwater than Day/McDaniel and the facts in this case. The groundwater never left the property during its use. It is even questionable if it ever left the property at any time unless pushed over the spillway by a heavy rain. CR 3116.

The Court has utilized Tex. Water Code Ann. §§11.042 and 11.023(Vernon 2008) in concluding "groundwater" becomes "state water," but fails to recognize Tex. Water

Code Ann. §11.021(a) (Vernon 2008) does not include groundwater in its definition. The Court ignores Tex. Water Code Ann. §11.001(Vernon 2008) which states:

> (a) Nothing in this code affects vested private rights to the use of water, except to the extent that provisions of Subchapter G of this chapter might affect these rights. (emphasis added).

Subchapter G is identified as Tex. Water Code Ann. § 11.301(Vernon 2008) *et seq.* Obviously, the sections of the Water Code utilized by the Court to insert "groundwater" into the definition of state water found in Tex. Water Code Ann. § 11.021(a)(Vernon 2008), are inappropriately relied upon to support the Court's opinion that groundwater becomes state water, since such provisions apply only after water is determined to be state water.

2. Day/McDaniel were denied their constitutional rights when the EAA mandated what matters could be heard at the Administrative level and ultimately at the trial of this matter.

Plaintiffs were denied the right to present their issues to the Administrative Law Judge, since only the EAA could contract the services of the Administrative Law Judge, and therefore instruct her to hear only one issue, See CR714-18; CR969-975 and Conclusions of Law No. 8 & 11, CR 784, 785. This effectively denied Plaintiffs access to a hearing for issues they deemed were involved in the controversy. CR 3117. This resulted in the denial of any fairness of such hearing. CR 1126-34 and Edwards Aquifer Rules § 707.619(e). This unfairness is compounded by fundamental authority of the Administrative Law Judge to conduct ex parte communications without disclosure to Day/McDaniel who were attempting to prevent the violation of their constitutional rights. The Fourth Court's Opinion notes "no allegation of ex parte communication is made in

this case." The Court does not explain how any applicant could complain of a matter if it is secretly kept from the Applicant (*Edwards Aquifer Auth. v. Day,*____ S.W.3d ___ , 2008 WL 4056321, Footnote 12, (Tex.App.-San Antonio Aug. 29, 2008, pet. filed)). Day/McDaniel contend this secretive process is a denial of due process. *Lewis v. Guar. Fed. Sav. & Loan Ass'n.,* 483 S.W.2d 837, 841 (Tex.App.-Austin 1972, writ ref'd n.r.e.).

Day/McDaniel sought to litigate the issues they were prevented from hearing at the administrative level in the Trial Court. Initially, the Trial Court, harmonized the substantial evidence rule with Day/McDaniel's entitlement to have heard their "takings" complaint and the damages flowing from such "taking" since April, 2003, the date of the EAA's ruling, [2] until the time of trial by ruling the "substantial evidence trial de novo" rule would control the evidentiary hearing. CR404. However, upon appeal by the EAA, the Fourth Court reversed the Trial Court and ordered the trial to be conducted only on the substantial evidence rule. *In re Day, supra;* CR410. Thus, Day/McDaniel were again denied an opportunity to have redress against their government for the wrongful taking of their property, violating TEX.CONST. aritcle 1 § 3.

In Plaintiffs' quest to find the evidence the EAA relied upon to disavow the Mitchell's Affidavit, the General Manager, Greg Ellis, was deposed. Mr. Ellis testified that he found no part of the evidence submitted by Plaintiffs to be untrue; that there is no other evidence available, and that it was only his opinion that the evidence provided was

[2] The EAA General Manager had found there was "clear and convincing" evidence to award an IRP for 600 acre feet. Subsequently, almost four (4) years later, the General Manager determined there was no "clear and convincing" evidence, and for which reversal of recommendation, no evidence has been shown to show it was not arbitrary. CR000924, CR000838.

insufficient. CR 2129. He did not offer an explanation as to why his opinion for forty-six (46) months, that the evidence submitted which was found to be "convincing," and technically and administratively compliant, was not now sufficient. In the forty-six month interim, Day/McDaniel constructed a $95,000.00 irrigation well under permit granted by the EAA, which was now absolutely useless for its intended purposes, i.e., to pump 600 gallons per minute.

3. Attorney's Fees

A. Day/McDaniel contended in the Trial Court the statute awarding attorney's fees only to the governmental agency, if it prevails, and not to the private citizen, should the citizen prevail, is unconstitutional.

The Trial Court denied all constitutional challenges of Day/McDaniel, CR483-486, (Final Judgment) and denied attorney's fees to the EAA on the grounds the EAA had not prevailed. CR485. Day/McDaniel pled for attorney's fees in their original petition, but were, upon Motion to Strike filed by the EAA, denied any attorney's fees. CR407. Day/McDaniel reversed the EAA ruling denying them an Initial Regular Permit (IRP) to pump 300 acre feet of Edwards Aquifer water, and thus prevailed, but were denied an award of attorney's fees. CR485.

The Fourth Court of Appeals affirmed the Trial Court's denial of Day/McDaniel's constitutional challenges as to all such challenges, except the Day/McDaniel contention that groundwater was their private property and under the Constitution, they were entitled to damages for the wrongful taking of such property. (*Edwards Aquifer Auth. v. Day,*____ S.W.3d ___ , 2008 WL 4056321, Footnote 12, (Tex.App.-San Antonio Aug. 29, 2008, pet. filed) Page 15). Additionally, the Fourth Court of Appeals reversed the

Trial Court and remanded the matter of attorney's fees to be awarded to the EAA to the Trial Court. (*Edwards Aquifer Auth. v. Day,*____ S.W.3d ___ , 2008 WL 4056321, Footnote 12, (Tex.App.-San Antonio Aug. 29, 2008, pet. filed) P. 25).

The Edwards Aquifer Act (see Attachment 2) makes no provision for the award of attorney's fees to the EAA. However, the Tex. Water Code Ann. § 36.066(g)(Vernon 2008) provides mandatory attorney's fees for a conservation district in the following terms:

> (g) If the district prevails in any suit other than a suit in which it voluntarily intervenes, the district may seek and the court shall grant, in the same action, recovery for attorney's fees, costs for expert witnesses, and other costs incurred by the district before the court. The amount of the attorney's fees shall be fixed by the court.

Added by Acts 1995, 74th Leg., ch. 933, §2, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 966, §2.43, eff. Sept. 1, 2001.

There is no provision in the Water Code, nor in the Edwards Aquifer Act, providing for attorney's fees and costs for the private citizen should the private citizen prevail, most especially should the citizen prevail upon constitutional grounds, as indeed Day/McDaniel have done in this case.

B. How Is the Texas Constitution Violated by an Act Authorizing the Award of Attorneys Fees Only to the Conservation District, Should it Prevail?

Article 1 §3 of TEX. CONST. reads as follows:

> **§3 Equal rights.**
>
> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

TEX. CONST. article 1 §3 is violated by Tex. Water Code Ann. § 36.066(g)(Vernon 2008) in that the state is the favored party if it should prevail in litigation with a citizen, rather than the citizen, should the citizen prevail, thus denying equal rights.

C. Ownership of Groundwater

This Court in deciding these issues is directed to Edwards Aquifer Act § 1.07, which delineates the Legislature's intentions in the empowerment of the Edwards Aquifer Authority.

> The ownership and rights of the owner of the land and the owner's lessees and assigns, including holders of recorded liens or other security interests in the land, in underground water and the contract rights of any person who purchases water for the provision of potable water to the public or for the resale of potable water to the public for any use are recognized. However, action taken pursuant to this Act may not be construed as depriving or divesting the owner or the owner's lessees and assigns, including holders of recorded liens or other security interests in the land, of these ownership rights or as impairing the contract rights of any person who purchases water for the provision of potable water to the public or for the resale of potable water to the public for any use, subject to the rules adopted by the authority or a district exercising the powers provided by Chapter 52, Water Code. The legislature intends that just compensation be paid if implementation of this article 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, 73rd Leg. R.S., ch. 626 §1.07, 1993 Tex.Gen.Laws 2350.

There are three (3) points made clear in Edwards Aquifer Act § 1.07:

1) The owner of the land owns the water beneath it.

2) The Act is not to be an excuse for the taking of such groundwater from the landowner.

3) If in the exercise of its empowerment, the Edwards Aquifer Authority shall take private property, just compensation shall be awarded.

D. The Act attempts to protect Constitutional Rights

The avowed purpose of the Edwards Aquifer Act is to regulate the use of Edwards Water and its conservation while ensuring the private property rights of the landowner against a taking of such property in violation of the landowner's constitutional rights. Edwards Aquifer Act § 1.07 publicly enunciates the dignity of private ownership of groundwater and thereby enables the owner of such property to claim compensation for the taking. Such is the declared purpose of Edwards Aquifer Act § 1.07.

E. Accordingly, it is incumbent upon the citizen to file suit in protection of constitutional rights

Absent the citizen's suit, the judiciary will be ignorant of the violation of the landowner's property rights.

F. Tex. Water Code Ann. § 36.066(g)(Vernon 2001) violates the equal protection clause of the Tex. Const. article 1 § 3

In *First Texas Prudential Ins. Co. v. Smallwood,* 242 S.W. 498, 505-506 (Tex.App.-Beaumont 1922), the Court cited with approval *Gulf, C.& S.F, Ry. Co., v Ellis,* 165 U.S. 150,152-164, 78 S. Ct. 255, 256-259, 41 L.Ed. 666 (1897), which dealt with the constitutionality of a Texas statute that awarded attorney's fees to a claimant, but not to the Defendant, should the Defendant be successful in the defense of the suit. The Court, in declaring the statute to be a denial of the equal protection of the law, stated:

> If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is not sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated, and are not treated as others. They do not receive its equal protection. This inequality and injustice cannot be sustained

> upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist.

Lafferty v. Chicago & W.M. Ry Co., 38 N.W. 660 (Mich. 1888).

An Act which penalizes a private citizen with exposure for an entire agency's attorney's fees and costs creates a most chilling effect, as in this case when five to seven attorneys have been engaged by the Agency that is now demanding hundreds of thousands of dollars in attorney's fees and costs under Tex. Water Code Ann. § 36.066(g) (Vernon 2008). CR490.

G. Frivolous Lawsuits.

1) Appeals

If indeed Tex. Water Code Ann. § 36.066(g) (Vernon 2008) is to prevent frivolous lawsuits, an appeal which is authorized by the Act, (originally Section 1.11(h) repealed)), the Tex. Water Code Ann. §§ 36.251-36.254 (the applicability to which this proceeding is advocated by the EAA) and Tex. Gov't CodeAnn. § 2001.174 (Vernon 2008); *In Re Edwards Aquifer Auth.*, 217 S.W.3d 581, 587(Tex.App.-San Antonio 2006, orig. proceeding) should not be frivolous. A reading of the statutes reveals nothing by which to conclude an appeal from the decision of the EAA regarding a Permit Application is frivolous, nor does the entitlement to appeal under the Water Code "smack of such frivolity" so as to warrant attorney's fees for the Agency only if the purpose is to discourage frivolous lawsuits.

2) The silence of the Code.

The Code, as well as the Act, is devoid of any indication that their purpose is thwarted by a private citizen's appeal from a decision of the Agency affecting groundwater access and ownership. There fails to be any legislative or judicial reason to place the "blade of the guillotine" above the neck of the citizen in the form of mandatory attorney's fees, should such citizen "doth protest," unsuccessfully, yet not frivolously.

H. The necessity of private citizen litigation

The ownership of groundwater has traditionally been a common law and statutory right. Edwards Aquifer Act § 1.07; *Houston & T.C. Ry. v. East,* 98 Tex. 146, 149, 81 S.W. 279 (1904); *Bartley v. Sone,* 527 S.W.2d, 754, 759, 760 (Tex.Civ. App.-San Antonio, 1975, writ ref'd, n.r.e.); *South Plains Lamesa R.R., Ltd. v. High Plains Underground Water Conservation Dist. No. 1,* 52 S.W. 3d, 770, 776 (Tex. App.-Amarillo 2001, no pet), Tex. Water Code Ann. § 36.002.

The doctrine is thus stated:

> That the person who owns the surface may dig therein and apply all that is there found to his own purpose, at his free will and pleasure, and that if, in the exercise of such rights, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to this neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action.

Houston & T.C. Ry. v. East, 98 Tex. 146, 149, 81 S.W. 279 (1904).

In *South Plains Lamesa R.R., Ltd. v. High Plains Underground Water Conservation Dist. No. 1,* 52 S.W. 3d 770 (Tex.App.-Amarillo 2001, no pet.), the following is found:

> After defining certain terms and stating the purpose of groundwater districts, in Section 36.002, the Legislature confirmed ownership rights of groundwater..... the Legislature recognized the rule of capture as it applies to groundwater according to the decisions of the Texas Supreme Court in *Houston & T.C. Ry. Co. v. East,* 98 Tex. 146, 81 S.W. 279 (Tex. 1904) and *City of Corpus Christi v. City of Pleasanton,* 154 Tex. 289, 276 S.W.2d 798, 801 (Tex. 1955).

Id at 776 (emphasis added).

No support in law or reality justifies the acrimony of Tex. Water Code Ann. § 36.066(g) (Vernon 2008). It is purely intended to intimidate otherwise well-meaning citizens who seek to invoke the constitutional shield against egregious government action by legitimate appeal authorized by the Legislature.

I. The "Barshop" supreme court ruling that the Act does not impede a party's access to a water permit

Day/McDaniel are not unmindful of the ruling of this Court in *Barshop v. Medina County Underground Water Conservation Dist.,* 925 S.W.2d 618 (Tex. 1996), which held:

> We cannot discern that any of the open court guarantees are even implicated by the permitting process of the Authority. The courts are available and operational to Plaintiffs after an appeal from a decision of the Authority; the Legislature has not provided any unreasonable financial barrier to impede Plaintiffs' access to a permit decision or an appeal of that decision; and the Act has not abrogated any right to assert a well-established common law cause of action. We conclude that the permitting process contained in the Edwards Aquifer Act does not violate the open courts provision of the Texas Constitution.

Id at 637.

In addition to holding the Act facially constitutional, while reserving for itself the constitutional examination of the Act after its application, (*Id* at. 626), the Court did not

have before it the following:

1) a statute which mandated attorney's fees only for the agency irrespective of the success of the citizen in the appeal which would definitely bear upon the issue of "financial burden;"

2) nor was the Court presented with an application of the Act whereby the EAA summarily excluded from the administrative hearing the citizen's constitutional claims, CR714-717; CR1126-1132 and subsequently invoked the "substantial evidence" standard of review upon the reviewing trial court in, *In re Edwards Aquifer Auth.* 217 S.W.3d, 581 (Tex.App–San Antonio 2006, orig. proceeding);

3) the provision within the Act relied upon by the Court, having since been repealed. Edwards Aquifer Act § 1.11(h) 2001.

In the Administrative hearing, the EAA contended the Water Code had no Application to the EAA, since the EAA was spawned by Special Legislation. CR772; CR749. With Edwards Aquifer Act § 1.11(h) repealed, the Act itself no longer has any provisions for appeal regarding permit denial. The "leap" to the Water Code for appellate review requires this Court to affirm this process of review in order to insure appellate review for subsequent actions of the agency for which citizens may legitimately seek redress.

PRAYER

Day/McDaniel pray of this Court that it grant the petition for review, reverse the Fourth Court of Appeals, and restore the Trial Court's Order requiring the Edwards Aquifer Authority to issue the Initial Regular Permit for 300 acre feet annually; and, that this Court declare Tex. Water Code Ann. § 36.066(g)(Vernon) to be unconstitutional; that this Court, should it remand the cases to the Trial Court, decree Day/McDaniel are not bound by the Substantial Evidence Rule in the trial of their "takings" case; and the Government Code provisions which authorize ex parte communications are invalid, if not revealed to the Applicant; and any and all other relief to which Day/McDaniel may show themselves entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, TOM JOSEPH, hereby certify that a true and correct copy of the foregoing Petition for Review of the Cross-Appellants' Burrell Day and Joel McDaniel, has been served by certified mail-return receipt requested, or regular mail, on counsel of record/interested parties as shown below on the 2nd day of February, 2009.

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