NO. 08-0964

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In the Supreme Court of Texas

EDWARDS AQUIFER AUTHORITY and THE STATE OF TEXAS
Petitioners,

v.

BURRELL DAY and JOEL McDANIEL,
Respondents

REPLY BRIEF ON BEHALF OF BURRELL DAY AND JOEL MCDANIEL TO THE RESPONSE BRIEF OF THE STATE OF TEXAS

Oral Argument Requested

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

ARGUMENT & AUTHORITIES

I. Day/McDaniel persist in their objection to the State as a proper party in this appeal.

Jurisdiction of this Court to hear the State's Petition for Review was initially challenged. (*See* Day/McDaniel's Response to Petition for Review by the State of Texas, pg. 2). The basis for the objection is standing: the State did not bring an appealable judgment to the Court of Appeals from the Trial Court, and therefore could not appeal to this Court. The State responded that it was unnecessary since the State was brought into the case based upon Constitutional claims which were all denied by the Trial Court, and hence no appeal was necessary. (State's Reply in Support of Petition for Review, pgs. 5-7).

Arguing further, the State alleges it was required to petition this Court when the Court of Appeals ruled that Day/McDaniel had vested rights in groundwater. The State contends its presence is authorized before this Court because it involves the interpretation of a statute. Which statute? Water Code §11.021(a) dealing with the definition of surface water, or §1.07 of the Edwards Aquifer Act, dealing with recognition of the landowners ownership of groundwater? Remarkably, the State totally ignores §1.07 of the Act. Instead, it focuses on whether groundwater is surface water. But that is precisely the issue which the Trial Court decided in favor of Day/McDaniel (1.CR.483-87, paragraph 3), wherein the Court ruled groundwater from the reservoir was not State water. Is that not what the State now argues? At what point in the record does the State

claim it made appropriate appeal? Not having briefed the issue before the Court of Appeals, it has no standing to do so before the Court today. *Bunton v. Bentley*, 153 S.W.3d 50-53 (Tex. 2004). The State has no standing to respond to the Brief on the Merits of Day/McDaniel in this Court.

SUBJECT TO THE FOREGOING, DAY/MCDANIEL REPLY TO THE RESPONSE BRIEF OF THE STATE OF TEXAS TO DAY/MCDANIEL'S BRIEF ON THE MERITS.

In the opening statement of its response, the State emphasizes the rule called for by Day/McDaniel, according to its interpretation, would have a serious impact on its efforts to manage water resources for the good of the public. While the executive branch of our State may have concerns, it is not the branch which has the power to achieve such management. (State's Response Brief (SRB) pg. 17). It is the Legislature which has the responsibility and power. The Legislature has clearly set out its plan for such management of the Edwards Aquifer by enacting the Edwards Aquifer Act. What is immediately apparent is that the State's Response Brief totally ignores a discussion of §1.07 of the Act, which was placed there by the Legislature for a very specific reason; management of the State's water resources will not be construed to be a taking of groundwater rights without compensation. If the State had addressed this section, it would have been required to admit the State's management of its water resources cannot take groundwater ownership from the landowner without compensation.

II. **The Statement of Facts set forth by the State (SRB pg. 2), cites three cases which it concludes support its position in this case, vis, that the groundwater emanating from the Day/McDaniel well became State water when it entered a watercourse; *Sun Underwriting Ins. Co. of N.Y. v. Bunkley*, 233 S.W.2d 153, 155 (Tex.Civ.App.–Fort Worth 1950, writ ref'd), *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 169, 96 S.W.2d 221, 228 (1936), and *Bass v. Taylor*, 126 Tex. 522, 530, 90 S.W.2d 811, 815 (1931). None of these cases support the State's position.**

A. In the *Bunkley* case, the Court of Civil Appeals made a statement which is italicized in the State's brief that "surface water is generally defined as that which is derived from falling rain or melting snow, or *which rises to the surface in springs,* and is diffused over the surface of the grounds."

The *Bunkley* case relied entirely upon out-of-state cases to support that conclusion. (Pg. 155). While in the same breath that Court cited *Texas Co. v. Burkett,* 117(a) Tex. 16, 296 S.W. 273, 54 ALR 1398, for a definition of floodwaters, totally ignoring the *Texas Co.* Court, in its declaration that spring waters are presumed to be percolating waters owned by the landowner, and, in which case this Court is reminded, specifically held that the landowner could excavate right next to the spring and access underground water, which would belong absolutely to the landowner. (*Texas Co.* at pg. 278). In this case, of course, the *Bunkley* opinion has no relevance, since the water in question emanated from a man made well which accessed underground percolating water. (Findings of Fact, #6 and #7, 1.SCR.0780).

B. *Turner V. Big Lake Oil Co.*, 128 Tex. 155, 169, 96 S.W.2d 221, 228 (1936), made the statement quoted by the State, but then refused to hold the watering holes for cattle in Garrison draw were surface waters or State waters, even though the watering holes of the Plaintiffs were in the draw itself.

In fact, the *Turner* Court, in its questioning of the constitutionality of a statute, identical to §11.021(a) of the Water Code, in discussing the ecological range of our State said: "This land of decreasing rainfall is the great ranch or livestock region of the State, water for which is stored in thousands of ponds, tanks and lakes on the surface of the ground. The country is almost without streams; and without the storage of water from rainfall in basins constructed for the purpose, or to hold waters pumped from the earth, the great livestock industry of West Texas must perish." (Emphasis added). The *Turner* Court went on to challenge the application of the statute to private property water holes even though enormous, which were contained in Garrison draw (pgs. 226, 228), and as are found in the fact recitation and opinion of the lower Court at 62 S.W.2d 491, 493 (Tex.Civ.App. 1933).[1]

Bass v. Taylor, supra, likewise offers no support. The facts are not remotely similar. There the Plaintiffs sued to enjoin the Defendant from building a dam to protect his lands from the overflow of Wilson Creek. Only surface water was involved. Groundwater is not found in the opinion. The case turned on whether the waters sought to be defended against were waters of the creek or surface waters against which levees could be constructed. (Pg. 815).

[1] In regard to the Turner v. Big Lake Oil Co., opinion, Day/McDaniel in their Original Petition challenged the constitutionality of §11.021(a). (1.CR.0009-10). While the trial court denied Day/McDaniel's constitutional claims, the trial court's decision to recommend an IRP for 300 acre feet denuded the complaint. The Court of Appeals, having determined Day/McDaniel have a vested right in their groundwater entitled to constitutional protection, is further reason why the constitutionality of §11.021(a) is not before this court now.

III. Reply to Summary of the Argument

The Court below amended §11.021(a) by adding to the definition of State water, the word "groundwater." Now, the State, not to be outdone, adds the word "artesian-fed" rivers to §11.021(a). (Pg. 8). Section 11.021(a), according to the history of the case, now reads the rainfall, floodwaters, tidal water, groundwater and artesian waters belong to the State.

The State chooses to respond to the issue of attorney's fees and the constitutionality of §36.066(g). It's reasoning is that the denial of Day/McDaniel's claims §36.066(g) is unconstitutional, is necessary to preserve "Texas' precious groundwater resources." (Pg. 8). Texas doesn't have "precious" groundwater resources; landowner's have precious groundwater resources. These are not the words of Day/McDaniel, but instead are the words of the Texas Legislature when it has spoken. (Section 1.07 of the EAA Act, § 36.002 of the Water Code). Though the State, in its Response Brief has chosen to ignore §1.07, and § 36.002, the Legislature has on too many occasions addressed groundwater or underground water and not changed §1.07 and §36.002. (Day/McDaniel Brief on the Merits, pg. 9). In regard to the State's argument alleging the legitimacy of § 36.066(g), Day/McDaniel adopt their argument as found in their Brief on the Merits, pages 28-35. What remains unanswered by either the EAA or the State, is the point made in Day/McDaniel's Brief on the Merits, vis, that the appeal authorized originally by the Act and the EAA, should not now be construed to be an impediment to the function of the EAA, and which should be prevented in order to focus the resources of the EAA to accomplish it purpose. *Id.* What seems to have been

forgotten or overlooked is the Act seeks to protect groundwater ownership from confiscation through regulation, and what better way to accomplish that then to provide procedures for an Appeal.

IV. What is the Standard of Review? (State's Response Brief (SRB) pg. 9).

The State and the EAA argue the Standard of Review is the Substantial Evidence Standard. By footnote, #5, page 9, the State points out the Trial Court granted a jury demand, but was reversed. The Trial Court had granted the jury demand after it determined the standard for trial would be Substantial Evidence *De Novo*, from which an interlocutory appeal was taken. (Re: *Edwards Aquifer Authority*, 217 S.W.3d 581 (Tex. App.–San Antonio 2006). While actions of the agency in regard to factual situations are judicially reviewed upon a "substantial evidence" standard, ruling of an agency on questions of law are reviewed "*de novo*." *See Texas Dept. of Public Safety v. Jackson,* 76 S.W.3d 103, 106 (Tex.App.–Houston [14th Dist.] 2002:

> Standard of Review
>
> Judicial review of a decision made by an ALJ under Chapter 542 of the TTC is governed by section 2001.174 of the Administrative Procedure Act. *Tex. Dep't of Pub. Safety v. Monroe,* 983 S.W.2d 52, 54 (Tex.App.–Houston [14th Dist.] 1998, no pet.). A reviewing court "may not substitute its judgment for the judgment of a state agency on the weight of the evidence on question committed to the agency's discretion . . . and shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (A) in violation of a constitutional or statutory provision; (B) in excess of the agency's statutory authority; (C) made through unlawful procedure; (D) affected by other error of law; (E) not reasonably supported by substantial evidence considering the

> reliable and probative evidence in the record as a whole; or (F) arbitrary or capricious or characterized as an abuse of discretion or a clearly unwarranted exercise of discretion." Tex. Gov't Code Ann. §2001.174 (Vernon 2000).
>
> Review of an ALJ's suspension of driving privileges is made under a substantial evidence review. *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999). Under a substantial evidence review, the reviewing court cannot substitute its judgment for that of the ALJ and must affirm if the ALJ's decision is supported by more than a scintilla of evidence. *R.R. Comm'n of Tex. v. Torch Operating Co.,* 912 S.W.2d 790 (Tex. 1995). In determining whether the ALJ reached the correct conclusion, the issue is whether the record contains some reasonable basis for that decision. *Id.* Whether the order of an administrative agency is supported by substantial evidence is a question of law. *Tex. Dep't of Pub. Safety v. Valdez,* 956 S.W.2d 767, 769 (Tex.App.–San Antonio 1997, no writ) (citations omitted). Thus, we review the trial court's judgment under a substantial evidence review *de novo*.
>
> Furthermore, when the issue on appeal is a question of law, we exercise *de novo* review. *Tex. Dep't Pub. Safety v. Thomas,* 985 S.W.2d 567, 569 (Tex.App.–Waco 1998, no pet.) (Citing In re Humphreys, 880 S.W.2d 402, 404 (Tex. 1994)). An issue involving the interpretation of a statute involves a question of law, and, as such, we review these issues *de novo. Id.* (Citations omitted). (Emphasis added).

There is no factual issue before this Court regarding the nexus issue before it. The EAA ruled the irrigation occurred upon 150 acres, but with surface water, not groundwater (in this case water from the Edwards Aquifer). The real question before this Court is one of *de novo* review since it is a question of law. Did the groundwater turn into surface water? That is a question which must be reviewed *de novo*. (See also Findings of Fact #20, 1.SCR.0782). On this issue, the existence or non-existence of substantial evidence plays no part. Should this Court decide the groundwater used to

irrigate the 150 acres remained groundwater through the cycle of its use for irrigation, all issues would be secondary. Substantial evidence, one way or another, does not impact the ruling of the ALJ concluding State water, not groundwater was used for irrigation. (Conclusions of Law #9, 1.SCR.0785).

V. The State argues the water in the lake belonged to the State by virtue of its entry into a watercourse. (SRB, pg. 10).

The opening sentence of this argument exceeds all case authority cited by the State: "It is well established that water of any type, in any watercourse, belongs to the State and is held in trust for the public." No case cited holds "water of any type, in any watercourse," is State water. The *Big Lake Oil Co.* case does not, nor does *Bunkley*, nor the *Bass* case, have so held. (See analysis above). The challenged statement is followed by citation to *In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438, 444 (Tex. 1982). This case held the riparian right was a vested right but that the State owned the river waters flowing by the land. No discussion was found regarding whether the river waters flowing past the riparian owners land were emanating from such land. No holding was made regarding groundwater. It was presumed in the opinion and unchallenged, that the waters made the subject of the litigation were State water. Indeed, the cited page was silent as to groundwater.

The *Big Lake Oil Co.*, Court would have had no difficulty in deciding Plaintiff's issue favorably since it was unwilling to hold the predecessor statute to §11.021(a) as applicable to groundwater while such water was in the confines of the landowner's property, and yet in a watercourse, thus allowing the act was constitutional. *Turner v.*

Big Lake Oil Co., 62 S.W.2d 491, 493, (Tex.Civ.App. 1933), and *Turner v. Big Lake Oil Co.,* 128 Tex. 155, 96 S.W.2d 221, 227-8 (Tex. 1936). The *Big Lake Oil Co.* Court of Appeals noted specifically the "watering holes" of the Plaintiff were located in the Garrison draw, but that such waters were not waters of the State but privately owned. (Pg. 493). The case of *Hoefs v. Short*, 114 Tex. 501, 506, 273 S.W. 785, 786-87 (pg. 11), does not support the State's premise. The *Hoef's* Court decided rainwater which fell in Lympia Canyon, at the headwaters of Barilla Creek, became State water when it entered the watercourse, Barilla Creek. It did not deal with groundwater emanating from an artesian well. The *Hoef's* Court did define what characteristics a watercourse had, perceptible or somewhat imperceptible channel, a definition which the State has said made Post Oak Creek a watercourse, but has failed to explain why the same groundwater entered yet another very perceptible watercourse, the ditch from the well to the lake, but did not become State water. The true answer is found in the Legislature itself. It has scrupulously avoided session after session from laying claim to ownership of groundwater. (Edwards Aquifer Act §1.03(20), Water Code §36.001(21)). The very same Water Code enacted by the Legislature that defines the waters the State lays claim to, defines the water which is not included in the claim, groundwater. While Day/McDaniel have contended the Legislature's intent to disclaim ownership of groundwater has been consistent and clear through the more than 100 years, it has had a chance to claim ownership, and has not, neither the State nor the EAA has offered any authority or argument that such is not true. (Day/McDaniel Brief on the Merits, pgs. 6-18). The true rule is that while groundwater remains on the land from which it emanates,

it is for the beneficial use of the landowner without waste, irrespective of its mode of distribution thereon. The State cites *Diversion Lake Club v. Heath*, and the Restatement of Torts in support of its premise that damming a stream does not affect the identity of a watercourse. (Pg. 11).

Diversion Lake Club v. Heath, 126 Tex. 129, 140, 86 S.W.2d 441, 446 (1935), is inapplicable to this case because the facts are not similar. Post Oak Creek was not found to be a navigable stream. No evidence exists at the administrative level, nor the trial and appellate level, of its actual dimensions or any legal definition defining it to be a navigable stream. Nor did Post Oak Creek have any normal flow of water that could be diverted, as was done in the *Heath* case. This distinction is confirmed in *IH Investments, Inc. v. Kirby Inland Marine, L.P.* 218 S.W.3d 173, 195 (Tex.App.–Houston [14th Dist.] 2007). The Day/McDaniel reservoir was more like the water holes in the bed of the Garrison draw described in *Turner v. Big Lake Oil Co.*

A. Again, the State ignores § 11.021(a). (SRB, pg. 12). It contends that because the irrigation water came from the lake and the lake is a watercourse, the water was State water.

Closing the mind to the Legislature's definition of the water that becomes State water which emanates from private property will not make the fact that groundwater is not identified as such water, disappear.

The water used by Day/McDaniel was well water. Well water is that which is brought to the surface by landowner efforts. Its source is groundwater. It is owned by the landowner because it is percolating groundwater, which ownership is disavowed by the State. The State argues that rainwater, floodwaters and storm waters are only

additional waters owned by the State, in addition to the natural flows, underflows, and tides of every flowing river, natural stream and lake, and of every bay or arm of the Gulf of Mexico. Assuming the State is correct, no definition exists that would describe well water as the natural flow of rivers or lakes or tidal waters. In the *Texas Co. v. Burkett,* 117 Tex. 16, 296 S.W. 273, 278 (Tex. 1927), and the *Denis v. Kickapoo Land Co.,* 771 S.W.2d 235 (Tex.App.–Austin 1980), cases where natural flows were occurring, the Courts awarded ownership to water drawn from excavated wells drawing from the ground waters adjacent to the natural flow of a spring (*Kickapoo* case), and a river (*Texas Co. case*). Groundwater is owned by the landowner and when it is brought to the surface through the landowner's effort, it is not a natural flow of any river, lake, bay, or tidal water, and because the landowner captured it (*Houston & T.C. Ry. v. East*, 98 Tex. 146, 149, 81 S.W.279, 280-81), it is the landowner's property to be used for the benefit of the land without waste. (*Bartley v. Sone*, 527 S.W.2d 754, 755, 759-61 (Tex.Civ.App.–San Antonio 1974, writ ref'd)).

B. The State complains that Day/McDaniel are illogical in the reading of §11.021(a) (SRB, pg. 12).

The State, to prove its point, must misinterpret Day/McDaniel's argument. In order to contend Day/McDaniel are illogical, the State attempts to make their argument illogical. Day/McDaniel do not contend groundwater can never become surface water. Day/McDaniel are not required to prognosticate the future of groundwater once it is used for beneficial purposes on their property. It is noted, however, that artesian water was moved from the environs of the vicinity of Pleasanton, Texas, to Corpus Christi, Texas

without this Court concluding artesian water became surface water, or that the owner of the artesian wells lost ownership of the water once it entered into the river. *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 801 (Tex. 1955). While §11.021(a) was not passed until after the *Pleasanton* case, its predecessor statute was fully in place and was addressed by the *Big Lake Oil Co.*, case. No case, no law, and no logic militates against Day/McDaniel's position that so long as the groundwater remained on their property, they were entitled to distribute it throughout, by any means, without losing title to it.

In its footnote #8, page 13, the State argues the definition of "conjunctive use" does not tell what happens to groundwater when it enters a water course. "Combined" means used together. Obviously, if groundwater is introduced into a flowing watercourse, it will combine with the surface waters therein. The definition is not exclusive, but inclusive of the many ways groundwater and surface water may be used in combination to maximize their benefits, at least, that is what the Legislature has concluded.

The State fears that artesian well owners would own the water in artesian fed rivers and would wreak havoc with what was left for the public and water plans of the State. Artesian water would not be in the river but for the expense and effort of a private landowner, and if indeed the only water in the river is artesian water, wildlife and natural habitat rejoice. What escapes the State is that groundwater is specifically decreed by the Legislature, by both the Edwards Aquifer Act at §1.07 and the Water Code at §36.002, that the landowner owns the groundwater. According to *South Plains Lamesa R.R. Ltd.*

And Kitten Family Living Trust v. High Plains Underground Water Conservation Dist. No. 1, 52 S.W.3d 770, 776 (Tex.App.–Amarillo 2001, no pet.), when the Legislature confirmed ownership rights of groundwater in the landowner in §36.002 of the Water Code, and by using the term "code" and not "chapter," the Legislature meant this section applied to groundwater notwithstanding any provision to the contrary in any other chapter of the Water Code. Section 11.021(a) is another chapter of the Water Code. It cannot be construed to abolish §36.002. (Day/McDaniel Brief on the Merits, pg. 8).

1. The State argues that if this Court confirms Day/McDaniel's ownership of their groundwater when it enters a water course, it would be incompatible with Texas Commission on Environmental Quality's groundwater transporting permitting regime citing Texas Water Code §11.042(c) and the *Upper Guadalupe* case at 642 S.W.2d at 445. (SRB, pg. 13).

This argument is a little ahead of the issues before this Court. The issue of transporting groundwater in the future is not raised by Day/McDaniel. The EAA and the State have argued that because Mr. Mitchell channeled the groundwater down a ditch into the reservoir constructed in Post Oak Creek in 1983-84, the landowner lost ownership of the groundwater and it transposed into water owned by the State. (EAA Response Brief, pg. 7). There was no groundwater transporting regime of the Texas Commission on Environmental Quality at that time, and there was no section (c) to Texas Water Code 11.042. (Its historical note shows (c) was added by the 75th Legislature, Ch. 1010, in 1997). Assuming there was a §11.042 of the Water Code as it exists today, §11.042 addresses the recognition of privately owned groundwater and applies to any flowing stream. Post Oak Creek has never been a flowing stream at the points where Mr.

Mitchell brought the artesian water in and from where he pumped it. (Testimony of Billy Mitchell 5.SCR.2649), (Testimony of Joel McDaniel 5.SCR.2716), (Testimony of Tommy Fey and Kurz, 2.SCR.1421 & 1414). Section (c) applies to waters not originating as groundwater or artesian water, but State or surface water. Again, the Legislature has guarded against denying the unique quality and ownership of groundwater. A reading of § 11.042 a-d, clearly reflects that if there is no flowing stream, groundwater today, may be used to irrigate one's land through the use of dry creek beds, ditches, and portable pumps.

C. The State seeks to reinterpret *Bartley v. Sone.* (SRB, pg 13).

The distinction drawn by the State to somehow argue *Bartley v. Sone* does not support Day/McDaniel's position is unfounded. The clarity of the *Bartley v. Sone* opinion is inarguable, and Day/McDaniel rely on their interpretation as is found in their Brief on the Merits, page 13-14, and foot note #4 at page 14.

D. The State argues Day/McDaniel may have had a common law right to transport groundwater in watercourses prior to the enactment of §11.042(b), but it is of no consequence.

After reciting and affirming what the State says is the common law right, it says the historical use by Day/McDaniel did not qualify because after it left the Day/McDaniel land, it was not controlled nor measured. Overlooked, of course, is that Mitchell did not desire to transport the groundwater to any other land, and at no time was there any legislation requiring the landowner to measure the groundwater that was to be run down a ditch, in a dry creek bed, where a reservoir was constructed in order to pool the water needed for use on such land. Nor was there any legislation which immediately converted

groundwater in its original form into immediate ownership by the State when it entered any ditch no matter how imperceptible or perceptible it might have been without just compensation paid therefore.

VI. The State contends §36.066(g) of the Water Code is consistent with equal protection. (SRB, pg. 15).

The State in its discussion misinterprets the Supreme Court case cited by Day/McDaniel confirming that a statute which awards attorney's fees to only one side in litigation is a denial of equal protection. *First Texas Prudential Ins. Co. v. Smallwood,* 242 S.W. 498, 505-06 (Tex.App.–Beaumont 1922) citing *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), Day/McDaniel Brief on the Merits, pgs. 31-32). The State's Response Brief raises the argument that the legislation is designed to save the State money. This argument, as well as the subject matter, is addressed in Day/McDaniel's Reply Brief to the EAA Response Brief at pages 21-23. The State, at page 18, footnote #14, addresses the *Gulf, C.&S.F. Railway Co.,* case and singles out the single word "arbitrary," and responds the fee scheme created by §36.066(g) is based upon [a] "reasonable ground," and is thus entirely consistent with *Gulf. Id* at 165. The holding in that case had nothing to do with arbitrary, it had to do with equal protection. See quoted portion, Brief on the Merits, at page 32.

As is addressed in the Response to the Brief on the Merits of the EAA, if the Legislature was worried about saving money in an appeal from the decision of the EAA, likely it would not have especially called for compensation at §1.07, would not have

authorized an appeal, and would have set forth attorney fee clauses as it did in the Act for certain litigation identified in the Act.

VII. The State believes the balance of the arguments made by Day/McDaniel are meritless or waived. (Pg. 18).

Day/McDaniel are satisfied this argument is properly refuted in their Brief on the Merits, pages 41-47, and the Response to the State's Brief on the Merits at pages 16-19.

Conclusion

The State has no standing regarding the subject matter of its appeal. The landowner owns the groundwater, and nothing done by Day/McDaniel and their predecessors forfeited such ownership. The State is incorrect in its position and groundwater is not to be deemed surface water while it remains upon the lands of its owner. The procedures practiced by the EAA under the Act were violations of the Constitutional rights of Day/McDaniel and the denial of a permit for at least pumpage of 300 acre feet was arbitrary and unreasonable.

Prayer

Day/McDaniel pray of this Court that it restore the 300 acre foot permit determined by the Trial Court, and that the Trial Court be reversed in its findings that the landowner does not own the groundwater, and that the Court of Appeals be affirmed in this holding, and all other relief in law or equity to which Day/McDaniel may show themselves entitled.

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CERTIFICATE OF SERVICE

I, TOM JOSEPH, hereby certify that a true and correct copy of the foregoing Reply Brief on Behalf of Burrell Day and Joel McDaniel, has been served on counsel of record/interested parties as shown below on the 17th **day of December, 2009.**

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