

TEXAS DEPARTMENT OF AGRICULTURE

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February 4, 2010

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The Honorable Supreme Court of Texas
201 W. 14th Street, Room 104
Austin, Texas 78701-1614

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

To the Honorable Supreme Court of Texas:

The Commissioner of the Texas Department of Agriculture files this amicus letter brief for the Court's consideration regarding the above referenced case. Enclosed are 12 copies of the letter for submission and distribution to the Justices of the Court. In accordance with Rule 11 of the Texas Rules of Appellate Procedure, I certify that copies of this amicus letter brief have been served on all parties. No fee has been or will be charged for preparing this letter.

This amicus letter brief is being filed with the consent of the Office of the Texas Attorney General, Office of Solicitor General. The Department acknowledges the efforts of the Attorney General to bring the important issues presented in this case to the Court for review, and welcomes the opportunity to present certain principles of significance to Texas agricultural producers and landowners.

The Texas legislature has found that agriculture has been a critical element in the economic, cultural, and historical development of Texas.¹ The legislature requires Texas agricultural policy to address water availability issues, and to ensure a high priority is assigned to the agricultural use of water.² Further, state agricultural policy must protect property rights and the right to farm.³

No property rights are more important to Texas farmers and ranchers than the rights to own and control their land and the groundwater in place beneath it. According to the United States Department of Agriculture's 2008 Farm and Ranch Irrigation Study, more than 12,000 Texas farms irrigate more than 5 million acres of crops annually.⁴ Specific to groundwater, almost 80,000 irrigation wells provide water to approximately 9,000 farms across the state.⁵



By total value of agricultural products sold, Texas is the second largest agricultural producer in the United States.⁶ The total value of Texas agricultural production exceeds \$21 billion dollars per year.⁷ In Texas, the agriculture industry helps employ one out of every seven working Texans⁸ and is a top producer of essential commodities, ranging from cotton to cattle.⁹ Nationally, Texas is among the top two producers of cotton, peanuts, grain sorghum and hay.¹⁰ These crops are represented in the top five users of irrigated water in Texas.¹¹ Irrigated cropland accounts for 23 percent of cropland acreage in Texas, generating an income of more than \$1.8 billion with an economic impact of more than \$9.8 billion.¹²

The Texas courts and legislature have consistently recognized landowners' ownership of groundwater in place beneath their land, subject to reasonable regulation that recognizes the property rights of the regulated community and existing users.¹³ Continued recognition of this valuable property right is fundamental to the ongoing viability of this state's significant and robust agricultural economy. The change in law proposed by the Edwards Aquifer Authority would leave existing and future groundwater users with no ability to protect their investments or rights. Recognition of this right does not threaten regulation of the resource, it only provides protection against unreasonable regulation.

The Edwards Aquifer Authority asks the Court to adopt a sweeping constitutional rule that a governmental limitation on the pumping of groundwater in Texas cannot ever operate as an unconstitutional taking of the landowner's property. In this case, the trial court never reached the question of whether the Act, as implemented, resulted in a taking of Day and McDaniel's property right. The lower court correctly reversed this summary disposition for development of a record on the takings claim. In *Mayhew v. Town of Sunnyvale*, this Court relied on federal law pertaining to the *ripeness* doctrine, requiring that, in order for a case to be ripe for review, the Court must be presented with a final decision regarding the application of a particular regulation to the property at issue.¹⁴ *Mayhew* recognized that a court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation has gone.¹⁵ In its current state, this case is not ripe for review. This Court risks inserting itself into an "abstract, hypothetical, or remote" dispute unless and until the trial court has an opportunity to develop a factual record defining the nature of Petitioners Day and McDaniel's property right(s), the effect of the Authority's regulation on those rights, and the nature and type of damages resulting from an unconstitutional infringement, if any, on those rights.¹⁶

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In summary, the policy of this state, including acts of both the legislature and the courts, confirms that groundwater is a form of private property; as such, a landowners ability to exercise this ownership right may be regulated in a balanced manner and in respect of the public good but never erroneously voided or completely ignored. Therefore, the Court must continue to preserve the vested right of a landowner in Texas to manage and utilize groundwater in a reasonable manner; to do otherwise would prove detrimental to Texas agriculture and negatively impact the Texas economy, along with consumers of food, clothing and the many other goods that include agricultural products. In its consideration of this matter, the Court should refrain from taking any action that alters 100 years of precedent establishing the absolute ownership theory of groundwater in this state.

Respectfully submitted,

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¹ Tex. Agric. Code §2.002(1).

² Tex. Agric. Code §2.003(a)(1).

³ Tex. Agric. Code §2.003(a)(11).

⁴ United States Department of Agriculture, *2008 – Farm and Ranch Irrigation Survey*, Table 3, Land Use on Farms with Irrigation: 2008 and 2003, http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Farm_and_Ranch_Irrigation_Survey/faris08_1_03.pdf.

⁵ *Id.*, Table 14, Irrigation Wells on Farms: 2008 and 2003, http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Farm_and_Ranch_Irrigation_Survey/faris08_1_14.pdf.

⁶ *2007 Census of Agriculture State Profile*, United States Department of Agriculture, Texas Agricultural Statistics Service, Texas – Ranked items within U.S. 2007, http://www.nass.usda.gov/Statistics_by_State/Ag_Overview/AgOverview_TX.pdf.

⁷ *Id.*

⁸ USDA Economic Research Service, *Texas State Fact Sheet*, March 2007.

⁹ United States Department of Agriculture, Economic Research Service, *State Fact Sheets: Texas*, Top 5 agriculture commodities, estimates, FY 2008, <http://www.ers.usda.gov/statefacts/TX.htm>.

¹⁰ USDA National Agricultural Statistics Service, *Crop Production 2009 Summary*, January 12, 2010.

¹¹ USDA National Agricultural Statistics Service, *Farm and Ranch Irrigation Survey*, November 2009.

¹² Derived from USDA National Agricultural Statistics Service, *Farm and Ranch Irrigation Survey*, November 2009, and estimates from the Texas Department of Agriculture of the economic impact on the food and fiber sector.

¹³ *Houston & Texas Central Railway Co. V. East*, 98 Tex. 146, 150, 81 S.W. 279, 281 (1904); *Barshop v. Medina County Underground Water Conserv. Dist.*, 925 S.W.2d 618, 626 (acknowledging the Court's consistent application of the absolute ownership rule, and the legislature's recognition of a landowner's ownership rights in groundwater); Tex. Water Code §36.002.

¹⁴ 964 S.W.2d 922, 929 (Tex. 1998).

¹⁵ *Id.* at 929.

¹⁶ *Id.* at 928.