ORAL ARGUMENT – 10/2/01
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BRAGG V. EDWARDS AQUIFER AUTHORITY

TERRILL: In 1995, in response to public outcry about the loss of private property rights through environmental regulations, the Texas legislature passed the Private Real Property Rights Preservation Act. The property rights act is the most comprehensive, far-reaching property rights legislation in the nation.

HANKINSON: The briefs reference the fact that in a case involving a plaintiff called Living Waters in Travis County, that the Travis co. court invalidated the rules that you are challenging in this lawsuit, and that the EAA determined not to appeal that, and in fact, has passed new rules. Is that correct?

TERRILL: That is correct. They are in the process of passing new rules.

HANKINSON: Since your first challenge in this lawsuit is to claim that those rules are void because of failure to perform a takings impact assessment under the private property rights act, what is the effect on this court's ability to decide that issue since those rules are invalidated and are no longer in effect?

TERRILL: There are a couple of important points here. The first is, the rules that we challenged, we were the first case to take their second set of rules - there are three set of rules - to judgment. And we did in fact void those rules because they did not perform a takings impact assessment, and we also were granted a judgment for attorney's fees, which is mandatory under the statute.

After that, another group challenged the rules the Living Waters, that's the catfish farmer, that too was taken to judgment). That was under a different statute, the administrative procedures act. Our judgment in this case was the first to go to judgment, and since that time there is an entitlement to attorney's fees in that case.

Now since the EAA has continued in its rule making process, it's now on it's 3rd set of rules, the EAA has used the CA's opinion in this case as a justification for not doing a TIA. So once again, they have not done a TIA.

HANKINSON: I understand that, but you filed a declaratory judgment action under the private property rights act provision that allows you to do that. And you were challenging a specific set of rules that are no longer in effect. So how can this court in fact then rule on whether those rules are void because of failure to perform a takings impact assessment if the rules are no longer in effect? Is it your attorney's fees claim that keeps the issue alive, and is that all that keeps it alive, or why isn't the issue mooted in its entirety?

TERRILL: There's two points here. First of all, the attorneys' fees claim certainly keeps the issue alive. The second is, this is an issue that was solely in the hands of the EAA. They are the

ones that ones that took the action to not...

HANKINSON: I understand. But you have to have a live controversy. And if the rules are not in effect, then the controversy can go moot while the case is pending. Why isn't this moot?

TERRILL: Certainly the attorney's fees claim keeps...

HANKINSON: Absent the attorney's fees issue would this case be moot?

TERRILL: No, the case would not be moot. This is the type of case that's capable of repetition yet evading review because again we're now on the third set of rules and it's the EAA's actions that have taken the case out of being a final judgment that's appealed all the way through the system.

HANKINSON: What is the status of the Bragg's two permit applications that are also at issue here?

TERRILL: Again on this latest set of rules, they didn't do a TIA, and they made exactly the same recommendations as before. And that is, no water for D'Hanis, and they partially denied the Home Place orchard well, giving them 2-acre feet per acre instead of the 4-acre feet that's necessary to irrigate pecans.

HANKINSON: So did the invalidation of the rules then in fact invalidate the action or proposed action by the EAA on the original applications for a permit, and so they had to go back and do it again?

TERRILL: Clearly any permitting determination, and this is not just for the Braggs...

HANKINSON: I just need to know the current status of these permits. Are we on to different actions than originally arose in this lawsuit?

TERRILL: That's correct.

HANKINSON: As a result of the invalidation, the original determinations by the EAA were wiped out and they had to start over again.

TERRILL: Correct.

HANKINSON: So we now have two additional permit applications. Are they still in the proposed action stage, or has the EAA actually acted and issued its final determination?

TERRILL: The general manager has made a proposed recommendation for both of those permit applications.

HANKINSON: So there is no final action?

TERRILL: Correct. Final action is a standard that applies to the APA. It is not a standard that applies to the property rights act.

HANKINSON: Under the Edwards Aquifer Authority Act, as this court determined in the Barshop decision, that is the applicable statute for judicial review of a permit application decision under the act. Right?

TERRILL: Yes and no.

HANKINSON: I know your proceeding under the private property act. But if they wanted to appeal that final decision by the EAA, they would take it up through the administrative procedure avenue.

TERRILL: Well the property rights act provides another way...

HANKINSON: I understand. I'm just trying to get the procedural situation squared away here, and we're still at the proposed action stage on the two new applications.

TERRILL: Correct. Two parts to the statute: takings impact assessment part of the statute protects against takings on the front-end, that is before government takes action. Takings impact assessment is completely new procedure for Texas. Texas has never had it before. And the gist of a TIA is when an agency passes administrative rules they have to take a hard look at those administrative rules and see whether they are going to have an adverse impact on landowners. In other words, whether they are going to cause a taking.

Now if the TIA comes back and says, yes if you pass this rule or these sets of rules, you're going to cause a taking, then the agency at a minimum needs to look at alternatives to see whether there are ways that the agency can affect the same regulatory goal without causing a taking.

O'NEILL: Is Texas the only state to have adopted a real property rights act?

TERRILL: No. Those are some other states that have done it, but Texas is clearly the most far-reaching of any statute that's passed by the states. I would say about 1/3 of the states have passed property rights.

O'NEILL: Do any of them require this TIA procedure?

TERRILL: I think that there are other states that have TIA procedures. I'm not aware of the particulars of those statutes.

O'NEILL: But you would say that Texas' statute is the most comprehensive of all?

TERRILL: It is definitely the most comprehensive of all. And the provision that I would particularly point the court to is the takings cause of action, the statutory takings.

O'NEILL: And that's where I'm heading. Since we do have the most comprehensive statute apparently in the US, isn't it important that when we're writing on a clean slate we look at the legislative intent in enacting such a sweeping statute?

TERRILL: Very definitely.

O'NEILL: And wouldn't you consider the bill's sponsor's statement of intent to be important?

TERRILL: Yes. I think the plain language of the statute is obviously where the court starts. But legislative intent is something that you would look at.

O'NEILL: And didn't the bill's sponsor state that it was her legislative intent based on the language of the (b)(11) exemption that it not affect the actions of the Edwards Aquifer? That is the clear legislative intent.

TERRILL: There are a couple of things that are important about that statement. The first one is, there's no reference to the (b)(11)(c) exemption. That's something that EAA says in their brief. But if you look at that two sentence colloquy that they quoted, which by the way was not relied upon by the San Antonio CA, I don't think it stands for that proposition. It doesn't say anything about (b)(11)(c).

O'NEILL: What do you think that statement was meant to mean if it says it doesn't affect the actions of the...

TERRILL: It's not clear because there's another part of the property rights act that talks about a sole source aquifer and about preventing collusion to a sole source aquifer. And those two legislators were discussing that also. So it's really not clear exactly what she's saying.

O'NEILL: Well how many permits does the EAA review per year?

TERRILL: The initial regular permits that are in the process of being processed by the EAA right now, there's approximately 1,000.

O'NEILL: And so under your reading of the statute, you would need 1,000 impact assessments under the property rights act?

TERRILL: No. And this is an absolutely crucial point. When you're passing administrative rules, you do one good TIA when you pass the rules. That way you address problems programmatically.

O'NEILL: Are you abandoning then your attack on the individual permitting?

TERRILL: No.

O'NEILL: Under my question that I just asked you, you are claiming that there would be 1,000 TIA's due?

TERRILL: No. If you do a good TIA up-front it's going to address the vast majority of these problems. First of all, you don't have to do a TIA when they are not denying permits. Now the EAA denied about 30% of the permit applications. Now if you do one good TIA on the administrative rules, that's going to programmatically address a number of the issues that are going to come up. For instance, pecan growers need 4 acre feet of water to grow pecans. So without regard to whether they have the historic use, we know that if they planted their orchard like the Braggs did in 1979, that from 1979 they always needed and had a reasonable investment backed expectation in 4-acre feet of water. The takings impact assessment should take that reasonable investment backed expectation into account up-front. That would address those takings issues from the get go.

JEFFERSON: But each person affected by an issuance of a permit would have their own individual issues would they not? I don't understand what you're saying here that there could be one assessment that would affect what for 10 years thousands and thousands of permits. I just don't understand.

RODRIGUEZ: And I want to piggy back to that question. The catfish farms for example, Living Waters, there that impacted what 20% of the aquifer, 30% of the aquifer's daily use. You're saying that the one TIA that would affect the Living Waters situation would also satisfy your client's concerns?

TERRILL: You have to distinguish between a TIA that's passed for the well permitting rules on the one hand, and those are the well permitting rules that affect everyone that withdraws water from the aquifer with individual TIA's for permit applications on the other.

If a good TIA is done on the administrative well permitting rules up-front, that should programmatically address people such as pecan farmers, corn farmers, industrial pumpers, municipal pumpers, address them as classes and look at the problems that are similar to them, to each class, and address them individually. Then if you get past that stage and you find that not all of the takings issues have been addressed, then you would have individual takings impact assessments on those cases where permits have been denied, such as on the Braggs D'Hanis well where they got no water from the EAA.

ENOCH: But you argue that there should have been a TIA on the one where they didn't deny it, they just didn't grant as much as requested. So your TIA applies not only when they deny a permit, it also applies when they give you something less than you asked for.

TERRILL: In this case we're not talking about 1, or 2 or 5%. We're talking about a dramatically - 50% less. And it's impossible to grow pecans on 2-acre feet of water and that is an undisputed fact in this case.

ENOCH: Isn't the authority supposed to - if you take out 5-acre feet here and it's more

than what the legislature permits to be taken, then the authority has to take that 5 from somebody else don't they? I mean it's not like everybody gets 5. It's like if you give more than what the legislature says here, you've got to take it from somebody's application here. I think you made a reference you can buy that authority from somebody else. But it's not like you could determine that all pecan growers get, how ever much it is acre feet of water, as a general permit without some determination that there is somebody else out there who isn't going to get as much as they want.

TERRILL: There's two answers. First, with regard to takings impact assessments, if you found for instance that pecan growers need 4 acre feet of water, that does not tell the EAA that they have to give pecan growers 4 acre feet of water. What it tells them is if you don't give them 4 acre feet of water it's going to cause a taking. It's going to adversely affect their operations. So that's the first answer. The second answer is, on the amount of water that's available, the legislature set a floor at 450,000 acre feet, and then gave the EAA discretion to raise that amount if they want to. And that is the EAA's call.

OWEN: Wouldn't those temporary permits, that's not done additional increment above the 450,000 is not a permanent permit like these are. It would be an interruptible permit. It's a different process.

TERRILL: That's correct. And for agricultural users, that's essentially fatal. Because if you can't grow your crop on a regular basis...

OWEN: But hasn't the legislature made that call that it's incremental and it's subject to interruption? Iit would not be a permanent grant of rights to pump above 450,000?

TERRILL: No, because the state gave the EAA the discretion to raise the amount of water that's...

OWEN: But if they do that, that increment is subject to interruption. It's not a permanent permit. And the EAA would have to periodically review that to determine whether that extra incremental amount could be pumped or not?

TERRILL: They would have to review that.

OWEN: So it's not a permanent initial grant as we're talking about in these cases?

TERRILL: The initial regular permits have a different status than the temporary permits.

HANKINSON: I understand that under 22007.003(b), which is the exclusionary provisions in the property rights act, that you take the position that rule making is not an action. But assume with me for purposes of this question that rule making is an action under subpart 4, where there is an exclusion for the action of a political subdivision that is reasonably taken to fulfill an obligation mandated by state law. Can you tell me with respect to these rules that you are challenging as compared to the statute in what ways the substantive guidelines provided in the statute are at variance from the rules that you are challenging here? Your opponent takes the position that they

match, that what the EAA has promulgated in substance is exactly what the legislature said in the statute. And I'm unable to locate in your brief any place where you take argument with that. Can you tell me specifically where the rules that you challenged vary what the legislature has said the EAA must do in permitting and controlling the taking of water from the aquifer.

TERRILL: I want to start by emphasizing that of the 4 exceptions that are claimed by the EAA, including B4, not one of them mentions rules or rule making.

HANKINSON: I want you to assume with me that rule making is something that is an action for purposes of the exclusion. I understand you don't agree with that. I just want to know in what way there is a variance between the substance of the rules that you challenge and the specific provisions of the statute as enacted by the legislature?

TERRILL: Two points here. First, the EAA takes the position that each rule that we challenge has to match up directly with the D'Hanis and Home Place orchards, and that they are mandated by state law. And that's not the case. Let's take D'Hanis for instance. They say that they are mandated to give 0 on D'Hanis and 2 acre feet on the Home Place. In Barshop, this court held that the dates where it says that you must file a DHU is mandatory, not directory. They claim that the provision in the Edwards Aquifer act says they are mandated to deny that. The language in that provision, and I believe it's 114(e), but I'm not positive about that, says may not. It does not say shall not. The difference between may and shall shows that they have discretion to act there.

The other thing that I would point to is that they have grandfathered other wells...

HANKINSON: I'm not talking about any actions that they've taken pursuant to the rules. I want you to put the rules right here and the statute right here and tell me in what way the rules promulgated by the EAA in substance are different from what the legislature promulgated as specific requirements in the statute?

TERRILL: One of the key things that the EAA has done is that they have provided a number of guaranteed minimums to other irrigaters.

HANKINSON: What rule are you looking at?

TERRILL: It's in the definition sections. And off the top of my head there is an above 10-year pumper rule that is commonly referred to as the San Antonio Water System's rule, the SAWS's rule that allows over 10 year pumpers to drop out low use years. The effect of that is, it raises their average up. And that gives them more water. And because we're talking about who gets how much water, that's...

HANKINSON: But you're not challenging that rule in this case though?

TERRILL: Yes, we are. Because if that gives them more water, then because we're

talking about an amount where you're allocating a set amount between different users, that definitely affects the allocation. There's other rules to that effect.

HANKINSON: And you say that rule is at variance with the language of the statute?

TERRILL: Yes, it is. The second rule is the under 3-year pumper rule. And that's commonly refferred to as the catfish farmer rule. That rule, and it's been challenged, the EAA says, well we have broad discretion to enact this rule. The EAA says, well we have broad discretion to prevent a regulatory taking. And they say that in the preamble to their rules. And so those are two examples.

PHILLIPS: Can you explain why a statute itself by its own terms doesn't exempt the EAA from having to make these rules for the particular type of regulation they are undertaking here? Most particularly under 2007.003(b)(11)(c), action taken by a subdivision to prevent waste or protect rights of owners of interest in groundwater, but also under the broader .003(a)(4), enforcing government action by use of permitting.

TERRILL: And I think this is absolutely critical. The property rights act applies to groundwater, protects groundwater rights, and it applies to rule making. At that point, it's the EAA's burden to prove that one of these exemptions applies. And when you look at the 14 exemptions in the act, there's only 3 instances where rule making is exempt.

The 4 exemptions that the EAA has relied on: (b)(4), (b)(6), (b)(11)(c) and (b)(13), not one of them mentions rule making. What I particularly want to hone in on is the (b)(14) exemption where the legislature said that an action or rule making is exempt. Now they could have done exactly the same thing in any of those other 4 exemptions. Like for instance, they could have said an action or rule making of a political subdivision that's reasonably taken to fulfil an obligation mandated by state law. But they didn't do that. They said an action. We believe that action means a narrow fact specific situation, and it does not include rule making. And the reason for that is, the whole purpose of TIA's is to address administrative rule making. And if you read those exemptions that broadly, it _____ the act.

HANKINSON: You kind of catch yourself coming and going on that. Because the word action is used for purposes of applying the act as well both in (a) of that provision, the statute, and also in the provision of the statute that actually sets out the requirement of a TIA being done. It refers to an action. And clearly in the applicability provisions without using the word rule making in some instances you're saying we should interpret action. In 2007.043, I believe, there is no mention of rule making there. And yet you're saying that we need to interpret action there to mean rule making, and we need to do it with respect to part (a) of 2007.003. But when it comes to the exclusion when we see the word action we are not to do that. So I kind of hear you coming and going.

TERRILL: That's not what we're saying. That's what they're saying that we're saying.

HANKINSON: Your brief specifically says that under 2007.003 and .043 that action means rule making.

TERRILL: No. And this is absolutely critical to interpret this statute. .003(a) says that it applies to the following governmental actions. In our view, governmental actions is the broad spectrum of actions that are covered by the act. Within that broad spectrum, there are a number of different things that fit into that: rule making; forfeitures; seizures; things of that nature. Then when you go to the exemptions, it doesn't say governmental action. It says action. And then it follows the word action with very narrow...

HANKINSON: No. It starts with (b): this chapter does not apply to the following governmental actions. It uses the exact same words.

TERRILL: But then when it gets to the actual meat of the statute, the specific ones that are exempted it says an action. And then it follows it with very narrow words like...

HANKINSON: But that's the same way that (a) is drafted. The setup for (a) and (b) are exactly the same.

TERRILL: It's the subparts under (b) that then say action. And then it uses words that are very fact specific. Like for instance, (b)(6) which they are claiming says, the governmental entity proves that a condition of property use is a nuisance. They are proving a nuisance. That's not a rule making function. They are saying that if there is leaking hazardous waste over the aquifer that's a nuisance, you can go out and you can address that problem without having to do a TIA. That would be ludicrous.

Rule making on the other hand is extremely different. It's a quasi legislative function where they are making programmatic rules that affect thousands. In this case millions of people. There is a huge distinction between these narrow fact based exemptions and rule making on the other hand, which is a legislative function.

There are other ones that stand for the same propositions. 13 for instance, real and substantial threat. It exempts an action that's a real and substantial threat to public health and safety is designed to significantly advance the health and safety purpose. It does not impose a greater burden than is necessary to achieve the health and safety purpose. That's a narrow exemption. It's a fact question. You can't say that something as broad as rule making could be shoe-horned into that exemption. Because if it does then the act, particularly the takings impact assessment part of the act, means nothing because everything will be exempt.

PHILLIPS: But you could certainly shoe-horn for taking waste or property rights, _____ groundwater under rule making. I mean there could certainly be a rule that would cover (b)(11)(c).

TERRILL: That is not our reading of the statute, and there's a couple of reasons for that. First of all, again, we don't believe that the statute exempts rule making unless the legislature uses that word, which they've done in three very narrow circumstances. Second, if you look at preventing waste, that is a narrow, specific fact intensive inquiry that in fact is defined by the Edwards Aquifer Act and there's no question about in the Braggs instance, there wasn't any waste involved.

OWEN: You don't really address the definition of waste in other context. If everybody is doing exactly what the Braggs are doing, which is using good conservation techniques, but nevertheless, the total demand for water exceeds the amount that can be pumped out of the aquifer, isn't that by definition waste?

TERRILL: It is by definition waste. And that definition is circular. They set a rule that says that this is waste...

OWEN: But under your analysis if you can go into court and prove that I'm a conservative user of water, I'm a farmer, I don't exceed my limits, I do everything according to all the highest agricultural standards, but there are a thousand farmers who can prove exactly that, and the total demand for water far exceeds over 450,000 level, under your interpretation the EEA is powerless to do anything about it.

TERRILL: No. Again, this is what's critical about takings impact assessments. This is not about telling the EAA how they regulate the aquifer. They have been given that authority.

OWEN: Under your definition of waste it is.

TERRILL: No. This is about whether they are exempt from the property rights act; whether they have to take property rights into consideration.

OWEN: I'm just asking what your definition of waste means. And my understanding is that if the total demand exceeds the supply, just like the RR Commission has to deal with oil and gas issues, they have to promulgate rules to decide how to prevent "waste." Meaning how to deal with the excess demand over supply.

TERRILL: As the legislature used waste in this statute, it is not a broad term.

OWEN: And where do we find the basis for that? Where do we find the definition of waste as not a broad term?

TERRILL: It has to do with the fact that first of all it's talking about an action. It's not using the rule making term. That's the first thing. The second thing is, when you look at the nature of these exemptions, they tend to be very narrow fact specific and addressing specific circumstances.

I will give you an example of what I think would be addressed by that. If someone had their Edwards well open and they were flowing water off of their irrigation fields into the ditch and clearly wasting water, I think that would be addressed by the statute. That would be something that would fall within that exemption. You wouldn't have to do a TIA for instance to go out and shut that well off. Again, that would be folly.

OWEN: Does the RR Commission have to do a TIA before it promulgates rules in the oil and gas industry to prevent waste and prevent and protect _____ rights?

TERRILL: I have not looked into that question.

OWEN: Isn't waste used the same in both §9 and §11?

TERRILL: Groundwater and oil, there is some overlap between the two. They are related concepts. But as to whether those mean the same thing, I know that there is an additional phrase in there. They say prevent waste of oil and gas, protect correlative of rights, or prevent collusion. So there is certainly a difference between the two phrases that they are using there. But again, I think the exemptions to the act are narrow and that there is not exemptions for programmatic rule...

OWEN: So that's my question. Does the RR Commission have to do a TIA before it promulgates statewide rules?

TERRILL: Because that particular exemption does not say an action or rule making as say (b)(14) does, then that is something that the RR commission would have to do a takings impact assessment for.

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RESPONDENT

O'NEILL: Mr. Hatchell, could you first address the question of whether this case is moot or maybe we should _____?

HATCHELL: I was going to do that. Prior to Justice Hankinson's very thoughtful questions, I was going to open this argument in a different way and conclude my argument with a respectful request that the court consider an improvident grant in this case.

It is true, as counsel has been very candid in telling you, that what he is asking the court to do through this act is to apply the private property act to invalidate rules that have already been invalidated.

This is not a case of last impression. It's a case of no impression. And counsel I think has also been candid in telling the court that the Bragg's applications have now been reprocessed under new rules, and they are pending approval under new rules. And I do not candidly think that the court has a case or controversy before it at the present time. I will also be candid in telling the court that the parties did not emphasize this particularly below, because they are before desires of an interpretation of the act.

HECHT: Was there a takings impact statement with respect to the new rules?

HATCHELL: None of this is in your record. The answer is no because the unequivocal position of the authority is that it's no required.

OWEN: I'm a little bit confused. I thought counsel awhile ago said that there were no new rules pending. That they had been recommended but not actually promulgated.

HATCHELL: I was confused by that as well. And we have a full compliment of new rules that are in effect and are being used. Now those rules may also be, and I don't know the answer to this question, they may also be under continuous consideration for revision. But the Braggs are subject to a new compliment of rules, which are final and effective as to them.

OWEN: Do they differ substantively on how they treat?

HATCHELL: They differ. And this is not in the record. When you say substantively, I suppose the answer to that question is not in great substance. They flesh out some of the more discretionary aspects. But insofar as basic structure is concerned, they are relatively the same. The action in regard to the Braggs has been the same under the new rules, although, insofar as the Braggs are concerned, the action will always be the same, because they can never get more or less than they got.

ENOCH: Moving to the CA's opinion in this case. Any argument could be made that the CA's opinion is written very broadly, or applies the act in a very broad interpretation that essentially eviscerates the private property act if the CA's opinion stands. So as written, it's got to be fixed. Now take that as the premise. What do you say is the strongest argument, the argument that made the CA's opinion correct and is the argument that the Edward Aquifer authority relies on?

HATCHELL: I'm going to answer that in two parts. Let me say that first, I do not agree with the fundamental underlying premise, except to the extent you can make an argument. I don't think you can make a good argument in interpreting the CA's opinion. And I think that's one of the problems in this case. Very skillfully, opposing counsel has attempted to characterize the opinion of the CA in the way that you have just described.

I would ask the court to look at Justice Duncan's opinion, and also Justice O'Connor's opinion in the McMillan case. And I think that you will see that what Justice Duncan does in this case is finds the mandate at a much higher level in the statute. And in fact, finds it in the constitution. She does not hold at the end of the day that just the words "shall make rules" are the state mandate. I think what she has said is that "shall make rules" is the reasonableness factor. She actually list two sections of the Edwards Aquifer Act, and particularly the one which says that the authority shall ensure compliance with permitting requirements and shall regulate permits as also being a mandate. But also throughout the opinion, she traces the mandate from the constitution into the preamble and throughout the various provisions of the statute. And I think that is where the opinion finds the mandate.

If you construe as I do that the opinion speaks of a broad mandate, you have very little problem with the (b)(4) exception. Because insofar as it being an all encompassing exclusion, because first of all it applies only to political subdivisions and not agencies. So this lists of horribles at the end of the brief of opposing counsel listing all the agencies who supposedly will be exempt from this act simply does not apply.

But secondly, as I say, I think the proper interpretation of the (B)(4) exception is as I think Justice Duncan has done is to look to the broad mandate from the constitution to the

preamble and to the powers clause of the statute, and to say that the "shall make rules" is what makes it reasonable. How can it be unreasonable for the authority to pass rules when they are mandated to pass rules in accordance with the other mandates of the statute?

HECHT: If that's the case, what does the property act do? Nothing.

HATCHELL: Oh no. I don't agree with that. We're talking here about simply whether the Edwards Aquifer authority is subject to one of the exclusions.

HECHT: But no agency can make rules unless it's authorized to do so.

HATCHELL: That is correct. But agencies are not exempted. Only political subdivisions are exempted insofar as state action is concerned. And I'm not sure that I have counted how many of those many, many statutes that are listed in the back of the brief apply to agencies. I think it is all but three of those.

You can't really answer that scope question until you just look at all of the political subdivision statutes. But the chicken little argument just simply doesn't work in this case. But I do have an answer Justice Enoch for the construction that your hypothetical gives to Justice Duncan's opinion. First of all, it would seem to me that it would be useless to require a takings impact statement in defense of her opinion just based on rules. For promulgating rules that you're mandated to comply with what is the takings impact statement going to tell you about those rules. You've got to do them and the statute has certainly statutory minimums that have to be in there. So I think that it would be useless.

OWEN: In that regard, what about the so-called catfish exemption? Your position is, as I take it, is essentially that everything that has been done under these rules is mandated by the statute. And the other side says no, there is all this leeway...

HATCHELL: Which is not to say that the authority is without discretion to flesh out through rules the broad mandate of the statutes. And in regard to the catfish exemptions and other exemptions, I think what is happening there, although I'm not candidly an authority on everyone of those exemptions, they are finding that when you do the proportional reduction you can put some users almost back to zero. And I think it's the clear mandate of the act that historical users should have some rights. So what I think is happening in these examples that counsel mentions, is that they are really promoting the basic overall policy of the act to protect the rights of historical users.

OWEN: But isn't it the Bragg's argument in this case that they are a historical user and you're essentially putting them back to zero?

HATCHELL: I don't see how they can be a historical user, because they simply don't qualify. But yes, to answer your question, that is their argument.

OWEN: The lease has to be a first well?

HATCHELL: No, as to the second well. They are historical user as to the first well.

OWEN: As to the first well, they are saying we are a historical user and you're putting us back to zero?

HATCHELL: Of course the historical user, you don't get just any amount that you want to pump has a historical user. Of course the statute itself sets out the way historical users...

OWEN: That's my question. Is the catfish exemption a departure from the statute or not?

HATCHELL: No. It has got to be consistent with the notion that historical users at least gain some rights. For example, the best is - let's take irrigaters, which is the most specific example in the statute. If they were bombed back to zero or to an unacceptable amount through the proportional reduction, they nevertheless get the irrigater minimum. And I think the broad mandate of the act gives the authority the right to also identify other specific categories that are in need of aid in relation to that broadening.

OWEN: Can you give me the section of the act that says that you're not bound by the proportional reduction section, that you've got leeway to depart from the proportional reduction _____?

HATCHELL: Indeed we are bound by that. But I do think that the general overall provisions of the act do provide for calculations and studies in which we can adjust. And it seems to me like what we're talking about is simply nothing more than a specific adjustment, which falls within the broad powers to make adjustments.

OWEN: Well that's my question. Where is the statutory authority for these calculations and adjustments?

HATCHELL: The statutory authority would be in the power given to them to 1) manage the mandate under the act, and 2) to manage through a permitting system. And I think coming with that is discretion on behalf of the authority to also ensure within the spirit and letter of the specific criteria in the act to have some leeway to grant those things that they have done.

HANKINSON: One of the amicus brief mentioned with respect to the Bragg's well that they were allowed to take water from because of their historical use. That in fact, they benefitted from the regulations because they were able to come up to the minimum, which is more than what their historical use showed. So in fact, as a result of the application _____ them, that they got more benefit than they otherwise would have. Is that accurate?

HATCHELL: They will probably dispute this, but my reading of what they've done is, is that they have essentially gotten double their historical use. Where the problem comes in is for the last year they put down a very large amount...

HANKINSON: But that was outside the historical use period.

HATCHELL: No, it wasn't outside the historical use period. But they put down a very large amount for ½ year. And so the authority had to factor that out because the statutory minimums are only calculated insofar as what their base rate would be on a full year. So what happened was, I think that they were fairly consistent of their use during the historical period except for this ½ year, and I think that that was around 45 acre feed. And then what happened is, when they were proportionally reduced it came down below their historical use, so as irrigaters they got bumped up to 112 or so, which was roughly doubled.

O'NEILL: We keep focusing on the TIA and the burden that would be. Opposing counsel seems to say that's really not that big of a deal. It wouldn't be that many impact statements. But we're also taking about takings claims aren't we, and would you please address what the impact of that would be?

HATCHELL: That's what we're really fighting about here, and nobody I think misunderstands. And the Braggs are perfectly legitimate in what they're doing. They are challenging and trying to get a construction of these exemptions through the TIA side of the act. But those exemptions apply just as well to the takings side of the act.

You heard the number of permits that we process. It's a thousand here. The subsidence district has 5,000 of these pending at the present time. What happens is if a takings impact assessment has to be done as we're put to the Hobson's choice, if adverse findings are made insofar as the 25% property reduction to either invalidating, in this instance we would have to invalidate our rules even though we're mandated to pass rules, or 2) we have to essentially pay tribute for the right to do what the statute commands (tape runs out on side 1).

And I just think that that's a very intolerable situation. And I think that is precisely why in the 11(c) exclusion for conservation and waste, that the legislature was specifically understood, as Rep. Comb said, that this is just not going to apply to the Edwards Aquifer act, because we can't function under that. And I would submit to the court that the amicus briefs, particularly the subsidence district will demonstrate they can't function either.

JEFFERSON: You've mentioned the exchange with Rep. Combs in the brief and there are other parts of the testimony. And I just have a broad question about the legislative intent. How much should we rely on exchanges between particular legislators or even statements in a summary of the bill that don't find their way into the actual legislation? What is our role when we interpret a statute is what I'm asking? Should we look at the words themselves and interpret those, or should we look back at exchanges like that?

HATCHELL: Although I think you and I might differ as to whether or not those actual words got into the statute. Because I read the (11) exemption as being those exact words. But I did a search recently in conjunction with a talk that I did and determined that this court has decided at least 55 cases since Jan 1, 1999 on statutory construction. And far be it for me to say that all of those statements are exactly in line with one another. But I think I generally get the sense that this court

is now determined to go to the words first. And Rep. Combs statement: if you do not find there to be any ambiguity in the language, and I can't frankly tell whether or not they are alleging ambiguity or not and I think you go straight to the language. That's the way I read most of the cases that the court has decided.

Now, you do get in to other cases there which talk about some of the background facts, and certainly background facts are very important. But I think the strictest line of authority that I find out of this court is you go to the language first. And legislative history doesn't mean anything until there is at least some form of ambiguity.

The Code Construction Act of course is different and it allows you somewhat broader discretion in that regard. And the court might well move to a position where the elements of the Code Construction Act are considered.

ENOCH: If you begin with the premise that prior to the Edwards Aquifer act that came in to existence, I assume the parties could pump whatever they wanted to out of the Edwards aquifer.

HATCHELL: Absolutely.

ENOCH: And so the act now changes a person's right to pump out of the Edwards Aquifer. I'm a little bit unclear about what the Edwards Aquifer's position about what it's mandated to do is. If citizens could not pump all they wanted to out of the Edwards Aquifer, and the aquifer comes in to existence and sets a different amount, and the legislature says well everybody can pump this amount of water. And so the Edwards aquifer permits everybody to pump that amount of water. I could understand that the permitting process is co-equal with the mandate from the legislature. But if they could pump anything they wanted to and the aquifer authority comes in and now the legislature says, well this is the minimum they can be permitted to pump, but the authority could offer a greater amount to be pumped. Why isn't the authority's refusal to allow a greater amount to be pumped not mandated by the legislature? This is the unstated disagreement between the parties. Your argument that you're mandated to do this comes from the premise - forget about the fact they have always pumped - the legislature now says they can pump this amount and since we're allowing them to pump that amount, that's the mandate we have, we don't need to do the TIA. What happens if we decide that if you refuse to not allow them to pump all they want to that's when the TIA applies?

HATCHELL: Then I think you've undermined the statutory regulatory scheme. Because if everybody gets an exemption and gets whatever they want, why regulate at all.

ENOCH: Well they don't, but the statute seems to imply that if they now no longer do, there's got to be this impact statement.

HATCHELL: I suppose in a perfectly free world if I owned a lot that had an abandoned building on it, and I wanted to clear that lot, I could either dynamite it or blow it down. But benefits to society in general would say that that's dangerous, and it's also dangerous to me. So I think that what we're really talking about here is perhaps revisiting the issue that was visited in the Barshop

opinion in which the Edwards aquifer authority act withstood every constitutional challenge. And one of the telling things in _____ is that this is an act which is aimed at public health, welfare and safety among other things.

I think what we have here is simply a legislative choice that unfortunately some individual rights have to give sway to a greater right in the public at large. And that indeed is in the preamble.

ENOCH: Our evaluation of whether or not a TIA applies, we start with a presumption that the use of water is already regulated, and the TIA is not needed so long as you permit what the legislature specifically authorized as the minimum. Because you've authorized the minimum use out of the Home Place, there's no TIA required, and because you've refused to authorize a new well to be drilled in D'Hanis, that's the minimum that the legislature set. Therefore, no TIA is needed for that. And that's the line.

HATCHELL: I don't look at it from a specific case-by-case basis. I think that these exemptions apply across the board. One provision of the statute that I think gets a lot to your question that hasn't been mentioned very much is in the general powers provision, which says that this article prevails over any provision of general law that is in conflict or inconsistent with this article regarding the area of the authority's jurisdiction. Now I think what you're saying here is essentially that there is a head-on collision between the property rights act and the Edwards aquifer act. And I don't see that. I think the legislature had said there is no collision that because of the necessity that we preserve water based on historical problems with drought, this is a crying public need that we regulate and that individual rights are going to have to give sway. And that if there is a general law, like the private property rights act, that seems to in a general way impinge upon that, the Edwards aquifer act is the one that you look to.

HECHT: But we did say in Barshop that the takings issue remains. To clarify what was said earlier, as you view the Bragg's request, it can't be granted under the regime that the legislature has set up.

HATCHELL: That is correct. They can never get more nor can they get less.

HECHT: So they will have recourse to the argument under the property rights statute that the takings assessment is required under these circumstances. And to that extent at least this dispute hasn't gone away and isn't going to go away until it gets resolved.

HATCHELL: Correct. One thing that I think should be understood, and I think it is understood by the court, that the Braggs are not without water rights. The act very prudently provides for commerce in water rights. And the Braggs can buy water rights.

OWEN: But the real issue on takings here is they have to proceed under the common law development of our constitutional takings provision or are they entitled to the much more lenient takings test under the statute?

HATCHELL: That is the issue, and I would point out that appropriately I think the focus of that should - that dispute is not on the authority. It's the act itself if the court were to so say, the Edwards Aquifer Act itself, and the state I think is the one doing the taking in this case. And I think prudentially you always want to focus the constitutional takings claim on the person that's doing the taking. We are doing nothing as a political subdivision.

OWEN: My point is, if we hold that no TIA is required, we're essentially holding that they don't get the lenient takings standard of the act either.

HATCHELL: That is correct.

HANKINSON: Let me take you back to the mootness question. What is the effect of the Bragg's claim for attorney's fees on whether or not this case is now moot?

HATCHELL: That's an interesting question because it sort of bundles up appellate procedure in addition to. But I would take the position that if mootness occurs during the process of a case, that the ancillary rights and remedies are void as a matter of law. I can't cite any authority to that effect. But it seems to me that that is consistent with the doctrine of mootness, because if there is no case or controversy, it seems to me almost the same result as a voluntary dismissal.

* * * * * * * * * *

REBUTTAL

RODRIGUEZ: Let's continue the assumption that the (b)(4) language is over-broad. I don't think I clearly understand why the (b)(11)(c) exclusion does not apply.

TERRILL: With respect to our challenge to the EAA's well permitting rules, unless an exemption says that it applies to rule making, it doesn't apply to rule making. There are very narrow instances where the legislature has exempted rule making, and (b)(4), (b)(6), (b)(11)(c) and (b)(13) are not any of those instances.

RODRIGUEZ: Notwithstanding the general language that proceeds all of that?

TERRILL: What general language are you talking about?

RODRIGUEZ: Where it discusses the governmental actions. I guess I'm curious on that point. If rule making is not going to be considered a governmental action, what actions would the authority be doing?

TERRILL: Again there is a distinction between governmental action, which is this broad spectrum of governmental actions that are covered by the act which includes rule making, and then the exemptions where they use the word action instead of governmental action and then follow it with narrow fact specific words like preventing a nuisance or addressing threats to health and safety, that sort of thing.

Part of this is just how do you look at a remedial statute like the property rights act. The property rights act, I think is probably perfectly obvious but I need to state it here, is designed to protect landowners not the governmental entities. And so to the extent that there are any close calls in the statute, they need to be called in favor of those who are being protected by the statute - the landowners.

HANKINSON: In that regard on something that Mr. Hatchell raised was his citation to the general powers provision of the Edwards aquifer act that this statute be more specific is going to control over more general statutes. That seems to fit in with what you're talking about.

TERRILL: I think what the legislature is talking about there is ch. 36 of the Water Code is the general provision that addresses groundwater districts. The EAA act is different in many particulars from general groundwater district authority under ch. 36. I think that that's what they are talking about there. They are talking about the difference between the Edwards Aquifer act on the one hand, and general law powers under ch. 36 of the Water Code as regards groundwater districts generally. And the EAA is very definitely different than most...

HANKINSON: As we classically talk about general provisions of statutes and specific provisions, which we talk about a lot, you would agree that the private property act in and of itself is a more general statute than the Edwards Aquifer act and that it is more specific?

TERRILL: I think it's apples...

HANKINSON: No, I understand. Classically we talk about general statutes and specific statutes. Those are legal terms. And your position is that the private property rights act is a general application isn't it?

TERRILL: It is certainly a statute of general application.

HANKINSON: And the Edward Aquifer Act is one of specific application.

TERRILL: It applies to the Edwards, and it is a specific application. The EAA has cited the McMillan case. First of all, McMillan is a statutory takings case. It's not a TIA case. And so in that sense it's distinguishable. But I want to put that aside because McMillan is wrongly decided. And I think it's important for this court to look at McMillan, because it is a very superficial and I think essentially dangerous opinion to the property rights act, because it reads the mandated by state law exemption to mean authorized by state law. They go through and they look at whether that governmental entity has authority under state law to do what it did, and then they take that to mean mandated by state law. And so that would mean only a ulta____ act would be outside of what they're looking at there. And that's an absurd construction of the statute.

Mandated by state law has to be more specific than that. It's the type of action for which a mandamus would lie. At least that's our conception of the statute.

HECHT: Mr. Hatchell says that if you're right on the statutory arguments, EAA and

subsidence districts really can't make it, can't continue doing what they're doing. What's your response to that?

TERRILL: Several. First of all, they claim that we're making a chicken little argument. That's their chicken little argument.

HECHT: Well either you've got to both make it or both give up.

TERRILL: And I know we're not giving up. Takings impact assessment, the whole purpose of that is, they say that this is really about a takings claim. It's not. The purpose of this is, if you can give the Braggs water, then it satisfies their needs. We're not talking about a lot of water here.

PHILLIPS: You're waiving any future takings claim?

TERRILL: No. I think it depends on what the EAA does when they do a takings impact assessment and gives the pecan growers some more water. This isn't about takings. If you do a good TIA up front when you pass your permitting rules, you can address - I'm nos saying you can address all the problems - you can certainly address a lot of them though.

OWEN: How would you get more water under the statutory mandates? I mean it may be that the catfish exemption is unlawful because it violates the statute. But we shouldn't decide this case based on a catfish exemption should we. I mean how do you get around the mandates in the statute that says you proportionately reduce unless you're an irrigater, and then you get a minimum?

TERRILL: Here's what they did. You do have to proportionately reduce. And by the way, the Home Place well did get proportionately reduced, we just fundamentally disagree on that and I think the record speaks for itself, until you get to a minimum. There are two minimums in the statute. There are 2-acre feet for irrigaters that's a minimum. It's not a maximum. And then there's also a 3-year historic pumper rule. What the EAA did is they passed additional rules to protect some other folks. For instance, they passed the SAWLS rules to protect them.

OWEN: They may not be statutorily permitted. Do we base our decision on what the statute says based on perhaps unlawful action by the EAA?

TERRILL: I'm not saying that what the EAA did was unlawful. What I'm saying is they exercised their discretion in those instances, which they claimed that they have to protect certain classes of irrigaters. If they are taking property rights into account for those folks, they ought to do it across the board. Like they specifically say on the catfish farmer rule, that they are passing that rule to protect against a regulatory taking. If they are taking property rights into account for certain...

OWEN: Where do they have a statutory authority to do that is my question? Do they have a statutory authority to do that or not?

TERRILL: Here's what the EAA says. They say we are given broad...

OWEN: I'm saying what does the statute say? Where do they have the statutory authority to vary from the proportionate reduction?

TERRILL: They are not varying from the proportionate reduction. They are still saying that they proportionately reduce. It's just that everybody eventually hits a minimum. And what they did is they by rule gave certain classes of irrigaters minimums so that they wouldn't get proportionately reduced any further.

OWEN: Where do they have the statutory authority to give minimum based on other than historical usage or the irrigaters...

TERRILL: When they have been challenged on that, what they do is they point to the general provisions in the Edwards Aquifer act that say essentially you have the authority to come up with a permitting system to regulate the aquifer. I don't have the cite.

OWEN: Part of your argument is you're asking us to assume that that's legal 1) that the statute allows them to do that, and that therefore, they've got all this discretion, which we may or may not agree with. But doesn't your argument under the act that it's not mandated hinge on whether they have that discretion or not?

TERRILL: I think that they have discretion to regulate the aquifer. The whole purpose of coming up with something like the Edwards aquifer act is the legislature doesn't decide the fine details. They give the authority to a political subdivision, the EAA, to decide who gets what. There is always inherent statutory in rule making.

OWEN: Clearly within certain defined parameters.

TERRILL: Yes. Within certain parameters.

ENOCH: In my mind, it seems to me I understand the argument to be this. The Edwards Aquifer says they don't have to do a TIA because they gave you the minimum that's authorized by the legislature. It seems to me your argument is, no, because they didn't give us what we requested they have to do the TIA. And your response is, since that's just a minimum that means there's this discertion out here and because they didn't exercise their discretion in our favor they have to do a TIA. Am I reading you correctly? The reason you are entitled to TIA is because they didn't grant you more than what the legislative minimum gives you?

TERRILL: Yes and no. There are two parts to this, and it's important to distinguish between the two. When the Braggs challenged the rules as opposed to the permit determinations, all the Braggs have to show is that they are property owners that are effected by those rules. They don't have to go in and say well this rule does this, and this rule does that to us...

ENOCH: But if they give all pecan growers the minimum - you're argument is that they gave different industries something other than the minimum isn't it?

TERRILL: Yes. They took property rights into account for them but not everyone.

ENOCH: Your argument still is that the reason the TIA is due is because they didn't exercise that discretion in your favor. They just gave you the minimum. And their argument is, we don't have to do the TIA...

TERRILL: It's actually different than that. It's that they didn't look at it at all. The property rights act doesn't tell you what rules you have to pass, but it says you do have to take property rights for everyone into account. And they did not do that.

O'NEILL: Can we look at that in terms of the well that did not have the historical use and there is no then permit to put the well, right, to draw water from the aquifer?

TERRILL: Correct. That's the D'Hanis well.

O'NEILL: Walk me through this as to how that works. Under your scenario then, the authority has to file a TIA. And what's the TIA going to say? There's been a taking, correct?

TERRILL: I think you have to step back and first say that there is a TIA for the well permitting rules before you get to the actual permit application.

O'NEILL: Let's just talk about the individual permit application. What you're going to end up with here is a takings claim. Even though the statute says that because there's no historical use the authority had no discretion to grant that permit.

TERRILL: That's an interesting question. And I think that the answer for the EAA is to grandfather the wells that were drilled before June 28, 1996, which is when this court decided Barshop.

HANKINSON: But that's entirely contrary to the express language of the statute.

TERRILL: No, it's not.

O'NEILL: Again, we're heading for a takings claim here. Let's say you get the TIA, and you end up with a takings claim. Take me where that goes. Then the authority is no liable to pay the property owner for the property that's taken?

TERRILL: Let me say one thing before addressing the takings claim. They did grandfather other wells. There's no debate about that. It's in the preamble to their rules. And it's because of this unique situation where you have a statute on the books, but no agency.

O'NEILL: But everybody can say that. Every single person who ever applies for a well permit, who doesn't apply for the historical use can say you can grandfather me.

TERRILL: Well it only goes up through the date that this court decided Barshop. But

that's what they did with subdivision developers.

O'NEILL: Putting that all aside, I want to see where the takings claim leaves us.

TERRILL: What is it that you want me to address about the takings claim?

O'NEILL: Then the authority now is responsible to compensate the landowner.

TERRILL: Yes. An important part of this is in the Edwards Aquifer act, §1.07, they say 3 things in that act. They say we are expressly recognizing property rights and groundwater. We are recognizing that the landowner has ownership rights in that water.

O'NEILL: I understand you're telling me that the act allows that. But what you end up with is the authority paying takings claims.

TERRILL: That's exactly what the legislature says in 1.07.

O'NEILL: What is this subsidence district to do with 5,000 permits?

TERRILL: I have heard about this reference to the subsidence district's brief, and I haven't gotten it, so I'm at a loss.

O'NEILL: Presume with me that the subsidence district has 5,000 permits. What's going to happen to the day-to-day operations if this is the scenario we're going to end up with. TIA's _____ property takings claim and payment to landowners.

TERRILL: Two important points here. The first one is, if you do a good TIA on your permitting rules, you should be able to address in broad programmatic fashion certain categories of problems so that you want have those takings claims. Second, if governmental regulation does in fact take private property, the legislature has clearly spoken and said, we want property owners to be compensated. We don't want individual people to be singled out to bear the cost of regulating the Edwards. We want the public at large to pay for it. That's what the legislature has said. The constitution obviously addresses that, but because there are problems with constitutional takings claims, the legislature went beyond that and said, that this is very important to us.

But I want to emphasize here that this case is not about the court awarding the Braggs water. It's not about the court awarding the Braggs damages. It's just about telling the EAA that they have to comply with the property rights act, and take property rights into account when they are passing their administrative rules.