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Supreme Court of Texas.
EDWARDS AQUIFER AUTHORITY, ET AL.
v.
CHEMICAL LIME, LTD.
No. 06-0911.

April 1, 2008

Appearances:
Mike A. Hatchell, Locke Liddell & Sapp, LLP, Austin, Texas, for Petitioner.
Robert B. Gilbreath, Hawkins, Parnell & Thackston, LLP, Dallas, TX, for Respondent.

Before:

Chief Justice, Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Supreme Court Justice, en banc.

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CHIEF JUSTICE JEFFERSON: Be seated, please. The court is ready to hear the argument in 06-0911 Edwards Aquifer Authority v. Chemical Lime, Ltd.
MARSHAL: Order in the court. Mr. Hatchell will present arguments for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF MR. MIKE A. HATCHELL ON BEHALF OF THE PETITIONER

MR. HATCHELL: May it please the Court. It seems to be a day for deadlines. This case is, is no different. The overlying factual issue is a very simple one, did Chemical Lime file its application for an initial regular permit for pumping out the Aquifer in town even though it was seventeen days beyond the date set by the authority. The basic facts are quite simple. Uhh... the authority set the deadline following the Barshop opinion at December 30th. Chemical Lime was aware of that date but it missed the deadline by seventeen days. The court of appeals said that the authority misinterpreted Barshop and set the deadline too early and therefore, Chemical Lime's application was timely. As a matter of fact, it was actually early, about a month early, according to the court of appeals. The basis for the court of appeals' opinion is an important issue and is the crux of the problem. And that basis is as

follows: the court recognized what...uhh... where the opponent, what we and what virtually all courts in Texas including this Court had recognized and that is the...the dissolution of the injunction in Barshop that prevented the enforcement of the EAA Act, had an immediate effect and therefore, constitutionalized both the act and the authority. But the court of appeals said that the trial court which is true issued a conjoined declaratory judgment declaring that the act was unconstitutional. That that declaratory judgment was not superseded and therefore, it was a legal "impediment" as the court of appeals specifically called it, to the effectiveness both of the act and of the authority. And therefore, the authority and the act did not become effective until eight months later when the mandate of this Court was issued and returned to the court.

JUSTICE HARRIET O'NEILL: Well let me I ask you. You seem to be conjoining the effectiveness of the act and the effectiveness of the authority. And we seemed to draw a distinction in Barshop between those two.

MR. HATCHELL: Well a...as, as matter of fact, we think that the Court used those terms conjunctively. It is true that the Court used the term effectiveness of the act and the effectiveness of the authority but we view the opinion as, as treating both the same and I don't see how you really can separate the two because the authority is created by the act. So if the act is effective, the authority is effective.

JUSTICE O'NEILL: If you did not conjoin the two, how -- what will be the basis for distinguishing...uhmm... when the period began to run based on the authority becoming effective?

MR. HATCHELL: Well, this Court held that when the authority what -- was effected, the legislature intended, by example at least, for there to be a six-month period in which to file the applications under the, under the act. I don't --

JUSTICE O'NEILL: And you, and you can't file an application 'til you know what the rules are.

MR. HATCHELL: That's no way, that's not, that's in a way I supposed that's true but -- but for this reason because the act says that it must be...uhh... it, it must be done on the form specified by the authorities. So to the extent... uhh... that the authority has not specified the form actually that's true but we read the act as simply being self-executing and so far as the deadline is concerned.

JUSTICE O'NEILL: Well, what if the, what if the authority had not put out forms until ten days before the deadline?

MR. HATCHELL: Well, I don't think that would any have effect. It would certainly be disruptive and then of course this is not what happened. What happened is that -- everyone was aware even though they're actually about 139 days, I think after the rule became effective for forms to be filled out and turned in. And of the hundred and thousand, I believe that it was approximately a, a thousand and eight applications, only twenty two were late. So I think that despite the delay in issuing the rule, there was has been no demo -- demonstrable prejudice effect from adding and please bear in mind, your Honor, that that would be precisely the same problem that would, would have been facing the authority if the Barshop decision had never, had never happened. Because under the act as originally done, the authority was going -- the act was going to become effective and the authority was going to come in existence. And he was going to have to promulgate rules but, but the deadline was set by the act itself. So there was going to be some, some delay. There was never going to be a time when

there will be a full six-month period for with rules in effect and forms on the table.

JUSTICE HECHT: Were any rules drawn up after the act of first past?

MR. HATCHELL: After the act of first past...uhmm... no. I don't think there were and my authority is with me and I can stand to be corrected but the authority -- you have to understand that, that there, there was a preexisting agency and the authority both took all the properties and assumed, and assumed the position of, of the previous authority. On the interpretation, that it was the June 28 Barshop decision that gave them the ability to do that. So in fact, directors were not even elected until after that time. So, so prior to then, no there was not.

JUSTICE HECHT: So nothing had been done to, to flesh out the application process until August?

MR. HATCHELL: Not officially, as far as I know. I suppose that it could have been done informally but I'm not even sure, and certainly the record doesn't reflect this exactly if the staff was even in place. And with the ability to --

CHIEF JUSTICE JEFFERSON: Excuse me, Mr. Hatchell. I'm sorry to interrupt you but there's a lot of noise coming from the back. Can we have a bailiff or somebody out there to help us control that noise? Thank you. If you'll continue...

MR. HATCHELL: Thank you, Mr. Chief Justice. The interesting dichotomy that has resulted from the decision in this case is that the Edwards Aquifer Act and the authority cannot be enjoined precisely because as a result of the Barshop decision, they are constitutional. And yet the judicial system, the citizens of Texas, the judge in this case, and the parties have to proceed as if the act is unconstitutional under the holding of the court of appeals. And we say that that is wrong for at least three reasons.

First, the language of the opinion is absolutely to the contrary. This court held we hold today that the deadline was intended to provide in six months to file a declaration of historical use. And the opinion further says, in accordance with legislative intent, we interpret the act as requiring declarations of historical use to be filed six months after the authority becomes effective. The judgment said that the EAA is facially constitutional. The, the judgment said that the injunction is dissolved. And it is the injunction that prevented the effectiveness and I would say first of all that the declaratory judgment merged into this Court's judgment and that any ancillary effect of that certainly was distinguished. We say that our position is correct because of the context of time. Everyone knows that the federal government was about to take over the Aquifer. And this Court processed the direct appeal from processing the appeal, to hearing an argument, to using an opinion in less time than it took to issue the mandate in this case. We think therefore reading the opinion, the urgency in the opinion itself indicates that this Court intended the, the opinion to render the -- both the authority and the act effective immediately. Why is the declaratory judgment not an impediment as the court of appeals assailed? First, we think that it falls with the declaration of constitutionality because all ancillary proceedings related to the injunction itself should be merged into in fall. Second, we say that the trial court judgment merged into this court to judgment because certainly one could not enforce the trial court judgment after the direct declaration of constitutionality. And for that reason, the declaratory judgment should not have prevented the effectiveness of

either the act of the authority. We say that the holding confuses the concept of our third reason of enforceability of a, of a judgment of an appellate court and the power to proceed under that judgment. But finally, a point which I think we make in the, in the brief but I don't think we make it as strongly as we should. We say that the issuance of the mandate cannot be important to -- in this case because the effect of the trial court's judgment and in joining the act was basically to suspend that act. And since we all know that this court's reversal of the injunction had an immediate effect, Article I, Section 8 of the Constitution puts in to effect at that point. It says that the trial court has no power to suspend a valid act of the legislature. What that means is that once this court declared the act to be constitutional there was no legal basis and certainly no constitutional basis for the trial court to suspend operation of the, of the act. And therefore, any...any act doing so is void. So you don't need to get to the question of the mandate. You don't get need to get to the question of supersedeas.

JUSTICE BRISTER: If the court was right that our opinion did not become effective until the mandate, what happens to everybody else's? I guess and even Chemical Lime's application is before the mandate [inaudible]. So what happens to everybody's applications?

MR. HATCHELL: Well, your Honor, we wished we knew. Many say, let me address Chemical Lime's first. In all candor, and I'm, and I'm not sure this appears in the record but I don't think, I think it's improper to tell the court. I believe the authority was sort of acting like [inaudible] file documents rule that we have in rules and procedure. And so I think they were accepting premature filings but, but the broader question that you raised is, is one that we are fearful of but we have no answers to. Let, let me just try to read all the list of horribles. The election of directors' occurred in the gap period between the opinion. We don't know whether that's void or not. Is any action taken during the gap period void? And during that period we set up a regulatory plan for, for monitoring the resource in the [inaudible] and we also set up rules. Are they all invalid? Regulation of water would be in chaos. At a minimum, do we have to recognize all late filers? Do we have to re-notice again and give everyone the opportunity to re-file because of bad notice? And the upshot of all this is going to be because the cap determines the amount that all of the pumpers can get. If we get more filers then we have to proportionately, we believe, lower the pumping rights of the existing, of the existing pumpers, and we believe then that's going to prompt almost a pumper wired lawsuit against the Aquifer.

CHIEF JUSTICE JEFFERSON: Why did Chemical Lime not file within the six-month period and does it matter what their rationale is?

MR. HATCHELL: Why were they seventeen days late?

CHIEF JUSTICE JEFFERSON: Yeah.

MR. HATCHELL: They, they were aware they had -- they were aware of the day, they had an employee who was working trying to compile the ten years, I believe of or maybe longer, of historical pumping data and he simply was unable to do that. He believes that he, he made a telephone call to the authority and made two telephone calls in which he believes that the authority told him to "get it in." And he interpreted "get it in" to mean get it in any time you want to. We believe that the more likely thing that happened was that he was told "you can get it in by the deadline and you can supplement it. But in any event, it was his interpretation of the phrase "get it in" that caused him to believe he simply had more time.

JUSTICE O'NEILL: Because the authority granted the permit here initially, none of the other water pumpers were affected, right? I mean.... What's the status quo right now? Chemical Lime is pumping. They were given the permit. So if they continue with that permit then what's going to happen --

MR. HATCHELL: They have not, as I recall, been given a permit. They have never been given a permit and I think as a result of this act, they are continuing to pump.

JUSTICE O'NEILL: Well, I think getting -- they were given preliminary approval and then --

MR. HATCHELL: I think that is correct.

JUSTICE O'NEILL: -- they were sort of revoked but, but as it presently stands no existing pumpers [inaudible] for example are going to be affected if this application --

MR. HATCHELL: I think that's, that is incorrect, your Honor, because the cap is determined now on the basis of, of the total. I am not used, used I think it's called acre or feet, of all persons who have permits and therefore, if Chemical Lime is put into the mix then that's going to have to be leveled out and others are going to have to be reduced. And that would end -- that's also true of any other late filers --

JUSTICE O'NEILL: Well, I understand that but I, I, I -- if others have gotten their permits, are you telling me that -- is Chemical Lime the only one that's still pumping but they haven't been approved?

MR. HATCHELL: I'm not certain about that...

JUSTICE O'NEILL: So you're telling me --

MR. HATCHELL: It's not in the record that I' am aware of.

JUSTICE O'NEILL: You're telling me even though they're still pumping permits were granted to other users based on that use?

MR. HATCHELL: I think that's correct.

CHIEF JUSTICE JEFFERSON: Justice Hecht, do you have question?

JUSTICE HECHT: But it is a small amount, right? Their usage is relatively small amount compared to the pumpers [inaudible] like they say 600 acre feet per year is supposed to 450,000 total.

MR. HATCHELL: I think that's correct. Yes.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Mr. Hatchell. The court is ready to hear argument from the respondent.

MARSHAL: May it please the Court. Mr. Robert B. Gilbreath will present argument for the respondent.

ORAL ARGUMENT OF MR. ROBERT B. GILBREATH ON BEHALF OF THE RESPONDENT.

MR. GILBREATH: May it please the Court. The authority is effectively asking this Court to give up a pretty important safeguard for ensuring the cases are correctly decided and that is the ability to change your mind on rehearing. Because if you hold that this Court's judgments are immediately effective, then as a practical matter the Court's ability to change its decision on rehearing --

JUSTICE BRISTER: How about you give that up? In Barshop we said statute says these six months but we say these six months and then we change our mind on rehearing, we would just say never mind, those six months. So why would wait the Supreme Court? Why would we give anything up?

MR. GILBREATH: Well, you would in future cases because if you say

that in Barshop, if -- what they want you to rule, is that this court's decisions are immediately effective before the mandate issues. So if you go with that holding, which is the holding, you would have to reach to sustain their position --

JUSTICE BRISTER: Why wouldn;t we want people to obey what we say immediately?

MR. GILBREATH: Well, you would -- There's a couple of reason why not, your Honor. Let me tell you, the first is that they say that well, the mandate is an inadequate benchmark but if you tell the public that your decision is the correct benchmark and then I think that's a misleading benchmark because think about it, when cases are published in Westlaw what's the big disclaimer at the top? This decision is not final and it hasn't and it's not going to be final. Don't rely on it until it's on the official law reports. Oh, when does that happen, it's after the motion for rehearing is denied.

JUSTICE BRISTER: But what happens to us if we say this law is unconstitutional and the legislature says well mandate haven't issued yet, so we're going to keep doing it.

MR. GILBREATH: Well that's the way most courts -- when appellate courts have to grapple with this issue, they always say that it's the mandate, your Honor. The original, if they you go with their position that the judgment is immediately effective, then the decision essentially become a fait accompli. Let's say the court mistakenly upholds the constitutionality of a statute authorizing the termination of parental rights. Well if the court's judgment is immediately effective than a whole lot of parental rights could be terminated in the interim before the court grants the motion for rehearing. And there are host of other unintended consequences that would follow from such a holding. I wanna underscore these next few points because they are not in our brief but I think they are very important for the court to consider. For example: what about statutes such as Articles 7.02(F) of the Business Corporations Act in Section 61.34-C of the Alcoholic Beverage Code which effect -- tied the effective date of an appellate court's decision to its mandate. For example: the Alcoholic Beverage Code provides, if a license is issued on the basis of a district court judgment and that judgment has reversed on appeal the mandate of the appellate court automatically invalidates the license. And what about supersedeas bonds, if this court's judgment is immediately effective then presumably the prevailing party can go out and collect the supersedeas bond before the court has a chance --

JUSTICE BRISTER: But the rules say you can't do that for 30 days.

MR. GILBREATH: I don't think so, your Honor.

JUSTICE BRISTER: Well, you can't execute for 30 days. You can't do lots of things for 30 days. But I mean what we have, what if we say sue and be sued doesn't waive governmental immunities. So, for eight months or however long time it takes us to get the mandate and rehearing over in that case, while everybody tries to get us to change our minds. Trial court just says well, we're going to keep doing it. I mean we don't send the mandate to anybody without publishing it anywhere. How would -- how would trial courts ever know when they need to start doing what we tell them to, when we tell them to do it be a good date?

MR. GILBREATH: The court invariably, the courts that have to grappled with this issue and said when the mandate issues. And another, think about this --

JUSTICE BRISTER: Which is published where?

MR. GILBREATH: It's not published but it's issued by this Court --

JUSTICE BRISTER: So everybody needs to start doing it on a date

that nobody knows of?

MR. GILBREATH: Well they know. They can check with the court and see when the mandate issued. The attorneys regularly do that, they tell their clients, look, it's not going to become effective until the mandate issues and then they check with the court now. Think about this, your Honor, if the respondents in Barshop had decided to appeal to the United States Supreme Court, what could they have done to prevent this court's decision from taking effect in the meantime? Seek a stay of the court's judgment? Well, I guess if the authorities are correct, then yes. But that is not what the rules of appellate procedure call for, the rules specified that under those circumstances, you are suppose to seek a stay of the mandate. That is Rule 18.2, and at the time of Barshop it was Rule 186-B. So, I think that rule make perfectly clear that it's the mandate that makes this court's decision effective. And what the authority is asking you to do is just not how appellate courts operate. They do not treat their decisions as immediately effective without taking special steps to make them so because the Eighth Circuit said on a Bailey case that is cited in our brief. An appellate court acts formally and officially only through its mandate. So for example, in Bush v. Gore, the United States Supreme Court specifically ordered the clerk to issue the mandate immediately, the same is true as the United States v. Nixon, the Watergate tapes case. The court ordered the mandate issued immediately. And think about the Elian Gonzalez case, you remember that case of the little boy from Cuba?

JUSTICE BRISTER: That compels the problem you started with though, if you do that. If we go, say well we have decided we really want people to obey what we say the second we say it.

MR. GILBREATH: Correct.

JUSTICE BRISTER: So, we will issue the mandate every time and then within six months or nine months we'll get motion for rehearing and then if we do change our mind, then we undo the mandate, which we told them to do immediately.

MR. GILBREATH: You have to recall the mandate, but I don't think there are that many cases where this court perceives a need to make its decision immediately effective. Most times the court wants to act deliberately and wait to its decision --

JUSTICE BRISTER: How many cases are there that you are aware of, where trial judges and the legislature ignore our opinions and tell the mandate issues? I mean part of the reasons we don't have to issue the mandate immediately is because everybody thinks when we say it, it's a law and if we tell them in this case no, ignore what we say. Tell the mandate issues we will get around to that later we are not telling you what that is... I'm just trying to figure out how we gonna run this railroad if the date when the people think -- what we say is the law then become law to some date that nobody knows what it is.

MR. GILBREATH: Well, it depends. It becomes the law, as to when the mandate issue controls as to the parties before the court. Now, there's a difference of opinions among courts about whether it is binding precedent the day the opinion comes out. That's a different issue and I think that's what you're raising. For our purposes, the mandate is necessary in the case before the court and that's the point, that's the only point I need to prevail on here. But, in the issue of whether the court's decision becomes binding precedent on other cases, courts disagree. I don't know the answer but I tell you what Chief Justice Rehnquist thought, when he had to deal with the issue. It is in our supplemental authorities' handout, the Chief said, Chief Justice

Rehnquist, look the decision on the Northern Pipeline just isn't effective we haven't issued our mandate yet. So, it was not binding precedent in the case before the court? There is also a decision from the Austin Court of Appeals where they say the same thing. The decision by the court in criminal appeals wasn't effective yet because the man -- it was not binding precedent yet, because the mandate had not issued. But --

JUSTICE HECHT: -- We've been a little looser about issuing on a mandates. appellate courts in Texas that it seems to be the federal system answer, is that [inaudible]

MR. GILBREATH: Well, I have checked [inaudible] the court's issuance of the mandate in recent years. And in recent years, the court has issued the mandate when it's supposed to be issued or just shortly a few days thereafter. So I think the court --

JUSTICE HECHT: In fact there was a time where the appellate courts just kind of did it when they get around to it --

MR. GILBREATH: It was. That's correct.

JUSTICE HECHT: Unwelcome burden and they put it off as long as they could and maybe Christmas time or something [inaudible].

MR. GILBREATH: I think many years ago, historically, that did happen. I would point out on that point, your Honor, that in 19 - when Barshop was decided on '96, the mandate was supposed to issue fifteen days after the court overruled the motion for rehearing or after the time expired to file a motion for rehearing. In '97, the court shortened that period to ten days, so I think the court was aware that the mandate is an important instrument. Just like in all of these cases I've recited -- the Elian Gonzalez case, when the Eleventh Circuit it imposed its own injunction and said "you can't remove this boy from United States."

JUSTICE O'NEILL: But that was going to be in my question. I mean, if should be draw a difference in this case between the declaratory judgment and the dissolution of the injunction?

MR. GILBREATH: No --

JUSTICE O'NEILL: The fact that we immediately dissolved the injunction doesn't that sort of operate as a mandate?

MR. GILBREATH: No, your Honor. I think that I would disagree to certain extent with the court of appeals on that issue and that is the -- I don't think the injunction was immediately dissolved. They have relied on a number of older cases that were decided before the rules were amended on this issue and so the key here is when this court's decision became effective and I don't agree with this notion that the injunction was immediately dissolved, but the declaratory judgment remained in place. Nothing happened until the court issued its mandate as between these parties. Court's decision --

JUSTICE DON WILLETT: What about an application files, like yours, pre-mandate?

MR. GILBREATH: Those decisions are, pardon me -- those applications are effective. They were prematurely filed. They became deemed effective on the date that the rules take effect and there's more --

JUSTICE BRISTER: What place is that?

MR. GILBREATH: I'm sorry, your Honor? The reason is --

JUSTICE BRISTER: But If I filed my application 1899. That the authority hadn't even been dreamed of yet. Why would that be effective?

MR. GILBREATH: The reason is, your Honor, in Section 1.41 of the original Edwards Aquifer Authority Act, they have got in their appendix of a more recent addition that is not relevant on these questions, you

got to have to go back and look on the copy of the record. But on the Section 1.41, the legislature provided that the rules past by the Edwards Aquifer Underground Water District would be effective rules for the authority and so they would be -- just because the authority changed, the prior rules would become effective.

JUSTICE WILLETT: The rules of the predecessor entity? That rules of the predecessor agency.

MR. GILBREATH: And so for that reason, this parade of horribles that you heard earlier is a non-starter, for that reason, and also because as we pointed out in our brief, in 2007 the legislature amended the act --

JUSTICE BRISTER: But the only reason there was a six-month period deadline is because these folks said it was, what you're saying these folks did not exist at the time. So, really nobody has ever said, and at the time when this group outfit was effective. Nobody had ever said what the deadline is, and people could file today or at least before the mandate issues in this case.

MR. GILBREATH: No, your Honor. I don't think it was the authority that said it was a six-month deadline. It was this court and Barshop so --

JUSTICE BRISTER: And your data knew about it?

MR. GILBREATH: He knew about it, but he called the authority and he spoke with Gil Tippen and said "look, I'm having trouble getting this 20 years worth of data but plan has been around since 1907. I'm having trouble getting this 20 years' worth of data, what should I do? --"

JUSTICE BRISTER: Never mind. Don't worry about it, that's just the Supreme Court and their mandate had not issued anyway.

MR. GILBREATH: But that was before the Supreme Courts -- I mean that was not the issue then. What the issue was is he calls and he says, "I'm having trouble getting this" and she says, "When you get that data just get it in." Now she had just told us that the authority had an unwritten rule that they would have accept the applications with incomplete data, then we would have filed their application and got the data later.

JUSTICE: Do you have an argument for a substantial compliance with our rules and [inaudible]?

MR. GILBREATH: Yes, your Honor. I think what the court should consider on the substantial compliance point is that there was, in this case, you know what they rely on this is United States Supreme Court case, the Locke case or you can have substantial compliance with the deadline. Well this Court and other state courts don't have necessarily agree with that view point and Hellenic Chemical Company case v. Wilkins, the court said that you could substantially comply with the deadline. But also I would like for the court to consider on that point that here you have a situation of official mistake that is added into the mix so that under those circumstances we suggest that you can have certainly substantial compliance. Think about the Baker v. Goldsmith, the old bill of review cases like that, where you consider official mistake. And here you do have official mistake because you have agencies --

JUSTICE BRISTER: -- you said we set the government agencies can't be estopped by somebody who answers the phone and says," Oh, pay no attention to our deadlines."

MR. GILBREATH: That's correct, your Honor.

JUSTICE BRISTER: And so, that's all you're saying here, though?

MR. GILBREATH: I don't think so, your Honor. I think we have

different arguments, a substantial compliance argument that's distinguishable from that situation.

JUSTICE BRISTER: How about parking back to our two previous cases this morning. Everybody else is going to be prejudiced. When the water level is low and in drought years and everybody is going to get cut back, the more people we add on, like your client, the less everybody else gets.

MR.GILBREATH: I don't believe there will be any additional applications approved because of this -- you rule in our favor --.

JUSTICE BRISTER: If we have your guy and leaving aside the question of whether since were declaring none of these -- all of these will happen during the time when the agency didn't exist, because of mandate had an issue, if we have your guy then in times of dry weather everybody else is going to get a little less, so there is no question there is going to be prejudice from this late files.

MR. GILBREATH: I disagree, your Honor, because we have been drawing water since 1907. We have continued to draw water, even though they want to deny our permit. We have been continuing to draw water. They gave us an initial regular permit, a proposed permit; we have been continuing to draw. They have got to have factored that in they got no evidence to say we haven't factored that in --

JUSTICE BRISTER: How do say a 600 acre feet, whatever your client is using. How is that that total amount work in a post [inaudible] water that has been [inaudible]. Sounds pretty minimal to me that --

MR. GILBREATH: It's very minimal. There are 572,000 acre feet that the legislature approved in the last session now. And they approved that based on all pending applications. They said that's the amount that is needed to cover all pending applications. Our application has been pending --

JUSTICE BRISTER: Do you have substantial compliance company has been around since 1907 doing the same thing. It's doing then what it's doing now. You have minimal water draw. Are those factors for us to consider or do we just look to in the mandate may or may not have issued?

MR. GILBREATH: Well, I think you should consider those factors, your Honor. I think there are a number of factors to be considered in this case, beyond just, I mean if you rule in their favor, the mandate issue is going to be a serious problem because of all the unintended, unforeseeable consequences that it would cause; for example, the statutes I have pointed out, but also these factors like our substantial compliance, the court's use of the language in the steep . You know when it adopted or embrace the holding in Stevenson case and said the words aren't going to be, or the six months doesn't begin the run until the authority becomes effective and here, how can you say that the authority was effective for purposes of accepting applications, before they even knew what the applications look like? I mean, they want to start the deadline two months before they even thought about what the application forms would look like. And they even state in this amicus brief says, the legislature intended that applicants have six months to file the necessary paperwork. And how would you have six months, if the authority has not even told you what the paperwork is supposed to look like and on the other hand, they are telling you to fill out one of their forms?

CHIEF JUSTICE JEFFERSON: Can I ask you to clarify just one point a moment ago in answers to Justice Brister did you say that the court set the six-month deadline or the authority?

MR. GILBREATH: It was the court.

CHIEF JUSTICE JEFFERSON: Well, in the court of appeals' opinion and maybe we'll just say to look at the record on this, it says that in lieu of the then-expired 1994 statutory deadline, the authority relying on an interpretation of Barshop set by rule a deadline of December 30th 1996, six months after Barshop --

MR. GILBREATH: Oh correct, your Honor --

CHIEF JUSTICE JEFFERSON: -- it's very confusing.

MR. GILBREATH: The authority is the one that set the specific deadline. It was this Court that said we interpret the legislature as the intending the parties have six months to file their application so, that's what I intended to say. So, the authority, yes, did choose the specific deadline.

JUSTICE HECHT: You refer to the state's brief. They have a different position about the effect of the notice of appeal on the trial court's judgment. Could you respond briefly to that.

MR. GILBREATH: Their argument is wrong, your Honor, because this court has said that the state's notice of appeal will act as a supersedeas, unless a contrary intention has expressed and here a contrary intention was very clearly expressed. The --

JUSTICE HECHT: By the trial courts you mean?

MR. GILBREATH: By the state.

JUSTICE HECHT: By the state.

MR. GILBREATH: When the state expresses a contrary intention, then there is no supersedeas. And they did that in about three different ways, I mean first one they filed their notices, the appeals -- they said, "Were not bound by the old cost bond requirement back then" but they didn't say anything about the supersedeas bond requirement. And then when the trial court denied them supersedeas they said, "Oh! well, we'll just let it go." They didn't challenge that, they had a right to do so. And then when they get in this court, in order to prevent the court from holding the deadline or holding the statute unconstitutional because the deadline had passed, they said, "Well, the act hasn't been in effect all this time," which, of course it's the judgment or if their notice of appeal have superseded the trial court's judgment, then yes it would have in effect. So in this court, they said "No, the act hasn't been in effect." So they essentially conceded that their notice of appeal did not supersede the trial court's judgment.

JUSTICE HECHT: Do you know whether everything is done by the authority or staff or otherwise during that period of time?

MR. GILBREATH: During which period?

JUSTICE HECHT: Until this court held the act was unconstitutional?

MR. GILBREATH: No, I do not, your Honor.

JUSTICE HECHT: [inaudible] I guess nothing was done then.

MR. GILBREATH: Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF MR. MIKE A. HATCHELL ON BEHALF OF THE PETITIONER.

MR. HATCHELL: May it please the court and Justice O'Neill, I have the answer to your question. It's outside the record. But, I do think that it's mentioned in the respondent's brief. There has never been a regular permit issued to Chemical Lime by the Board of Directors. They are the only one who can issue permit. But they are pumping today under an interim permit that has been granted by agreement. We had understood

that it was not to be a part of the record, but since it was mentioned --

JUSTICE O'NEILL: So everyone else's rights is taken into account -- that interim permit, they were allied?

MR. HATCHELL: No, that's not correct.

JUSTICE: Who issued now the permit?

MR. HATCHELL: Well, I think that I have -- again this is outside the record -- they would issue the permit, I suppose, to keep the status quo during the pendency of the litigation.

JUSTICE O'NEILL: How do you deal with trial court Rule 18.6 --

MR. HATCHELL: Oh, my favorite subject.

JUSTICE O'NEILL: -- [inaudible] of logical result?

MR. HATCHELL: I find that I'm oftentimes the only person along with Justice Hecht who's lived through the history of these rules. Well, first of all, let me say that at least in olden times, there were many, many considerations and interlocutory appeals that would justify the old 385 ruling to the 18.1 rule as we now have. As sometimes happens that I think the rule is not really written o reflect what was going on. A colorful better judicial history behind the rule is that there was --

JUSTICE O'NEILL: Well, let me -- without going into the history of the rule, what's the logical reason for making an accelerated appeal or wait the mandate for effectiveness but an irregular appeal --

MR. HATCHELL: Well, the answer is because Judge Dee Brown Walker in Dallas was notorious for, since he was in the courthouse finding out the opinions of the court of appeals and interlocutory appeals, and doing something within the case before the mandate came down. And Justice Clarence Ketard carried this rule amendment to the --

JUSTICE O'NEILL: I am not asking how it happened. I'm asking what's the logical basis regardless of what may happened in one court [inaudible] --

MR. HATCHELL: The logical basis is to give the court of appeals the immediate authority to issue its mandate with its opinion and interlocutory appeals so the trial courts will obey the judgment of the court. And that brings me I think --

JUSTICE O'NEILL: But why should it be different on regular appeal?

MR. HATCHELL: Well, it's different because in regular appeals, the mandate occupies three different roles, it occupies a role of simply providing notice to the trial court that the judgment has been rendered.

JUSTICE O'NEILL: As it does in the other -- in the interlocutory appeal?

MR. HATCHELL: It occupies the roles of...re-investing the trial court with how to enforce the judgments. And it finally occupies a role of simply to carry the judgment into effect. But in this particular case, -- pardon me -- to allow the trial court to do what needs to be done to implement that. But in this particular case, where the court has already stated, that the injunction is dissolved and the act is unconstitutional, the mandate occupies nothing more than a formal role. It does provide notice, but it does not require any enforcement and there was no need in this case, therefore, to prevent the trial court from inferring with the appellate court jurisdiction.

JUSTICE O'NEILL: So, to take some words from the response brief, you'd say that in a regular appeal the mandate is nothing more than a nagging and duplicative reminder?

MR. HATCHELL: That's not really necessarily true. It depends on the circumstances of each case. And I think if you look at the kinds of

cases, on which the Court has said that there is an immediate effect to the judgment, you will see that there are many kinds of cases involving the custody orders, contempt, conservatorship, injunctions, and receiverships that need to have an immediate effect; but on the other hand, there are many kinds of cases which where reversed and remanded, where the rights of the parties must be adjusted, and it's that adjustment, the re-empowering of the trial court to adjust those rights just to where the mandate has its most, probably its highest calling. In this case, it had no calling at all because everything had been done.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Patrick [inaudible], it is submitted. That concludes the oral arguments for this morning and the marshal will adjourn the court.

MARSHAL: All rise. Oyez, oyez, oyez. The honorable, the Supreme Court of Texas now stands adjourned.

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