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Supreme Court of Texas.
Edwards Aquifer Authority and the State of Texas, petitioners/cross-respondents,
v.
Burrell Day and Joel McDaniel, respondents/cross-petitioners.
No. 08-0964.
February 17, 2010.

Oral Argument

Appearances:Pamela Stanton Baron, Attorney at Law, Austin, TX, for petitioner: Edwards Aquifer Authority.
Kristofer S. Monson, Office of the Attorney General, Austin, TX, for Petitioner: The State of Texas.

Tom Joseph, Tom Joseph P.C., San Antonio, TX, for Respondents-Cross-Petitioners.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 08-0964, Edwards Aquifer Authority and the State of Texas vs. Burrell Day and Joel McDaniel.

MARSHALL: May it please the Court, Ms. Baron will present argument for Petitioner, the Edwards Aquifer Authority. Mr. Monson will present argument for Petitioner, the State of Texas. Petitioners have reserved five minutes for rebuttal. Ms. Baron will open with the first ten minutes, and Ms. Baron will present the rebuttal.

ORAL ARGUMENT OF PAMELA STANTON BARON ON BEHALF OF THE PETITIONER

ATTORNEY PAMELA STANTON BARON: May it please the Court, the Edwards Aquifer is the primary source of water for South Central Texas. In 1993, concerned with increased demand on the aquifer, the

potentially devastating effects of a drought, and the threat of federal court intervention to protect endangered species, the Texas Legislature adopted the Edwards Aquifer Authority Act. The Act declares the aquifer to be a unique hydrologically complex and distinct natural resource that is vital to the general economy and welfare of the State. To protect this vital resource, the Act provides that withdrawals from the aquifer are prohibited without a permit, it places a cap on total annual withdrawals from the aquifer and it grants priority to existing users. This Court in the Barshop case upheld the Act against a wide variety of facial constitutional challenges, including a facial takings challenge, but the Court made clear that in any future as-applied takings suit, and I quote, “It will be the landowner's burden to establish a vested property right in the underground water.” The issue before the Court today is whether plaintiffs have met their Barshop burden in this case to establish a vested property right in groundwater. The Authority asserts they have not for two reasons. First, under this Court's decision in East, the interests that they assert here is not vested because it is not exclusive, enforceable or certain --

JUSTICE HARRIET O'NEILL: Well, it is enforceable. I understand you're saying it's not enforceable because an adjoining landowner can take from underneath the owner's property, but they can offset that right by drilling themselves. And so it is enforceable in the sense that you can recapture your groundwater by drilling yourself.

ATTORNEY PAMELA STANTON BARON: You can, but this Court has never really talked about the remedy of self-help in the context of groundwater. It's repeated it in oil and gas, and as both Professors Walker and Johnson recognize in their articles, the remedy of self-help is really not practical or available in a groundwater context. For example, in the East case, the railroad came in and dug a deeper, wider well, and cut off Mr. East's water supply. He was only using it for domestic and household use.

JUSTICE HARRIET O'NEILL: But you could, you could offset that taking. You have the right to capture as much underneath your surface as you can pull out --

ATTORNEY PAMELA STANTON BARON: Well, without --

JUSTICE HARRIET O'NEILL: -- and so you have a right to enforce what's beneath your property and you have the right to exclude someone from invading or drilling or sinking a well underneath your property, so there are enforceable and exclusive aspects of the undershed.

ATTORNEY PAMELA STANTON BARON: Well, I will say that the remedy of self-help is available, I just would argue that in groundwater law, it really is not the same thing as in oil and gas, where if you drill a deeper well, there's an immediate market for what you produce, and it is meaningful to do that. But when you're only protecting for domestic use and you don't have a railroad shop or you're not Ozarka bottling water, that the remedy of self-help in the water area is not that useful.

JUSTICE HARRIET O'NEILL: What if you had a reservoir that was entirely contained underneath your property, would your answer be different?

ATTORNEY PAMELA STANTON BARON: I still don't think --

JUSTICE HARRIET O'NEILL: And nobody else could get to it.

ATTORNEY PAMELA STANTON BARON: You still wouldn't own it until it was captured. And let me explain what I think the plaintiffs' argument is in terms of how they get from the East case to the idea that they have a vested property right in the ground water in place. What they do say is in the East case, in the course of it, the Court takes this quote out of Pixley vs. Clark, which is New York case, and it says, “The landowner owns the soil and the water in it, which is part of and not different from the soil.” And then they transmute that quote into a holding in East that landowners absolutely own ground water. Then from there, they say absolute ownership, as used in Pixley, equates to ownership in place in oil and gas, and because this Court has recognized that vested rights in ownership in place in the oil and gas are subject to

constitutional protection, therefore they have a vested right. And there are a number of flaws with that syllogism. First of all, it's based on double dicta. The quote from Pixley was really not a holding in East, but it was just a statement of whether or not New York followed a particular rule or not. And then again it's --

JUSTICE NATHAN L. HECHT: But if I could interrupt you, you say in your brief in reply at page 11, that landowners have some rights to groundwater.

ATTORNEY PAMELA STANTON BARON: Yes, they do.

JUSTICE NATHAN L. HECHT: What are those, I'm not clear.

ATTORNEY PAMELA STANTON BARON: Right is the Rule of Capture right to enter onto the property. It's exactly what he says, that the owner of the surface may dig therein and apply what he finds. So it's a right to dig, apply and find, would be the property right.

JUSTICE DAVID M. MEDINA: Is your argument that the Edwards Aquifer is exempted from any water rights that a landowner has because there's a bigger state interest as explained in Barshop vs. Medina? It seems to me that plaintiffs could never win under your analysis, the landowner could never have a vested right in water as it comes from the Edwards Aquifer.

ATTORNEY PAMELA STANTON BARON: Well, I'm not sure it's a question -- I don't think the East case is aquifer-specific. I think that what this Court held is what this Court held in East, and what it did not hold was that there was ownership in place. And in terms of that, the holding in East was the dig, apply and find, and as this Court wrote in Coastal, the Rule of capture says nothing about ownership in place.

JUSTICE NATHAN L. HECHT: So who owns the groundwater, nobody?

ATTORNEY PAMELA STANTON BARON: Nobody has to own it. I think there's an incorrect statement in the briefs that somebody has to own something all the time. Not all of the states around the United States have followed the rule of ownership in place with respect to oil and gas. Those are called Non-Ownership States, and in those states, the oil and gas is not owned until it's actually captured.

JUSTICE HARRIET O'NEILL: But that's never been Texas law, and why should we treat water differently from oil and gas?

ATTORNEY PAMELA STANTON BARON: Why should we treat it differently? Because they haven't progressed along the same path, and I think there's this misconception that the ownership statement in Pixley equates to ownership in place. But the Court in Elliff in 1948 said, what “ownership in place” means is title in severalty to oil and gas in place. And the Pixley quote doesn't say title, it doesn't say severalty, and it doesn't say ownership in place. And if you look at this Court's opinions, you've never said ownership in place.

JUSTICE HARRIET O'NEILL: Yeah, but why wouldn't we treat it the same? I mean just as a practical matter, why shouldn't we subject the Authority to some sort of reasonableness test of investment-backed expectations, just a regulatory takings analysis? Why wouldn't we do that?

ATTORNEY PAMELA STANTON BARON: Well, I think you have to start with, is there a vested right? We're not asking you to treat us differently, but that --

JUSTICE HARRIET O'NEILL: But you've claimed that there are going to be all these adverse impacts if we go through this analysis, but why isn't groundwater just as valuable as oil and gas, and why shouldn't there be a vested right in it? And let's just put the regulatory takings analysis overlay on it. We do that in

zoning, we do that in oil and gas, why treat this differently?

ATTORNEY PAMELA STANTON BARON: Well, there are so many differences between oil and gas and ground water. You know, first of all, just historically the way the question came up back in Daugherty and Stevens vs. Kansas was in a question of taxation, and the problem was is that you could tax coal, but you couldn't tax oil and gas. And the Court recognized that oil and gas is a mineral, we're going to treat it the same as minerals. It's the most valuable thing on the property. But beside that, there are so many physical and economic differences between water and oil and gas.

JUSTICE EVA GUZMAN: It's not just a value issue. Water is very valuable, particularly in some parts of this state.

ATTORNEY PAMELA STANTON BARON: That's true.

JUSTICE EVA GUZMAN: Arguably more valuable than oil, at times.

ATTORNEY PAMELA STANTON BARON: That's true, but it is still not subject to ad valorem tax as a separate title and severalty like oil and gas is. But here, particularly in the Edwards, we have a resource that with good management is renewable. It is life sustaining, it is in constant motion. It is not static; it is one of the most transmissive aquifers that we know. Water has developed differently than oil and gas. There's no historical use for oil and gas. The first well was drilled into the Edwards in the late 1800s, cities have been built, industry is founded based on this water. You don't have to do that with oil and gas. When the field is discovered, everybody comes in equal. We don't have that in the Edwards, and the regulatory objectives between water and oil and gas are different. Oil and gas, you're trying to maximize the size of the pie, split it up and get every drop and --

JUSTICE NATHAN L. HECHT: Could the Authority refuse to allow someone -- not the Authority, but the Legislature refuse to allow pumping even though there had been historical use?

ATTORNEY PAMELA STANTON BARON: Well, obviously, you know, we don't have that question here, because historic use --

JUSTICE NATHAN L. HECHT: But if there's no vested right, isn't the answer yes? I think that there is no vested right to future production of water, and Mr. East found that out the hard way. But I will say that if you require somebody to shut down their well, there may be issues related to investment in the facilities that are basically being rendered worthless at that point.

JUSTICE HARRIET O'NEILL: But there's an entirely different analysis. On the rule of capture, in Mr. East was somebody was draining their property, and the Court just said there was no tort liability there, but it didn't really address ownership of the water in place.

ATTORNEY PAMELA STANTON BARON: Well, I agree with that, but I think that the argument on the other side is that this Court held in East that water is owned in place. And I think the Elliff case going back to the Elliff case in 1948, this Court recognized that the common law related to oil and gas in terms of recognizing ownership in place was a big deviation from the common law of migratory substances generally, and groundwater in particular. Because there again, it observed the split in the oil and gas states, the non-ownership versus ownership states, and it said the non-ownership states, the pure rule of capture states base that on the law of migratory substances, including subterranean waters that recognize that the substance is not owned until it is captured.

JUSTICE HARRIET O'NEILL: Would there be any check on the Authority's ability to curtail water at all? I mean under your analysis, it could even be arbitrary. If there's no vested right, the landowner couldn't challenge it.

ATTORNEY PAMELA STANTON BARON: No, that's not true. As this Court knows, this has been the most reviewed Act probably in the history of water law, but there are other constitutional protections available to landowners that don't require vested right- substantive due process, equal protection, plus they have the right to judicial review if the Authority exceeds its statutory authority, as the Court noted in Guitar and, you know, gave teeth to that provision.

JUSTICE HARRIET O'NEILL: But that's a pretty unfettered power, if it's just subject to substantive due process analysis.

ATTORNEY PAMELA STANTON BARON: No, it's also due to judicial review if you act outside your statutory authority. And you have to remember that what we have decided is to regulate groundwater at the local level. The boards are elected, they are accountable to their electorate, and if they are making decisions that are not the best for the particular aquifer, there is the power of the electoral process. There's also the ability to go to the Legislature for particular changes related to particular aquifers. And I think a lot of the arguments in this case really are that this Court should decide the common law on an aquifer-by-aquifer basis, but really that's just asking the Court to regulate groundwater, and what we need to do is have the Legislature take action, like it did in the Edwards Aquifer Authority Act, to make sure we have a system that's in place and works for the particular aquifer.

JUSTICE HARRIET O'NEILL: But it would be simply subjecting the Authority to any sort of regulatory takings analysis. And I'm not sure I understand why that would wreck the plan of salvation, if groundwater in place is treated the same as zoning laws or any other property right.

ATTORNEY PAMELA STANTON BARON: Well, here's the -- I guess, groundwater in place -- I mean oil and gas in place is subject to vesting, and the only way that's affected is by recognizing correlative rights, which is that you have the reasonable opportunity to produce your fair share of the minerals. And we don't recognize correlative rights in groundwater, so I'm not sure even if you recognize groundwater in place that you get to a vested right. But there are limitations, there are situations that can be a taking, but the way the Legislature has structured this Act, most of the landowners overlying the aquifer are not going to be able to withdraw water.

JUSTICE DALE WAINWRIGHT: Ms. Baron, regarding ownership, Section 36002 of the Water Code, says, “The ownership and rights of the owners of the land and ground water are hereby recognized.” You were asked about what rights landowners had in the water, and you said, three, to dig -- what were the other two?

ATTORNEY PAMELA STANTON BARON: Dig, apply and find, or dig, find and apply would probably be the correct order.

JUSTICE DALE WAINWRIGHT: Okay, so those are the rights. But the statute says, “Ownership and rights.” So what ownership in groundwater was the Legislature talking about in this statute?

ATTORNEY PAMELA STANTON BARON: Well, the landowner does own the land and the right to use the land to get the water.

JUSTICE DALE WAINWRIGHT: It says, “Ownership in groundwater is recognized.”

ATTORNEY PAMELA STANTON BARON: Right.

JUSTICE DALE WAINWRIGHT: What does that mean in your opinion?

ATTORNEY PAMELA STANTON BARON: My opinion, and really once you define what East says, then

it becomes a question of semantics. I think other states that have looked at this issue, for example, in Kansas I think they call it a “Qualified Ownership,” which means it's below your land and you have the right to try and get it, or you could call it an “Unvested expectancy,” like Arizona. I guess you're saying you don't want to call it non-ownership, but that really is the pure rule of capture classification for oil and gas.

JUSTICE DALE WAINWRIGHT: This other states are using different terms, “Qualified Ownership,” other terms you've used, the statute says, “Ownership in groundwater.”

ATTORNEY PAMELA STANTON BARON: It doesn't say what that ownership is, and you could almost --

JUSTICE DALE WAINWRIGHT: And that's why I'm asking what your opinion of what that ownership --

ATTORNEY PAMELA STANTON BARON: Right, right.

JUSTICE DALE WAINWRIGHT: The Legislature recognized some ownership in groundwater, what is it in your opinion?

ATTORNEY PAMELA STANTON BARON: I do think it's -- the way the ownership is effectuated is through the rule of capture right to dig, apply. And the statutes, you know, of course say, “Except subject to the Rules & Regulations of the Groundwater Conservation District.” So it says, “We recognize ownership, subject to these rules and regulations.”

JUSTICE HARRIET O'NEILL: So if I've got the right to drill a well on my property and capture as much water as I want to, and the Authority says, I can't at all, why is that not a taking? I mean you've told me that it's not vested until you obtain it, until it's drilled and pulled out of the ground --

ATTORNEY PAMELA STANTON BARON: Right.

JUSTICE HARRIET O'NEILL: -- but if the Authority doesn't allow me to pull it out of the ground, why isn't that a taking?

ATTORNEY PAMELA STANTON BARON: Because you don't -- I think what you're saying is -- well, if you don't have the vested right to withdraw to any particular amount of water, then the Authority can cut that right off. And that's what the In re Upper Guadalupe case is about, which was our second point. And I think that can be restricted just to the Edwards, because of the strong parallels between the Edwards Aquifer Act and the Surface Water Adjudication Rights Act of 1967. Both had to deal with situations that were unique and required a specific legislative response. In the upper Guadalupe case, you had a situation where you had -- I want to make sure I'm not impinging on Mr. Monson's time, but may I finish this statement?

CHIEF JUSTICE WALLACE B. JEFFERSON: You can carry on, yes.

ATTORNEY PAMELA STANTON BARON: Okay, thank you. That there was a situation where there were more claims to use than there was availability of a dwindling supply, so something had to happen. There were lots of different competing claims, it had to be done over a very large geographic area because it couldn't be done piecemeal and work, and they adopted an act which looks, after which the Edwards Aquifer Authority Act is patterned.

JUSTICE HARRIET O'NEILL: But again, nobody is questioning the Authority's ability to regulate.

ATTORNEY PAMELA STANTON BARON: Well, what I'm -- the next point of the upper Guadalupe case

is that there was a historical period, it was five years, and that if you didn't exercise your right during that five years, at that point you did not have further right for the water. And the nonusers in that case sued and they said, “You've taken our right to nonuse in the future,” and this Court said, “No, you do not have a continued right to nonuse, and it's not a taking.”

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Ms. Baron. The Court is ready to hear argument from the State of Texas.

ATTORNEY KRISTOFER S. MONSON: May it please the Court, I have two narrow ways to resolve this case without sending it back for a takings trial. It also will answer Justice O'Neill and Justice Wainwright's questions. So I'd like to start with Justice O'Neill's discussion of whether you get a taking in an oil and gas proceeding. No such claim would be available if we were in the parallel proceeding from the prorating of an oil and gas field. And this isn't -- I want to make it clear, I'm not making an analogy to oil and gas for the nature of the property right, we think that those are distinct common law analyses. But if you look at the way the statute works, you have a regulatory system set up by the Legislature about how to apportion this resource that people have reciprocal rights in. And in the context of oil and gas, in this kind of administrative appeal, from a well permitting order, there can be no regulatory takings claim so long as the order is itself reasonable and doesn't fall under the arbitrary and capricious --

JUSTICE HARRIET O'NEILL: But that presumes the existence of a vested right.

ATTORNEY KRISTOFER S. MONSON: And that's right. There can be no taking in this case, even if you assume that there's a vested right from groundwater.

JUSTICE NATHAN L. HECHT: Is there one?

ATTORNEY KRISTOFER S. MONSON: There is not. There is not, but the Court doesn't need to resolve this --

JUSTICE NATHAN L. HECHT: But you say there is a property interest in groundwater?

ATTORNEY KRISTOFER S. MONSON: That's right.

JUSTICE NATHAN L. HECHT: But it's not vested. Are we dancing on the head of a pin here?

ATTORNEY KRISTOFER S. MONSON: No. There is a vested property right, it's a property right to the surface estate and the fee simple, and incident of that property ownership is the right to dig and apply. As we know from the Texas Cove vs. Burkett case, for example, you can sell the right to enter onto the property and go and get whatever you can get out of the well. That doesn't sell the water itself, both as a practical matter, because the well might run dry. There's always a risk if you're transferring well rights that the water is not going to be there in the future.

JUSTICE NATHAN L. HECHT: But you say, and I'm quoting here from your brief, “Some manner and degree of groundwater regulation could under some facts effect a compensable taking.”

ATTORNEY KRISTOFER S. MONSON: That's true, but that would be based on a property right other than the estate in water itself.

JUSTICE NATHAN L. HECHT: Well, what would that be?

ATTORNEY KRISTOFER S. MONSON: Well, say for example -- and I think this is important to keep in mind the purpose of Section 1.07 of the Edwards Aquifer Act is to protect existing users from the potential for takings in transitioning to the regulated system. Once you're in the regulated system, nobody has a

vested property right in having water rights other than what's already there. So the question is how are you protecting people's rights, transitioning into the system? It's possible, for example, that you could have a factory that was put in a location in order to use a particularly strong well or a particular flow of water that would make that factory particularly suitable to the purpose for which it's been built. But the regulation could --

JUSTICE DAVID M. MEDINA: Can you help me out here, I'm not sure I understood you. You said the purpose of the statute was to protect owners' rights to water?

ATTORNEY KRISTOFER S. MONSON: No, not at all. It's to protect against takings.

JUSTICE DAVID M. MEDINA: Okay.

ATTORNEY KRISTOFER S. MONSON: The taking that might occur, that 1.07 is aimed at is not a taking of the water itself, it's a taking that impacts the other incidents of property ownership that damages the resale value of the fee simple, separate from the water.

JUSTICE NATHAN L. HECHT: But those don't depend on a property interest in groundwater.

ATTORNEY KRISTOFER S. MONSON: That's correct.

JUSTICE NATHAN L. HECHT: Well, but the brief says there is a property interest in groundwater.

ATTORNEY KRISTOFER S. MONSON: And it's the property --

JUSTICE NATHAN L. HECHT: And then it says, “And therefore some manner or degree of groundwater regulation could affect a taking.” That is a clumsy way of trying to get across the concept that's at play in all of the non-ownership oil and gas states. You have something to sell -- the Amici are correct -- you can contract for the long-term sale of groundwater. It's just subject to all of the things that can happen. The well can dry up, your neighbor can pump out from under you, and in some cases there's going to be regulatory risk. That doesn't mean the contracts are invalid or that there isn't a right, because the Court recognized in Burkett, to take the absolute ownership of what's dug and applied and sell it for whatever purpose you want.

JUSTICE EVA GUZMAN: So does that mean there's a vested right?

ATTORNEY KRISTOFER S. MONSON: No, it means there's no vested right in the water itself, but there is a right incident to the fee simple to dig and apply, and that's what can be transferred. But because --

JUSTICE DON R. WILLETT: Mr. Monson, one of the opposing briefs accuses the State of what they call, “inconsistent argumentation.”

ATTORNEY KRISTOFER S. MONSON: Uh-huh.

JUSTICE DON R. WILLETT: That the case argues from case to case from day to day, whatever the State has to argue to win in that case when the issue is the existence of property rights in underground water. And they mention specifically your briefing in Barshop, where the State said, “Underground water is the property of the surface owner, and that underground water in Texas private property is absolutely owned in place.”

ATTORNEY KRISTOFER S. MONSON: I have not reviewed the Barshop briefs; I don't believe that to be the case. But if you look at --

JUSTICE DON R. WILLETT: Do you believe those quotes are accurate?

ATTORNEY KRISTOFER S. MONSON: I don't believe the quotes are accurate. I can go and pull the briefs out of the warehouse and look at them, Justice Willett. But more to the point, the State's position today is completely consistent with every argument this Court noted in its opinion in Barshop.

JUSTICE DAVID M. MEDINA: You said you don't believe that's a good case? You don't believe Barshop is a good case?

ATTORNEY KRISTOFER S. MONSON: No, I don't believe that their citation to the Barshop briefing is correct, although I can't confirm that right now because I have not reviewed that briefing. But our position, as we pointed out in our briefing, is completely consistent with every argument that this Court noted in the Barshop opinion. There has been no deviation in the State's position in the intervening tenures.

JUSTICE DON R. WILLETT: So you would argue, what you're arguing today is fully down the line tracking what you argued in Barshop?

ATTORNEY KRISTOFER S. MONSON: Well, I'm not going to make that representation entirely because I haven't reviewed the Barshop briefs, but it is consistent with every argument that the Court noted in its Barshop opinion.

JUSTICE DALE WAINWRIGHT: So your position is, groundwater is like wildlife, not like oil. Groundwater is like wildlife because you only own it when you exert control over it. When you actually are the one who gets it?

ATTORNEY KRISTOFER S. MONSON: I think that's a useful illustration of how this works. Certainly we're not taking the position that the State owns the groundwater in place, which is something that some of the Amici have suggested. That is not the State's position.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counselor. The Court is now ready to hear argument from the Cross-Petitioners and Respondents.

MARSHALL: May it please the Court, Mr. Joseph will present argument for the Cross-Petitioners/Respondents.

ORAL ARGUMENT OF TOM JOSEPH ON BEHALF OF THE RESPONDENT

ATTORNEY TOM JOSEPH: Good morning, Members of the Court. I can assure you, it's a great pleasure to be here this morning, a high honor, I might say. I think one of the problems that the State and the Edwards Aquifer Authority have had is their refusal to accept what the Courts have said on the issue on groundwater ownership.

JUSTICE HARRIET O'NEILL: Let me make sure I understand the nature of your takings claim. Are you claiming a right to 600-acre feet by permit, or 1,800-something acre-feet?

ATTORNEY TOM JOSEPH: Your Honor, we didn't get to the condemnation part of our case, because we came out of the Trial Court with a permit for 300-acre feet. But in answer to your question, if in fact we were entitled to 2 acre-feet per acre, we had close to 900 acres of land there.

JUSTICE HARRIET O'NEILL: Well, but it's per acre of prior irrigated land, it's not just per acre.

ATTORNEY TOM JOSEPH: Your Honor, that's correct. But in essence, they were challenging our claim for takings based upon how much water we were entitled to, that nobody could measure it. I said, well, we

would start with that many acres and then we'll go from there. Now, historical use is, of course, something that the Court's have accepted, but in this particular case, we never had a chance to get into the details of what we meant under the condemnation part of our case because it was in the alternative.

JUSTICE HARRIET O'NEILL: So your 1,800-something argument is purely acreage?

ATTORNEY TOM JOSEPH: That's subject -- yes, Your Honor, it would be subject to being able to prove that we had that much entitlement. And of course, it was only a reactionary comment, because they were saying we couldn't measure how much water we had. Well, the State said we could get two acres, two-acre feet per acre. That's one measurement that I think the Legislature was comfortable with. I will point out one other thing too. I think one of the things the Court has to understand is who is speaking for the State of Texas? We have had the Attorney General file a brief in this case taking the side of the Edwards Aquifer Authority, but in the meantime we have received two, at least two briefs from the State of Texas. The State Comptroller has filed an Amicus brief in this case contending that the landowner owns the groundwater, and that it produces pretty close to $1.8 billion in revenues based upon irrigation and the activity of farmers and ranchers in connection with their ownership of the groundwater. And we've also received a brief from the Texas Department of Agriculture taking the side of Day/McDaniel in this case. So the first question that I have, and this Court probably might ask that same question, is who represents the State? It's my state --

JUSTICE DAVID M. MEDINA: Well, I think the Attorney General's office represents the state.

ATTORNEY TOM JOSEPH: Nevertheless, I feel like the -- and the big problem is they refuse to accept what the Courts have said on the issue. And in the Barshop opinion, Judge Abbott, who is now our Attorney General, said that it had not been decided by this Court that landowners had a vested right in their groundwater. And I don't agree with that statement. And one of the clearest declarations of a contrary opinion is found in the cases of the City of Sherman vs. Public Utilities Commission, and it was rendered by Judge Barrow when he was sitting on this Court in 1983.

JUSTICE NATHAN L. HECHT: Is it consistent with your view of the property interest in groundwater that access to it be regulated based on historic use?

ATTORNEY TOM JOSEPH: I think, Your Honor, if we concede that the landowner has a vested interest in the ownership of groundwater, that if you stop it, you have affected that right, I think that you can say that it can be controlled by the Legislature as to how much is used and when it's used.

JUSTICE NATHAN L. HECHT: Right, but can that be based on historic use?

ATTORNEY TOM JOSEPH: I have a problem with that, Your Honor, from this standpoint. That's what they've done, but in our particular case, our people were using that water to water Bermuda grass to feed their cattle, and it was a commercial cattle operation. In 1983, 1989, 1972, you were not required to measure how much water you used to feed, to raise the grass that your cattle are going to feed from.

JUSTICE NATHAN L. HECHT: And I realize you have those problems in this case, but if you could measure, and you had not used it, you just hadn't over a fairly long historic period, could the State say, “Well, your right under this regulation to access that water is going to be very limited”?

ATTORNEY TOM JOSEPH: I do not believe it could say that, Your Honor, because you do have a vested right in that groundwater. It's yours. It's the same as the soil itself, as Judge Barrow said in the case I was about to read from, “It is the same as the soil itself.” We've got a deed, we had a deed for this property, with the soil came the water.

CHIEF JUSTICE WALLACE B. JEFFERSON: But you said a moment ago, it could be regulated, and if it's not regulated in terms of historic use, what is the guidepost for regulating groundwater?

ATTORNEY TOM JOSEPH: I think the guideposts are what are the reasonable investment and goals of the individual? I mean in our case we were cattle ranchers and we intended to raise cattle and crops.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, part of the reason for the Act is the idea that this is a precious resource and the State can't see it withered away, because we have five of the fastest growing cities in the country now. So the idea is that it's going to be regulated and conserved at least, in part, for the public as a whole. Is that not what regulation is about?

ATTORNEY TOM JOSEPH: That's what regulation is, Your Honor, but if it gets to the point where a landowner cannot access his own groundwater, and it's a vested right, the State has to buy it, plain and simple.

CHIEF JUSTICE WALLACE B. JEFFERSON: But what I'm trying to figure out is, if it's not historic use, if we accept that regulation is okay, Barshop said this is a Constitutional act, and so there can be regulation of groundwater, and you're saying it's not to be tied to historic use. Then what is the formula that the State can legitimately use to regulate groundwater?

ATTORNEY TOM JOSEPH: In my opinion, Your Honor, it would be, how are people in the general area using the water for the production that they have from their land. That same standard is used in determining whether or not land is being used for agricultural use, for the agricultural exemption by the Appraisal District.

JUSTICE EVA GUZMAN: If it had been historically used by the surrounding landowners for a certain purpose, and someone comes in and has a new use, a use that greatly exceeds historical amounts, and it's basically going to deplete everybody else, shouldn't there be some mechanism for regulating it, not related to how it's being used?

ATTORNEY TOM JOSEPH: I do believe that there should be a mechanism to regulate it, Your Honor, but it cannot, and I repeat, it cannot deprive the landowner of his ownership of that water without him receiving compensation. Now, I'm not a genius in regard to how these matters are resolved, but I will tell you, Your Honor, that is where you have to start. You have to start with the fact that the landowner owns the groundwater, and that's been true for over a hundred years. In fact, it's been true even when the Ten Commandments were given to us, because it says, “Thou shalt not steal.” Well, if you couldn't own property, it wouldn't make any difference if you could steal, but nevertheless, Your Honor, groundwater is very much a part of our jurisprudence and part of our state and part of our property.

JUSTICE HARRIET O'NEILL: What will the takings claim look like if it were to go back down on a takings claim? What, as a factual matter, does that look like in terms of reasonable investment-backed expectations for these plaintiffs?

ATTORNEY TOM JOSEPH: Well, Your Honor, we purchased close to 915 acres for purposes of cattle ranching, and, you know, you're talking 10,000 cattle. It's not something that's just a few cows in the backyard. We have close to -- we built, we drilled the well for $95,000, thinking we were supposed to get this permit. But also, Your Honor, we had a report that we submitted under a bill of exceptions, that there was something like $4 million lost between the time that the Edwards Aquifer Authority in 2003 denied us our permit, effectively denied us our permit, until we went to trial in 2006. It was almost three years that we've not been able to use our property.

JUSTICE HARRIET O'NEILL: I guess what I'm saying is what does “reasonable investment-backed expectations” mean? Does that mean when you purchased the property, you purchased it as is with historical use attached to it, so you're limited to historical use? And the question then becomes whether the water drawn from the lake is surface water or groundwater?

ATTORNEY TOM JOSEPH: I don't know that I can answer that question simply, but the way I would approach it at the time of trial, if we have to go back, is that what was the groundwater value based upon that tract of land and what its highest and best use would be. And I would need an expert to define that for us. And of course, the State has a law --

JUSTICE NATHAN L. HECHT: Well, it's very hard to tell how much is down there. If we're going to analogize to oil and gas, we don't try to tell how much is down there, we just say, "Well, all of the people who have access to it can all pump within these spacing limitations," and hopefully everybody will get their share. But you don't really know how much is below that 917.4 acres.

ATTORNEY TOM JOSEPH: And, Judge, that's why I'm saying that we come first as landowners, because no one has been able to tell us that there's not enough water in that aquifer for everybody that owns land above it.

JUSTICE DAVID M. MEDINA: Let's say the Court agrees with you, that you have an absolute right to the water beneath the property and you prevail here, is that going to open a floodgate of litigation against the State? Because now people will say, "Well, I've got water there, let me go drill for it and see if I can sell it to the State." What's going to be the impact if you prevail here?

ATTORNEY TOM JOSEPH: Your Honor, I can't answer that everybody would do that, because it costs money to drill the well, but at the same time, I think the --

JUSTICE DAVID M. MEDINA: You could sell that interest, though, you could convey it to someone else.

ATTORNEY TOM JOSEPH: That's true. I think the economics of the situation, Your Honor, should not determine the constitutionality of the conduct of our government. And that is based upon the fact that, you know, our Constitution came at great sacrifice, those principles are in place, this Court has announced those principles in place. I would think that the government was more aware of these principles in place than someone that might buy the land. But nevertheless, it is inchoate right to own your groundwater if you own the land. Beyond that point, I can't answer all those questions, Your Honor.

JUSTICE DALE WAINWRIGHT: What if the argument that if you assume that there's ownership in the groundwater, what of the argument that the ownership nature of that water changed because it flowed into a watercourse?

ATTORNEY TOM JOSEPH: That's the issue that I think this Court should hear. I really don't think this Court should revisit the issue of groundwater ownership because that's pretty clear. Our whole point here today is that they're contending that because our well water got into a dry creek bed over which we had constructed a dam that created a 50-acre lake that wasn't even there. You could probably step across that dry creek bed before the dam was built, that now all of a sudden this water belongs to the State. Well, that's just like saying, "Okay, we're taking it, we're not paying for it." But my real issue is this: That no case and no statute that has been cited by the Edwards Aquifer Authority or the State says that groundwater becomes State water. There's no authority to conclude that groundwater becomes State water. As the administrative law judge did in this case, all of the cases hold that when water becomes a State water, it's not groundwater. It's either rainwater that has accumulated in a watercourse, it's floodwaters that has accumulated in a watercourse, it's tidal waters that have been in bays and inlets, and never has it been said that groundwater would be part of the State water. And there have been statutes passed which have recognized the ownership of the groundwater, as one was pointed out to you before at 36.002 of the Water Code, but we also have 1.07 of the Act. And this is the one that really needs to be focused on. These two parties should not be in this case if they had read Section 1.07 of the Edwards Aquifer Act which actually created the agency. It clearly states that the Legislature recognizes the ownership of the landowner, recognizes the rights of ownership of the landowner in the groundwater, and it clearly says that this Act is not intended to deprive the landowner of his rights in that water.

JUSTICE DALE WAINWRIGHT: Counsel, let's go back to my question.

ATTORNEY TOM JOSEPH: Yes, sir.

JUSTICE DALE WAINWRIGHT: 11.021 of the Water Code, “The water of the ordinary flow and rainwater, every river, natural stream is the property of the State watercourse.” Does it not say that water that gets into a river or natural stream becomes the property of the State, or is dependent on whether it's a continuous --

ATTORNEY TOM JOSEPH: No.

JUSTICE DALE WAINWRIGHT: -- or an intermittent stream, or do you interpret that differently?

ATTORNEY TOM JOSEPH: It says, “These waters” belong to the State when they get into a watercourse, and it doesn't include groundwater. It says, “The natural flow of the watercourse, of the river belongs to the State.” But the Kickapoo case and some of the other cases have said that spring water and groundwater does not constitute the natural flow of a river or a stream.

JUSTICE PHIL JOHNSON: Well, are you saying then that if you have a stream, that 50 miles upstream from your 50-acre lake, the water comes out of the ground and flows into the streambed and then flows into the lake, the 50-mile upstream landowner still owns that water, or has it at some point become in the watercourse?

ATTORNEY TOM JOSEPH: Let me see. Bartley vs. Sone, Your Honor, is the one that says that you can use the water from your land on your land, which is the one we feel applies to us. In response to your question --

JUSTICE PHIL JOHNSON: But let's go to the question of groundwater. You have a spring like this flowing spring on your property, but it's 50 miles upstream. That stream runs into the creek, the creek comes down into your lake. Who owns that water that came out of the ground 50 miles upstream? The State or that landowner upstream?

ATTORNEY TOM JOSEPH: If you follow the law, Your Honor, the groundwater, once it leaves that man's land, he no longer owns it, but it does not become ownership of the State. It becomes water that can be captured under the rule of capture by someone downstream. So consequently, if you could identify the groundwater that came from 50 miles upstream down to where you are as being groundwater and not State water, then you're free to capture it.

JUSTICE DALE WAINWRIGHT: How do you identify the different types of water in a stream?

ATTORNEY TOM JOSEPH: That's the question that we have, Your Honor. I don't know that there's a formula for that, except to say that if in fact the law is true, that groundwater is owned by the landowner when it's on your property, when it leaves your property, you no longer own it. But the law doesn't say it changes its nature, it remains groundwater. In fact, some cases have held, like in Corpus Christi and then in another case, Kickapoo, where this gentleman was measuring his water when it left his property and he was able to pick it up one mile downstream, even though it was in a river, when he moved it -- or when he used it again. So the groundwater doesn't change its identity.

JUSTICE PAUL W. GREEN: So the San Antonio River, at least back in the old days, the San Marcos River, which are both spring-fed rivers, it's all groundwater, it's not State water?

ATTORNEY TOM JOSEPH: It depends. I wouldn't say it's not -- if it's a natural flow of the river, Your Honor, I would say it's State water. If you can identify it as being groundwater, I think it's subject to being

captured.

JUSTICE PAUL W. GREEN: The flow from both those rivers is out of a spring.

ATTORNEY TOM JOSEPH: Not always, Your Honor, because rainwaters, floodwaters and other waters that are described in 11.021(a) are identified as State waters. And the reason I say this is important, that the identity is kept separate is because the Legislature has kept it separately. Number one, it identified it in the Act, and then 36.001, Subsection 21 where the definitions of water in Water Code exist, they clearly say that groundwater and State water may be commingled and combined to maximize the benefits of each. Now that tells us again that the Legislature considers groundwater separate from State water. Now, there are many times when there can be some confusion as to whether it's water that's groundwater or whether it's water that's State water, but then again, the burden is on the person who's claiming it. If he can prove that this water came out of the spring from this gentleman's land 50 miles up the stream, and it put out 50,000 gallons and he took 50 gallons out and there's still water in the creek, then it's groundwater. I didn't make that law, but I think that's what the law is. And several cases that we've cited in our brief have said that even though the spring water can become part of a river, it is considered that it is not State water. And I think that was the Kickapoo case that might have been the one that said that. So what we have here is that if you can identify groundwater after it's left your neighbor's property, and it would be either underground or on top of the ground, if it's left the neighbor's property, it's not his anymore, but it's subject to capture. So if I have a trench that I have dug for that water to come onto my property, then it's groundwater that I can freely capture for my own use. Now, there is a statute which says that if you impound more than 200 acre-feet of water on a creek, that you need to get permission from the State. And if you do less and you want to use it for irrigation, you have to get a permit from the State. And I think that recognizes that some of that water could be groundwater that's not measured.

JUSTICE NATHAN L. HECHT: You don't think your view of the property interest and the taking claim that you have precludes regulation?

ATTORNEY TOM JOSEPH: Your Honor, I have to tell you, I don't want to waive my right to insist on the right of ownership of groundwater, but there isn't very much in our society today that doesn't suffer some type of regulation.

JUSTICE NATHAN L. HECHT: Could it be as extensive as zoning regulations, for example?

ATTORNEY TOM JOSEPH: Zoning regulations, they've been held to be applicable to property ownership.

JUSTICE NATHAN L. HECHT: And that can fairly strictly restrict the use of the property?

ATTORNEY TOM JOSEPH: To the point where it's not destroyed or it has not been destroyed in its economic use. And incidentally, Your Honor, I also believe that if you tell a person they can't drill a well, it's a physical taking because access to your property is denied.

JUSTICE NATHAN L. HECHT: And according to the Supreme Court on the regulatory taking, even 90 percent or 95 percent of loss of value of the property may not be a regulatory taking.

ATTORNEY TOM JOSEPH: Yes, Your Honor, but you have to remember that water, groundwater is an estate in and of itself, much as the oil and gas estate is. So if you take 98 percent of the groundwater estate, haven't you pretty much decided you've taken it all?

JUSTICE HARRIET O'NEILL: You're not claiming they prevented you drilling a well?

ATTORNEY TOM JOSEPH: They didn't have a chance, Your Honor. But I just read in their brief where there's a million acres of land that's over the aquifer that does not have the right to drill a well.

JUSTICE HARRIET O'NEILL: Well, but you got your well permit, you're just claiming how much. So you're not claiming a physical taking here, you're claiming a regulatory taking?

ATTORNEY TOM JOSEPH: Well, they won't let us pump our well. There's a taking here, Your Honor, because we --

JUSTICE HARRIET O'NEILL: I'm just trying to figure out what kind of taking. You're not saying there's a physical taking here, because you do have a permit to pump some water?

ATTORNEY TOM JOSEPH: Your Honor, the permit we got isn't even what a domestic well that doesn't require a permit is. They gave us 14 acre-feet. 28-acre feet is what a domestic well can produce. Yes, ma'am, our well has been taken absolutely. We never had a chance to show that at the administrative law hearing, but it's been taken.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Joseph.

ATTORNEY TOM JOSEPH: Thank you, Your Honor.

REBUTTAL ARGUMENT OF PAMELA STANTON BARON ON BEHALF OF PETITIONER

ATTORNEY PAMELA STANTON BARON: If you look at the plaintiffs' pleading in the first volume in the Clerk's record at 14 through 15, they're saying they have the right to pump 900 gallons a minute from the aquifer, 24 hours a day, 7 days a week, which is about 1,296,000 gallons of water.

JUSTICE HARRIET O'NEILL: It sounds like that's what they're going to claim if they have the taking claim?

ATTORNEY PAMELA STANTON BARON: Right, right. But in Sipriano we're looking at 90,000 a day. They're looking at 1.3 million. They say there's plenty of water in aquifer, obviously the Legislature doesn't agree. It determined initially when it passed the statute that the cap to ensure sustainability of this resource should be set at 450,000 acre-feet a year, and initial applications that came in --

JUSTICE NATHAN L. HECHT: But has it been going up a little bit?

ATTORNEY PAMELA STANTON BARON: It has gone up, but the initial applications were something -- and based on historic use, were like 800,000 acre-feet.

CHIEF JUSTICE WALLACE B. JEFFERSON: But if the Court were looking at extremes here, on one extreme is your argument that there's no vested property right whatsoever in groundwater. On the other side, what they're claiming is, yes, we have a vested right, but we concede it's subject to some regulation, and we'll fight about that in court. Which seems more reasonable to you, given our common law history on the rule of capture and ownership of landowners in the soil, oil and gas, and water?

ATTORNEY PAMELA STANTON BARON: Well, I think once you go back and look and East and you look at Elliff and you at In re Upper Guadalupe, that there's not a vested right in groundwater in place when you tie East to Elliff, and even if it is vested, under In re Guadalupe, on reasonable notice, people who haven't used that right for a long period of time can be cut off.

JUSTICE HARRIET O'NEILL: But if we were to decide there is a vested right, we wouldn't get to that second piece, because the procedural posture of this case is simply that the Court of Appeals said there is a vested right, and if we said that's right, it's going to have to go back down to see how an as-applied takings claim would proceed.

ATTORNEY PAMELA STANTON BARON: Well, I would like at the In re Upper Guadalupe case through a different filter, and I think you can read that case as saying there's no vested right to continue to nonuse a right you have. So I would say it does fall within the vested rights argument. And let me remind the --

JUSTICE DALE WAINWRIGHT: Or it could be it's a vested right subject to some reasonable police power regulation, is another way of looking at it.

ATTORNEY PAMELA STANTON BARON: Yes. This Court isn't the first court to have dealt with this situation, and I will say that other states that have looked at the transition from common law groundwater rights to administrative permitted rights, have not found a taking. We don't see that happening in other states, and they have looked at the same language this Court is looking at in the East case, the Pixley quote. They have faced these same arguments, but in Kansas, Arizona, North Dakota, South Dakota, Florida, California, they have all addressed this issue, so this Court is not setting out a new path. And I would invite the Court to look at those cases, but I think they are very persuasive in showing that there is not a vested right to some groundwater in place or future production that you cannot protect against.

JUSTICE PHIL JOHNSON: Would you address the groundwater as opposed to the watercourse, the State water ownership in surface water?

ATTORNEY PAMELA STANTON BARON: Certainly. As you know, we had a dilapidated well, broken [inaudible] pump, flowed for several decades into a ditch into a lake. Above the lake, there is a creek, a defined creek with a name, Post Oak Creek. It's admitted in the record that it's a wet-weather creek, so there is flow during wet times. It goes into the lake, and then below the lake, it is a permanent creek. Under, you know, the Hoffs [Ph.] case it's pretty clear that water in a State watercourse belongs -- in a watercourse -- belongs to the State. A creek would be a watercourse; a lake would be a watercourse. We have defined banks, we have flow. It meets all of the elements. And obviously, I'm sure a lot of people in this room who do have water appropriation rights and the Texas Commission on Environmental Quality would be very surprised to hear that most of the water that they're getting under State surface water permits is groundwater and not subject to State regulation. So I think that --

JUSTICE HARRIET O'NEILL: What kind of relief could the plaintiffs here get through the TCEQ? Would they have rights to use water from the lake through that process?

ATTORNEY PAMELA STANTON BARON: If it's State water, which we assert it is, they can go to the TCEQ and apply for a permit. I don't know the details of that, so I apologize for that.

JUSTICE NATHAN L. HECHT: I'm not clear why you think that the Legislature could not set aside or, in essence, nullify water contracts, contracts to take the water from beneath property and use it somewhere else in the interest of regulation if there's no property interest?

ATTORNEY PAMELA STANTON BARON: Why do you have to protect historic use? Is that your question?

JUSTICE NATHAN L. HECHT: Well, no. I don't understand, if there's no property right there, why the Legislature couldn't come in and basically say, “We've decided the water should go someplace else,” and that would control?

ATTORNEY PAMELA STANTON BARON: Well --

JUSTICE NATHAN L. HECHT: I mean you say at the end of your reply brief, you don't need to worry about this, but --

ATTORNEY PAMELA STANTON BARON: I'm not sure they would be -- you know, it probably wouldn't have passed the initial test in Barshop in terms of substantive due process, equal protection, and so on and so forth. But you do have the rule of capture right. I would think that can be regulated, and so you would have to look at it from that perspective. The Act is working; it got us through the drought. If we recognize ownership in place, it basically pulls the legs out from under the Act, because you wouldn't be able to allocate, you may or not be able to allocate on historic use --

JUSTICE HARRIET O'NEILL: Well, but that's the problem I have with the briefing in this case.

ATTORNEY PAMELA STANTON BARON: Right.

JUSTICE HARRIET O'NEILL: This all or nothing sort of analysis. Nobody has questioned the Authority's ability to regulate the water. It's just that is there any check and balance on the exercise of that authority? And in an as-applied takings claim -- and it's a strict test. I mean it's a high level to meet --

ATTORNEY PAMELA STANTON BARON: Right.

JUSTICE HARRIET O'NEILL: -- to establish a taking, but to completely carve the Authority out from that sort of scrutiny just seems incompatible with our property rights law in Texas.

ATTORNEY PAMELA STANTON BARON: Well, I think you have to go back and see what that property law is and whether the right is vested, and that's the preliminary threshold inquiry. And until you get through that, you don't get to this investment-backed expectation argument. But I think the Legislature has almost built that in a little bit in terms of protecting historical use and protecting investment expectations. Day and McDaniel here had the right to use exactly the way they were using before. That did not change when the Act passed.

JUSTICE HARRIET O'NEILL: And if that's the case, then they're going to lose their takings claim, but your position wouldn't even have allowed them to bring it.

ATTORNEY PAMELA STANTON BARON: Well, if you give them a takings claim, they are our best -- you know, this is a situation where they got exactly what they had before. But a lot of people didn't. A lot of people were cut back in terms of what they were using before, because you have this cap and you can't go over it, otherwise you lose the resource that all these people are trying to access. And we also have people who did not get a well because they didn't have existing use. That's why I would invite the Court to look at the In re Upper Guadalupe case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted. That concludes the arguments for this morning. The Marshall will now adjourn the Court.

MARSHALL: All rise.

[End of proceedings.]

Edwards Aquifer Authority and the State of Texas, Petitioners/Cross-Respondents, v. Burrell Day and Joel McDaniel, Respondents/Cross-Petitioners.
2010 WL 709998 (Tex. ) (Oral Argument )

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