**ORAL ARGUMENT - 03/20/96**
**95-0881**
**BARSHOP ET AL. V. MEDINA COUNTY UNDERGROUND WATER CONSERVATION DISTRICT ET AL.**

ROGERS: May it please the court. This is a facial constitutional attack on the Edwards Aquifer Act. I am going to discuss the basic issues before the court. I am going to discuss the important state interests that are served by this legislation. And time permitting I will discuss the nature of the so-called rule of capture upon which the challengers base their case. I will then allow Mr. Potter from the AG's office to discuss some of the more specific constitutional claims in the case particularly the claims concerning retroactivity taking and equal protection.

This case raises 3 basic questions. The first question is: Does the Texas legislature have the constitutional authority to create a regional entity with the ability to manage and conserve withdrawals from an underground water supply. The challengers concede that the answer to this question is yes. And undoubtedly it is yes. The legislature has ample authority to create such an entity under the conservation amendment of the Texas Constitution, Art. 16, §59. This court has upheld against similar attack another district created under the same constitutional amendment. And I am referring of course to the Beck_____ case in 1978. The second question before this court is. In Texas does an individual landowner's common law right to capture underground water is that right of such a nature that it cannot be regulated by the legislature for the benefit of maintaining adequate water supplies for the public? Again the answer to this question is conceded. The challengers concede that the answer to this question is no. The legislature has been in the business of regulating underground water for many years. The two districts attacking this legislation are themselves products of such legislation. Specifically Ch. 36, formerly chapter 52, which was originally enacted in 1949. The third question before the court is: Does the Edwards Aquifer Act further legitimate state objective? Now at trial and to some lesser extent in their briefs, the challengers have accused the Texas legislature of passing this legislation in order to serve the selfish interest of other particular interest groups.

PHILLIPS: This reminds me of what you say about Professor Bull Warren, if you let him ask the questions he can always win the argument. Most of the challenges that were successfully made at the lower court seem to me not to be...a lot of them are not these first principal questions, but the second principal questions: Is that adequate right to appeal that is constitutionally protected and the notice date one that the court or the agency has the power to change. So you can spend some time with what you are say are not contested principals, but I would sure like you to move on to where issue seems to be going.

LAWYER: I appreciate it, and I will. And that was the purpose was to eliminate those items that are not in real dispute in this case. The purposes of the Edwards Aquifer Act are many. The legislature made specific findings as to those interests. I will name 6: The Act serves to preserve and stabilize water pressure and water level in the Edwards Aquifer. The Act serves to ensure adequate spring flows, both for downstream users and to ensure adequate supply of freshwater to bays and estuaries on the Texas coast. The Act protects aquifer dependent wildlife and habitat, an interest which Texas has an independent interest in protecting its own habitat and its own wildlife; The Act creates a regional market environment for water users that will promote the most efficient and beneficial use of the available water; The Act serves to replace the current balkanized status of the Edwards Aquifer region by creating one political entity that encompasses the interest of all users and allows these problems to be resolved in the appropriate political forum rather than in a court; and finally out of the six, the Act also serves to help prevent violations of the Endangered Species Act under federal law, and avoid possible loss of Texas sovereignty over this resource.

I will submit that there is no genuine dispute that any of these interests either singularly or in combination are sufficient to justify under the Equal Protection challenges, the due process challenges, and the taking challenges to support this legislation.

A word about the nature of the right. The challengers say that this case presents an attack on the East case, this court's decision in 1904. It is not. This court has repeatedly stated in East in 1904, and its City of Corpus Christi decision in 1955, and in its Friendswood decision in 1978, that the legislature is entitled to regulate the use of underground water.

ABBOTT: We all know that regulation of water is permissible. We know that districts have been doing it for years. That's not the issue in this case as I understand it. They are not concerned about water being regulated. What they are concerned about is their inability to withdraw water altogether, which amounts to a taking of water. What is your answer for the proposition that this particular Act is different from what is contemplated under the water code, different from what is contemplated under the Medina and Uvalde districts in the sense that it prohibits some owners of land from being able to withdraw water at all?

LAWYER: The theory of the challengers at trial and in their briefs is that because of the so-called date problem, the Act on the instant it becomes effective will require all water users to immediately seize flowing their water. If that's the way the Act would be construed to require everyone to stop using water, yes, that would be a constitutional problem. We contend that the Act does not have to be construed that way. We say that there is a date problem, the Edwards Aquifer Authority has sufficient powers to deal with that date problem, and there is no constitutional deficiency.

HECHT: What constitutional problem would there be?

LAWYER: The constitutional problem would be that the Act if it were construed to immediately require everyone to stop using water it would deprive them of that ability, whatever that right may be without due process. If that was the construction given the Act.

HECHT: So if it has that same effect on individual landowners there would be the same problem?

LAWYER: If the Act when implemented by virtue of the fact that it separates past users from future users, and puts certain users at the end of the line to await the availability of whatever water may be left, if users in that category are left without water because there is no water available our position is that that is not unconstitutional, that is simply a consequence of the fact that there is not enough water.

HECHT: Why is it a problem to shut the water off as to haul, but it's not a problem to shut it off as to sale it?

LAWYER: It is not a problem because the legislature is entitled to approach this issue on a regional basis. The legislature is entitled to differentiate between users who have established historical uses and the equities in the investment expectations that go with that from future users.

HECHT: Is it true that that use runs with the owner personally and not with the land?

LAWYER: Our interpretation of the Act is that the use would run with the well, and that whoever...what the Act does is it says: If there has occurred a qualifying use of groundwater during the 21 year period, then somebody is going to be entitled to claim a water right based on that. That person will usually be the person who's currently owning the land upon which the well is located. That's our

interpretation. The Edwards Aquifer Authority once it goes into effect will have the opportunity to provide further definitions and fill-in the gaps that the legislation leaves. But that's our interpretation.

CORNYN: You argue that everyone can use up to at least 25,000 gallons per day without restriction?

LAWYER: Yes, your honor that is our interpretation. Similarly to chapter 36 of the Water Code, the Act provides that all landowners are entitled with once exception: All landowners are entitled to drill and produce water up to 25,000 per day from a well for purposes of domestic use and livestock use. And that is available across the board. Now there is an exception for persons who are in platted subdivisions. Most of those people are going to be served by water purveyors and will have no need to drill wells particularly in the kind of dense small tract situations you have with respect to platted areas.

ABBOTT: So if I go to Medina County today and buy a piece of land that's not in a platted subdivision, and it has never had a well on it before, will I be able to drill a well next year under this Act and be able to withdraw 25,000 gallons a day?

LAWYER: Yes, your honor that is true.

ABBOTT: Now if I go out there and buy land in a platted subdivision I will not be able to withdraw any water?

LAWYER: You will not be entitled to drill to a nonexempt well would be the answer to that question.

ABBOTT: So if I go out and buy land in a platted subdivision that does not have a well on it, all those types of people would be denied the ability to withdraw water? They would be denied access to the water under their ground?

LAWYER: Not quite. They would not be entitled to a nonexempt 25,000 well.

ABBOTT: But since the well didn't exist there before the enactment of this Act, what would allow them to drill a well in the future?

LAWYER: They would need to apply for a permit and obtain a permit for a share of the remaining water available in the region.

ABBOTT: What were the TC findings as to whether or not there would be any well water available to any new buyers of property?

LAWYER: The theory preceded on at trial and of course it was accepted by the TC was that there would no water available. That was the TC's prediction. There would be no water available for additional users.

ABBOTT: One theory, one argument that could be made and that is that this Act merely is regulating, the use of water, which seems to be a permissible act by the state. But under some circumstances you are talking about right now it seems as though it is denying people access to water under their land.

LAWYER: Some people will be denied access to water under their land. Perhaps it's a cruel reality, but it's a reality nevertheless, that there is simply not enough water in the Edwards Aquifer according

to the legislature's policy decisions to satisfy the needs of all users.

ABBOTT: Couldn't this Act had been drafted though in such a way that would have entitled and enabled every landowner to withdraw somewhat such that every landowner had water rights?

LAWYER: Your honor once the legislature made the determination that they were going to grandfather existing users and provide for their needs first, that necessarily created the possibility that some new entrance into the system might not find sufficient water for their needs. That is a necessary consequence of regulation.

ABBOTT: With you conceding that some landowners will not be entitled to withdraw some water under some circumstances, is that a facial challenge, or is that an implied challenge to this Act?

LAWYER: The claim that there has been a taking is and as applied challenge and the case is not right with respect to those claimants there has been no regulation, no water use has been affected, the question of whether a taking occurs depends on a number of factors and facts that would have to be developed in an appropriate case when that occurs.

ABBOTT: With you conceding that the application of this Act will result in a taking of water from some landowners does that go ahead and convert it from a facial challenge to a de facto maybe de jure applied challenge even without the landowner having to go through the application of the Act?

LAWYER: Your honor let me be clear. I am not conceding that the Act takes water from any landowner in the constitutional sense. It does not. The Act regulates water use. It is not intended to and we believe will not have the effect of taking anyone's water.

HECHT: But isn't that just semantics? I mean if you can't get it, what difference does it make that it's regulated or taken? The point is the owner can't get any of it.

LAWYER: The answer to that question your honor is that the police power is broad enough to permit the legislature to impose regulatory scheme that may result in limitations of the use of property, and in some cases extinguishment of the use of property. Now when we do get into the taking analysis we are also going to have to consider the nature of this right of capture that they claim.

HECHT: But in what other instance can the state extinguish a use of property without paying for it?

LAWYER: For example, the best example of that is probably the zoning cases your honor.

HECHT: But they don't extinguish all use. They just restrict it.

LAWYER: The facts in the record here show that most of the agricultural users in the counties that are challenging this legislation make a profit and do quite well without irrigating. Irrigating is not a sine qua non of profitable use of land in these counties. There are many profitable uses available to these people.

PHILLIPS: Let me understand your legal position on the ownership of this water. Do you agree or disagree with the argument of the Harris Galveston Fort Bend Subsidence Districts about the nature of the relationship between the surface owner and the underground water?

LAWYER: Yes and no your honor. This court has never said that the right of capture is a

vested right. And in fact illogically it can't be because until you reduce the water to your possession it is contingent and more importantly you can't defend it against being taken away from you by others. It certainly is not a vested right. It's an absolute right in the sense that the court has chosen in 1904 to follow the English rule rather than the American rule, which would impose greater duties on pumpers.

Texas has chosen to treat groundwater as real property, as an aspect of real property, that goes with the land, is conveyed when the land is conveyed. To analyze the taking claims and the other claims we need to go beyond the labels and think about what is the right in fact. The right in fact is the expectation that the landowner may be able to withdraw particular amounts of water beneath his land if the water is there. If it's rained sufficiently, if his neighbor hasn't taken it, and he has no right to defend that fugitive water from his neighbor until he releases his possession. That brings us to the key point in many of these constitutional issues. The landowner in Medina county or Bexar county or whatever county, particularly in the Edwards Aquifer region does not have a reasonable expectation that they are going to be able to withdraw unlimited amounts of water. This court has said that that right is subject to legislation.

ENOCH: But do they have the expectation that they have the right to attempt to reduce it to their possession?

LAWYER: They have the right to attempt to obtain the water from beneath their land if it's there. It's a contingent right. It's an expectation that is not of the same level.

ABBOTT: The contingency is that they might not find anything, but it's not contingent upon their right to attempt to find it is not contingent? If I own the property I can go drill a well. I may not find any water, but I have the right to drill that well.

LAWYER: I basically agree with you with caveat that that right to explore or extract water would be subject to the police power.

CORNYN: Under the law of capture can my next door neighbor pump so much water out from under both of our properties that I have access to zero?

LAWYER: That was precisely the situation in the East case where the railroad company sucked up all the water, and left the landowner with a dry well. And the court said we can't do anything to help you. In the Comanche Springs case, the downstream users who relied on the stream flow complained because pumpers had dried up the spring. The court said, Sorry, the courts can't help you. You need to go to the legislature. That's what's been done in this case.

ABBOTT: Can your co-counsel discuss the compensation issue?

LAWYER: Yes sir he's prepared to address that point

HECHT: Do you address the judicial review issue, or your co-counsel?

LAWYER: I will leave that to my co-counsel your honor.

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POTTER: May it please the court. My name is Harry Potter and I am here today representing the State of Texas. I can address the compensation issue first if that pleases the court.

ABBOTT: We have a situation here where there is an argument made that there is taking of

property which may be permissible provided that there is adequate compensation. One argument is that the compensation scheme discussed in the statute is wilfully inadequate. What's your response?

POTTER: Well I would say that the compensation system in the statute simply provides that in the event the court interprets that there is a taking, that it is the intent of the legislature to provide compensation. Now the argument made at the TC was speculation concerning a 50% across-the-board drop in property values, and under that scenario there is not enough existing assets of the Edwards Underground Water Authority to cover a 50% drop all across the district. Needless to say that that is wild speculation and is certainly contrary to all of the takings cases out of this court which require tract-by-tract litigation as to whether or not a taking has occurred and if so for how much. But the mechanism in the statute in and of itself is not inadequate. It simply says that it is the intent of the legislature to provide compensation. Now the fallacy of the plaintiff's argument below was that they assume that the only money that could ever come is going to be simply from the assets of the EUWD. We all know that the legislature is certainly free to appropriate additional sums as may be necessary to compensate for those claims. So I would say that yes there is a clear intent by the legislature in early provisions of the Act to provide for compensation and beyond that we are engaging in speculation certainly beyond a power of any court.

ABBOTT: Are you saying that if the legislature does not approve it, then they may not be giving up any money?

POTTER: I think that there are aspects of it where the legislature if the funds exceeded the I believe is somewhere in the neighborhood of $5 million that EUWD currently has and if the user fees don't generate more than that in order to cover these claims, that there might be a problem where the legislature would have to appropriate additional sums. But we have no solid record to establish how much those claims would actually be. They are nothing by hypotheticals.

ABBOTT: If this Act is upheld as constitutional are we going to have in excess of 50,000 or so takings claims filed in the courts in Medina and Uvalde county?

POTTER: We may have some taking claims filed. As far as number I have no idea. But keep in mind that the statute has taken pains to honor historical use, has generous exceptions for these exempt wells. And quite frankly the very few people that are accepted from the exempt well 25,000 per day requirement I think that the best way to view that is as a spacing type of limitation. I believe that the record in the legislature will show that what the legislature was concerned with was a 25,000 gallon per day exception if a landowner had 100 acres there was nothing to prevent that landowner from subdividing into 100 - 1 acre lots and applying for numerous wells. What this system does is simply say that if you want under that scenario to get some sort of permit you are going to have to basically stand in line behind the historical users and apply for an additional permit; and spacing and other type requirements and the availability of water, that person may still get a permit.

ABBOTT: One concern I have about that what if this authority, this agency, drags its feet so much that someone who applies for a permit tomorrow may not even get a review for 3-4 years down the road?

POTTER: Once again if there is some sort of time lag we are going to have to have...there could be constitutional concerns at that level, but certainly to speculate there is nothing in the record that it would take anywhere near that long, and quite frankly that would have to be litigated at the time it arises.

HECHT: What are those concerns?

POTTER: Due process concerns that if somebody is having to take too long to go through

an administrative process in order to receive a permit. Certainly if it took 3-4 years that may raise due process concerns.

HECHT: Is that because they have some right to the water?

POTTER: They have right to access water under Texas law. It is important to keep in mind that, I want to reemphasize that since 1904 when the SC first recognized the rule of capture in the East case that it has always been subject to reasonable regulation by the legislature. There is no case out of this court certainly holding that there is an absolute right basically to capture that water.

HECHT: By the same token, the state seems to concede here that there is some personal property right in the water that can't be taken away altogether, or cannot be altogether infringed by the state?

POTTER: Well there is a property right in the rule of capture. I think that much is clear. But equally clear though is that the legislature has the power under the conservation amendment to the Texas Constitution to provide for reasonable regulation to conserve that resource. And we believe that is precisely what the legislature has done in this case. And certainly under the Conservation amendment it is permissible. For example under spacing requirements to deny somebody completely a well. That has been settled in some of the oil and gas cases, which is a rough analogy because conservation in oil and gas sense means some different than water.

ENOCH: Can someone be denied the right to drill an oil and gas well for oil on their property without being either unitized or pooled or sharing in the reservoir, the receipts from the reservoir? Here is the well, and we've got a spacing requirement and we don't want to over-pump, but the corollary to that doesn't the Railroad Commission have rules that require certain things to be pooled or unitized in such a way that I don't lose my property without being paid for it in some measure?

POTTER: Yes. In the oil and gas context as a general rule there will be made exceptions to the normal spacing requirements in order to accommodate users like this. But the analogy that I want to draw here is to the...keep in mind that under this Act virtually everyone gets the exempt well. The exception would be on the spacing requirement. For example, the landowner that subdivides his land. I believe that is precisely the case in Brown v. Humble Oil, the landmark oil and gas case out of this court was where a landowner subdivided their property, and as a result...

ENOCH: That was between old users and new users. In the oil and gas context no matter...as long as I was buying the oil and gas interests in the property, whether I bought them yesterday or bought them 5 years from now, I would participate in whatever lease arrangement was covering this property either unitized or pooling. I might not be able to drill my well, but certainly I have the ability to acquire that interest. Isn't that what ought to happen here? If I am going to regulate the use of water what should happen is the property owners have their interest allocated why wouldn't that be...

POTTER: I believe that there are provision in the Act that would provide for such a mechanism. There are provisions in the Act where the surf water for example can be sold, that water rights can be leased. And there is also a provision where the statute appears to envision the Edwards Aquifer authority acting as basically a water bank: purchasing back water rights. And I think that that can alleviate the concern that a very few landowners that may be affected under the subdivision requirement could be handled through this process that the legislature has envisioned where the Edwards Aquifer authority essentially acts as a water bank to purchase water rights to cover exactly this situation. So to the extent the court feels there may be under some highly unusual circumstances, not present in this record I might add, that that problem could be alleviated through administrative rules of the Edwards Aquifer Authority

under the permission granted to it by statute to basically act as a water bank and provide for that type of water rights.

ENOCH: If I go out to Medina County and I buy a 100 acre ranch, and I decided it would be more economically for me to drill a well and just pump whatever water I can find when I go drill a well. You are saying that the Act provides that I can just go to the water authority and I can just buy the water rights?

POTTER: There are provisions in the Act...yes, provided that there are those rights available, and the statute contemplates the authority purchasing water rights for the purpose of giving it to the people in that situation.

ENOCH: The answer is that unless the Aquifer wants to sell me those rights they can prohibit me from accessing the water that's under my property?

POTTER: There are other options beyond that your honor. There is a specific provision in the statute authorizing the purchase of conserved water or actually the sale of conserved water so you can purchase from other people who have water that fits into that category...

ENOCH: I guess my point is purchasing. It seems to me if my water under my property is being used by somebody else I should get paid for it. In the oil and gas context we assume that if you are not allowed to drill the well yourself you are allowed to participate in the money generated from the sale of that property. So it seems to me why isn't that a workable situation? If I can't drill for the water myself why don't we unitize it and whoever is drilling for the water that undercovers this land why don't I participate in whatever the value of that property is?

POTTER: Well I am not aware of anything offhand in the statute that would prohibit that scheme. Certainly that's not something that's been raised, nor have I given it quite frankly a great deal of thought prior to this argument. But that may be something that is permissible under the lease of rule making authority of the Edwards Aquifer Authority.

HECHT: Are the decisions of the authority reviewable by the court?

POTTER: Yes. Our position is clear...

HECHT: Where is that in the statute?

POTTER: Now I believe this is going to be a case of first impression in this court. Generally speaking the organic statute, enabling statute, will provide a mechanism for judicial review in the organic statute. And what we have in this situation is that there is a reference in the organic statute to the intent of the legislature, that the Administrative Procedures Act applies to decisions by the Edwards Aquifer Authority. If we read that as being...that they did not intend for the normal appellate rights under the APA to apply we would essentially by violating one of the Canons of Statutory Construction that the legislature is intended to basically accomplish something purposeful by their statements.

The plaintiffs below made a number of references to statutes where it says that the organic statute has to contain the administrative review type provisions, the right to appeal. In those cases it was silent. In none of those cases was there a situation as we had in our case where there is a specific reference to the Administrative Procedures Act. And the Administrative Procedures Act has been incorporated.

HECHT: If you didn't have a right to judicial review would that be a problem?

POTTER: They raise that under the separation of powers and the adjudication provision. I think the answer to that is no. Because the court has held that without the right to...the legislature has the authority to deny the right to appeal.

OWEN: Do you agree with Mr. Rogers the historical use exemptions run with the land not with the individual owners?

POTTER? Yes. I think that that's susceptible to two interpretations but certainly I think that that is a reasonable interpretation particularly under the general rules of_____ and _____ of the statute and that would certainly be left up to the Edwards Aquifer Authority in promulgating its rules.

OWEN: What's your position on how that should be construed?

POTTER: I believe that the better view is that it is a...in other words it can be separated from the property.

ABBOTT: What about the argument that there is a defect of law if not an unconstitutional aspect in the Act in that it requires all users to file a declaration of use by March 1, 1994, all this time problem with regard to when they have to file?

POTTER: I think the key aspect of that is that the legislature intended at the point it adopted the Act for that to be a prospective date. And due to as this court is aware of the voting rights problem with the Department of Justice and subsequent litigation that ended up being a date in the past. And I think there is ample authority for the court to treat that date as merely directory in light of the impossibility of performance because of intervening circumstances. And even if, and I think that is the best interpretation, merely treat it as directory. But even if the court were to determine that it was mandatory for some reason it could still be stricken and it could just say file a declaration of historical use under the agency's broad rule-making authority. I think that they would have the power to establish a reasonable deadline for which landowners could comply.

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RESPONDENTS

MCCULLOM: May it please the court. My name is Scott McCullom. I am counsel for the Medina County Underground Water Conservation District. I will discuss the property issues and the application of the Act as it affects the property rights. Mr. Riggs will address the issues surrounding that other than those that directly impact the property right.

I was counting as the appellants propose to amend their statute this morning they propose to amend the statute with regard to dates, they propose to amend the statute with regard to the right to appeal, they propose to amend the statute with regard to whether water rights run with the land, whether a permit runs with the land. It seems to me that if you look at the Act, there is really only one conclusion as to what the legislature meant. The problem the appellants faced with this statute is it is clear and unambiguous in what it says, what it means, and what happened. Unfortunately in each instance it's a clearly unconstitutional result. They are left with the argument that this court must change these provisions and save the statute, or it must allow the EAA to ignore these provisions and save the statute. It's not this court's job to amend statutes.

CORNYN: How can we say that it's a clearly unconstitutional result if the constitution permits taking but requires compensation if there has been no adjudication on that point?

MCCULLOM: The compensation issue is an interesting one. And I think the essential problem that the appellants face with regard to compensation is under our Constitution you can't have a taking until there is compensation in advance. Under this statute...

CORNYN: What case says you have to pay in advance of the taking?

MCCULLOM: You must at least advance the funds or make a promise to pay. In this instance there is no such promise or advancement of funds. If you take a loot at the statute, the money that is available to the EAA is extremely limited. First of all the statute itself explicitly provides that the EAA cannot exercise the power of imminent domain under underground water itself, which implies that they cannot compensate when they take it, or when the statute takes it. We have about $5 million that will go to the EAA. There was evidence before the TC. There are TC findings that is woefully insufficient knowing the size of the property interest that is involved here. And there are not going to be any fee revenues available until the Act gets up and running and they actually issue permits other than perhaps the application fees which themselves are $25 and $10. There simply is not going to be enough money available to make the advance compensation either pay it or make a promise so that the Act itself can go into effect. The Constitution does require advance payment, the Act can't go into effect until there is compensation, there can't be compensation until the Act goes into effect.

SPECTOR: You began by saying you want to discuss the application of the Act. Isn't that another case? What is the controversy at this point?

MCCULLOM: If the court reads the statute I would hope that it first takes a look at the declaration that the aquifer is not an underground river in 1.01. And then consider the confirmation of private ownership in 1.07. Then take a look at how it actually treats the property itself. In 1.21 it talks about granting water rights; 1.22 permitted rights to you; 1.24 permitted rights to aquifer water; 1.29c retirement; 1.29d retirement of aquifer rights; 1.34c permitted water rights. The Act treats the underground water as if it is state water to which rights to use are then given. Notwithstanding the declaration of we still keep private property here, the Act itself exercises such dominion over the underground water, that it affects the taking.

ABBOTT: How is this Act different from the regulations and restrictions imposed by the Water Code and by the Medina county and Uvalde county water districts? What is more onerous about this Act?

MCCULLOM: Under Ch. 36, and especially in the Medina and Uvalde districts a special attention is paid to giving each landowner an opportunity to capture a fair share of the water under their land. There are exceptions that are available. There will be no instance except with regard to spacing where someone is indeed cutoff.

ABBOTT: Say that last thing. Under the Water Code and under the Medina and Uvalde you say that there are exceptions where some people may be cutoff altogether?

MCCULLOM: When for example, probably the best example is the Brown case, where this court recognized that someone who assumes or buys property after spacing rules goes into effect, and given the spacing rules their property is not eligible for a well, it is possible then that one could be denied. There was testimony in the record before the TC and there was a finding by the TC that no one in Medina or Uvalde county has ever been denied a permit.

ABBOTT: It seems like what you're saying now is that facially there may be very little difference between the current Act and the Act that's already in place.

MCCULLOM: Not at all. Not at all. And the reason for that is the overriding concern that is given to maintaining spring flow, and the way in which property rights are absolutely cutoff so that the springs keep flowing.

ABBOTT: How are in this case under this Act how are property rights absolutely cutoff?

MCCULLOM: They are cutoff in any number of ways. First of all people who drill who have a well that went in place after June 1, 1993, are not going to get a well.

ABBOTT: Well I thought there was an exception for all residence and for all people who have livestock?

MCCULLOM: Let me address the exemption. First of all if you take a look at the heading you might think that it's an exempt well, it's totally exempt from regulation. Not true. Although you don't need a meter, and although you don't need to file a declaration of historical use, under the statute you are still subject to limitations based on the EAA's overriding concern and requirement that it protects the springs. We think even exempt wells are subject to cutoff if necessary to protect spring flow. Also this exemption is not available where platting is required. Now under the Local Govt Code anytime you divide property to 25 acres or below you've got to file a plat.

ABBOTT: That sounds similar to situations under the old Act that says that you may not have a well due to spacing requirements.

MCCULLOM: First of all the spacing requirements are much smaller than that. The spacing requirements certainly do not preclude a well on 25 acres or less much, much smaller. In addition our position is that the water code itself has explicit protection for correlative rights just as is the case with the Railroad Commission. We assume regulation very similar to what happens with the RR Commission. Whereas this Act itself acts so as to absolutely cutoff and limit completely unlike the way regulation refers to oil and gas.

ABBOTT: Let me ask you a different question and it falls under the category: Be careful what you ask for because you may get it. Let's assume that the court rules that this Act is unconstitutional. Would you be happy with the result if that was the result in federal courts taking over this particular aquifer?

MCCULLOM: Let me be clear about this Justice Abbott. We certainly are not advocating federal control.

ABBOTT: I know you're not. But if we rule this Act unconstitutional would you agree that there would be a possibility that the federal courts may take over this aquifer?

MCCULLOM: There is a possibility that a certain federal judge may make an effort to take over. I think there is more than an equal possibility the 5th circuit will quickly rein in.

ABBOTT: And what about the other possibility and that is let's assume this Act is ruled unconstitutional and because of that and because there is no constitutional act ever passed, the result is continued drainage of water from the aquifer such that everyone in the entire district loses out?

MCCULLOM: Let me see if I can recite a couple of the facts that were found by the TC that I

hope will address you question. First of all the problem here isn't a supply problem. There is lots of water in the aquifer. There is more water in the aquifer than is contained in all of the surface reservoirs in Texas combined. Some 55 million acre feet or more below the springs. The problem is a spring flow problem. But even if we accept for a moment the proposition that we must somehow maintain spring flow, the TC found this Act won't do it. Whereas the existing plan between the 3 existing districts is much more likely to maintain the spring flow. So my answer to your question is what we have on the ground today is better than what is put in place than through this Act. We are more than satisfied with what's in place.

CORNYN: Under your theory of the case could I pump as much water out of a well on my property such that my next door neighbor could access no water underneath their land without recourse?

MCCULLOM: No, not at all for two reasons: Under Ch. 36, which is what we operate in our district, our districts are authorized to impose spacing requirements and production limits. When someone gets a permit from the district we do impose production limits. They are designed to serve 2 goals: to prevent waste; and to protect correlative rights. There's been a lot of discussion in the briefs as to whether there is correlative rights in underground water anymore. And our position is that as a result of Ch. 36 yes there are.

CORNYN: Is the concept of correlative rights inconsistent with your theory of a vested property right to all the water underneath your land?

MCCULLOM: No sir. No more so than it is with regard to the oil and gas law. And this court has addressed that subject many times. The Water Code itself grants adjoining landowners a private cause of action for illegal drainage. If I pump water from my land in violation of my permit or if I waste the adjoining landowner can sue me under the Water Code for illegal drainage. That is correlative problems.

PHILLIPS: Would you compare and _____ the _____ takings here with the zoning laws of Texas?

MCCULLOM: First of all with regard to zoning laws there is several differences. Zoning cannot be such that you are required to immediately cease an existing application. That happens under this Act.

HECHT: Not if the date's moot?

MCCULLOM: If the dates are moot that still occurs.

HECHT: How does it occur then?

MCCULLOM: For example, this court received I guess yesterday or the day before yesterday some proposed rules that would supposedly address the date problem. If the court takes a look at those rules you will see that it is still proposed to keep the June 1, 1993 cutoff date for existing or new wells in there. In other words under the rules that this court has told will solve the date problem you still don't get a permit if that well was drilled after June 1, 1993. So even addressing the date problem in the way that the appellants and those on its side say they would you still have a retroactivity problem.

PHILLIPS: Do your districts know how many wells have been drilled since then?

MCCULLOM: There was testimony to that effect in the case your honor and there may even be a finding. I have to tell you I can't remember that number.

PHILLIPS: It's greater than zero?

MCCULLOM: It is greater than zero.

PHILLIPS: What are the other two zoning points then?

MCCULLOM: Zoning cannot completely...a zoning regulation doesn't have to completely eliminate or destroy a property right in order to be either invalid or to require compensation. It's not required that there be indeed a physical invasion of the land. The test that the courts apply under this court's direction is a test of reasonableness. Now if the court looks at what is happening under this Act, and you look at it from a zoning perspective it makes people stop existing uses, it limits their present uses. The best example of that from the record is the pecan orchard that has a present use and that would have to cut back significantly under the Act even under a historical use standard, such that pecan trees would die. That is not a permissible zoning act without compensation.

We really are comfortable with the zoning test to this statute once one understands what the Act does. We are comfortable with application of oil and gas law and the principles developed under oil and gas law once one understands what happens under this statute. And although we strongly believe that the dates cannot change, we think the result does not change. It is still unconstitutional. It is still retroactive. It still violates due process even if the dates are changed.

ABBOTT: Let me ask you about vested property rights in this water. What case law, what law do you rely upon to conclude that underground water that has never been utilized at all by nonhistoric users constitutes a vested property right?

MCCULLOM: First of all this court has held on several occasions that the right of capture is a vested right, the right of capture itself. And that right of capture exist regardless of whether one has ever exercised that right. If one accepts the proposition and we certainly think it is a correct proposition that the landowner owns the corpus of the water under the land. You own it whether you choose to use it today or not. And so unlike the surface water situations where the state owns the water and all it gives is a right to use, which implies as this court held no right of non-use, where you own the corpus of the water, where you own it yourself, you don't lose it by not using it anymore so than I don't lose any piece of my property by not walking around on it once every 4 years or putting a fence around it. It's still my property even if I choose to let it lie fallow.

ABBOTT: What cases do you rely upon establishing that a property owner owns the corpus of the water under the land?

MCCULLOM: I would first of all cite the court to one of co-counsel for the appellants Professor Johnson. We gave an extended quote from one of his law review articles where he discusses...

ABBOTT: What cases do you rely upon?

MCCULLOM: East, the Comanche Springs, some of the CA's cases including Kickapoo.

PHILLIPS: Could the legislature have declared this an underground river and declared the water to be owned by the State?

MCCULLOM: We think that it perhaps could have done so, but like what happened in the State of Kansas it would have probably required that those who thought they owned that water and who under the law did own that water would have to be paid for it.

PHILLIPS: This court's interpretation in 1904, the adoption of the English rule, gave a vested

property right. They didn't have to be compensated.

MCCULLOM: Yes.

HECHT: The rights that you are arguing in defense of today are not yours, but the landowners out there; is that true?

MCCULLOM: That is correct.

HECHT: In fact none of the issues that you raise impact any right of the Medina county district is that true except for possibly attorney's fees?

MCCULLOM: I must disagree with the latter proposition. If the property is taken, if land values do decrease certainly that reduces our tax base. We are an ad valorem taxation district. And so to the extent property values go down it affects our _____. That in itself I think is sufficient to give us standing. But even independent of that we are a governmental entity elected by the people. Our purpose is to protect their correlative rights in the aquifer. This action more than any other advances that interest.

HECHT: The authority has some of the same constituents.

MCCULLOM: It does and we are not challenging their standing.

HECHT: So we have constituents of two agencies of the state arguing about a state statute.

MCCULLOM: It is not unusual.

ABBOTT: To what extent does the Texas Constitution state, imply or argue that this water in essence is either the state's water or within the state's ability to regulate in such a way that it's done here? In other words are we in essence saying that the constitution is unconstitutional?

MCCULLOM: No we are not. First of all the property right itself is derived from the common law which was adopted when we became a republic and of course which is prereserved through the constitution. I think however what the justice is asking is what about the conservation amendment. Our position is and this has been confirmed by the court in Brown and Corzealous(?) and several of the other cases just because the state is given the power indeed to duty to conserve these natural resources doesn't mean it can reach out and take private property. Yes, it can regulate it. That's what we do. But that regulation has limits. As does the police power. This statute has crossed the line of permissive regulation. It affects a taking.

* * *

RIGGS: May it please the court. Mostly I have thrown out most of my notes here as I have tried to listen to your questions and hopefully can continue Mr. McCullom's efforts to answer your questions and any others you may have about our other reply points to the points of error raised by appellants in this case.

I do want to try to start by trying to answer some of those which deal with what exactly do we believe this legislation does and what is its most serious defect? We start with the premise that we in this state and this country can do anything we want to with our property so long as we don't hurt our neighbor or another person. When we hurt our neighbor, when we hurt the public by our use of property, the state may step in and regulate. They may step in and regulate without paying us. And what

the courts have done is called this preventing a harm to the public.

ABBOTT: When you say though the test to be applied here is to whether or not the state can regulate this is the rational relation test?

RIGGS: We think this is a fundamental right.

ABBOTT: What case law, what type of legal authority do you rest your argument that this is a fundamental right?

RIGGS: The City of Sherman case for example called this, the water rights at issue here, an exclusive and fundamental right. Now I would differ with Mr. McCullom about the nature of the right. I think it is more a right to seek and obtain water under the land. But the fact that it is a right to seek and obtain doesn't mean that the right doesn't vest until you actually take the water. Otherwise oil and gas law you would never have anyone entering into oil and gas leases because they wouldn't have a present right for which to grant a mineral lease.

ABBOTT: So you are saying that we should not apply the rational relation test, but the compelling interest test?

RIGGS: That's correct. We do think however that this statute fails under the rational relation test for a number of reasons. Both under inclusive as to some factors and over inclusive as to others. The primary problem with it though is what this statute does is try to redefine the very nature of the property right. And it's the way it does this and the way it shifts the burden to the landowner from the government that is a primary concern. You asked earlier about how does this really differ from Ch. 36? Under Ch. 36 what happens is the government may regulate if and when the need arises. If and when there is a serious drought condition and everyone is pumping might endanger everyone in the community, then existing underground water conservation districts can come in and take action to prevent a harm.

What this statute does is shift the burden to the landowner to prove...it creates a presumption that there is no right unless you apply for and are granted that right.

ABBOTT: Are there conclusive fact findings? I say conclusive in the sense that it's unequivocal there is no way around it, at the TC level that there is no conservation need?

RIGGS: I think there were conclusive findings in the TC that there is not currently a crisis situation justifying imposing a current cap on pumping. Again that gets back to this idea. I think the state characterized this Act as a drought management plan writ large. Is the term the state used. That's exactly what the problem is. This statute assumes that if a drought occurs spring flows will stop at the Comal springs. But what the findings at the TC showed as Mr. McCullom pointed out is that there is sufficient water in this aquifer for everyone for users existing users even if spring flow stops.

ENOCH: We've said on any number of occasions we are not here to assess the wisdom of what the legislature did. So I am not sure its really relevant to be arguing whether or not this actually accomplishes what the legislature wanted to do. And it seems to me that the water district's points here...you seem to argue that the state needs to meet some sort of constitutional test for regulating water. But that's water under the bridge. They regulate water. The only issue I see that's pertinent in any of this is under the new Act people who otherwise had an expectation of a right to access water now no longer have that right.

And it seems to me that's a property deprivation issue. This is not an invasion of

privacy or some sort of invasion of a protective individual interest. It seems to me this is simply a property right. And following up on Justice Cornyn's question the constitution specifically provides that the government can take your property. The solution is you get paid for it. Why isn't the answer in all of this litigation is to wait until some individual who owns a property right finds it taken by the authority and they sue for the failure of the state to compensate? I don't think rely on whether or not the government allocates just X dollars to an authority over here. It's whether or not it pays. It sees to me constitutionally whatever the value of that property right is the governments got to pay for it. Now why don't we just tell the authority: go about doing your business and when somebody comes forward and claims that their property has been taken at that point then the courts will become involved to determine whether constitutionally compensation is required. Why isn't that really what's going on here?

RIGGS: Your honor we believe that the statute on its face affects a taking now. Partially because of the absolute cutoff, the March 1, 1994 date, you cannot get a well under the express terms of the statute unless you have applied to use your property rights.

ENOCH: Do we have a litigant here who has made an application...who wants to drill a will and they have been prohibited from doing so?

RIGGS: In fact your honor there was testimony that no one could apply because the district did not exist as of the deadline. And therefore it was literally impossible for anyone to meet that deadline. There were no forms.

ENOCH: So is there someone here who is has brought a claim saying I would like to make an application and I can't because I don't have any place to put it?

RIGGS: There was testimony in the TC. There is not an individual named plaintiff. However we do have representational standing on behalf of the property owners in our district to make that claim. In addition the Texas and Southwestern Cattle Raisers Association also has representational standing to make that claim on behalf of their members. And I may be incorrect in this and I hope my co-counsel will correct me, but I believe that one of the named appellees did in fact attempt to make application, the Russell Cattle Co. So I believe there was testimony in the record that an effort was made but there was no form, no place, no agency to whom to make the application.

SPECTOR: Were they prevented from drilling the well?

RIGGS: They were prevented from complying with the terms of the statute, and the statute creates an absolute prohibition on pumping unless they have done so, unless they had made proper application as of March 1, 1994.

SPECTOR: But the statute has not been applied?

RIGGS: Only because the TC restrained its enforcement from being applied.

BAKER: But that's what you wanted done wasn't it?

RIGGS: Yes we wanted it restrained. Absolutely. We don't believe that a litigant has to wait until an unconstitutional statute is applied to him, her, or it before that litigant may challenge that statute in court.

BAKER: Facially?

RIGGS: Yes.

BAKER: I mean that is constitutional law. You can only challenge facially unless you absolutely have a claim to show it isn't that right? Does Russell say we are attacking this as applied to us in this case, in these briefs?

RIGGS: No.

BAKER: Alright can you argue that at all? Can you argue Russell's position, or can they if they are not making an application claim?

RIGGS: They cannot argue that you owe me X dollars because you have taken my property.

BAKER: So that gets back to the very first question. We have only a facial attack on the Act as it exists?

RIGGS: We disagree with that. We believe that we sustained our burden of showing that as applied this statute would clearly cut off some property owner's rights. Absolutely.

CORNYN: If you're making a takings claim you haven't been constitutionally injured until you have been denied compensation have you?

RIGGS: If you are trying to gain compensation under art. 1, §17, no, you can't say my property has been taken give me my just compensation. But you can obtain injunctive relief to prevent a taking if you show that government action will affect a taking. And that's why we came to court.

CORNYN: But the government can take your property. They just have to pay you for it right?

RIGGS: That's correct. And I do want to point out to the court that the compensation provisions that have been asked about and discussed here are not in fact compensation provisions. What happens here is the nature of the right has been redefined and those who have a current vested property right have to apply to the government to obtain it.

CORNYN: You said the nature of the vested right of these landowners is to seek and acquire the water under their property. Unless they actually seek and attempt to acquire the water and there is no water to acquire for some reason they haven't been injured have they under your theory of the vested right?

RIGGS: They have been deprived of the right to drill for water. They have been deprived of the right to use the water.

CORNYN: But for those who are using their property for non-agricultural purposes and who don't seek to drill a well, how have they been injured?

RIGGS: They cannot lease to someone else the right to seek water under their land.
CORNYN: Maybe they have no interest in doing so. Doesn't your theory of the case necessitate our assumption that every landowner affected by this legislation will either seek to drill a well or be denied a permit, or otherwise be injured?

RIGGS: A party doesn't have to actually exercise a right to have it taken away from them. Mr. McCulloughs example: we may have raw land Southwest of Austin, we may have no current intention

of developing; it may be land we've inherited from our family; it may be the only property we own. If the state comes in and says that land will be park land, not the analogy of well you may have a hope to build a shopping center, we are not going to let you do that, we will let you build a residence. What's happened here is the state has come in and said: You may not build, that land is going to be a public park. If I had made no effort to develop that land, I, nevertheless, have had my property taken if the government is requiring that that land not be used, not be developed, I have been deprived by the effect of a law saying it shall be a park, I have been deprived then of a valuable property right.

ABBOTT: The buyers or owners of the platted property may never have any desire to drill a well. And because they may never a desire to drill a well they may not have been injured in any way yet. Is it a valid argument, and if so you are going to have to explain it to me, is it a valid argument that on the face of the legislation owners of property have been injured because it automatically reduces the value of their property even for those who may never want to drill a well?

RIGGS: Yes. And there was ample testimony about the difference in the value of property with water, and without water.

ABBOTT: So in other words, with the enactment of the Act, with the effectiveness of the Act itself, without anybody desiring to drill a well or anything like that, and based upon what was done at the trial court, have property owners been injured even without deciding whether or not they are ever going to drill a well?

RIGGS: Yes, your honor. And we believe that there was testimony that they were injured even in anticipation of the bill becoming effective. There is a reduction in any desire to develop property and that was part of the explanation for why certain people hadn't sought permits under the bill because of an anticipation that they would not be able to sell their property.

ENOCH: If this is a facial challenge Mr. Potter suggested that it would be within the authorities purview to promulgate rules protecting correlative rights. Meaning they could setup rules that unitize water interests, or pool water interest so that whatever water I have under my property if I'm subjective to the spacing requirement, or I can't drill a well here, that I can participate in the revenue achieved from the well next door or have an interest in the water that's pulled out of the well next door, and they could do rules like that. Effectively overruling East but at least making it consistent with what we do with oil and gas. If your interest is protected by this pooling or unitization does that solve the facial unconstitutional challenge here?

RIGGS: No, because it's not what the statute lets them do. Mr. Potter characterized the EAA as a water bank. But if you actually look at the funding mechanism under §1.29, what it allows is once someone proves they are entitled to a permit, if they manage to meet the March 1 deadline, if they have drilled a well by June 1, 1993, if they manage to get a permit then the funding mechanism allows the EAA to come in and retire existing permits. People who have not been able to meet their burden of proof of clear and convincing evidence, which is the burden the statute imposes on them to prove their right to their existing property right, if they are not able to do that if they haven't met those deadlines, they are not even allowed to participate in that funding mechanism. That funding mechanism he described only allows the EAA to repurchase permits, to acquire permits. And it may then redistribute the water. There are a few mechanisms that allow people to use conservation measures and increase the amount of their permits.

But as far as buying and selling we would disagree that there is a common pool and that money goes back to the property owners. One it only goes to those people who have a permit, which we think is impossible for them to do. In addition in §1.29, there is a limit 1) that the authority can't collect certain amounts unless they are reasonably necessary to administer the authority. And there is a limitation

on fees assessed and fees assessed on downstream water rights holders may not exceed 1/2 of the cost of permit retirements from 450,000 acre feet a year, or an adjusted amount as determined under the statute. So there is a limit on what they can collect. And we think what they can use that money for. So we would disagree with their characterization.

PHILLIPS: Your answer to Justice Abbott's query seemed to be that the mere reduction in the value of property, or potential resale, even if your personal use hadn't been impacted at all is a constitutional taking, how does that square with our repeatedly ruling on imminent domain?

RIGGS: A mere diminution in value is not in and of itself a taking. But if a diminution in value say for example the pecan tree example there is ample evidence in the TC that the 25,000 limit doesn't apply if your property happens to be a pecan farm.

PHILLIPS: I was talking about your answer to Justice Abbott's question about the owner of a plat in a subdivision, a lot in a subdivision who did not intend to drill a well ever, and the lease said there was a constitutional taking.

RIGGS: The reason there is a taking here is you look at property as a bundle of rights. But because water like oil and gas can be severed what's happened with this statute is a taking of 100% of the value of the water. It's not just a diminution of the value of the surface. It is 100% of that water right. Yes it is part of the bundle of sticks that make up property rights. But because of its unique nature taking all of the water right isn't just a diminution of value. It is a complete and total taking. And that's why we believe that there is an applied argument here and that we sustained that argument at the TC.

ABBOTT: Explain your basis for your claim that the Act requires a prepayment of an administrative penalty before a court appeal could be taken?

RIGGS: Our concern there is that 1) we don't think the statute lets you appeal it. There is no express provision in the statute that allows an appeal to DC. And we think that makes it constitutionally defective to begin with. But there are also penalty provisions. If someone drills a well as the statute says they are not authorized to, and these folks out here right now risk being hit with civil penalties the one provision, the only provision in the Act that allows an appeal deals with the assessment of civil penalties. And it says that the penalties must be paid before you can go to DC to challenge what the agency has done. Now those kinds of schemes if they allow for the filing of affidavits of inability to pay have been upheld. But what has happened here again is because of the nature of the right and the fact that we don't believe the Edwards Aquifer Authority can adjudicate that right by shifting the burden to the property owner, again what they have done is in effect a denial of due process because of the nature of the right and a shifting of the burden.

If we were talking about you have a license to practice law and the State is accessing a penalty and you must pay that penalty prior to appealing a decision on your license we would have a different situation. And I think that's why the Texas Association of Business case can be distinguished from what we are arguing here.

ABBOTT: In modern day Texas how can you defend the continued application of the English rule?

RIGGS: If the State of Texas wants to decide that we as a State no longer want to allow the rule of capture, then we as a State can change prospectively property rights. So that people who purchase property in the future will know that they no longer have a right to groundwater. But for those who have an existing right before a bill actually cuts off that right, they have to be compensated. So can

the state do it? Yes, the state can do it. But they haven't done it with this bill.

ABBOTT: So you're not defending the English rule prospectively?

RIGGS: Well that would be a policy. And we don't deny that the legislature can come in and say: Texas we don't want you to have this property right anymore. We are going to take it away from you. We are saying that they have to...if someone already has that property right, if that property right has vested as it has for all those people who own land in Texas you can't take it away without paying for it. But prospectively if the state wants to say: We've decided it's a bad idea, and they want to pay for those rights to come out and buy the land, of course the State has the authority to do that. But it's going to take a lot more than this bill to do it.

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REBUTTAL

POTTER: May it please the court. I have a few comments then I will defer to my colleague Mr. Rogers. The first thing that I want to discuss is what I think has been a fundamental misconception on the part of the plaintiffs below. And that is the idea that somehow the English rule or the rule of capture is somehow some sort of absolute right not subject to any reasonable regulation. This court has made clear since 1904 in the East case that absent positive legislation that the English rule would be the rule.

There is no vested property right in the water itself under its land because the rule of capture is not to capture your own water, but essentially in the East case it was the right to capture your neighbor's water. And it is a rule of nonliability. And what we are hearing today is a conversion of a rule of nonliability into somehow a rule of an absolute right to capture water for one's own use irrespective of any legislation. That flies contrary to 92 years of case law out of this court. It has always been subject to reasonable regulation by the state. And what we've heard today is the one exception to getting a well is a subdivision requirement. As we sit here today in my lot in North Austin I cannot drill a well because of zoning regulations on my lot to withdraw water. Does that mean that my property has been taken? Absolutely not.

ABBOTT: But you knew that when you purchased your property.

LAWYER: That's correct.

ABBOTT: In other words what they are arguing is that it would be as if you when you bought your property you could have drilled that well, but then they come in and put new deed restrictions in that prohibit you, which in essence takes away that right from you.

LAWYER: In that limited narrow circumstance is also the situation that these very districts have. Under Ch. 36 the Medina and Uvalde districts as well as other ch. 36 districts have the power to deny permits based upon spacing requirements. And the platted subdivision requirement is nothing more than a spacing requirement. You can still apply for a permit. You don't get the automatic exemption is the only key there.

ABBOTT: Under that Act, under the Water Code or under the Medina or Uvalde water districts, who defines what the spacing requirements are?

LAWYER: I believe it's by administrative rules. They decide what the spacing is going to be. And I think that the legislature had reasonable intentions in mind when they were concerned about the owner of a large parcel of land subdividing it simply to acquire a bunch of water rights. They wanted this

truly to be an exemption and not some sort of ability to commercially exploit what was supposed to be an exemption for smaller wells.

But I want to bring that back to the larger point. The larger point here is there has been I think too much focus on one aspect of the bundle of sticks. Mrs. Riggs hit it exactly right when she said that property right in water is but one bundle of sticks in property ownership. It is one aspect. And that is where the zoning analogy hits home once again. All that is being regulated is the use of that water. It is not that you cannot use that property for any reason, and that is why this is very similar to a zoning restriction. In fact the example that I just gave you know my lot here in Austin I cannot drill a well, but that's just one aspect of ownership. That doesn't mean that there's been a destruction of the value of my property. Keeping in mind also that under the takings laws and under the regulation of the state's police power, the state has the right to come in and take that property even if you said that water rights were the whole bundle of sticks. The state still has that right provided that in the balancing of interest the interest of the landowner verses the common good that that balancing favors the state. And certainly that is what's happened here.

There are 1.5 million users of Edwards Aquifer water that are dependent on that resource for the sole source of water. And I think what the legislature has done here is balance those interests verses the...what we are talking about is very minute exceptions to the rule. These few people that may have fallen into this little gap are going to have to stand in line to apply for a different type of permit. We are not saying that they are cutoff absolutely. That is mere speculation on the part of the plaintiffs that there will not be rights available that the EAA will not make permitted rights available. And then we assume that there was somehow some absolute right to capture. That the court has been clear since the very beginning in the East case that the right to capture is subject to causative legislation. In fact the court's last major writing on this subject was in 1978 in the Friendswood case. And the court held that the need for additional legislation for creation of districts to cover unregulated groundwater reservoirs and to solve other conflicts which may arise in this area of water law and subside and seems to be inevitable. Providing policy and regulatory procedures in this field is a legislative function. It is well that the legislature has assumed its proper role, because our courts are not equipped to regulate ground water uses and subsidence on the suit by suit basis. And that is precisely what the legislature has done in this case.

In accordance with the precedent established by this court since the East case in 1904 through the Friendswood case in 1978, the legislature acted in enacting the EAA in a constitutional manner consistent with principles articulated in the constitution. And keep in mind that what we are balancing here is a common law right, the rule of capture which this court has said is subject to the legislative will. And that was prior to the enactment of the conservation amendment. And somehow the argument seems to be that we have the common law swallowing the constitution.

ABBOTT: What about their argument that for us to uphold this as constitutional, we, the court, will in essence have to be amending the Act to include some new dates, to include a right to appeal, and some other things like that, and to include whether or not the permit runs with the land?

LAWYER: Well one there is no need to determine whether the permits run with the land. I think that there are already legal concepts to cover that, and certainly there are express provisions concerning the purchase of water rights. I think that's a matter of interpretation for the authority not for this court. Second as far as amending the dates, the only thing that this court needs to do with respect to the filing deadlines is simply say that due to impossibility of performance the dates are directory. That allows the authority to come up with reasonable dates. And as far as the administrative review provisions those are right in the statute. We don't have to assume that the legislature wanted the APA to apply. The legislature told us what they intended. They intended for the Administrative Procedures Act to apply. And to say otherwise would reach an absurd result, and to assume that the legislature put that language in there

for no reason.

In closing, the legislature acted in a constitutional manner consistent with principles articulated in the conservation amendment to the Texas constitution, and consistent with principles articulated by this court over the last 92 years. For these reasons the State of Texas respectfully request that this court reverse the judgment of the TC and render a judgment affirming the constitutionality of the Edwards Aquifer Authority Act.

* * *

CORNYN: Mr. Rogers do you contend that it's an all or nothing proposition, or provisions of this statute severable?

ROGERS: That's a good question Justice Cornyn. The vast majority of the complaints that are directed at this legislation deal with one aspect of the Act. And that is the part of the Act that talks about permitting so that the water use can be fit within an overall cap. There are many other provisions of the Act, tools in the box of tools available to the Edwards Aquifer Authority, to improve the situation in Central Texas. The permitting provisions that are complained of here are only a part of that if those provisions were unconstitutional. Those provisions can be stricken, should be stricken so that the remainder of the Act can go forward. Bear in mind that the Edwards Aquifer Authority this entity on the map at the very least has all the powers of a Ch. 52 district. The same powers that the districts attacking it had. And the legislature has determined that they would rather deal with this problem regionally rather than continue dealing with smaller turf wars.

ENOCH: It seems to me that under the individual districts that existed one of the points was that it really balanced interests among users. This user and that user and that sort of thing. And basically what happened is that if somebody asserted that their neighbor was using up more water than they could reasonably use, they were wasting it, then you had certain causes of action that existed out there. Or if one persons' use of water actually resulted in physical damage to the neighbor there was some sort of cause of action that transferred the funds from one side to the other. An underlying argument that's going on here is that what this new district does is for the sake of the whole it now limits an individual's use of their property, not because they are wasting it, but in fact could say you are going to have to let your pecan orchard die because we have made a policy decision that something else needs to be protected. One of the briefs talks about there's plenty of water in the reservoir for all the human beings in San Antonio to drink, but we don't want the minnows to die. If that's the public policy decision that the state makes, can the state say that you can't drink water out of your well today, you can drink it tomorrow, maybe you can drink it 5 days from now, but today you can't drink that water out of your well, can the state say that without that being a taking for public purpose?

ROGERS: The first point I would make your honor is that of course we have to remember that we have the exempt were provisions in here: If you need to drink water you can drill a well and you can take up to 25,000 gallons per day.

BAKER: Do you have to get a permit to get that exempt _____?

ROGERS: No your honor.

BAKER: You just can drill?

ROGERS: You just can do it. It's a safety net is what it is.

BAKER: All these people out there can drill now without fear of the penalty?

ROGERS: They can drill an exempt well for domestic purposes and livestock purposes.

BAKER: What about pecans?

ROGERS: Whether or not the pecan farmer can be required to let his trees die is a matter for an administrative proceeding in the future once the Edwards Aquifer Authority has had a chance to go through the process and consider his application and determine whether to grant him _____, or to provide some other exception. That's a case for another day.

ENOCH: But if it's not waste, and they need more than 25,000 of water, and if it's not waste but the government just says: we know this is what you had and this is what you've used, but because somebody else down the road we prefer that they have access to it over you having this access, we are going to transfer your access to them; is that not some sort of taking that's compensable?

ROGERS: If I may paraphrase your question as I understand it. I believe you are asking can the legislature regulate a region to achieve an overall public benefit while causing some burden to individuals? I think the answer to that question is yes. In the Turtlerock(?) case this court chose to take a very holistic approach to the taking analysis. And that is first of all we determine whether the legislation is a reasonable attempt to achieve some legitimate purpose, number one. The second prong is does the public benefit derived from the legislation exceed the burdens that are separate by individual? In other words it's a cost benefit analysis. Is the region better off not withstanding the fact that some individuals may have some limitations on their use of property in the past? I think the answer to that question if the court reaches the taking issue in this case, the answer to that question is no there is not a taking. This is regulation. There may be some affect on land values. But this court for many years has recognized that that is a necessary attribute of exercising the police power.