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Supreme Court of Texas.
Hearts Bluff Game Ranch, Inc.
v.
The State of Texas and the Texas Water Development Board.
No. 10-0491.

October 5, 2011.

Appearances:

Terry Jacobson of Jacobson Law Firm, P.C., for Petitioner.
Arthur C. D'Andrea of the Office of the Solicitor General, for Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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ORAL ARGUMENT OF TERRY JACOBSON ON BEHALF OF THE PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: Next argument is 10-0491 Hearts Bluff Game Ranch, Inc. v. the State of Texas and the Texas Water Development Board.

MARSHAL: May it please the Court, Mr. Jacobson will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ATTORNEY TERRY JACOBSON: May it please the Court. This case presents the court with the question of whether the state and federal constitutions provide a property owner a remedy when the State uses its sovereign powers to manipulate the marketplace to the State's benefit and to the detriment of its owners. The cases of this Court and other supreme courts in other states have consistently allowed that remedy to exist. The State here has argued and will probably argue again that its actions are justified because the Marvin Nichols Reservoir in Northeast Texas is critical to its plans to supply water to the Dallas-Fort Worth area for the next 50 years. And while that is certainly an explanation for why the State did what it did, it is not an excuse for what the State did. My client had plans to develop a mitigation bank. It's an environmentally friendly, it's a value-enhancing and socially responsible use of property. My clients did due diligence before they bought the property. My clients had the assurances from the Corps that there was no legal impediment to them buying the property before they bought the property. And when the State learned that a mitigation bank might exist within the footprint of Marvin Nichols Reservoir, the State became concerned because in a mitigation banking situation, the interests of the federal government under the Clean Water Act become part of the property. The property becomes deed restricted and gives the Corps of Engineers substantial rights in the property to enforce either a conservation

easement or, alternatively, a deed restriction. And so the State was very, very, very worried that the federal interest in this particular mitigation bank would preempt any effort in the future to make Marvin Nichols a State water supply strategy.

JUSTICE NATHAN L. HECHT: Would it?

ATTORNEY TERRY JACOBSON: Great question. In the *City of Dallas v. Hall* case where there was a conservation, a wildlife conservation easement in Cherokee County in Lake Festerol, essentially there the U.S. Supreme Court eventually heard arguments on it. The argument was never heard whether or not the preemption did actually exist. And under the *Rapanos* case, which was cited by both the State and us in our briefs, there is an argument, a potential argument that a Federal interest might or might not preempt the state's right to control its own waterways. But regardless of whether it did or not, what the State did here was use its sovereign power, power only the State has in the marketplace, to create the result they desire and that result was to not to take the chance that preemption might exist, and the State's brief is remarkably candid about this point. On page four of its merit's brief, the State says that Marvin Nichols is a critically needed piece of infrastructure.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well why isn't that a huge part of this case? I mean we've seen just recently droughts and fires and the water resources is becoming much more critical for the State of Texas and isn't that the purpose of a sovereign power to protect the State and its citizens in the use of a critical resource like this?

ATTORNEY TERRY JACOBSON: It can certainly be a consideration and should be, but if the State wants to use my client's property for a purpose, property the State does not own, the State ought to pay for it when it keeps my client from developing this property in a responsible way. The other half of the need for the sovereign power to develop the State water plan is the talisman, the foundational principle in taking these cases and that is in fairness and justice, who should bear the burden of the State's action? Should it be the individual landowner who's forced to forego its own socially responsible, environmentally friendly and very profitable use of the property or should the burden be borne by the State?

JUSTICE DON R. WILLETT: Did the State here do anything other than announce an intention to condemn land at some point in the future?

ATTORNEY TERRY JACOBSON: Much more. Prior to the letter that my clients received denying the mitigation-making permit, the State sponsored a site protection, reservoir site protection study, which isn't so much, but the State also, for the first time, included in its regency water plan an unique reservoir site designation for Marvin Nichols and the Texas Water Development Board had approved that designation prior to the denial of the permit. It went from simply suggesting that at some point in the future a water supply reservoir might be there and there are hundreds in state water plans going back 40 years. Here the State took the step to actually put its footprint in the law saying we are going to have a water supply reservoir here. Don't grant this mitigation-making permit. And under the Corps' mitigation-making criteria, what that meant was there might come a time when the mitigation bank might be under 60 feet of water and so the State declined to issue the permit.

JUSTICE DON R. WILLETT: Could Hearts Bluff still prevail if we uphold the directness requirement in the court of appeals' opinion?

ATTORNEY TERRY JACOBSON: I think that the court of appeals' opinion misunderstands the directness requirement. The court of appeals' opinion concedes that the State's actions were the factual cause of the taking and they have to do that because that's the way we pled it and it's also the truth. The State, the court of appeals then creates something heretofore unknown in Texas law, a legal cause or an ultra vires exception, which is not part of Texas law. Consistently in the cases this Court has reported, it's a factually driven element. Did these State's actions, were they the producing cause, the proximate cause, did it result in the taking? And so in this court in *Biggar* has already essentially found the same thing. In *Biggar*, the City of Austin issued a site devel-

opment plan and that was the value-enhancing additive to that property. Here, the value-enhancing additive is, of course, the mitigation-banking permit.

JUSTICE DALE WAINWRIGHT: What was Hearts Bluff's vested property right?

ATTORNEY TERRY JACOBSON: Every property right you can own under our constitution.

JUSTICE DALE WAINWRIGHT: What was the vested property right at issue here? There was never a permit issued by the court. Only the court could issue the permit.

ATTORNEY TERRY JACOBSON: Only the court can issue the permit, no question about it.

JUSTICE DALE WAINWRIGHT: Obviously, Hearts Bluff bought the property, owned the property, had right to the property. What was the vested right that the State interfered with?

ATTORNEY TERRY JACOBSON: To develop its property in any legally permissible way that the law allowed. That is what property is all about.

JUSTICE PHIL JOHNSON: But that's what the court of appeals called merely a tortious interference tort action. The interference with your right to develop your property.

ATTORNEY TERRY JACOBSON: The interference here wasn't tortious. It was constitutional.

JUSTICE PHIL JOHNSON: Well that's your view. The court of appeals viewed it a little different.

ATTORNEY TERRY JACOBSON: I understand. And the way the case was pleaded, of course, is the State's sovereign powers were the factual cause of the permit denial.

JUSTICE PHIL JOHNSON: Which goes to Justice Wainwright's question, what was the vested right taken or affected?

ATTORNEY TERRY JACOBSON: My client's ability to develop its property as a mitigation bank, much like any other property here in Texas has the ability to develop its property in any legally permissible way that's not restricted.

JUSTICE DALE WAINWRIGHT: In this case, you could only develop it with a permit from the Corps for mitigation bank. If you had a mitigation bank permit and that was interfered with, destroyed, obviously that would be a vested right, the permit, and the ability to develop the mitigation bank. You never--

ATTORNEY TERRY JACOBSON: I'm sorry, Justice.

JUSTICE DALE WAINWRIGHT: I'm just trying to focus in the inquiry. There was never a permit from the Corps issued. So what's the vested right?

ATTORNEY TERRY JACOBSON: The vested right--

JUSTICE DALE WAINWRIGHT: That you can't develop the mitigation until you have the permit.

ATTORNEY TERRY JACOBSON: It's fee-simple title. There are a number of federal circuit cases that talk about this concept where arguments are made regarding, you don't have the permits so you don't have a vested property right taken. And the response to the Federal Circuit, which deals with a lot of these questions a lot of the time is essentially it's anomalous to argue that you don't have the right until it's granted. Instead, what you

look at are the foundational facts through a Penn Central or a Lucas analysis under the U.S. Constitutions. They don't let the fact that a permit hasn't been given yet stop the landowner from prevailing in an inverse-condemnation case. In the City of Teague case or even Biggar's case for that matter, the landowners in Biggar didn't have the right to their site development plan development until they got the easement swap.

JUSTICE DON R. WILLETT: The record and the pleading seem to suggest that Hearts Bluff bought the property with knowledge that a state agency might somehow interfere with its permitting process. Do you dispute that?

ATTORNEY TERRY JACOBSON: I think what Hearts Bluff did was do its due diligence with the Corps to understand whether or not a potential future development might impede the granting of mitigation-banking permit. And the status of the State's involvement at that time in this particular project was such that the Corps would not deny a permit based upon a state water plan that had been around for 40 years.

JUSTICE DON R. WILLETT: But there was knowledge that a state agency had the ability to step in and thwart the permitting process.

ATTORNEY TERRY JACOBSON: Thwart wouldn't be the way I'd put it. I think the way I would put it would be the State had the ability at some point in time to certainly develop a reservoir. And if the State wants to do that, it needs to pay for the right to have done it. What the State's doing here now is controlling the development of my client's property, property it doesn't own, without buying it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Could the Corps have granted the permit notwithstanding the State's opposition to it?

ATTORNEY TERRY JACOBSON: The Corps does have discretion to grant or deny permits. I think the court's fear was that ultimately the preemption issue might, in fact, go in favor of the State and then the court will be faced with a situation where a water development site would be sitting on top of the mitigation bank and so the court declined to grant it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Unless the Corps could have granted and the Corps was considering the request, delayed it several times and it was your client that pushed for an immediate decision, correct?

ATTORNEY TERRY JACOBSON: I think what actually happened was the Corps offered my clients the opportunity to determine, to wait and see whether or not the unique reservoir site designation actually made it into the State water plan.

CHIEF JUSTICE WALLACE B. JEFFERSON: But your client, as I understood the record, objected and said, no, we want a decision now.

ATTORNEY TERRY JACOBSON: We've been waiting two years. We'd like a decision from the Corps. Please tell us what happened. But my clients also went back to the Corps and afterwards asked the Corps to reconsider for one reason to ripen the claim also and to make sure that the Corps had every fact it needed to understand in order to grant or deny the permit. So my clients went back again and even asked whether or not a mitigation-banking site could actually be moved trying to accommodate the State's interests and its own. The Corps said no; we're worried about this mitigation-banking site being under 60 feet of water. Therefore, we're going to deny your permit.

JUSTICE NATHAN L. HECHT: You don't claim that every section 16051 designation is a taking.

ATTORNEY TERRY JACOBSON: No, we do not claim that. In fact, I think the--

JUSTICE NATHAN L. HECHT: So how do you distinguish between this designation and all the other ones?

ATTORNEY TERRY JACOBSON: In this particular case, what the State did resulted in a current direct restriction on my client's property. I think that's the key distinction. That idea exists in the case law already. Certainly, farmers are still farming land out there and the fact that the site is a unique reservoir site hasn't stopped anything in the real world. That's why I think the decisions of this Court looking at an ad hoc, fact-based analysis are so important. Here it was a sovereign act of the State that caused the current direct restriction and that's a distinguishing factor. Not --

JUSTICE DON R. WILLETT: Lucas talks about denying all economically beneficial or productive use of the land.

ATTORNEY TERRY JACOBSON: Yes, sir.

JUSTICE DON R. WILLETT: Are you claiming that Hearts Bluff has been denied all economically beneficial and productive use or just what you had hoped to use it for?

ATTORNEY TERRY JACOBSON: That's an interesting question and I appreciate that because I couldn't get the court of appeals to even address the federal law claims, for example, Lucas. If you read some of the Supreme Court cases after Lucas, there's some discussion about whether the forceful rhetoric of all economically viable use of the property is what it appears to be. There's a case that came out of, I believe, the Dallas court, City of Sherman v. Wayne, that does some analysis about whether or not a property has lost all economically viable interest. We would claim that, but also understand that the property does have some potential uses, but the uses of the property that are there now are uses that wouldn't justify the amount of money my client paid for the property or the amount of money that my client put into the property to make it a mitigation bank. So we would be a net loser at this point in time under a Lucas analysis.

JUSTICE DON R. WILLETT: But again you bought the property knowing that an agency could at some point step in and deprive you of your hoped for use for the property.

ATTORNEY TERRY JACOBSON: What we bought was a piece of property that had been the state water plans for 40 years and had never been acted upon. And it would be very unfair and unjust if every property owner in the 113 or 115 reservoir sites in Texas was charged with the knowledge that at some point in time in the future, there might be a reservoir site there and so they couldn't develop their property in ways that might conflict with the State's rights. If the State wants to do that, the State needs to pay for the right to control the property.

CHIEF JUSTICE WALLACE B. JEFFERSON: There are going to be many examples where the federal government or an agency asks the State for its opinion on matters like this and what you're saying is the State can't give its recommendation or evaluation without thinking the next thing that's going to happen if we recommend denial is there's going to be a lawsuit against the State for an improper taking.

ATTORNEY TERRY JACOBSON: That's not what I'm saying. What I'm saying is when the State's actions and the use of its sovereign power, power that nobody else in the marketplace has results in a current direct restriction, there ought to be recovery.

CHIEF JUSTICE WALLACE B. JEFFERSON: What power was exercised by the State?

ATTORNEY TERRY JACOBSON: The state legislature declared Marvin Nichols to be a unique reservoir site, put it in the State water plan. The development board actually approved the region's seawater plan. Those are

things that only the State can do. No other landowner has those powers.

CHIEF JUSTICE WALLACE B. JEFFERSON: But how did that control the federal government, the Corps' action?

ATTORNEY TERRY JACOBSON: The Corps was worried that there might be a reservoir and --

CHIEF JUSTICE WALLACE B. JEFFERSON: But how did it control the Corps' determination on whether to grant the permit?

ATTORNEY TERRY JACOBSON: It forced the Corps to conclude that the mitigation-banking site might not exist in perpetuity.

CHIEF JUSTICE WALLACE B. JEFFERSON: Which goes back to my original question, so the Corps had no discretion after the State made its determination here to grant the permit?

ATTORNEY TERRY JACOBSON: The Corps might have had discretion, but the discretion is somewhat illusory. There's never been a mitigation-banking permit in the nation denied except for this one and the Corps is in the business of promoting mitigation banking. So --

JUSTICE DEBRA H. LEHRMANN: Let me ask you, what if you were successful and you received damages and then the legislature amended the law so that the property was no longer designated a unique reservoir site, then what?

ATTORNEY TERRY JACOBSON: I've alleged a temporary taking claim if, in fact, that happened before we actually got a trial on the merits and evaluation decision. So I've actually thought about that could happen. But as a practical matter, that's the kind of situation that really cries out for constitutional protection. My client has been forced to forego a valuable, environmentally responsible use of its property. If the Corps were to change, if the State were to change its mind in five or ten years, we've been denied the right to develop our property and --

JUSTICE PAUL W. GREEN: Are there zoning cases that would be analogous to this situation?

ATTORNEY TERRY JACOBSON: There might be some zoning cases that could be analogous, but neither side has tried to analogize it to a zoning situation, but I could see a situation where if a state zoned a particular area in a certain way, for example, the City of Houston v. McGuire Oil case that this Court just denied petition for last week. There the City of Houston had an ordinance that said you can never develop an oil and gas well within so many feet of our water supply and that was found to be a taking. So certainly zoning cases, especially zoning cases that preclude development can, in fact, be analogous to our situation.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions. Thank you, Mr. Jacobson. The Court is ready to hear argument from the Respondents.

MARSHAL: May it please Court, Mr. D'Andrea will present argument for the Respondents.

ORAL ARGUMENT OF ARTHUR C. D'ANDREA ON BEHALF OF THE RESPONDENT

ATTORNEY ARTHUR C. D'ANDREA: May it please the Court, the plaintiffs are advocating would allow environmentalists to use federal preemption to shut down any controversial public works project. The State must be able to truthfully communicate with the federal government concerning its critical infrastructure needs. Without the Bright-Line Rule in Westgate, planners would be forced to keep their projects secret instead of encouraging public debate and they would be prevented from evaluating all the various options for risk of incurring takings liability for every site that they propose. There is no regulatory takings in this case because Hearts

Bluff cannot show that it is suffering any restriction on its properties used.

JUSTICE NATHAN L. HECHT: Well it didn't get the permit.

ATTORNEY ARTHUR C. D'ANDREA: It's not a permit, Your Honor. It's --

JUSTICE NATHAN L. HECHT: It didn't get the --

ATTORNEY ARTHUR C. D'ANDREA: The contract. It didn't get a contract.

JUSTICE NATHAN L. HECHT: Didn't get the contract.

ATTORNEY ARTHUR C. D'ANDREA: With the federal government, right, and so what is it being stopped to do. The contract works like this. A mitigation contract with the federal government is a deal between the landowner and the Corps and what the contract says is the landowner will create a conservation easement, setting aside its land in perpetuity forever to compensate for wetlands and, in exchange, the landowner will get mitigation-banking credits from the federal government, which the landowner can then sell to developers. So all it lost was that contract.

JUSTICE NATHAN L. HECHT: And you agree that the State caused the loss.

ATTORNEY ARTHUR C. D'ANDREA: The State, I think for the purpose of this appeal, we have to agree with that--

JUSTICE NATHAN L. HECHT: Your brief is a little ambiguous, but --

ATTORNEY ARTHUR C. D'ANDREA: We asked them to. We don't agree that we have any power over the court to do that. Now I think what we asked the court was to please site your habitat for migratory water fowl somewhere else. Now whether that please had an influence on the Corps I think we have to accept for the purposes of appeal that a factual matter it did, but we disagree that the Corps. The Corps had discretion to deny it. And what they denied was just a contract because, even today, if Hearts Bluff wanted to, they could build the heart, put hardwood trees in the land and create a conservation easement and they could sell that conservation easement to the Sierra Club.

JUSTICE DON R. WILLETT: Has the Corps denied any other mitigation-banking credit to your knowledge?

ATTORNEY ARTHUR C. D'ANDREA: They have suggested the Corps has not. That is not, I don't have any, I'll point you to this. There is, commentators have called the Corps' process in this granting the mitigation permit, lengthy bureaucratic labyrinth and they've criticized the uncertainty in the process because any member of the mitigation banking review team can deny one of these contracts for any reason.

JUSTICE DON R. WILLETT: Can a labyrinth still be ministerial?

ATTORNEY ARTHUR C. D'ANDREA: It, well, I, I mean - of course it could be.

JUSTICE DON R. WILLETT: At the end of all that kind of agony can it still be ministerial?

ATTORNEY ARTHUR C. D'ANDREA: I suppose it could, but this is a commentator in 81 Iowa 565 and there they suggest and list several instances where these have been denied. I think --

JUSTICE DON R. WILLETT: Do you dispute that the denial is traceable to the actions of the State?

ATTORNEY ARTHUR C. D'ANDREA: I think, again, for the purposes of these appeal, they have alleged that we have influenced them so I think we probably, I mean certainly that was our purpose in asking them not to do it, but what's important is the state has no power. Not just no power to issue this mitigation banking contract, the State wasn't even using its eminent domain authority here because the State has no, it cannot threaten the federal government with eminent domain.

JUSTICE NATHAN L. HECHT: Well I mean, on the one hand you say you can't, but on the other hand you say you did, and so you know it's sort of irrelevant whether you can or not if, in fact, you did which is what you thought you were doing and hoped you would do.

ATTORNEY ARTHUR C. D'ANDREA: I think, Your Honor, I think what we thought we were doing is saying, pretty please, don't locate that here because we need this land for a reservoir and if you put a reservoir here, we will not be able to condemn it. This isn't a matter of the State not paying for it. Paying for this land would never have been an option. If one of these mitigation bank, if a federal mitigation bank went in on this critically important site, that would be the end of it. Through federal preemption, the State would never be allowed to build Marvin Nichols there. So it's not about paying.

JUSTICE NATHAN L. HECHT: But if there were a municipal authority there and you asked them not to approve the subdivision because you're thinking about building a reservoir, wouldn't that be a taking?

ATTORNEY ARTHUR C. D'ANDREA: That would, I agree that that would be a much more difficult case. It would depend in part on how much authority we have over that municipality.

JUSTICE NATHAN L. HECHT: Zero.

ATTORNEY ARTHUR C. D'ANDREA: Right. Well even with zero, under Westgate it would not because, it depends on what the municipality denied, but say they denied the same thing, a contract here, under Westgate it still wouldn't be because there's current direct restriction. What Westgate says is it's got to be actual physical or legal restriction on the property's use and there's nothing restricting them.

JUSTICE NATHAN L. HECHT: [Inaudible] -- if you went in and said if there was a subdivision out here, it's going to impede our plans we're not ready yet, so don't approve this subdivision. We're not sure what we're going to do yet and the county said, or the city, probably the city, okay, we won't. Seems to me that's pretty clearly a taking.

ATTORNEY ARTHUR C. D'ANDREA: I think, Your Honor, I could imagine, I could imagine an exception to Westgate along the lines of if the State uses a threat of eminent domain to settle a deal, right? And maybe that would be a taking if, first of all, they're, they are actually restricting the land's use. The, they're applying for a subdivision and we're saying no.

JUSTICE DEBRA H. LEHRMANN: Let me ask you if this, if this decision stands, isn't it going to encourage the government to take different types of actions, to lower the value of property that it later intends to condemn? I mean is that a possible result?

ATTORNEY ARTHUR C. D'ANDREA: I don't think so, Your Honor. Westgate leaves open the possibility of a claim that the State has acted in bad faith and used its power of eminent domain, has threatened the use of eminent domain. So say, say this weren't the federal government, say it were third party. A third party wanted to enter into a contract with Hearts Bluff to develop the land in some way and the State went to that third party and said if you do that, if you sign that contract, we're going to condemn this in 10 years. Now I could imagine, under Westgate that wouldn't be enough because there wasn't a direct restriction on the land yet. There's just a threat to the eminent domain. But I could imagine an exception to Westgate that said look a bad faith threat of eminent domain could be actionable as regulatory takings. But here there's no threat of eminent domain because

we can't threaten the federal government. We're not trying to avoid paying them; we're trying to avoid this project being shut down altogether. There's no cloud of condemnation here.

JUSTICE PHIL JOHNSON: You had a specific intent to preclude something and it was going to have a detrimental effect on these. I mean you specifically intended to do that. And eminent domain it seems like whether we call it a suggestion or a right of eminent domain or a bad faith or anything else, you did specifically intend to affect these peoples property, and you're the government.

ATTORNEY ARTHUR C. D'ANDREA: We specifically intended for the federal government not to sign a contract with them.

JUSTICE PHIL JOHNSON: Well, but you intended, you intended to try to prevent that.

ATTORNEY ARTHUR C. D'ANDREA: To prevent a contract, we did.

JUSTICE PHIL JOHNSON: Yea that was the whole purpose.

ATTORNEY ARTHUR C. D'ANDREA: The State, and I think the State and parties all the time specifically intend to prevent other parties from signing contracts.

JUSTICE PHIL JOHNSON: And you knew, you knew it would detrimentally affect their property values and what they were trying to do if you were successful in getting the federal government, the Corps not to issue the permit.

ATTORNEY ARTHUR C. D'ANDREA: I think, I think I disagree that we were trying to affect their properties' value.

JUSTICE PHIL JOHNSON: Well not that you, but you knew it was going to.

ATTORNEY ARTHUR C. D'ANDREA: It's not terribly clear. It was just, this is just one deal. This is one possible deal of a contract they could have done. They can still do the conservation easement. There's nothing they have alleged that they can't do tomorrow. They can still create a conversation easement, they can --

JUSTICE PHIL JOHNSON: Well, but that's blanking reality. I mean these people had to have the permit bank and all of that to make their financial plan work, didn't they?

ATTORNEY ARTHUR C. D'ANDREA: The are, no one has denied them any permits. They keep calling it a permit to make it sound like a land use permit, but it's not that.

JUSTICE PHIL JOHNSON: Can they do the finance, can do they do the mitigation banking, sell those credits now?

ATTORNEY ARTHUR C. D'ANDREA: No, they can't do because that's a federal program so they can't participate.

JUSTICE PHIL JOHNSON: And certainly, the State was aware of what was going on out there when they took this action intending to keep them from doing what they wanted to do and it was going to affect them financially. The State had all of that knowledge and the specific intent to prevent it.

ATTORNEY ARTHUR C. D'ANDREA: Yes, Your Honor, we knew that, we knew that, our intent was to make sure that the feds did not go in and create some kind of permanent, long-term bank that we could then never condemn.

JUSTICE NATHAN L. HECHT: But even if they have other alternatives that seems to me to go to the merits of the taking claim. Whether they can actually prove a regulatory taking, interference with reasonable investment back, expectations and economic deprivation all that.

ATTORNEY ARTHUR C. D'ANDREA: Yes, you're right, Your Honor. That was, I mean this is three levels down in the argument, but you're right. If we got, if you wanted, first if the Court first overruled Westgate or at least traded a big exception to it and then said even that aside, even the fact that the State had no authority over the federal government, you could still, then if we got down Lucas where it was all economic viability, you're right, that would be a, that's the jury question is, is all economic viability here, what other investment-backed expectations and then, of course, we would say haven't taken all economic viability because they could still create a conservation easement. They could sell it to the Sierra Club instead of the federal government and maybe they'd pay a little less because they're not the federal government. But then we could actually condemn it one day, which would be the benefit to us. I'd like to address the designation in the State water plan because that's the only real legislative act that they've pointed to. And let's, the designation in the State water plan is an incredibly mild statute. All that designation does is put the, is put legislative informant on this 2006 State water plan and it designates every one of the reservoirs in there as potential reservoir sites. And so in the statute itself, the only restriction it is, is that once you're designated, the only effect of that is that local and governmental entities and state agencies cannot buy land in there that would affect the reservoir.

JUSTICE NATHAN L. HECHT: And I don't understand that. I agree with you that doesn't seem like much of a restriction because if it was a state agency, looks like the State would just tell them not to and that would be the end of it.

ATTORNEY ARTHUR C. D'ANDREA: It's to let, let the left hand know what the right is doing, Your Honor. I think it's, to make sure that we don't have to send an email to everyone. But it is, it's very small and it's not meant to be anything more than that. It was just forever this, the water development board was issuing these State water plans and they kept asking the legislature please just acknowledge them. And this is all it is. It's some acknowledgement to prevent State agencies from interfering. And that same statute actually encourages development. One of the provisions in there, subsection I says that it allows municipalities and State agencies to acquire land and easements if it's done for the purpose of providing retail public utility service to the property and the reservoir site or allowing the owner of a property and the reservoir site to improve or develop the property. So that designation, it actually considers the fact that these reservoirs may never get built; if they are, it's 50 years out and so that you should encourage some development there. And the state really has no problem with this sort of development. Our only problem is with, is to make sure that it, when there's some kind of controversial project like this on the outskirts of town that environmental groups can't come in, apply to the feds, get some kind of mitigation bank there or wildlife refuge and then stall us.

CHIEF JUSTICE WALLACE B. JEFFERSON: We all know and understand what your purpose was in doing this. Why not just condemn the property instead of going through this exercise and because you are impacting landowner rights?

ATTORNEY ARTHUR C. D'ANDREA: We can't, if the federal government creates --

CHIEF JUSTICE WALLACE B. JEFFERSON: They haven't created, so instead of writing this letter, why not condemn the property. It's not condemned now, right?

ATTORNEY ARTHUR C. D'ANDREA: It's not and it may never be.

CHIEF JUSTICE WALLACE B. JEFFERSON: It may never be and so you're, and so they're left hanging in the wind so why not just go through the formal condemnation process?

ATTORNEY ARTHUR C. D'ANDREA: I mean I guess, what that would be, the result of that, Your Honor, would be every time the federal government, like here, the court said open for notice and comment, does anyone have any objections to someone putting a mitigation bank here? And that's what we responded to; yes, we do. And that's what they allege as the taking. Now the response you're suggesting, Your Honor, is that we could have said yes we do. We condemn this property, but that forces the State's hand. We still don't, there are several options where we might put a reservoir. If we do, we're not, it's a billion, multibillion dollar project. We might not begin construction for another 10 to 15 years so it's, that would, every time the federal government then proposed one of these things, we would have to rush in and start condemning all the land in the footprint where it's proposed and I think --

JUSTICE NATHAN L. HECHT: Or else decide that you didn't want it after all.

ATTORNEY ARTHUR C. D'ANDREA: That's right, but what Westgate requires, it's we, Westgate allows us to make those sort of public planning decisions and to make announcements.

JUSTICE NATHAN L. HECHT: Allowing you to hold the decision open interminably.

ATTORNEY ARTHUR C. D'ANDREA: Well Westgate says, Westgate actually forecloses the idea that we could be liable for unreasonable delay, but it does, it doesn't let us do it interminably. First of all, the State water code says that this designation expires in 2015 and, but even if we could somehow convince the legislature to keep renewing this, Westgate does leave open the idea that you could go to trial on the idea of did the State act in bad faith to unreasonably delay and to cause economic harm? Now I don't think that exception applies here first because they haven't alleged unreasonable delay, quite the opposite. They said that once they bought this land a few years ago, we accelerated our efforts. And even then, that bad faith exception should only apply to third, to private third parties. It should only apply when the State actually threatens the use of eminent domain when there's a cloud of condemnation. And there can't be cloud of condemnation in this case because the State cannot condemn federal land. It's simply a preemption problem.

JUSTICE DALE WAINWRIGHT: Counsel, perhaps even the implications of finding a taking here are even broader than what you state, like any, almost any regulatory takings case, this one is difficult. Otherwise, we wouldn't be here. But the legislature says the water development board has to develop plans for providing water to a huge state, many, many people, tremendous commerce and the State designates potentially hundreds of reservoir locations trying to plan for the future. Many of these reservoirs may never happen. Some will. But the State is trying to plan when it has no control over how much rain there will be, how much rain there will not be, where the fires will be, no control over nature while trying to plan water for the, for this tremendous use in this State. At the same time, there are private property owners who are trying to develop their land. Certainly, the people of Texas would want the State to try to plan for water usage for the State, as the chief pointed out, particularly when there are tremendous droughts like we're suffering through now. So the State seems to be kind of in a difficult situation, plan, prevent ideas, locations for these hundreds of potential reservoirs by the property owners have rights in their properties, but if the State plans or designates some of its planning, then there's a takings claim potentially for hundreds of reservoir sites not just for mitigation banks, but for potentially many, many other uses.

ATTORNEY ARTHUR C. D'ANDREA: For highways.

JUSTICE DALE WAINWRIGHT: Private properties made, private property owners may want to put that property to so it's a tough case. Do you think that it would be right for the citizens of Texas to hold that this could never be a taking?

ATTORNEY ARTHUR C. D'ANDREA: No, Your Honor.

JUSTICE DALE WAINWRIGHT: This situation.

ATTORNEY ARTHUR C. D'ANDREA: I think this situation, because the federal government's involved, I think should, as a matter of law, not be a taking for two reasons because we can't threaten him with eminent domain. So that's, this is, this is clearly a case of the State saying please, not threatening.

JUSTICE DALE WAINWRIGHT: But the key distinction is the Corps was the decision-maker?

ATTORNEY ARTHUR C. D'ANDREA: I think, that's right, the key distinction is the federal government, the Corps was the decision-maker. That's one reason it shouldn't be, and the other is we should be allowed to have truthful notice and comment to the federal government about our infrastructure needs. Now the situation you've described where there's this careful balance between the State's need to list a bunch of places and the fact that we need, the State wants to encourage development in all these places and I think the statute tries to do that. Now if there were a situation where the Texas Water Development Board, there were a subdivision that might go up or some private deal and the Texas Water Development Board targeted them and tried to scuttle that deal with the threat of eminent domain, that's real cloud of condemnation because that's a threat of condemnation. Now maybe, you have to create an exception to Westgate, I think, because there's not current direct restriction there. The State hasn't done anything to restrict the land. It's just scuttled a deal, but I could imagine such an exception existing and that might be one way to balance the fear, but that hard question isn't in this case because here there's just no threat of condemnation because of the federal government. And if there are further questions, I'll --

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

ATTORNEY ARTHUR C. D'ANDREA: Thank you.

REBUTTAL ARGUMENT OF TERRY JACOBSON ON BEHALF OF PETITIONER

ATTORNEY TERRY JACOBSON: If I can respond briefly. The notion that a mitigation bank does not involve a permit, how that got into this record is mystifying to me. Attached is Exhibit number one to the petition, excuse me, our reply to the response to petition for review is a copy of nationwide permit number 27. Nationwide permit 27 it says specifically this NWP is a Corps of Engineers permit can be used to authorize compensatory mitigation projects, including mitigation banks. So how the idea, there's no permit here, it's mystifying to me, that's even it's a red herring.

JUSTICE DAVID M. MEDINA: What's your response to it's no taking as a matter of law because the federal government's involved?

ATTORNEY TERRY JACOBSON: I think that the cases of this Court in the past have allowed recovery where a property owner can show that a sovereign right that's exercised by the State that results in a current direction restriction, however you want to call it, an easement swap in Biggar, whatever you want to say about it, it results in a current direct restriction of a landowner's right to use and develop his property, there is a taking. That's a constitutional issue here.

JUSTICE EVA M. GUZMAN: But in Biggar and Teague, the entity being sued actually had authority to actually grant the permit. How does that distinction impact the analysis here?

ATTORNEY TERRY JACOBSON: I think the analysis is a fact-based analysis and it has to be in a constitutional sense. It's very difficult to create per se rules when you're asked to answer the question what is fair and just, who bears the burden here? And creating a per se rule that says the State can factually cause a current direct restriction and have that causation not have legal merit that carries through with the taking is beyond comprehension to me.

JUSTICE DALE WAINWRIGHT: Cite a case in which this court has held that there's inverse condemnation. When the state took action, but had no control, the federal government had control over issuing the final permit to make it happen.

ATTORNEY TERRY JACOBSON: State v. Biggar. The City of Austin issued a cite development plan. It wasn't a state-issued plan. It was the City of Austin's. That's what made the property valuable. The State refused to enter into a contract, an easement swap and it did so for its own reasons. It wanted to eventually condemn the property for a lesser price on a piece of the property. There you go.

JUSTICE DALE WAINWRIGHT: The federal government was not involved in this?

ATTORNEY TERRY JACOBSON: No, but the City of Austin was involved. And the City of Austin was not a party to the case. The federal government declined to give an easement swap, something they had the discretion to do, but had never ever not done before just like the Corps permits here and the failure to go through with the easement swap resulting in the site development plan going way, that's what hurt the values of the property. This court will have recovery there because the State's actions were directed.

JUSTICE DALE WAINWRIGHT: But in that case, didn't the State deny the permit then the city passed an ordinance that said you can't do it anyway?

ATTORNEY TERRY JACOBSON: No, that's in Biggar's, the site development plan that had a time length on it and the site development plan required that there be an easement swap. And the State used the easement swap, a contract, no fear of eminent domain there to allow the property to lose its site development plan resulting in a loss of value. This Court has already found essentially a taking on various similar facts in Biggar.

JUSTICE DALE WAINWRIGHT: Address the State's position of having to plan for water for 25 million people, tremendous commerce by trying to designate potential reservoir sites as directed by the legislature and at the same time protect private property rights.

ATTORNEY TERRY JACOBSON: Two points about that. Number one is Chicken Little. There were 13 unique reservoir sites.

JUSTICE DALE WAINWRIGHT: What's Chicken Little?

ATTORNEY TERRY JACOBSON: I mean, the sky is really not falling.

JUSTICE DALE WAINWRIGHT: The water difficulties are Chicken Little?

ATTORNEY TERRY JACOBSON: No, no, no, the fact that they designated the site as a unique reservoir site has resulted in one case in Texas in five years, this case. So the prospect of somebody bringing an inverse condemnation case just because of the unique reservoir site declaration is almost nonexistent and that's because for most property uses, what's going on in unique reservoir sites has been going on forever. Farming, drilling, houses are being bought and sold because the unique reservoir site didn't create a current direct restriction on those uses. It does on ours so I don't think you'll see many, if any more, cases involving unique reservoir site declaration. And number two, if the constitution is going to protect private property rights and the State has to control property into the future to protect the public and provide a water supply, the State needs to bear the burden. In fairness and justice, who should bear the burden? The property owner who's being deprived of a current right to develop his property or the State that's going to benefit from the public project? I think the argument has to be the State will, needs to pay for that. And it can spread the cost amongst the seven million people in Dallas-Fort Worth, it might cost them 50 cents extra a month for two years to pay for this property; it is not the end of the world.

JUSTICE DALE WAINWRIGHT: You're not running for public office are you? You just put forth a tax increase proposal.

ATTORNEY TERRY JACOBSON: No, I'm saying that you can slide it in your water bill and the people won't know, and the people who are benefitting from Marvin Nichols Reservoir who get to drink water and put water in their pools, they get to pay for it. That's what the constitution requires. That's why a fairness and justice requirement is the most important part of your analysis. And we would encourage you to look at this case through that lens. It is the foundational principle in taking these cases. Thank you so much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted. The Court will take a brief recess.

MARSHAL: All rise.

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