ORAL ARGUMENT – 10/21/04
03-1111
CITY OF MARSHALL V. CITY OF UNCERTAIN

BALDWIN: In this case, the court has before it Water Code §11.122(b). It's part of a major legislative initiative essentially to find water in Texas and get the water where it is needed. To accomplish this, the legislature saw that water marketing was a very court tool. And to make water marketing feasible and to facilitate it, the legislature adopted a principle or adapted a principle rather that this court had announced in the Stacey Dam case relating to new permits. The legislature took that and adapted to the permit amendment process.

OWEN: In your briefing you don't mention §11.147. What is your position? Does it apply when you file to amend an application or not?

BALDWIN: 11.147 is rolled in to 11.122(b) in the sense that one of the parts of 11.122(b) says that if it doesn't cause any additional harm to the environment in the stream. And we think that is subsumed by 11.122.

OWEN: Why isn't that a fact question?

BALDWIN: In some cases it may be. And we've never said that it's not. But in a case like the one that the court has before it right now, if you lay the application for amendment out next to the pre-existing water right, the certificate of adjudication that Marshall had before amendment, and you consider what's on them, there's nothing that could affect anything any differently than the original right using...

OWEN: Let me give you a hypothetical. Let's suppose that - as I understand it. Under 11.147, let's suppose you're in a different part of the state and the water source affects bays and estuaries, for example. As I understand 11.147, the commission can look at the priorities in the code in deciding whether they are going to allow the application or not. For example, the code gives priority to municipal use and then there's lower, lower and lower priorities. Let's suppose the original applicant comes in with a low priority request. And this has an adverse impact on the bays and estuaries, so the commission says you can use it for municipal uses but you cannot use it for one of these lower priority uses. We recognize there is going to be some damage, we balance out everything that .147 tells you to balance out, you get your permit but only for municipal purposes. Under your construction why couldn't the municipality then turn around and sell this excess water that it has to someone for a lower priority use, and then it would get no review at all on that balancing test under .147?

BALDWIN: First of all, 11.147, it's our position that it's subsumed in 11.122(b). So the questions that are in those other statutes, the legislature in this subsequent enactment of 11.122(b) laid those issues to rest. And what you have to consider is what's in 11.122(b)?

OWEN: But under your analysis all you look at is where they are taking water out and how frequent it is. And you're not balancing the other factors that .147 has in there. Priority of use verses ecological impact, that goes out the window under your analysis of 11.122.

BALDWIN: First of all, in considering the scenario that you posed, if a municipality gets an amendment for a certain purpose of use they are still going to have to come in and get an amendment to change that use. So if you're talking about them selling it for some other purpose, they are still going to have to come back in through the amendment process.

OWEN: Which is what's happened here. They are changing the purpose.

BALDWIN: But, in this particular case and the case before you today, what we have is a situation where they have a municipal right, and within that municipal right is contemplated industrial use.

OWEN: Of potable water.

BALDWIN: Of potable water. But then look at the legislature's full use assumption. If you assume, which you must under Marshall's municipal right, that it can use every drop. The issue that the respondents would like you to focus on, and I think where the question is coming from, is that you should be looking at the likelihood that more water is being used. That's not what the statute says. The statute says look at what Marshall could use under its existing right, on its face...

OWEN: But the commission might say we're going to let an industrial user use potable water for municipal purposes. But we're not going to let them use it for one of these lower priority things under 11.024. It's okay to damage the environment if you're going to use potable water for these purposes, but we think it's unrealistic that an industrial user would use potable water for hydroelectric power, for example.

BALDWIN: I think what the legislature did in this statute is say - let's look at the use that is authorized. I keep coming back to that because I think that's what they did. I don't think that they have required the commissioner to ignore those considerations. But what I think they are doing is say, okay. If somebody has a water right on the ground, like the City of Marshall, and they are asking for a change, now is this change at all conceivably capable given what Marshall could do under its existing right, is it possible it's going to change anything.

O'NEILL: Could it really do that. I mean isn't the potability restriction, doesn't that have an economic impact that makes it really unrealistic that they would draw it down to the full extent?

BALDWIN: This is the problem that we have with the CA's decision and with the position of the respondents. This likelihood issue to which you refer is not something that's to be considered under the statute. The statute says full use.

O'NEILL: But you seem to be equating full use with simply the amount of water they are allowed to draw, and not the method by which they draw it. And the method itself defines how much they are going to draw down if it's more expensive to draw it down or a more cumbersome process.

BALDWIN: I do think that that's right in terms of their likelihood to use more water that they are authorized. If I change a use for example, and this is not before the court today, we're not arguing that it is. But let's say I change my use from a hydroelectric right that has not consumption at all attached to it. And I go to a municipal right which by law entitles somebody to complete consumption. Then obviously there is a question there that goes beyond the face of the instruments that the commission would have before it, beyond the face of the certificate that Marshall had and the application that Marshall filed.

But in the other case that you posed, J. O'Neill, what I think your question goes to is the likelihood that they would use it more because of the economics.

O'NEILL: It's not really likelihood. It's a very real restriction on use. Requiring it to be potable before it could be provided is a very real economic restriction on their ability to use the water. So it seems like you're just focusing on volume when the economics of getting it delivered the way you want to get it delivered is really what's driving it. And that's a significant change in use.

BALDWIN: I understand that. But I have to keep going back to the statute because I know that you're saying there's a potential for there to be a different use that way if it's economically feasible to use it more. Fo example in the case of Marshall where it might be easier to sell that water if it's not treated than it would be to sell it at treated levels.

O'NEILL: Well you're reducing the price at which you can deliver it, and by reducing the price you can deliver a greater volume quicker. Even though you are allowed to under your permit with that restriction in place you can't deliver that large volume at the same rate.

BALDWIN: I guess that is what is addressed in the full use assumption. And the full use assumption is not a bad thing. It's a good thing.

O'NEILL: But full use as the permit contemplates, and the permit contemplates right now potability. And so it seems to me you're reading out of the full use requirement a very significant restriction on actual use.

BALDWIN: I see what you're saying. But I think that under that scenario that you would never have a shall grant amendment, because you are always going to have something that makes it different. And that would give no effect to the shall grant language in the statute. There has to be a difference...any change is going to cause some potential effect, the likelihood of some effect, but it may still be within the parameters of the existing right. What I think again the CA decided and what the respondents want you to think is that this possibility of a difference, because of economic

reasons or something else makes a difference. And that it opens up the inquiry. That's not what the statute says.

SMITH: This case is here just on the question of whether or not there's going to be a contested case hearing.

BALDWIN: Essentially. That's right.

SMITH: And your position is, well it's not quite clear what it is. Are you representing both Marshall and the State?

BALDWIN: No. Mr. Townsend represents the City of Marshall.

SMITH: What's your position on whether amendments to permits you're required to have a hearing, a contested case hearing generally?

BALDWIN: If they entail an increase in appropriation, then they do. That's clear. The statutes that respondents say apply in this case, which we disagree with, do apply in that case. If they are asking for more water than they have.

SMITH: Or just other amendments other than the particular facts in this case, you are saying generally amendments to permits are entitled to a contested case?

BALDWIN: I think a lot of them do.

SMITH: And what's you're saying in this case is, it's clear that they are going to lose, you don't have to hold a hearing. Is that your position?

BALDWIN: I think it is clear that if you lay the two, the application and the pre-amended right next to one another, there's not an issue there.

SMITH: Why can't that decision be properly made by the administrative law judge in some kind of summary dismissal and a lack of standing, or failure to state a claim, or summary judgment procedure within the contested case framework?

BALDWIN: Because of the situations that fit within the statute, the legislature mandates the decision. And we disagreed with the respondents and some of the amici to the extent that they say that if there is either a statutory requirement or any other legal requirement there be a hearing in this particular situation. First of all, we don't think that it's there under the water code. Because we don't think that the statutes they have cited apply to amendments, that amendments...

SMITH: Well that's my question. What's your basic position on does the code ever require a contested case hearing on an amended permit?

BALDWIN: In some cases that require an additional appropriation, which would also be called an amendment, that that is yes one example, because they are asking for more water.

SMITH: This is an exception to the general rule?

BALDWIN: Yes. This particular case presents an exception to the rule that an amendment might require. I'm not saying that that's true in every case, that they require a hearing in every case.

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RESPONDENT

ENOCH: First, I would like to talk a little bit about the briefing on whether a notice and a hearing is required here? I think based on Mr. Baldwin's presentation here and the questions, I think we can be satisfied, particularly by the reply brief on page 7, that essentially they agree there can be disputed facts. If there are disputed facts, there would be a notice sent out and an opportunity to be heard.

HECHT: The petitioners say, they have sort of a challenge to you. They say neither the CA nor the respondents have postulated any adverse impact on water right holders for the environment caused by the proposed amendment that would be greater than the impact caused by the full exercise of the existing water right according to its terms and conditions. They have not postulated one because none exist. As I read your response you say, well, no there is at least one which would be seasonal variations in the water being diverted. It might be more taken during the summer. Are there any evidence?

ENOCH: Other than the season variations, yes. The type of use that it's put to, I do believe could have any number. Much stock is put in to the dam case, the Lower Colorado River Authority v. Parmer(?) Water Resources, but the court there itself said basically our decision is that the article prohibits double permitting or stacking of appropriated waters on appropriated waters. The case simply said nothing about the type of use that the appropriated waters would go to. And so just relying on that for the full use doctrine doesn't really answer all of the questions.

O'NEILL: We seem to again assume full use means volume. And the underlying premise of the AG's position seems to be that if it changes a purpose that that doesn't affect use. And it seems to me an argument could be made that those are pretty inextricably intertwined.

ENOCH: Let me describe it this way. Accepting the permit, on page 7 of the TDCQ's brief in response to our brief, they have a chart. And the chart says if you look at this chart, here's the permit for the City of Marshall and below it is a permit that Marshall wants to get an amendment to. And as you can see there is no change on the amount of water to be used, and the diversion rate of the water. The only thing we're changing over here is whether it's potable water for industry or non-potable water for industry. I look at the first two categories, the amount of water used and the diversion rate, they are functions of each other. I can pull out 16,000 acre feet of water in one year.

And I could pull it out in 1 month, 3 months, I could ration my use and pull it out over the course of a year. I can determine how fast I pull that out by the diversion rate. I cannot divert, take out, more than 50 cubic feet per second. Arguably, if I run 50 cubic feet per second, 24/7, my 16,000 acre feet disappears in 3 months. I'm finished. I can no longer take any water out of there. Or, I can choose to do 10 cubic feet per second, and I can spread it out and maybe not use it up for the course of the year.

But that is a bulk of the water. You could change the use to industrial, and you could have a change in the pattern of usage from one that's from municipalities during the summertime, they approach 50 cubic feet per second, and in the wintertime when they are down by 10. You go to an industrial use, and you raise the use constant over the court of the year. It could be that the industrial user says I want to get 16,000 acre feet from this lake, and I'm going to get 32,000 acre feet from that lake, and I'm going to get 40,000 acre feet from that lake, and I'm going to pull all 16,000 from this lake as fast as I can pull it. In fact, I think we used the example of a cooling pond. I'm going to begin my year, after year by pulling out 16,000 acre feet within 3 months and I'm going to fill my pooling pond, and I'm going to run off my pooling pond the rest of the year.

It seems to me that you cannot ignore the external factors on the full use doctrine. What is being measured is not 16,000 acre feet, 50 cubic feet per second. What's being measured is what external factors are affecting the use pattern that might have an impact on water rights owners, or on the environment...

HECHT: And yet, I assume you agree that if you were drawing it out at 10 cubic feet per second, if you're drawing it out at 10 cubic feet per second and you suddenly wanted to change to 30, because you had some uses for it, as long as you didn't go above 50 you could do that?

ENOCH: No. The statute 11.122 says if you're going to change the use of it, you've got to make an application for an amendment.

HECHT: If you had a greater municipal demand you could change from 10 to 30 and there's no application.

ENOCH: No application. But that's not what happened here. They applied because they are changing the use. It might be helpful to look at the exhibit that I provided there on the first page. The argument essentially from Marshall and TECQ is the legislature wanted to eliminate the hearing process. We disagree. We read the statute that says all of ch. 11 that's applicable applies when you make an application. Interestingly enough, the statute does not apply if you ask for more water or a greater rate of diversion. Their argument says if you don't ask for more water, then we have a right to terminate under the statute.

What the statute says is, if you apply for a change, if there is no adverse greater impact then you grant the permit. What is happening under the statute it is deciding a question of law what are you measuring for this greater adverse impact? What are we measuring

from? There was an argument up to this point that the City of Marshall only used 6,500 acre feet of water in any year, never approached 16,000. And, therefore, whatever was affecting the environment at that time is your starting point. And now if they want to sell it to the industry for 16,000 acre feet, we've got to assess what the harm to the environment will be there.

This statute settles the question of law. It says no. You extrapolate 16,000 acre feet at the available usage, diverting usage, and you extrapolate what the environmental impact is on that, or the impact on the water rights holders.

O'NEILL: I don't see that in the statute. Show me where in .122(b). It seems to me the clear wording is that you contemplate full use, wide open, full rate, and then you overlay on top of that what environmental impacts would result from that overlay.

ENOCH: I look at essentially the last sentence. What it says is, you see a greater magnitude than under circumstances in which the permit, the permit that's sought to be amended, was fully exercised according to the permit's terms and conditions. So we take the permit, the municipal use, potable water and we say - let's assume they used the permit for its full use, what's the environmental effect? What's the effect on the water rights owners?

O'NEILL: If they did not seek an amendment and they were attempting to supply potable water to this cooling pond at the maximum rate would you be able to go to the commission for a hearing on how that would affect you?

ENOCH: They are not required to apply, because they are not changing the use. The statute says if they are going to change the purpose of use you've got to apply. So what do we now measure whether there's an adverse impact that's greater than what existed? The question is, do we measure from their actual use or do we measure what they could have done under the permit?

SMITH: Basically in the CA you had a complaint about this innerbasin transfer and that was ruled against you and basically waived that.

ENOCH: Right. We're not here on that.

SMITH: But you did get a right to a contested case. And so if we rule for you obviously it's going to go back to the commission for a contested case.

ENOCH: I believe that's correct. There was actually competing summary judgment, but I assume it's a notice issue. There was no notice in the case, so I'm assuming it ends up back in the commission.

SMITH: So if we rule against you what level - do you have arguments left at the CA? do you have arguments left in the TC? or would you essentially be out?

ENOCH: Essentially the bottom line our argument is not with them issuing a permit. Our argument is there are conditions that can be placed on the issuance of the permit that protects certain interests that are available. And as a matter of fact, that's what can happen here. There is no sense that you can even go to a contested hearing even if you show an adverse impact. There's nothing in the statute that says don't issue the permit. It simply gives the commission the opportunity to make such conditions on the permit as satisfies a...

JEFFERSON: Can you give us an idea of both the adverse impact and what conditions you think might be imposed upon approval of that amendment?

ENOCH: First adverse impact. The Texas Parks & Wildlife says that in this estuary, its life cycle is dependent on seasonal activity. When I say seasonal activity understand we're not backdating what Marshall does. And we're not saying that we're going to measure what Marshall actually uses and its effect on the environment. We're going to say accepting the permit as it is, if they use 16,000 acre feet and whatever their usage was for 16,000 acre feet at 50 cubic feet per second, we then project what that affect on the environment would be. And now we're going to measure that against the industrial use.

We suggest that because the city itself at 16,0000 acre feet and at 50 cubic feet per second still has a pattern to its usage that creates a seasonal like activity at this lake for the environment, that there will be an environmental impact if all of a sudden this pattern is now subtracted from the overall pattern of water use, water available in the lake. So that's the adverse impact for which there ought to be an opportunity heard on that to present evidence on it.

OWEN: But the only difference in the equation is potability verses not. That's really what you're looking at isn't it?

ENOCH: I'm not sure that's the case. That is an external factor. Nobody is going to buy potable water if it's running through piping to do cooling towers. So it's an external factor. I don't know if that's an external factor that TDCQ would be considering or not. It might be a factor in usage. What our concern is that the industrial use levels out.

OWEN: But that's okay under their permit as long as it's potable water. That's believed authorized.

ENOCH: But you take it as used. Remember, as their permit exist you can take out 16,000 acre feet at 50 cubic feet per second. You can take it out in 3 months. You can take it out over a year. What's the environmental impact of their uses, of a municipal use? There are tons of information that people have studied what that use produces on the environment through the federal regulations, and federal studies, EPA, state environmental. There is tons of studies of what that use means. And all that this statute settles is the question of law: what is it you're measuring when you begin? We're measuring that municipal, industrial potable use there.

JEFFERSON: Let me ask two questions. The adverse impact and then what conditions can you see?

ENOCH: On the first application to amend a permit for water usage there is the opportunity and requirement for the TECQ to ask for a conservation plan. What is the city going to do serving our natural resources, water being one of them? One of the opportunities here and one of the things several of the parties are very much interested in is that Marshall update it's conservation plan, which is a requirement that could be placed under the regulation statutes.

HECHT: Did it file one with the amendment?

ENOCH: I'm sure it did file one with the amendment, but that's...

HECHT: But it was just the old plan?

ENOCH: They filed it with the old plan. I believe they did file them with this one. But the parties are interested in contesting that it doesn't go far enough. As I recall there is some question about the new one. The argument is they only have to conserve when they are out of water as opposed to conserving before they are out of water. So there is some things to issue that there will be a dispute over. But there are others who think there is a significant environmental impact, and the conservation plan plays into the remedy if there's a showing of a greater adverse impact than what existed under the original permit. There's the opportunity now to work on a plan that ameliorates that greater impact.

O'NEILL: Does the potability requirement affect the pattern abuse?

ENOCH: I haven't looked at the studies. My guess is, money makes a big difference and potable of course is way too expensive. I think as an economic matter there is very little industrial use if it's potable, because just industry doesn't find a need for potable water. It's very expensive so they wouldn't.

BRISTER: Suppose Coca Cola or Anheiser Busch moves in a huge plant and they want a lot of potable water. People drink more cokes or beer in the summer than they do - it's going to have exactly the same effect as this power plant even if it's all potable.

ENOCH: I guess that begs the question. They applied for a change in use. We wouldn't be here if it was Coca Cola coming in on a plant and there is no question...

BRISTER: Coca Cola and Anheiser Busch or people not industries. It seems like an industry to me.

ENOCH: 11.122 does not apply when there's not a request for change of use. And that would not be a change of use. There was an application for change of use from potable to non-

potable. In answer to J. O'Neill. There are studies of municipal use and I assume studies of industrial use of potable water by which we can project what 16,000 acre feet at 50 cubic feet per second diversion rate would produce from a municipal use, potable use by industry, and compare that to an industry that doesn't need potable water, and what impact 16,000 acre feet and 50 cubic feet per second affects on that in terms of is there a spike in the use and less use, or is there a flat use that eliminates some of the activity in the wetlands.

O'NEILL: That's my about the potability affecting the pattern use. I can't help but picture a pipe with water coming out of it that has a screen on it. And the water comes out at a certain rate with the screen on it, and they want to take the screen off, which is going to let it come at a higher rate. It's still within the rate of what they are allowed to do under the original permit, but by taking the screen off or changing the use, is it your argument that will affect the pattern of use?

ENOCH: I'm not an expert. So I don't know. There is some discussion about the return rate flows.

O'NEILL: You seem to be saying that the adverse impact is the change in the pattern of use.

ENOCH: Yes.

O'NEILL: And unless that's caused by removing the potability requirement, then I don't understand the relevance of that under this original permit.

ENOCH: I guess that's what I would say. That's a fact determination.

O'NEILL: So you would say that the potability requirement affects the pattern of use?

ENOCH: I would argue we have the opportunity to show that it affects the pattern. You can't assume that it does not, which is what they would like to do.

HECHT: Can you think of any change in use that wouldn't raise a fact question?

ENOCH: I could think of changes in use that no one request a hearing on.

HECHT: I can too: it's just that they went home. Assuming that they requested one and said, this is going to change it one way or the other, less, more, there's going to be more diversion, more return, we want to hear it. Wouldn't you essentially always have a hearing on the adverse impact?

ENOCH: I think that's entirely possible. If you will look at page 2, of the exhibit I passed you, that's essentially TECQ's position. TECQ's position is, that adverse impact has been eliminated as a fact question by the full use doctrine. As a result, is this a full use doctrine? Full use

assumption case is what TECQ would say. If it is, therefore, no notice, no hearing, amendment approved.

SMITH: there's an administrative decision, March 15, 2002, that settled this thing. That was an administrative action. It wasn't a contested case decision. And then client's filed a petition for judiciary review in Travis County court. So what's the standard of review of the agency action? Is it de novo? Is it substantial evidence? Arbitrary and capricious? What are we looking at with regard to the decision that you're complaining about?

ENOCH: In my opinion it's obviously not substantial evidence, no evidence was taken. In my opinion I think it's de novo review. Does the statute require notice? Does the statute require the opportunity to be heard? The argument is that 11.122 eliminates the fact issue to be heard. But as you heard from Mr. Baldwin today, they understand if there is a fact issue there would be notice, there would be an opportunity to be heard. The argument here is is there a fact issue? We think that 11.122 solves a law question about what you measure to determine if there is an adverse impact. It does not dispose of the fact question of whether there's an adverse impact.

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REBUTTAL

TOWNSEND: I do want to address what we are dealing with. And that is, the interpretation of an amendment in a statute that is part of SB 1.

OWEN: 11.122(b) says, subject to meeting all other applicable requirements of this chapter for the approval of an application. Your briefing takes the position that some of the requirements for applications apply and some don't. Where do we find within the statute itself directions on how to pick and choose?

TOWNSEND: You find in the statute in the terms applicable. 11.122(b) states that, a presumption of full exercise of the existing permit in that consideration will the change go beyond the full exercise of...

OWEN: That's still expressly subject to other applicable requirements for the approval. And you say some apply. For example, I think you say that you do have to file a conservation plan. Did you file a conservation plan?

TOWNSEND: Yes, we did. Every water right holder, every water right purveyor has to have a conservation plan. And have had to have that.

OWEN: What section of the act do you think you are required to do that?

TOWNSEND: 11.127(1). And that provision was added to the water code in 1985. And people have conservation plans. And the agency has to - well it's just impossible for the agency to

every year check everyone's conservation plan. So in part of SB 1, when they amended 11.127(1), they said anytime you come through the door present your conversation plan so we can make sure that it is consistent with the then applicable regs.

OWEN: Why shouldn't that have to be subject to notice and hearing. If anybody has an objection - I mean aren't there fact questions presented on whether your conservation plan is adequate or not?

TOWNSEND: The conservation plan is to comply with the commission regulations of what is required in a conservation plan. And that's a ministerial check - check the boxes. It's not a contested case.

OWEN: We have no conservation plan, that's our plan, and that would fly?

TOWNSEND: No. You would say, have a conservation - is your conservation plan consistent with the commission's rules for a conservation plan?

OWEN: Why can't there be fact questions there?

TOWNSEND: Because you have to make your conservation plan consistent with what the rules require.

OWEN: Shouldn't people be able to say, Commission, we don't think it complies because. Isn't that actually...

TOWNSEND: That would be an enforcement matter because all the conservation plan has to do is comply with those regulations and make the statements and the requirements of that regulation.

SMITH: You filed this application that was granted. So say if it was denied by the commission, would you argue that you had a statutory right to a contested case hearing?

TOWNSEND: If it were denied because it went beyond...

SMITH: Any reason. You said, I've got a good application. They said no you don't. They say that's final. You say no. I get a contested case hearing under ch. 11?

TOWNSEND: I would say that if the commission thought it was beyond the bounds of my existing right, and .122(b) was not applicable and I would be bound by the rules of the agency that govern action on applications. The commission has rules that say how they are going to deal with applications to amend permits. And the rules say no notice is required if your amendment request is within the bounds of your existing permit.

SMITH: So under the rules you would be entitled to a contested case hearing?

TOWNSEND: I would be kicked out of the .122(b) amendment situation, and so you don't qualify for a .122(b) amendment. You're some other kind of amendment. And I would follow the rules under that type of amendment. That would be my situation.

Now to answer the question about the permit, and the change from potable to untreated water.

OWEN: Under 11.134(b)(4), it says the application has provided evidence that reasonable diligence will be sued to avoid waste and that achieve water conservation. I presume you did that with the original application.

TOWNSEND: Correct.

OWEN: Did you do it with your amendment?

TOWNSEND: I believe when the legislature says in 11.122(b), you will assume full exercise of the existing permit, all of those questions had been decided under the existing permit.

OWEN: That's exactly my question. It seems to me, at least logically, that avoiding waste and achieving water conservation is putting a potability requirement on for starters. And that if you take the potability requirement out, that's got to have some impact on the evidence of waste that you've - evidence of _____ achieve lack of waste and conservation. So it seems like taking potability off might tend to increase...

TOWNSEND: I disagree. In the sense that if it was Anheiser Busch or Coca Cola, and we sold up to the maximum, and it was drinkable water, there would be no difference than if we sold up to the maximum within our diversion rate....

OWEN: I agree with you because if you take potable off so that somebody else can come in and do that. Doesn't that affect...

TOWNSEND: That is trying to compare some assumed current condition verses the change and that's what the legislature said in this presumption you don't do. You assume full exercise of the existing right. Marshall's existing right does not have any seasonal limitation or pattern of use limitations.

OWEN: Let's suppose you're in a different part of the state and the commission expressly would deny you the right to take 16,000 feet out for industrial uses, nonpotable because it impacts the estuary. And they say, no, you cannot do that. We are going to give you permit only for municipal and industrial potable purposes. And you turn right around 1 year later and say, I've got the right to take 16,000. Now I come in with an amendment. I want the potable requirement out.

And the commission says no. We'll let you do it for potable purposes. We are not going to let you do it for nonpotable. It seems to me you're making end run around that determination.

TOWNSEND: I think if that were the case, the agency would put restrictions such that the terms and conditions wouldn't allow somebody to turn around and overcome that decision. If the agency said, we don't want anything but municipal use, there would be an additional term or condition or restriction that you couldn't then overcome because if you applied the full use under those terms and conditions it wouldn't cause a greater impact.

I believe that really you have to look at the permit you are dealing with and you have to follow the legislative directive to assume full exercise according to the terms and conditions of that water right. And it's not what they may do or could have done. It is that water right under those conditions. And that's what the legislature is trying to do.

O'NEILL: It is in effect though you are removing a restriction. Your amendment seeks to remove a restriction.

TOWNSEND: It changes the purpose of use. Yes. It is potable.

O'NEILL: And the removal of that restriction may have effects.

TOWNSEND: Not more than the full exercise.

O'NEILL: We don't know that. You're only looking at volume.

TOWNSEND: I'm looking at volume. I'm looking at flow rate, and entire consumption. And what more can an effect be when there is no restriction for what time of the year it can be consumed.

O'NEILL: But there is a restriction on use. It seems to me that your position just ignores that restriction. It seems to say that we can come in and remove all the restrictions this was originally permitted under as long as we don't exceed the volume or rate of flow.

TOWNSEND: You don't exceed the volume, the rate of flow or the other terms and conditions. And here we don't have a condition or a term limiting the amount of consumption. It can be in its entirety.

BRISTER: So you can't have an adverse impact unless you affect rate or total amount?

TOWNSEND: In Marshall's situation, that's correct.

BRISTER: You can or can't have an adverse impact other than flow rate and total

amount? We make a rule and it doesn't apply just to Marshall. We can't have one rule for Marshall and a different one from Lufkin. So we're writing a rule that's going to apply their neighbors and to El Paso and to everybody else. You have to admit because, otherwise, the statute is duplicitous. The statute says the same thing twice. If the only adverse impact is when you increase the amount or the flow, there was no reason for the legislature to put in after accepting out something that increases amount of flow to say also if it has no adverse impact.

TOWNSEND: The legislature did say according to its terms and conditions and there could be - if you wanted to change - it may not be the volume, and it may not be the rate, but you may have a condition that requires a return flow amount. And if you change that, what you want to do is change that, that could have an adverse impact. And what we have here in Marshall, we don't have any such restriction. We don't have any seasonal restriction. We have no condition on consumption.

SMITH: The CA said it has to be a contested case, and if we affirmed that this is going to go back to the commission for a contested case. Now you're saying that the CA was wrong. Say we go your way, what's your view as to where this case should go? Should it go back to the CA? back to the TC? or back to the commission?

TOWNSEND: It's decided at this level. Because the question I think presented is...

SMITH: Nothing left in this case...

TOWNSEND: There is nothing left in this case because it is whether the commission's interpretation and application of 11.(**SIDE 1 RUNS OUT)**

...to Marshall's amendment application was reasonable and consistent with the plain language of the law.

SMITH: So you request a take nothing judgment from this court if you prevail.

TOWNSEND: If we prevail the grant is affirmed. The agency's grant of Marshall's amendment would be affirmed.