United States Court of Appeals for the Fifth Circuit, New Orleans

Judge Edith H. Jones, Judge Jerry E. Smith, Judge Emilio M. Garza

Aransas Project v. Bryan Shaw, et al.

No. 13-40317

Unofficial Transcript of Oral Argument

Thursday August 8, 2013, 9:00 a.m.

Appearances:

Jonathan F. Mitchell, Solicitor General, of the Texas Attorney General's Office, Counsel for State Official Defendants-Appellants, Bryan Shaw, Toby Baker, Carlos Rubinstein, Mark Vickery, and Esteban Ramos

Aaron M. Streett, of Baker Botts LLP, Counsel for Guadalupe-Blanco River Authority ("GBRA"), Intervenor Defendant-Appellant

James B. Blackburn, Jr. of Blackburn Carter, P.C., counsel for The Aransas Project ("TAP"), Plaintiff-Appellee

Solicitor General Jonathan Mitchell: May it please the Court. The State Defendants are entitled to judgment for two independent reasons. First, state officials do not violate the Endangered Species Act by licensing private conduct that harms an endangered species. Second, the chain of causation between the water diversions and the alleged harm to the whooping cranes is too attenuated to qualify as proximate cause. It is crucial that this Court reverse the District Court on both of these grounds.

Judge Smith: On the first ground the First Circuit apparently disagrees with you.

Mitchell: That's correct, Judge Smith. And *Strahan* is wrongly decided for the reasons we described in our brief. The opinion would hold state officials liable for any type of licensing activity that results in harm to an endangered species.

J. Smith: Is that case distinguishable or would we be creating a circuit split if we were to decide in your favor on that?

Mitchell: You don't have to create a circuit split to decide in our favor because there are other grounds on which one could reverse the District Court. I think it is possible to distinguish *Strahan* but it's very hard to do so. The more straightforward ground I think if the Court were to decide that state officers cannot be held liable for their licensing decisions is to say that *Strahan* is incorrectly decided. *Strahan* if taken seriously would prohibit state officials even from issuing driver's licenses because the act of driving a car will inevitably result in harm to endangered species and that's just not a tenable construction of the Endangered Species Act.

Judge Garza: I thought you conceded that if there is a violation of the ESA then the state officials could be liable.

Mitchell: Oh no, we haven't conceded that at all, Judge Garza. If there's a violation of the Endangered Species Act, if there

is a proximately caused harm to the species from the water diversions that is the responsibility of the people who are taking the water from the river. The state officials cannot be sued. And the people who have been taking water from the river are not named as defendants in this case.

Judge Jones: So who, how many people take water from these rivers?

Mitchell: Many, there are many, hundreds of permit holders.

J. Jones: So how would the, how would the Fish and Wildlife, how would the government if it were going to enforce the Endangered Species Act go about doing something about the water diversions?

Mitchell: Well, if the water diversions violate the Act then civil liability would have to be imposed on the people who were using the water. So there could be lawsuits brought against permit holders or against people who are taking water from the rivers. But this is not a violation of the Endangered Species Act in any event because the chain of causation is far too attenuated. Even if one concedes there is a "but for" causal link in this case between the water diversions and the harm to the cranes it does not qualify as proximate cause under *Sweet Home*. So these are two independent reasons for reversal. There's no causal link in this case that satisfies proximate cause. There are too many steps in the chain of causation and there are too many intervening factors that determine whether the cranes will be harmed. Mainly the drought that occurred in 2008.

J. Jones: Could you explain to me the relationship between the State of Texas and the Guadalupe River Authority? are you harmonizing your issues or did you break up the responsibility for trying the case and arguing it on appeal or is there... I perceive potential tension in the arguments that each party raises.

Mitchell: We're advancing different arguments, that's correct, Judge

Jones. The state defendants have been sued in this case. Guadalupe Blanco River Authority has not been sued.

J. Jones: They have intervened.

Mitchell: They have intervened as a defendant.

J. Jones: Right.

Mitchell: But the claims have been brought against the state officials.

J. Jones: I guess there's no injunctive relief against GBRA?

Mitchell: There isn't. There's an injunction that bars the state against issuing permits. So that effectively prevents GBRA from acquiring future permits. But there's no injunction directed at GBRA as an entity. As for the arguments that we're presenting on appeal the state defendants are seeking reversal of Judge Jack's ruling and we're asking the court to enter judgment as a matter of law in favor of the state defendants.

J. Jones: What would be the consequence if we were to abstain?

Mitchell: If you were to abstain then there would not be a judgment on the merits. There would be a dismissal without prejudice and the case would go to state court and the proceedings would take place there.

J. Garza: I want to make sure I understand your position. Your first position, your first issue is that per se permitting is not a violation of the Act?

Mitchell: That's correct. Its possible that permitting could violate the Act if it crosses the line into solicitation. But the mere act of issuing the permit is not.

J. Garza: It has to be, yes, great. And secondly that the causation is too attenuated – that the legal causation is attenuated in this circumstance.

Mitchell: Correct. Those are two independent arguments, two independent grounds for reversal.

J. Garza: I'd like to shift the issue just a tad for both sides, ok? I'd like you to discuss the affect of Judge Jack's analysis or lack of analysis on drought vis a vis the end result of the deaths of these cranes, number one. And then I want you to discuss the analysis or lack thereof of subsequent years, analysis of subsequent years vis a vis the injunction remedy. Those two in my view are extremely important for both sides giving whatever leeway as far as their comments.

Mitchell: As I understand Judge Jack's opinion she found that proximate causation was satisfied simply because state officials had issued a license and that the conduct of drawing water from the river caused harm to the whooping cranes in a but for sense, and the mere fact that the state official had issued the license made it proximate cause. That was her analysis. So the drought may have contributed to the harm of the cranes but Judge Jack thought that the drawing of water from the river contributed to that harm and therefore triggered liability.

J. Garza: Are you suggesting that any analysis of drought was not relevant to her in her analysis on causation?

Mitchell: We think she misunderstood what proximate causation is, because she issued a series of findings that established "but for" causation in her view between the alleged harm to the cranes and the upstream water diversions. But she did not consider whether intervening factors such as drought could sever the link in the sense of proximate cause.

J. Jones: I'm surprised no one cited *Palsgraf*.

Mitchell: We considered citing *Palsgraf*. We thought *Sweet Home* was a better cite just because that dealt more specifically with the Endangered Species Act. Proximate causation. . .

J. Jones: But in order to, you know, I mean there's nothing about water volumes is there? In the record about the volume of water that was flowing into the San Antonio Bay at this point in time?

Mitchell: I don't think there's a specific finding about the amount of water that was flowing into the bay but certainly the water diversion reduced the amount of water that otherwise would have been flowing into the bay.

J. Jones: The water use did or the drought did?

Mitchell: Both. The drought contributed.

J. Jones: But you don't have any real idea about how much?

J. Garza: It seems to me and this is a great point. Let's just say that there was a case where there was 90% of the decrease in water was due to drought and 10% was due to water permitting. What does that do to a taking analysis? What does that do to an injunction analysis? What does that do to an abstention analysis?

Mitchell: I don't think its relevant to abstention. Its certainly relevant to the question of take.

J. Garza: If it affects taking and taking is a violation of the Act or there's lack of evidence of taking it clearly seems to me to affect the abstention analysis in this case, I may be wrong on that, but it seems to me that there is more, there is less of an interest depending on the causation issue, I may be wrong about that.

Mitchell: Well if 90% of the water reduction is caused by the drought, then it's hard to show that the water diversions contributed to the death or harm of any whooping cranes. It may still be possible to show that in a "but for" situation.

J. Garza: There's one other thing if we just talk about the decrease in water as one thing but it seems to me that you have to

take the next step and the next step is did that decrease in water either cause the cranes to die or cause their vegetation or their . . ., and I don't know to what extent the expert – because this is an expert's case as I understand it down below – to what extent they got into details as to those issues.

Mitchell: There are a lot of details about how the water reduction could have affected the vegetation and there are many factual disagreements that persist throughout this case. The plaintiffs have said that the water diversions increase the salinity of the water in the bay which in turn decreases the amount of wolfberries and crabs available for the cranes to eat which in turn caused the cranes to suffer food stress which in turn caused the cranes to die. Now those factual assertions from the plaintiffs are still disputed by the state, we're not conceding any of that, but even if the plaintiffs are correct, even if every one of the plaintiff's experts is correct, the state defendants are still entitled to judgment because this causal chain is too attenuated and if this causal chain isn't too attenuated, it's hard to imagine a case in which...

J. Garza: What I'm suggesting to you is that the wrong analysis may have been made in this case. If you have a study and that study only encompasses say 10% of the data you could come to some conclusion. If it encompasses 50% of the data, you could come to a different conclusion perhaps, and if it encompasses 100% of the data, then it seems to me that is what you want or at least as close as you can get to 100% of the factors that are relevant to the analysis of the ultimate demise of these cranes. And my question, I'm asking this now so that the other side can concentrate on this, is was that, was she too myopic? Did she, was her analysis tunnel vision in her overall description of causation especially?

Mitchell: Well, she adopted the plaintiff's proposed findings of fact verbatim without much analysis or consideration. The

expert reports that the plaintiffs propounded purport to show some link between the alleged harm to the cranes and the upstream water diversions. But the contention that we are making on appeal is that is legally insufficient. Because it's not enough simply to show "but for" cause, the plaintiffs have to show proximate causation, they have to show a reasonably direct, foreseeable harm that could occur, that's not too attenuated, that's not too affected by intervening causes such as drought and many other factors that contributed to the salinity and the wolfberry reduction and the reduction of the amount of the blue crabs.

J. Smith: You don't concede "but for" cause do you?

Mitchell: No, we don't concede that either, not at all, and Mr. Streett, when he speaks, will spend more time challenging the plaintiffs' factual case but the

J. Jones: (go ahead)

Mitchell: the state is saying that even if we were to grant the plaintiff's factual case, and we don't, we're still entitled to judgment as a legal matter because this is insufficient to qualify as proximate causation.

J. Jones: There's a lot of argument back and forth in briefs about the scope of the TCEQ's authority in regulating water and the State's brief is pretty, actually not participating in that argument. Can the state actually impose drought conservation measures?

Mitchell: Yes.

J. Jones: Through the TCEQ? I mean, being from San Antonio, I know what the Edwards Aquifer does, so the TCEQ can do that on these river authorities?

Mitchell: TCEQ has some prerogative to act in cases of drought or in cases of emergency.

J. Jones: Is that as a result of S.B.3?

Mitchell: Some of that is, but we don't believe any of these state law authority questions are relevant to this case because the TCEQ officials have been accused of violating federal law. It is no defense to that accusation to try to point to a lack of state law authority.

J. Jones: So basically, I mean what you're doing is undercutting the GBRA's abstention analysis?

Mitchell: I'm not trying to undercut GBRA and I think GBRA will agree with us that the question of state law authority in this case is not relevant to whether the TCEQ officials have violated federal law.

J. Jones: Well it seems to me, it would be very relevant to abstention to the extent that you know the district court focused a great deal on interpreting the scope of the TCEQ authority and therefore the Court immersed herself in deciding the TCEQ was either abusing – wrongfully using – that authority or not using it properly to protect the cranes and that seems to me to feed into *Burford*.

Mitchell: The District Court's discussion on that point was entirely unnecessary.

J. Jones: It's what?

Mitchell: The District Court's discussion under the state law authority issues was entirely unnecessary. So, Your Honor is suggesting that perhaps there's no skein of state law to untangle here and we would agree with that. There are no state law issues that need to be resolved to determine whether the TCEQ officials have violated the Endangered Species Act. If their licensing decisions qualify as a take, then they have violated the Act and it does not matter whether they have authority under state law to go back and change the conditions of these permits. Federal law is supreme and trumps in case of a conflict.

J. Jones: You know, I, you know, you're, let's go to this analogy about the driver's licenses and legalizing marijuana and so on, what about the Supremacy Clause?

Mitchell: Well, the Supremacy Clause requires state officials to obey federal law. It does not require state officials to impose independent, supplemental state law penalties and prohibitions on conduct that violates federal law. It's entirely up to the state to decide whether they will criminalize or prohibit as a matter of state law private conduct that violates federal law. So, Colorado has the constitutionally-protected prerogative to decide whether to legalize marijuana under state law. California has the prerogative to decide whether to license the use of medical marijuana under state law, and TCEQ officials likewise have the prerogative to decide whether to allow water diversions as a matter of state law even if those water diversions violate federal law. The principles of dual sovereignty that undergird the commandeering doctrine and constitutional federalism allow a state to decide to legalize as a matter of state law private conduct that might violate federal law and Judge Jack lost sight of that principle in her opinion. As did the *Strahan* court in the First Circuit, let's go back to Judge Smith's original question. We just think *Strahan's* analysis is fundamentally inconsistent with the dual sovereignty structure of constitutional federalism because it prohibits a state from licensing under state law private conduct that is alleged to have violated federal law.

J. Jones: You really want this case to go to the Supreme Court?

Mitchell: I see my time's expired. May I answer?

Jones: You can answer. Yes, if you can answer that quickly.

Mitchell: I don't have an opinion on that question, Judge Jones. We do believe, however, Judge Jack's ruling should be reversed and the case remanded with instructions to enter judgment

for the State.

J. Jones: Okay.

Mitchell: Thank you.

J. Jones: Alright. Mr. Streett?

GBRA Counsel Aaron Streett: May it please the Court. The intervenors hold water rights directly affected by the decision below-water rights that underpin the Texas economy. And that's why we've participated so vigorously at trial and on appeal. The intervenors urge this Court to go beyond holding that state officials cannot be held liable and bring stability to intervenors' rights by either holding that proximate cause was not established as a matter of law or by holding that this dispute should be committed to the state agency and the state courts under *Burford*. I'll turn first to *Burford* and I also want to reach the causation questions that have been raised by the Court. This case should have been dismissed at the outset under *Burford* because it is controlled by this Court's decision in *Sierra Club v. San Antonio*. And to get directly to Judge Jones's question, we agree that under a proper understanding of the Endangered Species Act, Judge Jack did not need to delve into state law. But, that's not the question under *Burford*. The question under *Burford* is looking at the theory that the plaintiff pleads, would the Court become entangled in state law, would it disrupt a coherent state policy, and is there adequate state court review. The plaintiff's theory in this case was that the TCEQ was not applying its state law authority to curtail existing water rights. That's why Judge Jack felt the need to delve into that and to delve into SB3. . .

J. Jones: So, I don't think that was irrelevant to her analysis.

Streett: It was absolutely not irrelevant to her analysis or irrelevant to the plaintiff's claim and that's one reason we think *Burford* abstention is, was in fact, mandated here,

although now that the case has proceeded to a final judgment, this Court has a long menu of options to choose from for reversal.

J. Smith: So, you would say it would be, it would be error for us to decline *Burford* abstention and instead to take on the merits and reverse the injunction?

Streett: No, Your Honor, that's the exact opposite of what I'm saying. I'm saying that now that this case has proceeded to final judgment, this Court has a full menu of options for reversal. The Court should have dismissed the case below under *Burford*, but now that it's gone past that stage, this Court can choose any ground that would reverse the judgment below. It's fully up to this Court's discretion and we would ask the Court to go beyond the state's argument, although we agree with it, hold that this chain of causation is too attenuated from the permit holders down to the alleged harm to the cranes to constitute causation in any future case as a matter of law. And we also think the *Burford* abstention is perfectly open and appropriate here because it's directly controlled under *City of San Antonio*.

J. Smith: Which result do you prefer?

Streett: We would prefer a result that brings finality and stability to this sort of claim — a claim that upstream water diversions have affected a very complex ecosystem at the end of the bay and violated the Endangered Species Act. We would prefer a holding that that is not proximate cause as a matter of law. We've never found a case where the chain is that attenuated and still constitutes proximate cause. We agree with the state's second point on that.

Under *Burford* and *San Antonio*, this case is directly on point. It involves a challenge to the application of state law authority, of state law permits, concerning a vital natural resource. It is highly disruptive of the state's coherent regulatory scheme with respect to water because

Judge Jack ordered a total ban on new water permits on this river basin. If TCEQ issues a permit, it has to go before Judge Jack for her veto first. I cannot imagine a more disruptive scheme that violates the principles of *Burford.* And in addition, she ordered the state to participate in the Habitat Conservation Plan process that can last 10 to 20 years, during which her ban on permits will remain in place. And that Habitat Conservation Plan process aims to revisit the regulatory and permitting decisions that the state has made under state law. And, finally, as in *Burford*, there's really no serious dispute that there is state court review available in the Travis County District Court of TAP's Endangered Species Act claim.

J. Jones: And on what basis would that proceed?

Streett: It would proceed because TAP could bring its concern about habitat and endangered species in a challenge to S.B.3's rules, in a challenge to a water permit, and any other proceeding before the TCEQ, and it would then petition for review and say to the Travis County District Court, federal law is supreme under, and in our interpretation, speaking for TAP, the Endangered Species Act requires the revision of TCEQ's authority and rules.

J. Garza: How about the Texas Water Code, Section 11.0235(c) that doesn't give them the power to do what you're, you know, to provide, you know, under an emergency, water for the cranes?

J. Garza: The provision, I mean, it seems to me that that's in, you know, your argument is deflated at least because of that statute that they have to follow, that the Board has to follow.

Streett: Let's just assume that that's correct, that's a correct reading of that statute. Even if the TCEQ cannot grant relief, the principal question under *Burford* is whether there is state court review of the federal issue. The whole premise of *Burford* is that the agency may be unable

or unwilling to grant relief. But the state court has the full panoply of power that a federal court does to enforce federal law.

And with that, I'd like to turn to causation for a few minutes and address Judge Garza's question. Judge Garza, you're absolutely correct to call this tunnel vision or a gaping hole in the analysis. TAP's theory was that upstream water diversions are correlated with salinity with harm to the food of the cranes, and harm to the cranes but they did not attempt to address drought or tides, which they conceded, and you can see in our record excerpts, they conceded are significant, if not the most important contributing factors.

J. Jones: Mr. Streett.

J. Jones: What do tides have to do with it?

Streett: Because it's a . . .

J. Jones: Tides are tides and you're in a salt marsh. So, you're gonna have tides.

Streett: Because it's an estuarial bay environment where the level of tides flowing into that estuary affects salinity. And if you have low tides, you're gonna have, it's going to affect the salinity.

J. Jones: How do you have low tides? What is drought? How does drought cause low tides?

Streett: I didn't mean to suggest that drought caused low tides.

J. Jones: What caused the, well, I mean, yes, but I mean tides are tides and unless they're, I don't understand how they would abnormally affect the salinity in one year.

Streett: The point is you could have low tides for a variety of independent reasons. You could have a lack of rainfall on the bay and you could have upstream water diversions . . .

J. Jones: But, did you, did your experts point that out to the Court?

Streett: Yes, Your Honor. We pointed it out, we accounted for the upstream water diversion's effect and our expert determined that the effect of upstream water diversions was only one part per thousand on salinity.

J. Jones: Which expert was that?

Streett: That was Mr. Ward, which everybody, Mr. Ward, which everybody agreed would be an insignificant effect on salinity. And TAP has never attempted to account for the drought or the tides and if you don't want to consider tides, that's fine. The drought would be sufficient. As Judge Garza pointed out, if the drought's causing 90% of the problem, and the upstream water diversions are causing 2% of the problem, then that is not proximate cause because proximate cause requires TAP to show that the upstream water diversions were a substantial factor, a direct cause of the harm that's being alleged. If perhaps, Your Honors, I would like to close very quickly with the point relating to Mr. Stehn's testimony, Mr. Stehn's testimony was inadmissible because it was unreliable and unscientific as a matter of law, and that was their only evidence that cranes perished as a result of upstream water diversions. It was rejected by the Fish and Wildlife Service and his testimony should have been thrown out, and therefore, judgment should be reversed and rendered.

J. Smith: That would be an abuse of discretion standard. I just don't think that argument gets you very far.

Streett: It is an abuse

J. Smith: The District Court considers that evidence for whatever value it may have had.

Streett: And the Fish and Wildlife Service, the expert federal agency charged with protecting endangered species also evaluated it and determined that that methodology lacked scientific rigor and said, "it is unnecessary and untenable

based on current data" because cranes don't just stay in one place.

J. Smith: Well, but Judge Jack is still the gatekeeper on that. I mean, that argument, as I said, isn't gonna get you very far.

Streett: I understand that point and we think we prevail on many other grounds sufficient for reversal.

J. Jones: Okay. Thank you.

J. Jones: You have time for rebuttal. Okay, Mr. Blackburn.

Jim Blackburn, Counsel for The Aransas Project: Thank you. May it please the Court. I represent The Aransas Project and I've heard the discussion that's been ongoing, so let me just start by going directly to some of the questions, particularly, Judge Garza, that you raised. We have extensive proof in the record that goes to every issue that's been discussed here. Counsel here are both excellent appellate counsel. They were not the trial counsel. At trial, we spent a significant amount of time on the issues that are being discussed. First, this chain of causation is exactly what is required by the definition of harm that was approved by the Supreme Court in the *Sweet Home* decision. That definition requires you to prove harm that you show a significant modification of habitat that adversely affects feeding, sheltering, or breeding and actually kills or injures the species.

J. Garza: Let me, because this, to me, is very crucial and I want you to explain your position. We already heard the other side. Assuming that the depletion of water caused the deadly effect on the cranes, the question at this level is what caused the depletion in water?

Blackburn: Right.

J. Garza: We know, and it's undisputed that there was a drought in 2008-2009.

Blackburn: That's correct, Your Honor.

J. Garza: There is absolutely no doubt that certain water was taken out because of permitting, and the question then is, what is the proper analysis when you have these multiple factors in the causation scheme under the Act? If you could help me with that, that would, do you have enough evidence, if there's only one cause, and that's the water permit, I agree with you totally. But, the question is, did she take into effect the drought and how did she do it to come to her conclusion?

Blackburn: But, absolutely she did, and first of all, the starting point is, it's really not an issue about the death of birds when there's not a drought. So, it's, this issue about inflows and its relationship to . . .

J. Jones: So that means you concede that the population has continued to increase every year since '08-'09.

Blackburn: It has not, Your Honor. The same testimony that, well, the same evidence that was referred to by counsel that is not in the record also identifies actually that the number of birds has declined since

J. Jones: I thought it went to 270 and 280 or something.

Blackburn: But, it's down to 257, that's with the most recent

J. Jones: Yeah, but when?

Blackburn: That's the most recent count. It's not in the record.

J. Jones: What? Is that for '11-'12, or '12-'13?

Blackburn: '11-'12, I believe.

J. Jones: But, you're not gonna blame that on

Blackburn: It's after. We've had drought conditions since 2008, 2009 in Texas, Your Honor. What I . . .

J. Jones: But, there's the counterfactual about the increases in population during a drought.

Blackburn: They've honestly have not increased. They've gone down, Your Honor.

J. Jones: But they did go up for two years afterward.

Blackburn: They went up one year afterwards and then they turned around and I think they stayed up for two years and then back down. Yes, Your Honor.

J. Jones: Is there anything in the record to show number of deaths, if any, since '09?

Blackburn: Nothing that is really in the record because, you know, Mr. Stehn was the expert that was the evaluator and he had retired and they have not been able to duplicate his process, been either unable or unwilling to do so since then.

J Smith: So, doesn't that go directly to the requirement of future harm to justify an injunction?

Blackburn: No, well, actually, Your Honor, we think we've met that with the same evidence I was about to talk about with regard to Judge Garza's question. If you go, there are tabs, we have made attachments. There's attachment 17 and attachment 18 to the Brief. Attachment 17 is a table that was put into evidence by Joe Trungale, who is a computer modeler who was one of our experts. He modeled three scenarios. He modeled inflows that would have occurred in 2008-2009, if the reported withdrawals had been added back into the system. So, basically, a no-withdrawal alternative. He identified the impacts of the actual – he actually measured the inflows that you had at the USGS gauges, and then did a model to show what the difference would be from what it would be without human intervention to what would be with the withdrawals that occurred in 2008-2009.

J. Jones: What withdrawals? All the withdrawals, new permit withdrawals? What withdrawals, excess withdrawals over prior history? What are you . . .

Blackburn: These were, I'm sorry, Your Honor. These would be the reported withdrawals and those are on the next tab, on tab 18, and those show the withdrawals for every year. These are reported to TCEQ. We have, those, those were in the evidence and Mr. Trungale compiled them and then ran them in computer models, and he predicted what the salinity impact of those changes would be. And those salinity impacts are shown on Exhibit 17, and for example, in December of '08, over half of the bay would have been suitable for blue crabs under drought conditions but with no human withdrawals.

J. Jones: No human withdrawals?

Blackburn: No human withdrawals, but under drought conditions.

J. Jones: You mean that all the couple of million people that reside on the Guadalupe Blanco and the San Antonio River could have availed themselves of none of that water in order to protect the cranes. Is that what you're saying?

Blackburn: No, I'm not saying that, Your Honor.

J. Jones: But, you're modeling is about, okay, . . .

Blackburn: I'm sorry. But, as I understand it, the question is, is this a drought-caused killing of the cranes, or is this water-use killing of the cranes? And, we are trying to prove that the water-use killed the cranes. And we believe that Mr. Trungale's analysis proved that.

J. Jones: Okay.

Blackburn: And this is again in Exhibit or attachment 17, but it shows a reduction in the amount of the bay that is suitable for blue crab from 50% of the bay all the way down to 20% of the bay in December and it goes as low as 9% of the bay in

October in '08 based on the withdrawals that occurred. Now, we're not saying all those withdrawals should be curtailed, but what we're saying is there needs to be a reasonable accommodation made that can at least begin to address this issue because we also put a table in that showed if the full amount of the water that has been permitted was withdrawn, what the impact would be and frankly, it leaves almost none of the bay suitable.

J. Jones: As I understand their argument, and I think you agreed with this, and I think Judge Jack did too, TCEQ cannot deny usage to those users who already have permits. Is that correct or not?

Blackburn: That is correct under Senate Bill 3, which is the *Burford* abstention analysis and that's why we think there's nothing to abstain to.

J. Jones: At page 52 of your brief, you say that challenging a future permit is not enough to protect the cranes.

Blackburn: We think that is correct, Your Honor.

J. Jones: Well, all she did, well what, so what she did, was, she said no more future permits, I'm enjoining that, and they have to request an Incidental Take Permit.

Blackburn: Correct.

J. Jones: So, in other words, you're transferring, that would transfer to the federal Fish and Wildlife Service all of the water management from the TCEQ.

Blackburn: I actually disagree with that characterization. The Habitat Conservation Plan is not a takeover process. It's a shared process. It has worked incredibly well in the Edwards Acquifer. We have the, we have a lot of

J. Jones: That was because the federal court abstained.

Blackburn: No, actually, Your Honor, the Edwards Acquifer authority

was formed because of an initial lawsuit, joined in by GBRA at that time.

J. Jones: And then the federal court abstained to . . .

Blackburn: Later on. When they abstained at a later time because the EAA had been set up with a specific mandate to address endangered species. We don't have anything similar. The coast is unprotected in terms of endangered species, period. There is no process to defer to, which is I think, the, you know, circumvention is what *Sierra Club vs. San Antonio* was about and that's not here.

J. Jones: Well, but, I mean, again, surely the Texas courts and the TCEQ are bound by the Endangered Species Act under the Supremacy Clause, right?

Blackburn: That's where we started this case from, Your Honor.

J. Jones: Right. And so, they do have a, you can go before the TCEQ and before the state courts and make that argument.

Blackburn: They have no authority under Texas law to consider endangered species.

J. Jones: Then, you go to the state court and you say the state court has to do something about the TCEQ because of that.

Blackburn: Well, if there's no mandate by the state legislature for the TCEQ to consider endangered species. . .

J. Jones: Then, it can go up to the U.S. Supreme Court.

Blackburn: I'm trying to get there. I guess. Don't mean that as funny as it perhaps came out.

J. Jones: No, you're not trying to get there. Where you're trying to get is for Judge Jack to manage the water resources while the Habitat Conservation Plan works itself out over 10 or 15 years in a state that's adding a million people a year.

Blackburn: Well, but it's . . .

J. Jones: I mean that's a very awkward situation from the standpoint of federal court responsibility.

Blackburn: Remedy is awkward.

J. Jones: Let me ask you another thing on your chain of causation deal. The city of Houston is adding a thousand people a day. There are endangered prairie chickens and there's an endangered toad around Houston and those are the ones that strike my memory most easily. The city of Houston is able to expand and it grants building permits to developers. It grants building permits for roads and sewers and all sorts of things. Is it, would it be your argument that if prairie chickens die, the city of Houston can be sued and placed under the Endangered Species Act in the way that you want here because it gives out permits that allow these people to settle in Houston?

Blackburn: No, Your Honor. I don't make that argument at all because, frankly, it leaves the fact situation that you raise, it really isn't applicable because there's just no Houston toads in Houston any more, but . . .

J. Jones: Well, suppose it was prairie chickens or any other endangered, you know, I don't care if it's a chameleon, the point is, you could argue that there's a significant modification of the habitat, but significant modification is something that significantly affects the habitat to cause that particular thing to decline in population and therefore, the permitting authority, which is the city of Houston, has violated the Endangered Species Act.

Blackburn: I think if there were certain circumstances, that could be correct. But I think, foreseeability, which is a key aspect of proximate cause, that was specifically identified by Justice O'Connor, is a limiting factor on the scope of this ruling.

J. Jones: But, the District Court made no findings on foreseeability. Now, you say that's admitted by all as a matter of law, but it seems to me foreseeability in this kind of circumstances, has to be somewhat quantifiable.

Blackburn: Oh, it's been in the Fish and Wildlife Service and the Whooping Crane Recovery Plans specifically identified that freshwater inflows were absolutely essential to the future of the whooping cranes. It was signed by the state of Texas. The, you know, it is absolutely, I think, it's not doubted that that was well known. I think that distinguishes us from the . . .

J. Jones: If it was caught, it was well known that if scales suddenly fell down from the, their holding place on the railroad station that they were heavy and they could bop someone in the head, but that does not mean that the series of events that triggered Mrs. Palgraf's injury was going to occur because there are many factors that affect inflows and salinity in an estuary.

Blackburn: Well, I think in this case, it was well known. The scientists had all understood this. It had been specifically raised in the study of the Aransas Bay under the Senate Bill 3 process that blue crabs and whooping cranes should be considered from a freshwater inflow standpoint and TCEQ rejected any consideration of those factors because, you know, that's the type of foreseeability that we think is real and it was absolutely across the board testified to here. There's no question about the link.

J Smith: What do you do with the argument that if the state did not have a permitting process at all, that is to say, that no permit was required to take and use water that the state would not be liable — in other words, that the state is being put in jeopardy here or the state officials are only liable because they permit some of the taking and not all of it?

Blackburn: Well, I think that the ownership of the water is a complicating factor to your hypothetical there to that suggestion. And I don't think the state can abdicate. I think that the state has authority, control, and ownership. As it is now, they've got the absolute maximum amount of both ownership and authority and control. It doesn't get stronger than what they've got right now. I think if they were just left with ownership they would still be responsible. I think ownership is a key aspect of any of the, particularly of the *Yeutter* decision that was from the Fifth Circuit, I think had a key aspect of ownership. The *Loggerhead* case is about a beach that was a public resource. I think that all of these cases have public resources that are owned and I think you …

J Smith: So the failure, excuse me I don't mean to cut you off but I think I heard your answer and it was responsive, so the state's failure to impose a licensing scheme would be a violation of the ESA?

Blackburn: When they owned the resource. I think it's sort of like a landowner saying, knowing that there is an endangered species on the property saying, you know, anybody wants to come in, can come in and hunt. And if that species were killed it would be foreseeable.

Smith: Well, we're not hunting an endangered species. We're simply talking about again an attenuated causal, causal chain where the state just says we're not going to issue permits anymore, anyone can take the water.

Blackburn: Well now I mean I read that and I thought it was an interesting statement but I really do think ownership is a key aspect here.

J. Jones: But the state points out that all of the, none of the cases you relied on involved a state owned resource.

Blackburn: Well, I mean in the case of *Yeutter* it was a federal owned resource. In the case of *Loggerhead* it was …

J. Jones: In the case of *Yeutter* it was the Fish and Wildlife Service violating its own stated plan to protect the woodpeckers so I think that's at least factually distinguishable. And nobody seems to have argued causation or proximate cause in that case, at least from the way I read the opinion. It's only a few paragraphs. And as you know, Judge Garwood seldom wrote few paragraphs about things. But, but none of those cases that you rely on turns on state ownership and the bulk of the state's reply brief is devoted to saying just what is the test for the necessary causation between state regulation by a governmental entity and the effects of that regulation down the line on the species.

Blackburn: Yeah, with all due respect I point you to Justice O'Connors. . . Again, her concurrence in *Sweet Home* where she talks specifically about landowner liability for draining a pond that has a species. And the fact that ownership alone and the activities of that owner in management would be sufficient.

J. Jones: Well, that's not the argument that you've made. The argument that you have made is *Strahan*. This is controlled by *Strahan*. This is controlled by the Washington logging case. This is controlled by the Loggerhead Turtle case.

Blackburn: We think it's consistent on all grounds with all of those since Stra--

J. Jones: None of those involved turn on the — what I'm saying is that you, you are arguing, you do not have a precise connection between your theory of causation and the state authority and that what you're arguing for is a purely open-ended connection. States involved, I mean, you're not far off of the driver's license which I thought was extreme, but …

Blackburn: Well, I don't think we are off. I mean I think we are very different from the driver's license. The definition of take includes Section 9(g) which says "cause to commit a take" as an element of a take, not just that the state

would actually take a species, which would be to go out and actually kill a crane. I mean, they all admit that they would be liable for that. But 9(g) is "cause to commit." That's the basis for *Strahan*. That's the basis for all of the line of cases that we depend upon and that's what we have here. The State of Texas tells every withdrawer where to take the water. It tells them how much water to take. The state has said if they put a straw in the water and they take the water out of the straw they're liable. But what the state does is it gives the straw out, it tells the individual permit holder how much water they can pull out of the straw, when they can pull it out, and how long that can go on. It is absolute authority and control and …

J. Jones: So if there's this absolute authority, ownership, and control but there ain't enough for *Burford* to come into play?

Blackburn: They have no problem …

J. Jones: You're arguing it both ways.

Blackburn: Well, I do have it both ways, I think, Your Honor, because the state has failed to enact any meaningful protection for endangered species on the coast.

J. Jones: And according to Justice Black in *Burford*, the state was failing to protect the due process rights of property owners or subsurface owners.

Blackburn: Although that was pure circumvention in the original *Burford* case. That was basically a plaintiff running around and coming over here and saying "federal court I don't like what's happening in state court and I want relief." I don't have that problem.

J. Jones: That's not the basis of the opinion, as you very well know.

Blackburn: But I still think it's circumvention.

J. Jones: The basis of the opinion, you did a lot better argument

about this in your brief. The basis of *Burford* was that you have a very complex regulatory scheme that affects thousands of people, that it is a zero sum game in terms of whom it affects, and that the state has the primary responsibility to adjust those rights and interests. And as we know from the *City of San Antonio* that's not limited to just state law issues. So it seems to me there is a lot to be said for the *City of San Antonio* result here.

Blackburn: Well, I understand how someone would say that. On the face of it it looks similar but I would come back to what the state did in the Edwards Aquifer Authority when it was created. It created that entity specifically to address endangered species issues through the regulation of groundwater in central Texas. That is what I think is the key point. That was set up, and there was a process that was ongoing at the time the Sierra Club came to the district court.

J. Jones: I understand that is a great and justifiable victory on the part of the Sierra Club, but the same, it seems to me you have the same interest in place here because you have a, you are not saying that you are disabled from going into the state agencies and being a stakeholder in the process because you have the mantle of federal law. You are a stakeholder and it doesn't really matter that they can't push you out the door. They have to take your interests into account and it is a zero sum game as far as millions of people and farmers and people who make their livelihood in the State of Texas are concerned.

Blackburn: Your Honor, with all due respect, if I don't have a statute that requires consideration of the whooping crane or endangered species in the process of the TCEQ, I will get thrown out of state court, period. I've got to have some cause of action to go in on. There is none. If there were, I would go.

J. Jones: There's a footnote in the GBRA Reply Brief that says the Texas Farm Bureau intervened and challenged one of the

usage restrictions successfully recently.

Blackburn: But that had to do with their role, but the fact that there were senior and junior appropriators and there were water rights …

J. Jones: Cite a case for me that says you would be thrown out of state court.

Blackburn: Well, I mean, I can just tell you my experience has not been good when I've gone to the state court without a cause of action.

J. Jones: Well, maybe you ought to put the state court's feet to the fire on it. But you're not, in saying that you have no place at the TECQ, you are not saying that it is not a very complex and reticulated regulatory scheme.

Blackburn: What I'm saying, Your Honor, is that I think for there to be *Burford* abstention in a situation that has a compelling interstate iconic endangered species in a case that has clear federal preemption that seems to fit right within the *NOPSI* standard I have difficulty thinking that I've got to go and try to find some court somewhere in Texas that might not throw me out because I want to find a forum to talk about the killing of the whooping cranes by the State of Texas. And that's what I'm here for.

Smith: You're saying that this is — this is a friendly question I think — but you're saying that this is essentially a matter of federal law rather than the intricacies of state law and for that reason that it absolutely should be abstention.

Blackburn: Absolutely. And I think *NOPSI* is right on point on that and, again, I think the *Sierra Club* certainly is the case that certainly needs to be looked at and very seriously considered, but I think the key difference is that federal interest was taken care of in the state process. There is no process that I have to go to. Nothing that would give me a chance, and I think that that's really what these rules are about is trying to figure out how you parse these

things and that things, that this one parses that there is an overriding federal hindrance.

Smith: Let me just give you, I mean, you know, what you've said is you offer no opportunity for the state to adjust the permitting at all. You say that it has to be done under the mantle of federal court supervision.

Blackburn: The state has said they have no authority. That's what the state has consistently said. Now earlier on in this case there was extensive briefing done about the fact they couldn't be held liable because they had no authority. So they basically have disavowed throughout this process any ability to control. And in fact, pages what I think is 16 to 18 of the state's brief, basically disavows any interest, willingness, or concern about the endangered species.

J. Jones: Well, that's …

Blackburn: I understand, but that, you know, I do take these briefs seriously in that sense. And I think it actually is very accurate. It was a true statement of the current situation in Texas, which is why we went to federal district court. And this is an extremely difficult case and we put on the best set of experts I've ever worked with in my 40 years in the court system.

J. Jones: Don't you think it's peculiar that Judge Jack found every one of your experts credible and every one of their experts not worthy of belief?

Blackburn: You know, I've got to tell you it was one of the most interesting cases. It was also one of the worst cases put on by the other side that I have encountered in a long time. I hate to say that, that frankly, but there were, we found lies, we had errors, we had omissions. I mean, it was unlike anything I've ever run across in my legal career and, I mean, I don't consider myself to be the best trial lawyer ever on the face of the earth by any means. But

what happened in that courtroom was an embarrassment to many, many people. Our experts are first class. Every one of them is absolutely well-respected.

J. Jones: Well that, I mean, according to the GBRA Brief, there, and I accept what she said about errors and lies, and I have the names confused sometimes, but a lot of them were extremely highly credentialed as well.

Blackburn: It's amazing what highly credentialed people will do in a court. I think you well know that.

J. Jones: There is the problem about the, well you concede that the injunction would have to go against TCEQ officials, right?

Blackburn: It does have to go against TCEQ officials and it should be either redrafted or sent back down for redrafting.

J. Jones: Since Judge Jack did not find foreseeability in her findings, what do you do about, what do you say about that?

Blackburn: I think she did, I think she did make …

J. Jones: I'm not going to tell you I remember every one of the hundred and some pages of her opinion, but assume the state is representing that accurately.

Blackburn: Again, I think that the proof is in the record. The proof is in her decision. The proof is there.

J. Jones: As a matter of law is it an inferred finding? I thought foreseeability was, is that a fact …

Blackburn: I think it was actually overtly stated. I mean, it was clearly laid out in the record and in the testimony.

J. Jones: That's causation. Foreseeability is a different thing from causation.

Blackburn: Well, the foreseeability was as well in the sense that it was not only foreseeable but it was foreseen. It was predicted. I mean it really wasn't an issue in the sense

that the Fish and Wildlife Service, the State of Texas had both signed documents saying water is necessary, fresh water inflow is necessary for the cranes to stay alive for their food source. I mean, like I said, it not only was foreseeable, it was foreseen. You did ask a question earlier about how did I, how do we prove anything about the future. And I think that is an important aspect and we did that as well. We put on two of the best statisticians that I have run across. One is an ecologist statistician, the other one was chair of the statistics department at Rice. And they both clearly established that there was a significant linkage between the amount of inflow coming into the bay and whooping crane mortality over the years. And basically, every time the drought recurs, what you have is you have whooping cranes dying in significant numbers. It was proved with statistical significance. Now, statistics alone …

J. Jones: What do you do about the fact that the population of Texas has probably quintupled since the whooping crane population was at its nadir and yet it's still well over 200 now.

Blackburn: Well, 1,000 is the goal for recovery so we are far short. In fact, the expert from GBRA did say that he agreed that the cranes were not close to recovery yet.

J. Jones: I didn't say that, but I did say that the crane population has achieved a quintupling or more, about eight times increase in the crane population since the 1940s, and the population of Texas has also increased and the species manage to live together.

Blackburn: Your Honor, I really, we pushed for the Habitat Conservation Plan as a remedy because I honestly think it can be accommodated that both population increase, that water can be provided to everybody that needs water and we can also take care of these cranes. It requires thought, it requires action, and it requires creativity and I can promise you there is enough intelligence in the State of Texas that we can solve this problem if somebody decides to

do it. That's what this lawsuit was about. It's not being done and it is killing cranes. I think we've proved that absolutely. And I think that's a violation of federal law. That's why we're here and we can fix it.

J. Jones: Do you concede the state's argument that she could not, that the Judge could not require Texas to apply for an incidental take permit?

Blackburn: If you look at some of the Tenth Amendment cases, the *Baker* case, the …

J. Jones: I think this is the Eleventh Amendment issue.

Blackburn: Well, I guess I get somewhat confused between the Tenth and Eleventh sometimes. It's where, you know, when you ask the state to undertake an affirmative action, you know, there are affirmative acts that are required to meet certain obligations. I think the *Abilene* case talks about having to take affirmative actions of different types and, but certainly and, I guess really it's the *Reno* case that catches my attention more than anything. It's that in managing a database the State of South Carolina was told that they had to manage it in a certain way in compliance with federal law. It caused them to do something different. It caused them to take certain affirmative actions, and yet that wasn't found to be a violation of the Constitution. I think the same thing with *Baker* where they were changing the bond. They had to make sure that the bonds were treated in a certain way in compliance with federal law. Where you have a violation I do think it's appropriate. Now, I think of everything that is in front of you, the remedy I would suggest is by far, you know, to me it is the one area that I would find that would be perhaps most suspect. I mean, the liability findings I think are absolutely solid.

J. Jones: Well, then all you're defending then is the, I mean I'm not saying all but it's a big thing, is the liability finding

and the cessation in new permitting.

Blackburn: Well, I'm not conceding remedy. I'm saying I think there are more issues about remedy than there is about any other aspect to this case.

J. Jones: So the point is, so may I infer that if you were to, well just suppose for the argument that we were to void the ITP requirement that leaves in place the cessation of new permitting, would you go back into the district court and say we have a menu of other things that need to be done?

Blackburn: I'm not sure, Your Honor, what we would do. We do think that it is certainly absolutely appropriate to have both the declaration of the violation and the cessation of future permits. It does leave the question open about what could be done in the future. I think if the Judge were to just ask the state, "would you go out and consider doing these things, would you go out and consider doing a positive stakeholder process?" Something like that I think is absolutely a possibility and we'd all work...

J. Jones: Federal courts don't usually put our, you know, decrees in terms of "would you consider?"

Blackburn: I understand, and then with all due respect I'm not so sure that might not be a problem in a case like this because this is that type of case. There is a bona fide problem. The cranes are dying. The state is a sovereign, it has its important position. We can make those work.

J. Jones: I appreciate that, but I just thought there was a bit of a, if the ITP is problematic, your brief said that, as I said, challenge, stopping the future permits is not enough to protect the cranes. So this has got, you know, so this had to, must portend something else if you think there's a violation of the law.

Blackburn: No, I think that if we were to emerge from this with a declaration intact, with the prohibition on new permits unless they were to take care of cranes, I would bet you

would that we would work together and figure something out. But, you know, that's yet to be seen. But if you have, in the world of hypotheticals there's been a lot tossed around. That's a hypothetical I feel comfortable that we could figure out a way to make it work.

J. Jones: All right. Thank you.

Blackburn: Thank you very much.

J. Jones: Mr. Streett.

Streett: I don't mean to start by bursting Mr. Blackburn's dreams of getting to the Supreme Court, but this court should go beyond holding that the state can't be held liable. And it should hold alternatively, or additionally, that proximate cause is lacking here. Turning to causation first and then circling back to *Burford*, Judge Jack's cut-and-pasted findings did not have the word "drought" in them. There is nothing to defer to with respect to whether TAP accounted for drought in the causation analysis. And because it did not even attempt to account for drought in the effect of the alleged harm to the cranes, they cannot prove that the upstream water withdrawals were a substantial factor, which is a bedrock requirement of the proximate cause analysis. In addition, we've had some discussion of foreseeability. Judge Jack did not make findings on foreseeability. I think the discussion of the '09 and 2010 number is vitally relevant to foreseeability. And Mr. Blackburn said there was only one or two years after '08-'09 in the record, that is simply not accurate. There are three full years using Mr. Stehn's methodology in the record and you can find that at 1 Tr. 59, 1 Tr. 175, and Defendant's Exhibit 226, shows a continuous upward trend of the crane population and most crucially, I think, is the winter of '09 to 2010 when the drought was continuing. It was undisputed that the drought was continuing. It was undisputed that there was high salinity. And under Mr. Stehn's analysis there was only one crane that died that year. So they have completely failed to prove causation. They have completely failed to

prove foreseeability. Even if you could prove that you could foresee a record drought. And I think the last years, the previous years are also quite relevant to foreseeability. As Judge Jones pointed out, the crane population, in fact it's increased from 15 to 300 while the Texas population and water usages have massively increased. And the fact that there was some discussion of the importance of flows to the habitat as a general matter, that fact, yes, that fact is undisputed, but that's a far cry from saying that any particular winter it was foreseeable that upstream water diversions would proximately cause harm to cranes—would go through all of those seven steps that TAP identified and cause harm in a proximate fashion. Now Mr. Blackburn threw out the number of 257. He said the cranes have declined. That is not in the record. That number comes from after the Fish and Wildlife Service changed its survey method completely because it tossed out Mr. Stehns' method and it used a range. It said Mr. Stehn is engaging in faux precision. You can't get to a one for one count of cranes, and so it gave a range, and if I remember correctly, it says there's somewhere between 190 and 320 cranes. That's the best we can do scientifically. So the claim that the cranes have declined is simply inaccurate. With respect to *Burford*, Mr. Blackburn cannot deny that the state court can review federal claims. That is bedrock constitutional law reiterated in *Haywood vs. Drown*.

J. Jones: Do you agree with his position that the, because and, with Mr. Mitchell's position that the state actually has no statutory authority to deal with this and therefore going into court or trying to avail themselves of state remedies would be potentially futile?

Streett: No, for three reasons. First of all, I think the state law is pretty unsettled on that. I think the state has a pretty broad range of authority, not to curtail existing water rights but to address the needs of the habitat in other ways. But the more important reasons are the second

and third reasons. First of all, Mr. Blackburn says "I need a cause of action to go before the TCEQ and make the claim." That is not the way the Texas Administrative Procedure Act works. He can petition for a rulemaking. The statute says that any person may petition for a rulemaking. He could go to the TECQ and say conform your rules and your permitting with the Endangered Species Act which is the supreme law of the land. And then he has standing to file a declaratory action in Travis County State Court. He could intervene in a water permit proceeding. TAP and other groups that are environmental groups frequently are found to have standing to intervene in a water permit proceeding and it doesn't matter whether they have a cause of action with respect to cranes or not. So we think under our federal system the proper case for this case to be heard—the proper place for this case to be heard—is the state agency and the state courts that are familiar with the way the state permitting system works and can address the issues and devise a remedy, if any, that would be sensitive to Texas law.

J. Smith: I thought you told us in your opening argument, I must have misunderstood, that that might have been the case before, but given the stage of the litigation where we are now that we should go ahead and decide the underlying issue rather than abstaining. I must have misunderstood so you better explain that.

Streett: Certainly. We don't think this Court is compelled to choose *Burford* over the other options for reversal because as Your Honor said, the case has now gone to a final judgment. And in fact, I reiterate my answer to your question about our preferred outcome. Our preferred outcome is to hold that the state officials cannot be liable as a matter of law and that TAP failed to prove proximate cause as a matter of law because the chain of causation from permit holder to alleged harm to the cranes is too attenuated to constitute proximate cause. We think *Burford* is another ground for it to go on but it could

equally go on the other ground and in fact we would prefer the other ground. Thank you, Your Honor.

J. Jones: All right, thank you all.