

APPLICATION OF END OP, L.P. FOR § BEFORE THE STATE OFFICE
WELL REGISTRATION, OPERATING § OF
PERMITS AND TRANSFER PERMITS § ADMINISTRATIVE HEARINGS

BETTE BROWN, ANDREW MEYER AND DARWYN HANNA'S AMICUS BRIEF

To: Gregory Ellis, Special Counsel to the Lost Pines GCD Board of Directors, 2104 Midway Court, League City, Texas 77573.

COMES NOW Bette Brown, Andrew Meyer and Darwyn Hanna (collectively, "Amici Curiae") and hereby submit this brief.

I. PROCEDURAL BACKGROUND

By memorandum dated July 21, 2014 and email dated July 22, 2014, Special Counsel to the Lost Pines Groundwater Conservation District Board of Directors has asked the parties to this proceeding to provide a brief addressing certain issues in the SOAH Proposal for Decision. The Amici Curiae file this response to these requests. Here, Amici Curiae only address the issue of the general mitigation fund.

II. ARGUMENT

There is absolutely no legal authority, express or implied, for utilizing a "mitigation fund" in place of preventing unreasonable impacts to existing well owners and users, especially unidentified well owners who were not parties to the hearing. This proposal or implementation of such a fund is fatally defective due to its complete lack of any procedural due process. Having successfully opposed these land-owner protestants from obtaining party status, and the ALJ having found that End-Op's production will cause significant drawdown in the Simsboro

Aquifer, End-Op now seeks to curtail landowner rights of redress by creating a gratuitous, but illusory, mitigation fund.

There are only two means by which a mitigation fund would be proper. First, if this proceeding were a class action proceeding or, second, if the District implemented rulemaking. Neither of these two scenarios are present here.

This was a consolidated case hearing in which the ALJ denied party status to the very people whose interests the ALJ now attempts to ostensibly protect. However, neither the ALJ nor the District, within the context of this contested case, can legally create such a fund and arbitrarily bind those who were denied party status or any other unidentified people.

The principal reason is that there is no party or tribunal which can protect the non-party's interests. In a class action, the interests of the unidentified class members are protected by class counsel who has been expressly approved by the tribunal. Then, any settlement fund would be subjected to judicial scrutiny to determine whether it was adequate to protect the class members. A significant part of that scrutiny is the establishment of a procedure which sets forth the objective criteria for accessing the fund. Again, these procedures would undergo strict judicial scrutiny to assure that due process is afforded. By this, class members who elect to participate in the fund are barred from asserting any other claims. Those who elect not to participate have a right to pursue their own claims in court. The proposed mitigation fund and PFD fail to address any of these due process measures.

The only other means for establishing a binding mitigation fund is for the District to go through the formal rulemaking process pursuant to the Administrative Procedure Texas Register Act ("APTRA") 10 Tex. Gov. Code §2001. By this means, notice must be given with the public having an opportunity to comment and have input on the proposed rule. A substantial part of the

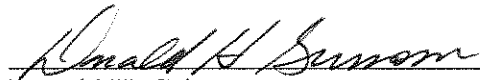
procedure is again to establish objective criteria for accessing the fund and an enforcement or appeal procedure for those who assert claims that are denied.

III. CONCLUSION

The mitigation fund proposed by the ALJ is totally illusory. Any proposal for a special condition to establish a mitigation fund should be denied.

Respectfully Submitted,

GRISSOM & THOMPSON



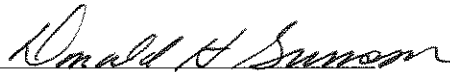
Donald H. Grissom
State Bar No. 08511550
William W. Thompson
State Bar No. 19960050
509 West 12th Street
Austin, Texas 78701
(512) 478-4059
(512) 482-8410 fax

Ernest F. Bogart
State Bar No. 02556500
P.O. Box 690
Elgin , Texas 78621
512-281-3326
Fax 512-281-5094

Attorneys for Brown, Meyer and Hanna

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been either hand delivered, sent by electronic mail to the following service list on this 4 day of August, 2014.


Donald H. Grissom

Eric Allmon
Lowerre, Frederick Preales, Allmon & Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701

David P. Lein
Robin A. Melvin
GRAVES DOUGHERTY HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
Attorneys for the General Manager of the Lost Pines GCD

Gregory M. Ellis
2104 Midway Court
League City, Texas 77573
Special Counsel for the Lost Pines GCD

Michael A. Gershon
Kristen Olson Fancher
c/o Lloyd Gosselink
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5872 fax
Attorneys for Aqua Water Supply

MCGINNIS, LOCHRIDGE & KILGORE, LLP
Russell S. Johnson
600 Congress Avenue, Suite 2600
Austin, Texas 78701

STACEY V. REESE LAW PLLC
Stacey V. Reese
2405 W. 9th Street
Austin, Texas 78703
Attorneys for End Op