

Attention Landowners with Groundwater Interests

Several landowners in Bastrop and Lee counties have been denied the right to be heard in a contested case hearing before the State Office of Administrative Hearings (SOAH). This administrative decision has broad, significant implications throughout Texas for landowners wanting to protect the groundwater *in place* beneath their lands. These landowners petitioned SOAH for party status (legal standing and the right to legally participate) in a disputed groundwater pumping permit hearing involving End Op (a water marketer), Aqua Water Supply Corp., and the Lost Pines Groundwater Conservation District.

The Texas Supreme Court affirmed the ownership of groundwater *in place* as real property in the recently-decided Day decision. This SOAH decision upholds the rule of capture without recourse. Contrary to the Day decision, this decision denies landowners the opportunity to participate in administrative proceedings concerning the depletion of their groundwater, except under the most narrowly defined conditions. The Administrative Order strips landowners of their rights to protect their property; it denies them the right to participate in legal proceedings that will determine the amount of groundwater that water marketers can pump from under their lands, and strips groundwater conservation districts of the ability to hear arguments on behalf of those landowners. The only entity that was given standing was Aqua, a water supply corporation with large well fields and pumping permits.

The Administrative Law Judge (ALJ) ruled that a landowner must “demonstrate ownership of wells or have plans to exercise their groundwater rights,” AND “must establish a specific injury to a personal justiciable interest” to have standing in a contested case hearing before a groundwater conservation district.

This decision is so narrow that one of the landowners seeking standing owns an organic farm and testified that he planned to drill a well, had estimated costs, and had identified a well driller, and yet was denied standing. Another landowner owned two wells that support her domestic and agricultural interests as well as the interests of two other adjacent properties owned by family members. Because she did not present evidence on “the amount of use or depth of the well” and “no expert analysis with regard to the potential impact of [the permit] on [her] operational well”, she was denied standing.

A third landowner, who did not have a well but wanted to protect both groundwater *in place* and streamflow in the Colorado River, was denied standing because the flow of the Colorado River “is an interest shared by the general public”. Though the landowners presented evidence that there was potential harm both to groundwater and the Colorado, the landowner was denied the opportunity to argue the merits of the case, and was denied standing for the lack of “credible evidence”.

“[T]o prevail,” the ALJ ruled, “the Landowners must show a concrete, particularized injury-in-fact that must be more than speculative, and there must be some evidence that would tend to show that the legally protected interests will be affected by the action.” Further, the particularized interest must be “distinct from that sustained by the public at large.” Put simply, landowners must prove that they are actually, presently, particularly, being harmed.

The Texas Supreme Court, in reviewing the history and status of groundwater regulation in Texas affirmed that, under the Texas Constitution, the “responsibility for the regulation of natural resources, including groundwater, rests in the hands of the Legislature.” The Legislature exercised this responsibility by enacting Groundwater Conservation District Act of 1949, permitted landowners to create groundwater conservation districts to regulate production from underground reservoirs, and is the state’s preferred method of groundwater management through rules developed, adopted, and promulgated by a district in accordance with the provisions of Chapter 36 of the Texas Water Code.

Groundwater conservation districts have been given “broad statutory authority,” according to the Day decision, and “their activities remain under the local electorate’s supervision.” As such, the ultimate decision regarding standing, regardless of the ALJ’s order, is the duty and authority of the district. Though the district’s board may look to SOAH, TCEQ, and other regulatory authorities for guidance, and hear arguments from parties, the decision, within the limits of the statute, is theirs alone, and will establish precedent for contested case hearings within that district and for other groundwater conservation districts.

The action of this administrative order, if left to stand, will establish the conditions for party status in contested case hearings held before groundwater conservation districts throughout the state, and will severely limit the ability of landowners to protect their groundwater property rights by severely limiting their ability to argue the merits of their case.

The questions we pose to the Lost Pines Groundwater Conservation District’s Board is this (in layman’s terms): Does the ownership of real property above and within an aquifer (groundwater) where drawdown will potentially occur as the result of a groundwater permit allowing the pumping of tens of thousands of acre-feet of water per year constitute a legally protected, ownership interest that a landowner can defend against those who wish to pump away this property?

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