

December 16, 2013

**Statement of Malcolm Harris, landowner in Hays County, Texas,
to the Lost Pines Groundwater Conservation District.**

Good evening. My name is Malcolm Harris. I am a landowner in Hays County, Texas that relies on groundwater for household needs. I have had the experience of a well going dry due to over-pumping of the aquifer.

I am also a lawyer with long experience in the courtrooms of the State of Texas including the increasingly frequent litigation over water issues. I have followed very closely the developments in Texas water law and have studied carefully the decisions including the Texas Supreme Court decision in the *Day* case and the San Antonio Court of Appeals decision in the *Bragg* case.

I am here to commend the Lost Pines District for your courage and resolution to protect your aquifer from excessive pumping.

I am also here to bring you the message that you should discharge your obligation to protect your aquifer without fear of a "takings" lawsuit and to remind you that in so doing you are, in fact, the State of Texas.

You are the political subdivision of the State of Texas charged with the responsibility of conserving the groundwater natural resource within the Lost Pines area of the State. It is your job to regulate the production of groundwater in order to conserve it so that none of it is unfairly or unreasonably taken or consumed in a way that is unfair to your constituents.

And I would also remind you that your constituents are not just those who rely on groundwater for irrigation, business and household use--- you are also charged with the responsibility to protect aquifer levels, spring flows and the flows of streams and rivers that are absolutely dependent on maintaining aquifer levels. They, too, are part of the natural resources you are charged to protect.

Landowners with springs on their land have a right to keeping the springs flowing. Landowners alongside streams and rivers have a right to see those streams and rivers continue to have a healthy flow.

Support for these propositions may be found in the Constitution of the State of Texas which charges the Legislature with the responsibility to protect and conserve the natural resources of the State, including its groundwater natural resources. And so it is clearly part of your responsibility to protect aquifer levels, spring flows and stream flows.

The same things have been effectively so declared by the Congress of the United States in its enactment of the Endangered Species Act which is the law of the land supreme over Texas Law. And it has been so ruled by multiple Federal judges that have declared that the springs must be kept flowing to protect otherwise endangered species.

(over)

And I would also point out these same propositions have been supported and declared by the Supreme Court of Texas in the decision in the *Day* case. Many choose to cite the *Day* case and the more recent *Bragg* case only for the language about landowner ownership of groundwater, but choose to ignore the equally forceful, perhaps more forceful language of the Texas Supreme Court:

(1) That the State of Texas “unquestionably” and that is the word the Texas Supreme Court used, “unquestionably” has the right and power to regulate groundwater production through its groundwater conservation Districts.

And...

(2) another aspect of the Texas Supreme Court ruling that many choose to ignore---the Supreme Court declared in the *Day* case that Groundwater Conservation District regulation of pumping need not result in liability for a “taking” under the Takings Clause of either the Texas or the U.S. Constitutions. It is only in the extreme case of depriving the landowner of all economically beneficial use of his land or otherwise violating the provisions set forth by the U.S. Supreme Court in the *Penn Central* case, that a conservation district might go too far in excessive regulation.

And, as the *Bragg* case makes clear, it is not deprivation of the value of the water that is being measured, it is the value of the land as a whole that is measured to determine whether or not the regulation is unnecessarily excessive.

I can tell you as a lawyer who has litigated takings cases for the landowner, that the landowner has an extremely tough job to prove a case that would entitle the landowner to recover money damages for excessive regulation. It is only in the rare circumstance and set of facts that a landowner can expect to succeed in a “takings” case.

And I will tell you that in my opinion, you are not dealing with such a case here. It is my understanding that Forestar made its investments with full knowledge of the groundwater regulatory regime that exists in the State to protect groundwater from over-pumping. And any investment Hays County may make in the Forestar plan is made with full knowledge of the limitations on the amount of water Forestar can expect to take from the Lost Pines district.

For these reasons, I don't believe that any “takings” lawsuit by Forestar against the Lost Pines District or the State of Texas has any likelihood of being successful, and that you should discharge your responsibility to protect your groundwater resources without any regard for the possibility or likelihood that Forestar might file such a lawsuit.

I would also state that as a Hays County property owner I think it is unreasonable that my ad valorem property tax monies are being used to finance reservation of Forestar water at the wellhead in another county with no means to deliver it to Hays County and no likelihood that such water will ever be delivered to my area.

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