

CAUSE NO. 398-335

ANDREW MEYER, BETTE BROWN,	§	IN THE
DARWYN HANNA, Individuals, and	§	
ENVIRONMENTAL STEWARDSHIP,	§	
Plaintiffs,	§	
	§	
v.	§	
	§	21st JUDICIAL DISTRICT COURT
LOST PINES GROUNDWATER	§	
CONSERVATION DISTRICT,	§	
Defendant.	§	
	§	
END OP, L.P.	§	
Third-Party Defendant/Counter-Plaintiff	§	OF BASTROP COUNTY, TEXAS

ANDREW MEYER, BETTE BROWN, DARWYN HANNA, AND ENVIRONMENTAL STEWARDSHIP'S PETITION FOR JUDICIAL REVIEW

TO THE HONORABLE JUDGE:

Andrew Meyer, Bette Brown, and Darwyn Hanna, Individuals, and Environmental Stewardship, a non-profit organization, (collectively "Plaintiffs") file this Petition for Judicial Review complaining of decisions of the Lost Pines Groundwater Conservation District ("Lost Pines") and would show as follows:

I. INTRODUCTION

1. Plaintiffs seek an order
 - a. reversing Lost Pines decision denying Plaintiffs party status to a contested case hearing before the State Office of Administrative Hearings ("SOAH"), specifically Docket No. 952-13-5210, and
 - b. reversing the order granting the applications of End Op, LP ("End Op") for well registrations, operating permits and transfer permits to produce water from the Simsboro aquifer on land within Lost Pines district of Bastrop and Lee Counties.

2. In the alternative, Plaintiffs seek a trial in this Court on the application of End Op's application to determine if the application should be denied based on Plaintiffs evidence of impacts and arguments on the violations of Texas law. In other words, as in historic agency decisions that affect constitutionally protected interests or rights, including property rights, those individuals with such protected interests and rights must be afforded the opportunity to protect their rights and interests through trial-type proceedings in court if they are not provided that opportunity in the state agency process.

3. Plaintiffs are landowners situated above the Simsboro aquifer and own the groundwater beneath their land. They oppose the quantities of water approved for production because of

- a. the impacts on their groundwater and their ability to produce, save and conserve groundwater, and
- b. the impacts on flows in the Colorado River.

II. BACKGROUND

4. This petition is the third that Plaintiffs have needed to file to preserve their rights to appeal. After Lost Pines' decision at its meeting of September 10, 2014 to adopt the Administrative Law Judge's Proposal for Decision that included an Order No. 3 recommending denial of party status to Plaintiffs, Plaintiffs timely filed a Motion for Rehearing. When no action was taken on that Motion, Plaintiffs filed their appeal on November 7, 2014.

5. On January 19, 2015, the District issued its order confirming its denial of Plaintiffs' request for party status. In this order, the District adopted the findings of fact and conclusions of law in the ALJ's Order No. 3. On February 20, 2015, Plaintiffs filed their

second judicial appeal to preserve their right to appeal.

6. Once Lost Pines made its decision of September 7, 2016 to issue an order granting, in part, End Op's application, Plaintiffs filed their new motion for rehearing and a request for findings of facts. Because no written order on the September 7, 2016 decision has been issued, Plaintiffs are filing this appeal in an abundance of caution, again to avoid the issue of the proper time to file the appeal on the denial of the hearing request and granting of the application.

7. Thus, this appeal should be consolidated with the prior two appeals, and the issue of Plaintiffs' right to participate in the hearing on End Op's Application should be addressed under the law that existing at the time of that appeal.

8. End Op applied to Lost Pines for permits to drill 14 wells and produce 56,000 acre feet per year of groundwater from the Simsboro aquifer within Lost Pines district located in Bastrop and Lee Counties. Plaintiffs' properties are situated over the Simsboro aquifer and it was determined that a drawdown of the aquifer would occur beneath the properties. After the filing of the Application, Aqua Water Supply Corporation ("Aqua") filed a protest and sought a contested case hearing. Subsequently, Plaintiffs filed requests for party status in the contested case proceeding. On June 19th, 2013, Lost Pines issued an order that, inter alia, granted Aqua's contested case hearing and referred the issue of whether Plaintiffs had standing to participate as parties to SOAH.

9. The SOAH administrative law judge (ALJ) held a preliminary hearing on August 12, 2013, after which the ALJ determined that Plaintiffs had not demonstrated the "required interest" to participate as parties in the contested case hearing. All the evidence presented, however, demonstrated that the wells would impact the aquifer levels beneath.

Plaintiffs' property. This denial was memorialized in the ALJ Order No. 3 and was adopted by Lost Pines on September 10, 2014. On January 19, 2015 Lost Pines issued a written order also reflecting this decision.

10. Now with a final decision on End Op's application, Plaintiffs appeal both the denial of their hearing requests and the approval of End Op's permit to produce groundwater

III. DISCOVERY

11. If discovery is necessary, Level 3, TRCP 190.4, should control it.

IV. JURISDICTION VENUE

12. Jurisdiction is proper in this Court pursuant to Texas Water Code §36.251. Plaintiffs timely filed their Motion for Rehearing (Exhibit "A") in the underlying administrative proceeding. Venue is proper in this Court under Texas Water Code §36.251.

13. Jurisdiction and venue are also proper in this Court pursuant to the Courts original jurisdiction to address decisions of state agencies impairing private property rights or takings of property.

V. PARTIES

14. Bette Brown is a "landowner" as defined by Rule 1.1 of the Lost Pines Rules and Regulations as she owns the possessory rights to the land and the groundwater situated under it. The land and groundwater is within the jurisdiction of Lost Pines.

15. Andrew Meyer is a "landowner" as defined by Rule 1.1 of the Lost Pines Rules and Regulations as he owns the possessory rights to the land and the groundwater situated under it. The land and groundwater is within the jurisdiction of Lost Pines.

16. Darwyn Hanna is a "landowner" as defined by Rule 1.1 of the Lost Pines Rules and Regulations as he owns the possessory rights to the land and the groundwater situated under

it. The land and groundwater is within the jurisdiction of Lost Pines.

17. Environmental Stewardship is a "landowner" as defined by Rule 1.1 of the Lost Pines Rules and Regulations as it owns the possessory rights to the land and the groundwater situated under it. The land and groundwater is within the jurisdiction of Lost Pines.

18. Lost Pines Groundwater Conservation District is a political subdivision of the State of Texas with responsibility to promote water conservation, preservation, protection, and recharge of groundwater and aquifers within Bastrop and Lee Counties and to ensure that groundwater is used efficiently and at sustainable rates. Defendant may be served through its President, Michael Talbot, at 908 N. Loop 230, Smithville, Texas 78957.

VI. LOST PINES ERRED IN DENYING PLAINTIFFS' REQUESTS FOR PARTY STATUS

A. Plaintiffs demonstrated a justiciable interest related to their vested groundwater rights.

19. Lost Pines was required to grant each Plaintiff party status once the plaintiff demonstrated a personal justiciable interest related to a legal right, duty, privilege, power or economic interest within Lost Pine's regulatory authority that would be affected by their decision on the application¹. Plaintiffs demonstrated such an interest.

20. Each plaintiff in this matter owns groundwater in the Simsboro aquifer that will be adversely impacted by the withdrawal of groundwater pursuant to the permits at issue. The proposed pumping will cause the drawdown of groundwater in the Simsboro aquifer beneath Plaintiffs' properties.

21. Plaintiffs' petition for party status was denied based on a legal conclusion that a requester must demonstrate an actual *or intended use* of groundwater owned by a person before the

¹ Without limitation, this is required by Constitutional due process, as well as Tex. Water Code § 36.415, and Lost Pines' District Rules 14.3 and 14.4.

person can validly assert an interest in that groundwater. Plaintiffs' argument that a person's ownership interest in groundwater must itself be protected was rejected.

22. For example, with regard to Environmental Stewardship, Andrew Meyer and Darwyn Hanna, the proposal for decision adopted by Lost Pines stated:

[T]he Landowners in this case cannot demonstrate a particularized injury that is not common to the general public because owning land and the groundwater under the land is not sufficient to show a particularized injury, especially since the Landowners are not using and have not shown that they intend to use groundwater that will be drawn from the Simsboro.²

Lost Pines further stated:

[W]ithout demonstrating ownership of wells or plans to exercise their groundwater rights, the Landowners lack a personal justiciable interest and therefore lack standing to participate in a contested case hearing on End Op's applications.³

23. This reasoning is in error, since it fails to recognize the significance of Plaintiffs' groundwater rights. Ms. Brown's circumstances were distinguishable, since she in fact has two wells on her property. Even so, it was found that Ms. Brown could not show herself to be an affected person without presenting evidence on the actual current use of the Simsboro Aquifer.

24. Additionally, Lost Pines found that the modeled potential for drawdowns of roughly 100 feet to roughly 300 feet did not distinguish Requesters from other landowners in the area,⁴ equating the predicted drawdowns beneath these properties with "system-wide" aquifer drawdowns. This magnitude of the impact does not mean that the resulting injury is any less

² Order No. 3, p. 11.

³ Order No. 3, p. 11.

⁴ On this point, Plaintiffs will note that under *Texas Department of Parks and Wildlife v. Maria Miranda and Ray Miranda*, 133 S.W.3d 217 (Tex. 2004), all evidence on an issue where the merits of a case overlap with a fact relevant to standing, the evidence presented by the person attempting to demonstrate standing must be taken as true absent conclusive proof otherwise. Plaintiffs contend that they have shown by a preponderance of the evidence that a potential exists for the drawdowns they claim to occur. Even so, since the extent of aquifer drawdown in the Simsboro goes to a factor to be considered in this permitting proceeding (namely compliance with the desired future conditions), Plaintiffs' evidence regarding potential drawdowns must be taken as true.

concrete and particularized. Plaintiffs' interest impacted by the permit applications at issue is not an interest common with the general public.

B. The denial of Plaintiffs' petitions for party status was in error.

25. Lost Pines erred in concluding that the ownership of groundwater is not an interest warranting protection in the permitting process. Plaintiffs' ownership of land, with the accompanying vested interest in groundwater, constitutes a legally protected interest within the regulatory framework established by Chapter 36 of the Water Code.

26. It is undisputed that Plaintiffs own real property overlying the Simsboro aquifer from which End Op seeks authorization to pump 56,000 acre-feet per year,⁵ or 18.2 billion gallons per year. It is further undisputed that groundwater modeling performed by Lost Pines itself indicates that this massive amount of pumping will result in a drawdown of water within the Simsboro Aquifer extending to Plaintiffs' properties.⁶ This drawdown of water beneath Plaintiffs' properties constitutes an "injury in fact." Plaintiffs' interest in the groundwater beneath their properties will be concretely impacted by the anticipated drawdowns, and such drawdowns will only occur in the particular area impacted by the proposed groundwater withdrawal.

27. Lost Pines apparently finds that Plaintiffs' groundwater interest is one common to the general public. This ignores the particularized predictions of drawdown within the Simsboro Aquifer that Plaintiffs presented at the preliminary hearing.

28. For these reasons, Lost Pines' decision to deny Plaintiffs' requests for party status was:

- a. in violation of a constitutional or statutory provision;

⁵ End Op Ex. 3, p. 1.

⁶ Exhibit ES-4.

- b. in excess of the agency's statutory authority;
- c. made through unlawful procedure;
- d. affected by other error of law;
- e. not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; and
- f. arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

29. The decision deprived Plaintiffs' of their due process rights under the United States Constitution and due course of law rights under the Texas Constitution, as well as violating District Rules 14.3 and 14.4.

C. The substantial rights of the Plaintiffs have been prejudiced by Lost Pines' denial of Plaintiffs' requests for party status.

30. Plaintiffs were particularly harmed by the denial of party status since no hearing meaningfully occurred on the issues of greatest interest to Plaintiffs.

31. Plaintiffs were denied the opportunity to address disputed issues of concern to Plaintiffs such as the impact of End Op's pumping on Plaintiffs' wells, whether the proposed permits are consistent with Lost Pines' desired future conditions, or whether the proposed permits are consistent with Lost Pines' management plan. Plaintiffs have been denied the opportunity to conduct discovery, present evidence, conduct cross-examination, and present argument regarding the applications and the adverse impacts that the proposed pumping will have on Plaintiffs' interests.

VII. LOST PINES ERRED IN GRANTING END OP'S APPLICATION

32. Plaintiffs oppose the granting of the application filed by End Op to produce water in the Lost Pines groundwater conservation district because of the impacts of pumping at the

levels approved on the groundwater owned by Plaintiffs under their lands, Plaintiffs' increase costs of production of their groundwater under their lands in the future, and the impacts of the production by End Op on flows in the surface water rivers and streams in the Colorado River basin.

A. The authorized production by End Op will reduce Plaintiffs' groundwater.

33. Plaintiffs proved that the production proposed by End Op and approved by Lost Pines will reduce the groundwater levels, and amount of ground water available to Plaintiffs under their property. These impacts on Plaintiffs' private property rights were not properly considered by Lost Pines, and no provisions were included to mitigate or otherwise compensate Plaintiffs for their loss of groundwater and rights to produce their groundwater.

B. The authorized production by End Op will increase the costs for Plaintiffs to produce their groundwater.

34. Plaintiffs also proved that the production proposed by End Op and approved by Lost Pines will increase the costs of well development and pumping groundwater from under Plaintiffs' properties. These impacts were not properly considered by Lost Pines, and no provisions were included to mitigate or otherwise compensate Plaintiffs for their increased costs.

C. The authorized production by End Op will reduce flows in rivers and streams of the Colorado River Basin.

35. Plaintiffs also proved that the production proposed by End Op and approved by Lost Pines will decrease flows of groundwater to surface waters in the district, resulting in negative impacts on flows in the rivers and streams, reduce opportunities for recreational activities by Plaintiffs and others, negative impacts on fish and wildlife, and other such adverse impacts. Those impacts were not properly considered by Lost Pines, and no provisions were included to measure, mitigate or otherwise compensate for the impacts.

D. The authorized production by End Op violates Texas law by exceeding the allowed drawdown of aquifer under Chapter 36, Tex. Water Code and violating the “desired future condition” for the Lost Pines District.

36. Texas law sets limits on production of groundwater to protect the aquifer and assure long-term production from the aquifer. The decision by Lost Pines violates those limits, allowing End Op to produce water that would exceed the amount allowed under Lost Pines’ desired future condition and the available groundwater for production to protect that desired future condition.

VIII. CONCLUSION

37. Plaintiffs are filing this petition out of an abundance of caution. Plaintiffs will file a motion to consolidate this appeal with the prior two appeals. Plaintiffs will also ask that consideration of this suit be abated pending consolidation and completion of all Lost Pines’ proceedings in this matter.

IX. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendant be cited to appear and after trial be awarded judgment for Plaintiffs as follows:

- a. Reverse Lost Pines' decision to deny Plaintiffs' requests for party status;
- b. reverse Lost Pines’ decision to grant End Op’s application;
- c. remand this matter to Lost Pines for proceedings consistent with the Court's decision; and
- d. grant Plaintiffs all other relief to which they may show themselves justly entitled.

In the alternative, Plaintiffs pray for a trial on the merits of the application of End Op followed by;

- a. the reversal of Lost Pines’ decision to grant End Op’s application; or

- b. revision of the Lost Pines' decision to authorize End Op to produce water to assure protection of Plaintiffs' interests and rights and to assure the authorization complies with Texas law; and
- c. the granting of all other relief to which Plaintiffs may show themselves justly entitled.

Respectfully Submitted,

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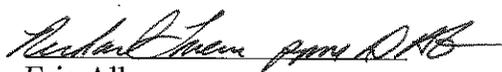
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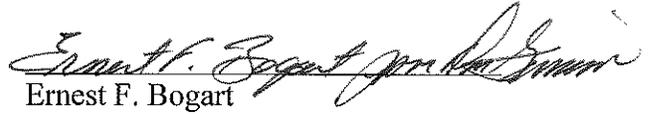
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