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Sarah Loucks, District Clerk
Bastrop County, Texas
By: Sharon Schimank, Deputy

Cause No. 29,696

ANDREW MEYER, BETTE BROWN DARWYN HANNA, Individuals, and ENVIRONMENTAL STEWARDSHIP, Plaintiffs	§	IN THE
	§	21ST JUDICIAL DISTRICT COURT
v.	§	
LOST PINES GROUNDWATER CONSERVATION DISTRICT	§	OF BASTROP COUNTY, TEXAS

LOST PINES GROUNDWATER CONSERVATION DISTRICT'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEFING

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant Lost Pines Groundwater Conservation District ("District") files this Response to Plaintiffs' Supplemental Briefing and would respectfully represent to the Court as follows:

I. Introduction

This is an appeal, not an ordinary civil action. The underlying administrative permit action has already been before the Lost Pines Groundwater Conservation District, on which the legislature conferred jurisdiction. There is only one question before the Court: does the Court have jurisdiction to hear this appeal? The parties agree that the Court can only acquire jurisdiction in one of two ways: (i) from the Texas Water Code, or (ii) under its inherent authority to hear appeals of administrative actions that "adversely affect a vested right in private property."

In that context, two facts bear repeating:

A. This appeal from a permit action does not involve title to real property.

This case presents no issue of title to real property. The question here is not whether Plaintiffs have "title" to any particular property. It is instead whether they have shown that any

vested property right has been *adversely affected* by a decision of the District. If not, and because the relevant statute bars this appeal, this Court has no jurisdiction to hear this appeal.

B. Plaintiffs have already received due process.

There is also no dispute that Plaintiffs have had an opportunity to plead their case. Plaintiffs have had both notice and an opportunity to be heard on no fewer than two occasions. On August 12, 2013, Plaintiffs put on evidence, presented testimony, cross-examined witnesses, and made arguments to an administrative law judge. AR Tab 38. Upon reviewing that evidence and argument, the administrative law judge recommended that their participation in the contested case hearing be denied because they could show no particularized harm any different than the general public. AR Tab 22, attached as Attachment 4. On September 10, 2014, the District's Board of Directors considered Plaintiffs' arguments and evidence in light of the administrative law judge's proposal for decision. AR Tab 36, attached as Attachment 5. The Directors determined that Plaintiffs' participation in the contested case hearing was correctly denied for the reasons set forth by the administrative law judge. Plaintiffs received due process; they are simply dissatisfied with the result.

II. There is no automatic right of appeal.

Under longstanding principles of administrative law, to defeat the District's plea to the jurisdiction, Plaintiffs must show a specific, statutory right of appeal, or that the District's order adversely affects a vested property right. The default rule is that Plaintiffs have no appeal. "It is well recognized under Texas law that there is no right to judicial review of an administrative order unless a statute provides a right or unless the order adversely affects a vested property right or otherwise violates a constitutional right." *Continental Cas. Ins. Co. v. Functional Restoration*

Assoc., 19 S.W. 3d 393, 397 (Tex. 2000); *Traylor v. Diana D.*, 2016 WL 163871 at *5 (Tex. App. – Austin 2016).

Thus, if Plaintiffs cannot show either (i) that the Water Code permits this appeal, or (ii) that their appeal falls under the narrow "inherent authority" exception to the default rule, then the Court must dismiss this appeal.

III. The Water Code expressly bars Plaintiffs' appeal.

The plain language of the Texas Water Code forecloses Plaintiffs' appeal. Texas Water Code section 36.251(b) provides: "Only the district, the applicant, and parties to a contested case hearing may participate in an appeal of a decision on the application that was the subject of that contested case hearing. An appeal of a decision on a permit application must include the applicant as a necessary party." That provision could hardly be more specific or applicable to this case. Plaintiffs affirmatively allege that they were not the applicant and were not parties to the contested case held on End Op's Application. Therefore, Texas Water Code section 36.251 does not waive the District's immunity from their suit; Plaintiffs' appeal is barred.

Alternatively, Plaintiffs contend that they are not appealing from the District's final order on End Op's permit application, but from the District's previous, non-final, interim order denying their participation in the contested case hearing. But the Court also lacks jurisdiction to consider interim orders. *West v. Texas Commission on Environmental Quality*, 260 S.W.3d 256, 263-64 (Tex. App.—Austin 2008, pet. denied). The Court may only hear appeals from final orders – and then it may only hear appeals from final orders over which the legislature provides jurisdiction. Here, the legislature has barred any such appeal.

IV. Plaintiffs lack standing to invoke an "inherent right of appeal".

In the further alternative, Plaintiffs argue that the Court may hear their appeal pursuant to its "inherent constitutional authority" because the District's decision on standing "adversely affects a protected property interest." But as in any other case, Plaintiffs must first show that they have standing to bring such a claim. They cannot.

The District does not disagree that Plaintiffs have some vested right in the groundwater in place beneath their properties. However, that does not entitle Plaintiffs to any particular amount of groundwater, much less to undifferentiated standing to contest every permit application within the District, even where they can show no adverse impact at all. The Austin court of appeals faced a similar question in *Traylor v. Diana D.*, 2016 WL 1639871 (Tex. App. – Austin 2016, pet. denied) (reversing district court's denial of plea to the jurisdiction). In *Traylor*, certain medical service providers attempted to appeal from the state Health and Human Services Commission's reduction of Medicaid reimbursement rates. While medical service providers have a vested property interest in some level of reimbursement – money they expect to receive – just as surface owners have a vested interest in some amount of groundwater, the Austin court of appeals held that "they do not have a due-course-of-law claim or right to seek inherent judicial review because they lack a vested property interest *in a particular level* of Medicaid rates." *Id.* at *6 (emphasis added). Similarly, though Plaintiffs have *some* interest in the groundwater under their properties[1] they have no vested property interest *in any particular groundwater level*.

[1] The evidence presented at Plaintiffs' hearing before the administrative law judge conclusively showed that Plaintiffs either (i) have no wells and no intent to drill a well at all (Darwyn Hanna, Environmental Stewardship); (ii) have no wells and no intent to drill a well in the Simsboro aquifer, where End Ops wells will be completed (Andrew Meyer); or (iii) have only shallow wells, unlikely to be completed in the Simsboro (Bette Brown). *See* evidence summarized in the District's first Reply Brief at 3-5.

This takes Plaintiffs back to where this appeal began: Plaintiffs inability to show any actual or imminent particularized injury different from the general public. Plaintiffs had an opportunity to show an adverse impact on a protected property interest – standing – and could not do so. They share only the common interest with the general public and the District – an interest in protection of the region's groundwater resources – which does not confer standing. *See Stop the Ordinances Please*, 306 S.W.3d at 930 (allegation that city ordinances that discourage tourism would not confer standing on businesses that rented tubes and coolers for use on Guadalupe and Comal Rivers because economic impact would be shared with other residents).

V. The Supreme Court expressly held that the correlative rights doctrine does not apply here.

The Plaintiffs devote an entire brief[2] to a discussion of *Coyote Lake Ranch LLC v. City of Lubbock*, 498 S.W.3d 54 (Tex. 2016) and its application of the *common law* "accommodation" doctrine. This, Plaintiffs argue, somehow means that this Court should apply a different doctrine that does not appear in the common law: "correlative rights."

But the Supreme Court expressly foreclosed this argument: "[C]orrelative rights are a creature of regulation ***rather than the common law***." *Edwards Aquifer Authority v. Day*, 369 S.W.3d at 830 (emphasis added). Here, the Water Code and the District Rules – where the Court must look for "regulation rather than the common law" – require plaintiffs to show an actual or imminent particularized injury in order to participate in a contested case hearing. This Court cannot apply a common law correlative rights doctrine; there is no such thing.

[2] Pltfs.' Supp. Brief Regarding Denial of Party Status

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the District prays that the Plaintiffs' causes of action be dismissed for lack of subject matter jurisdiction or the District's order be affirmed, that the District recover its attorney's fees and costs as allowed by applicable law, including without limitation Texas Water Code section 36.066(g), and that the District have such other and further relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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