

Cause No. 29,696

ANDREW MEYER, BETTE BROWN
DARWYN HANNA, Individuals, and
ENVIRONMENTAL STEWARDSHIP,
Plaintiffs

v.

LOST PINES GROUNDWATER
CONSERVATION DISTRICT

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IN THE

21ST JUDICIAL DISTRICT COURT

OF BASTROP COUNTY, TEXAS

**LOST PINES GROUNDWATER CONSERVATION DISTRICT'S
FIRST AMENDED ANSWER**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant Lost Pines Groundwater Conservation District ("Defendant") files this its First Amended Answer and would respectfully represent to the Court as follows:

**I.
PLEA TO THE JURISDICTION**

Plaintiffs have appealed an interim order issued by the Defendant's Board of Directors in a contested case hearing on the Applications of End Op, L.P. For Well Registration, Operating Permits and Transfer Permits, SOAH Docket No. 952-13-5210, under Texas Water Code section 36.251. Interim orders are not subject to judicial review under Texas Water Code section 36.251. Plaintiff's suit must be dismissed for lack of jurisdiction.

**II.
GENERAL DENIAL**

Reserving its right to plead further and consistently with its rights under Rule 92 of the Texas Rules of Civil Procedure, Defendant enters a general denial of the matters pleaded in Plaintiffs' Petition for Judicial Review and demands strict proof thereof.

**III.
PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Defendant prays that upon final hearing and trial hereof, Plaintiffs take nothing by their action, that Defendant go hence without day and recover its attorney's fees and costs as allowed by applicable law, and that Defendant have such other and further relief to which it may be justly entitled.

Respectfully submitted,

GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, TX 78701
(512) 480-5717
(512) 536-9917 (facsimile)
dlein@gdhm.com

By: /s/ David P. Lein

Robin A. Melvin
State Bar No. 13929590
David P. Lein
State Bar No. 24032537

ATTORNEYS FOR DEFENDANT
LOST PINES GROUNDWATER DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following via facsimile on October 1, 2015:

Donald H. Grissom
William W. Thompson
GRISSOM & THOMPSON
509 West 12th Street
Austin, Texas 78701
512-478-4059
512-482-8410 FAX

Ernest F. Bogart
P.O. Box 690
Elgin, Texas 78621
512-281-3326
512-281-5094 FAX
ATTORNEYS FOR BROWN, MEYER AND HANNA

Eric Allmon
FREDERICK, PERALES, ALLMON & ROCKWELL, P.C.
707 Rio Grande, Suite 200
Austin, Texas 78701
512-469-6000
512-482-9346 FAX
ATTORNEYS FOR ENVIRONMENTAL STEWARDSHIP

Stacey V. Reese
Stacey V. Reese Law PLLC
2405 West 9th Street
Austin, Texas 78703
512-212-1423
512-233-5917 FAX

Russell S. Johnson
McGinnis, Lochridge & Kilgore, L.L.P.
600 Congress Avenue, Suite 2600
Austin, Texas 78701
512-495-6074
512-505-6374 FAX
ATTORNEYS FOR END OP, L.P.

/s/David P. Lein

David P. Lein

Cause No. 29,696

ANDREW MEYER, BETTE BROWN
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LOST PINES GROUNDWATER
CONSERVATION DISTRICT

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IN THE

21ST JUDICIAL DISTRICT COURT

OF BASTROP COUNTY, TEXAS

**LOST PINES GROUNDWATER CONSERVATION DISTRICT'S
PLEA TO THE JURISDICTION AND
RESPONSE TO MOTION TO STAY PROCEEDING**

TO THE HONORABLE JUDGE OF SAID COURT:

This is a statutory appeal of an interim order of the Board of Directors of the Lost Pines Groundwater Conservation District (the "District") denying the Plaintiffs' requests for party status in a contested case hearing on permit applications filed by End Op, L.P. ("End Op"). The Board has not yet made a final decision on the permit applications. Plaintiffs have filed a motion asking this court to intervene in the District's contested case proceeding and enjoin the District from exercising its statutory authority to grant or deny permits. Plaintiffs' lawsuit should be dismissed for lack of jurisdiction because interim orders are not subject to judicial review. In the alternative, Plaintiffs' motion for stay should be denied because administrative bodies are entitled to and should exercise their statutory duties without interference from the courts.

BACKGROUND

In June of 2013, the District Board issued an order referring End Op's permit applications to the State Office of Administrative Hearings ("SOAH") for a contested case hearing. Plaintiffs sought to become parties to that hearing. After a one-day evidence hearing, the SOAH Administrative Law Judge ("ALJ") denied Plaintiffs' requests for party status. Following an

evidentiary hearing on the merits, the ALJ submitted a proposal for decision to the Board. The Board voted, on September 10, 2014, to deny Plaintiffs' request for party status and to remand the case to SOAH for additional evidence on one issue. Following a second evidentiary hearing, the ALJ submitted second proposal for decision to the Board. The Board considered the proposals for decision at meetings on June 24, 2015 and September 9, 2015, but has not made a final decision.

Plaintiffs filed this lawsuit on November 7, 2014. Plaintiff took no action to schedule briefing or a hearing on the merits until June of 2015, when it asked the parties for dates for available dates for a status conference. Plaintiffs filed their Motion to Stay Proceedings on September 16, 2015.

ARGUMENT

I. Plaintiffs' appeal of an interim order should be dismissed for lack of jurisdiction.

Plaintiffs appeal under Texas Water Code section 36.251. At the time Plaintiffs filed suit, Texas Water Code section 36.251 provided: "A person, firm, corporation, or association of persons affected by and dissatisfied with any provision or with any rule or order made by a district is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order."

In *West v. Texas Commission on Environmental Quality*, 260 S.W.3d 256 (Tex. App.—Austin 2008, pet. denied), the Austin Court of Appeals considered the appeal of an interim order under a very similar statute authorizing appeals of decisions of the Texas Commission on Environmental Quality. Texas Water Code section 5.351 provides: "A person affected by a ruling, order, decision, or other act of the commission may file a petition to review, set aside, modify, or suspend the act of the commission."

The appellants in *West* sought judicial review of a Commission order denying their requests for a contested case hearing on the application and an ALJ order remanding the application to the Commission's executive director for decision. The Court held that order were "interim orders not subject to appeal or judicial review." *Id.* at 263-64. These interim order were "subsumed within the Commission's final decision to approve the permit application and subject to judicial review on appeal therefrom. To obtain judicial review of these interim orders, appellants were required to seek judicial review of the Commission's final decision in compliance with section 5.351." *Id.* at 264.

"Concern for efficient administrative procedure requires consideration of the validity of interim orders only upon appeal from final orders." *City of Corpus Christi v. Pub. Util. Comm'n*, 572 S.W.2d 290, 299 (Tex. 1978). If every interim order issued by a groundwater conservation district could be immediately appealed to a court (and a decision on the merits stayed while each appeal was pursued through the appellate courts), it would be very difficult for a district to make a final decision on a permit application in any contested case.

Texas Water Code section 36.251 does not authorize Plaintiff's appeal of an interim order and therefore does not waive the District governmental immunity from Plaintiffs' suit. Plaintiffs' suit should be dismissed for lack of subject matter jurisdiction.

II. Plaintiffs' Motion to Stay Proceeding Should Be Denied.

If the District's plea to the jurisdiction is not granted, then the Court should deny Plaintiff's motion to stay proceedings, because such a stay would interfere with the District's exercise of its statutory authority. The general rule in Texas is that "administrative bodies are entitled to and should exercise the duties and functions conferred by statute without interference from the courts." *Westheimer Indep. Sch. Dist. v. Brockette*, 567 S.W.2d 780, 785 (Tex. 1978).

“[T]here is a vast difference in a court reviewing a final order of an administrative board and in prohibiting such board from making any order or from prosecuting an inquiry to ascertain whether any order will be necessary. That courts are without authority to thus interfere with commissions and administrative departments of the government in the lawful exercise of duties and functions committed to them by law is well settled.” *Tex. State Bd. of Exam'rs in Optometry v. Carp*, 343 S.W.2d 242, 246 (1961), quoting *Turner v. Bennett*, 108 S.W.2d 967, 971 (Tex. Civ. App—Beaumont 1937, no writ).

The District is acting within its authority in making a final decision on End Op's permit applications. The District has the statutory duty to act on these applications. See TEX. WATER CODE § 36.114.

Plaintiffs claim that court interference with the District's statutory duties because Plaintiffs need time to prosecute their suit to completion. But Plaintiffs did not begin to seek a hearing on the merits of their appeal until more than seven months after filing suit. And any stay would need to continue during appeals of the Court's decision on the merits, if Plaintiff wants a final decision on their party status before a final District decision is made, which could lead to years of delay. The equities do not support Plaintiffs' motion.

CONCLUSION AND PRAYER

The District respectfully requests that the Court dismiss this lawsuit for lack of subject matter jurisdiction. In the alternative, the District requests that the Court deny Plaintiffs' motion to stay proceedings.

Respectfully submitted,

GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
(512) 480-5731
(512) 480-5899 (fax)

By: /s/ Robin A. Melvin

David P. Lein

State Bar ID No. 24032537

dlein@gdhm.com

Robin A. Melvin

State Bar ID No. 13929590

rmelvin@gdhm.com

ATTORNEYS FOR LOST PINES GROUNDWATER
CONSERVATION DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following via facsimile on October 1, 2015:

Donald H. Grissom
William W. Thompson
Grissom & Thompson
509 West 12th Street
Austin, Texas 78701
512-478-4059
512-482-8410 FAX

Ernest F. Bogart
P.O. Box 690
Elgin, Texas 78621
512-281-3326
512-281-5094 FAX
ATTORNEYS FOR BROWN, MEYER AND HANNA

Eric Allmon
Frederick, Perales, Allmon & Rockwell, P.C.
707 Rio Grande, Suite 200
Austin, Texas 78701
512-469-6000
512-482-9346 FAX
ATTORNEYS FOR ENVIRONMENTAL STEWARDSHIP

Stacey V. Reese
Stacey V. Reese Law PLLC
2405 West 9th Street
Austin, Texas 78703
512-212-1423
512-233-5917 FAX

Russell S. Johnson
McGinnis, Lochridge & Kilgore, L.L.P.
600 Congress Avenue, Suite 2600
Austin, Texas 78701
512-495-6074
512-505-6374 FAX
ATTORNEYS FOR END OP, L.P.

/s/ Robin A. Melvin
Robin A. Melvin



GRAVES DOUGHERTY HEARON & MOODY

A Professional Corporation

401 Congress Ave., Suite 2200
Austin, TX 78701
512.480.5600
512-480-5717 (Writer's Direct No.)
512-636-9917 (Direct Fax)
dleln@gdhm.com
www.gdhm.com

MAILING ADDRESS:
P.O. Box 98
Austin, TX 78767-9998

FAX TRANSMITTAL

TO: Donald H. Grissom/William W. Thompson FAX #: 512-482-8410
Grissom & Thompson File: A26002.9
Telephone #: 512-478-4059

TO: Ernest F. Bogart FAX #: 512-281-5094
 File: A26002.9
Telephone #: 512-281-3326

TO: Eric Allmon FAX #: 512-482-9346
Frederick, Perales, Allmon & Rockwell, P.C. File: A26002.9
Telephone #: 512-469-6000

TO: Stacy V. Reese FAX#: 512-233-5917
Stacy V. Reese Law PLLC File: A26002.9

TO: Russell S. Johnson FAX#: 512-605-6374
McGinnis Lochridge & Kilgore, L.L.P. File: A26002.9

FROM: David P. Lein

RE: LPGCD/Meyer, et al.; Cause No. 29,696; 21st Judicial Dist.,
Bastrop County, Texas

DATE: 10/1/2015

TIME: _____

TOTAL PAGES
INCLUDING COVER: 10

Notes, comments, special instructions:

Dear Counsel:
Attached are Lost Pines Groundwater Conservation District's First Amended Answer and Lost Pines Groundwater Conservation District's Plea to the Jurisdiction and Response to Motion to Stay Proceeding that were e-filed with the Court today in the above-referenced matter.
Thank you.

PLEASE NOTE

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If there are problems concerning this fax, please contact Nancy Karnes at 512.480.5634.