

NO. _____

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| MESA WATER, L.P. and G&J RANCH, INC., | § | IN THE _____ DISTRICT COURT |
| | § | |
| Plaintiffs, | § | |
| | § | |
| v. | § | IN AND FOR |
| | § | |
| TEXAS WATER DEVELOPMENT BOARD, | § | |
| | § | |
| Defendant. | § | TRAVIS COUNTY, TEXAS |

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME MESA WATER, L.P. and G&J RANCH, INC., Plaintiffs in the above cause, and file this Original Petition against TEXAS WATER DEVELOPMENT BOARD ("TWDB"), and for cause of action against said defendant, show the Court as follows:

PARTIES AND VENUE

1. Plaintiff Mesa Water, L.P. is a limited partnership formed pursuant to and authorized to do business under the laws of the State of Texas. Mesa's address is 8117 Preston Road, Suite 260, Dallas, Texas 75225.

2. Plaintiff G&J Ranch, Inc. is a corporation formed pursuant to and authorized to do business under the laws of the State of Texas. G&J Ranch, Inc.'s address is P.O. Box 608, Canadian, Texas 79014.

3. TWDB is a governmental agency existing by virtue of the laws of the State of Texas. It may be served with process in this action by serving its Executive Administrator, J. Kevin Ward, at its offices at 1700 North Congress Avenue, Austin Texas 78711-3231.

STATEMENT OF FACTS

4. Groundwater Management Area 1 (“GMA 1”) is a Groundwater Management Area (“GMA”) comprised of all of Hemphill County Underground Water Conservation District, all of North Plains Groundwater Conservation District, all of Panhandle Groundwater Conservation District, and a portion of High Plains Underground Water Conservation District No. 1, designated by TWDB pursuant to TEX. WATER CODE § 35.004. Plaintiffs own private real property interests within the geographic boundaries of GMA 1. Plaintiffs’ private real property interests include rights in underground water recognized under the laws of the State of Texas as being subject to ownership, transfer and conveyance, and as such are rights having ascertainable and considerable value.

5. Pursuant to TEX. WATER CODE § 36.1071, a groundwater conservation district is required, in coordination with surface water management entities on a regional basis, to develop a comprehensive management plan that uses the district’s best available data to address in a quantitative manner the desired future conditions (“DFCs”) of the groundwater resources. Pursuant to TEX. WATER CODE § 36.108, if two or more groundwater conservation districts are located within the boundaries of the same management area, the districts are to meet at least annually to conduct “joint planning” with the other districts in the GMA. Not later than September 1, 2010, and every five years thereafter, the districts are to establish DFCs for the relevant aquifers within the management area.

6. Pursuant to TEX. WATER CODE § 36.108(d), groundwater conservation districts may establish different DFCs for (1) each aquifer, subdivision of an aquifer, or geological strata located in whole or in part within the boundaries of the management area; or (2) each “geographic area” overlying an aquifer in whole or in part or subdivision of an aquifer within the

boundaries of the management area. Although the term “political subdivision” is a defined term under TEX. WATER CODE § 36.001(15), that term is not used in TEX. WATER CODE § 36.108(d) as a proper basis for different or multiple DFCs in the same aquifer or subdivision of an aquifer.

7. The groundwater districts within GMA 1 have acted outside the authority of TEX. WATER CODE § 36.108(d) by establishing different DFCs for the Ogallala Aquifer based upon political subdivisions and not on aquifer boundaries. The Defendants adopted the following DFCs in GMA 1 Resolution No. 2009-01:

- a. 40% volume in storage remaining in 50 years in Dallam, Sherman, Hartley and Moore Counties;
- b. 50% volume in storage remaining in 50 years in Hansford, Ochiltree, Lipscomb, Hutchinson, Roberts, Oldham, Potter, Carson, Gray, Wheeler, Randal, Armstrong and Donley Counties; and
- c. 80% volume in storage remaining in 50 years in Hemphill County.

8. The DFCs adopted by the GMA 1 districts are not based on different uses or conditions of the aquifer across GMA 1, but instead exactly follow and are based on the political boundaries of the districts themselves or counties within those districts. The Ogallala Aquifer, by contrast, has only two hydrological subdivisions in GMA 1, specifically the area located north of the Canadian River and the area located south of the Canadian River. The DFCs adopted by the districts of GMA 1 do not adhere to or respect these aquifer subdivisions. Rather, the inconsistent DFCs apply to the same subdivision of the Ogallala Aquifer.

9. TWDB staff has determined that the DFCs adopted by the districts will result in groundwater flowing from peripheral areas of Hemphill County to adjoining counties in amounts up to 18,000 acre/feet per year during the 50 year period over which the DFCs are designed to be

effective. Plaintiffs own groundwater in the areas that will be drained. This fact, coupled with the discriminatory decree that only 20% of the groundwater in Hemphill County will be available over the next 50 years (as opposed to 50% available in all counties adjoining Hemphill), has caused a taking of Plaintiffs' groundwater and a diminution in the present fair market value of Plaintiffs' Hemphill County groundwater rights.

10. One consideration in the adoption of the DFCs at issue was the stated desire of Hemphill County Underground Water Conservation District to preserve stream flows in its district in order to preserve a specific private enterprise ("eco-tourism") and to enhance or preserve the value of real property interests belonging to private individuals other than Plaintiffs for private purposes such as hunting. This goal is accomplished by causing Plaintiffs and others similarly situated to leave virtually all of their groundwater in place for the next half century. Notably, some members of its board of directors have private real property interests the value of which will be preserved or enhanced by the adopted DFCs.

11. The groundwater conservation district members of GMA 1 conducted meetings and "hearings" concerning their adopted DFCs. In none of those meetings or hearings were Plaintiffs afforded an opportunity to take discovery, compel evidence, cross-examine witnesses or object to evidence. Likewise, TWDB conducted a hearing on November 11, 2009 to review the reasonableness of the DFCs. Pursuant to its own administrative rules, the hearing was not a contested case hearing. Plaintiffs were not afforded the fundamental due process rights of taking discovery, compelling evidence, objecting to testimony or cross-examining the various witnesses for the groundwater conservation districts.

**FIRST CAUSE OF ACTION:
REVERSAL OF TWDB ORDER ON REASONABLENESS OF DFCS**

12. Acting pursuant to TEX. WATER CODE § 36.108(1) and TEX. ADMIN. CODE § 356.41 *et seq.*, Plaintiffs filed separate appeals to TWDB following the adoption of DFCS by Hemphill, North Plains, Panhandle and High Plains. Such appeals challenged the DFCS adopted by the districts of GMA 1 as being unreasonable because they adversely impact private property rights of Plaintiffs in Hemphill County, Texas, and because the DFCS are impermissibly based on political subdivisions. Plaintiffs asserted in those appeals that the DFCS adopted by the districts caused the present fair market value of their groundwater rights in Hemphill County to be diminished. Plaintiffs further asserted that the DFCS adopted by the districts will result in physical drainage of their groundwater from Hemphill County into adjacent counties without compensation to them. Plaintiffs asserted that the DFCS were designed to take their private property for a public purpose without compensation in contravention of the constitutions of the United States and the State of Texas, or take their private property for a private purpose in contravention of Section 17, Article 1 of the Constitution of the State of Texas.

13. On February 11, 2010, the staff of TWDB issued its report on the appeals made by Plaintiffs regarding the DFCS of GMA 1. In that report, the TWDB staff erroneously opined that the DFCS adopted by the GMA 1 districts were not unreasonable. The staff report mischaracterized Plaintiffs' positions in the appeals in several critical respects, and failed to follow TWDB's own administrative rules for the resolution of appeals.

14. TWDB is required by TEX. ADMIN. CODE RULE 356.45(c)(5) to consider the impact that DFCS will have on private property rights. Contrary to that duty, TWDB declined to determine the impact of the questioned DFCS on Plaintiffs' private property rights, claiming such determination required legal opinions or conclusions beyond the jurisdiction of TWDB. Further,

TWDB failed to properly interpret and apply the provisions of TEX. WATER CODE § 36.108(d) by failing to determine that DFCs based on political subdivisions were outside the statutory authority of the GMA 1 districts.

15. Pursuant to TEX. ADMIN. CODE RULE 356.45(c), TWDB must base its determination of Plaintiffs' appeals only on evidence in the hearing record, considering only specified criteria when determining whether a DFC is reasonable. TWDB based its ruling, order or decision on factors outside the hearing record, including assumptions about legislative intent for which there was no evidence in the hearing record. TWDB claimed its "hands are tied" by the legislature concerning the political process by which DFCs are determined. TWDB admitted that the DFC process is "fundamentally flawed," but refused to exercise its statutory authority to correct the DFCs at issue, stating that the Legislature would have to remedy the situation. TWDB thus abdicated its executive authority to the legislative branch.

16. On February 17, 2010, TWDB denied Plaintiffs' appeals. Plaintiffs are persons affected by a ruling, order, decision or other act of TWDB and bring this action pursuant to TEX. WATER CODE § 6.241 to review, set aside, modify or suspend the February 17, 2010 ruling, order or decision of TWDB. Such ruling is legally and factually incorrect and should be set aside. This action is filed within 30 days of the ruling, order or decision by which Plaintiffs are affected.

17. Plaintiffs accordingly request that the Court enter a judgment setting aside the ruling, order or decision of the TWDB, and holding that the DFCs established in GMA 1 are not reasonable.

**SECOND CAUSE OF ACTION:
DECLARATORY JUDGMENT**

18. Plaintiffs reassert the allegations in the preceding paragraphs as though fully set forth herein.

19. Plaintiffs seek a declaratory judgment pursuant to TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.* to settle and afford relief from uncertainty and insecurity with respect to their rights, status and other legal relations as involved in the determinations of DFCs by the districts of GMA 1 and as involved in their appeals to TWDB.

20. Plaintiffs are persons whose rights, status or other legal relations are affected by a statute, and are therefore entitled to a determination of questions of construction or validity arising under the statute, and may obtain a declaration of rights, status or other legal relations thereunder pursuant to TEX. CIV. PRAC. & REM. CODE § 37.004.

21. Specifically, Plaintiffs request that the Court enter a declaratory judgment declaring that:

- a. Under Texas law, groundwater conservation districts may not establish DFCs, rules, production limits or other regulatory schemes that discriminate between groundwater rights owners in the same aquifer or subdivision of an aquifer.
- b. TWDB cannot, as a matter of law, approve DFCs that discriminate between groundwater rights owners in the same aquifer or subdivision of an aquifer.
- c. Under TEX. WATER CODE § 36.108(d), political subdivisions are not a proper basis for assigning different DFCs with respect to an aquifer or subdivision of an aquifer.
- d. TWDB cannot, as a matter of law, approve DFCs that are based on political subdivisions rather than aquifers or subdivisions of aquifers.

- e. The DFCs established by the districts of GMA 1 and approved by TWDB result in a taking of Plaintiffs' private property rights for private purposes and are therefore improper under the Texas Constitution.
- f. TWDB cannot, as a matter of law, approve DFCs that result in a taking of private property for private purposes in violation of the Texas Constitution.
- g. The DFCs established by the districts of GMA 1 and approved by TWDB result in a taking of Plaintiffs' private property rights for public purposes without compensation and are therefore improper under the United States and Texas Constitutions.
- h. TWDB cannot, as a matter of law, approve DFCs that result in a taking of private property for public purposes without compensation in violation of the United States and Texas Constitutions.
- i. Under TEX. WATER CODE § 36.108(n), TWDB has the authority to require groundwater conservation districts to revise their adopted desired future conditions in accordance with the recommendations of TWDB.
- j. Under TEX. WATER CODE § 36.108(n), groundwater conservation districts must revise their desired future conditions in accordance with the recommendations of TWDB.
- k. To the extent that the DFC process as outlined in Tex. Water Code § 36.108 and Tex. Admin. Code § 356.44 impacts private property rights without affording procedural due process rights to those affected, such process results in a deprivation of property without due process.

22. Plaintiffs seek attorneys' fees and costs incurred in bringing this action pursuant to TEX. CIV. PRAC. & REM. CODE § 37.009.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendant TWDB be cited to appear and answer herein, and that upon trial of this matter, Plaintiffs be awarded relief as prayed for above, and that Plaintiffs have such other and further relief, both legal and equitable, to which they may show themselves entitled.

Respectfully submitted,

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