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ANDREW S. "DREW" MILLER
ENVIRONMENTAL, ADMINISTRATIVE
& PUBLIC LAW DEPARTMENT
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November 13, 2009

BY HAND DELIVERY

Mr. Kevin J. Ward
Executive Administrator
Texas Water Development Board
1700 N. Congress, Suite 513
Austin, Texas

RE: Petition of G&J Ranch, Inc. to the Texas Water Development Board
Petition of Mesa Water LP to the Texas Water Development Board

Dear Mr. Ward:

Enclosed please find an original and one copy of Motion of Respondent Hemphill County Underground Water Conservation District to Strike (1) Portions of the Affidavit and Video and Live Testimony of Robert D. Harden; and (2) Audio Recording in the above-referenced case.

Please return the file-stamped copy with the person delivering this. Thank you for your assistance on this matter.

Sincerely,

KEMP SMITH LLP

By:

Andrew S. "Drew" Miller



DMIL:lg
Enclosures

cc: Mr. Joe Reynolds - *via hand delivery*

the hearing in this proceeding on November 11, 2009. The affidavit and testimony contain the legal opinions of Mr. Harden and Mr. Harden's opinion on property valuation and socioeconomic issues for which no foundation has been laid and such opinions should be struck and not considered for any purpose by the EA or the TWDB. The audio recording is not authenticated or complete and should be struck and not considered for any purpose by the EA or the TWDB.

II. Portions of the Affidavit and Testimony Containing Improper, Unfounded Opinions Should Be Struck

Mr. Harden has been offered by Petitioners in this proceeding to provide technical opinions to the TWDB in connection with the petitions, and *not* to provide unqualified legal opinions or opinions on property valuation or socioeconomic issues. Notwithstanding, the affidavit and large portions of the testimony of Mr. Harden offered by Petitioners contain unfounded, improper legal opinions and opinions on property valuation or socioeconomic issues in an attempt to convince the EA and TWDB of the validity of the Petitions.

Although the petition proceeding is not adjudicative, the TWDB will be issuing a determination on the reasonableness of the DFCs established for GMA 1. *See* 31 TEX. ADMIN CODE § 356.45. In order to fairly and reasonably provide such a determination, the EA and TWDB should only consider valid expert opinions.

The Texas Rules of Evidence provide a useful guide to the EA and TWDB's consideration of purported expert testimony in these matters. Texas Rules of Evidence 702 provides the basic rule for expert testimony, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." In *E. I. Du Pont De Nemours & Co. v. Robinson*

the Texas Supreme Court established the standards for evaluating expert testimony and held that the party offering an expert's opinion has the burden of establishing that the expert is qualified, that his testimony is relevant to the issues in the case, and that it is based on a reliable foundation. *Robinson*, 923 S.W.2d 557 (Tex. 1995). The Supreme Court has expounded on the *Robinson* holding in later cases, requiring that a party offering expert testimony establish that the individual possesses special knowledge as to the very matter on which the individual's opinions are offered. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718-719 (Tex. 1998). In fact, the Texas Real Estate License Act and the Texas Appraiser Licensing and Certification Act ("TALCA") require that persons appraising real estate hold a state license. TEX. OCC. CODE ANN. §§ *Id.* § 1101.002(1)(A)(v), .004, and .351(a)(1) (Vernon 2004); TEX. OCC. CODE ANN. §§ 1103.003(1), .004, .005 (Vernon Supp. 2009).

There is no basis to qualify Robert D. Harden in this proceeding as an expert on any legal matters or in the valuing of property or on socioeconomic issues. Mr. Harden is a hired technical consultant, trained as an engineer, not as a lawyer or legal expert or property valuation appraiser. Mr. Harden's qualifications are provided in Exhibit 85, pp. 6-9. Any opinion Mr. Harden has as to what the law requires or how to interpret the law or on property values or socioeconomic impacts is objectionable and should not be considered for any purpose by the EA or the TWDB.

The following identified portions of the Affidavit of Robert D. Harden contain objectionable, improper opinions on the value of property and should be struck and not considered for any purpose by the EA or the TWDB:

¶ 7(h): Overall, the DFCs adopted by the GMA-1 have profound consequences . . . as well as property values and landowner rights when compared to traditionally

applied standards of equal treatment for landowners to use the groundwater resources beneath their property.

The following portions of the Testimony of Mr. Harden contain objectionable, improper legal opinions and opinions on the value of property and socioeconomic issues and should be struck and not considered for any purpose by the EA or the TWDB:

P. 16, lines 18-25; Page 21, lines 7-25; Page 22, lines 1, 14-25; Page 23, lines 1-25; Page 24, lines 15-25; Page 25, lines 1-6; Page 67, lines 1-14; Page 71, lines 16-25; Page 72, lines 1-10; Page 73, lines 4-25; Page 74 (all); Page 75, line 1; Page 77, lines 15-25; Page 78, line 1; Page 79, lines 1-25; Pages 80-84 (all); Page 85, lines 1-15, 20-25; Page 86, lines 1-7, 13-15, 20-25; Page 87, lines 1-12; Page 89, lines 1-6; Page 90, lines 18-25; Page 91, lines 1-2, 15-25; Page 92, lines 1-4; Page 94, lines 7-18, 22-25; Page 95, lines 1-19; Page 96, lines 16-25; Page 97, lines 1-6, 12-17; Page 99, line 25; Page 100 (all); Page 101, line 1; Page 102, lines 15-25; Page 103, line 1; Page 107, lines 22-25; Page 108, lines 1-12; Page 109, lines 2-3; Page 112, lines 16-21; Pages 113-125 (all); and Page 126, lines 1-9.

Because the above-cited portions of the Affidavit of Robert D. Harden and the Testimony of Mr. Harden contain unfounded legal opinions and opinions on property valuation and socioeconomic issues, the EA and the TWDB should exclude and not consider them in support of the Petitions.

III. The Unauthenticated, Incomplete Audio Recording Should be Struck

Petitioners have offered as Exhibit 89 in support of their Petitions an audio recording, which they have neither authenticated nor provided in complete form.

Because the EA and the TWDB will be offering their opinion on the reasonableness of the DFCs established for GMA 1 in connection with these Petitions, only reliable evidence should be considered. See 31 TEX. ADMIN CODE § 356.45.

The Texas Rules of Evidence provide a useful guide to the EA and TWDB's regarding their consideration of the audio recording. Texas Rules of Evidence 901 requires that evidence be authenticated as a condition of admissibility to support any findings. Furthermore, to be admissible as evidence, courts require that audio recordings be authenticated by establishing that the person offering the recording: was present when the tape was made, can identify all relevant voices on the recording, and indicates that the recording accurately represents what took place. See e.g., *Fluellen v. State*, 104 S.W.3d 152, 161-62 (Tex. App.—Texarkana 2003, no pet.).

Texas Rules of Evidence 107 provides the Rule of Optional Completeness:

When part of . . . [a] recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any . . . [information] which is necessary to make it fully understood or to explain the same may also be given in evidence.

The audio recording offered as Exhibit 89 in this case contains unidentified voices, in apparent mid-discussion with no context provided, and no witness has provided any authentication for it. Furthermore, there has been no opportunity to inquire as to the rest of the statements made at the time before or after the offered recording.

Because the audio recording is neither properly authenticated nor complete, the EA and the TWDB should exclude and not consider it in support of the Petitions.

WHEREFORE, the Hemphill District requests that the above-cited portions of the Affidavit of Robert D. Harden and the Testimony of Mr. Harden (both submitted and presented live on November 11, 2009) and the audio recording (both submitted and to the extent it was

made a part of the record at the hearing on November 11, 2009) be stricken and not considered in support of the Petitions.

Respectfully submitted,

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By: 

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State Bar No. 24007004

ATTORNEYS FOR RESPONDENT
HEMPHILL COUNTY UNDERGROUND
WATER CONSERVATION DISTRICT

CERTIFICATE OF SERVICE


I hereby certify that on this 13th day of November, 2009, a true and correct copy of the foregoing has been delivered by facsimile to the following persons:

Marvin W. Jones
Facsimile: 806-373-3454
*Attorney for Petitioners Mesa Water and G&J
Ranch*

Keith Good
Facsimile: 806-435-4377
*Attorney for Respondent North Plains
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Gary McLaren
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Andrew S. ("Drew") Miller