

CAUSE #CV 06188

PRESERVE OUR WATER, INC.,
EMILBECKMAN, NEILL BINFORD,
DAVID COLLINS, LYNNE McKIRDY
and JOHN A. WATSON
Plaintiffs,

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IN THE DISTRICT COURT

BLANCO COUNTY, TEXAS

vs.

BLANCO-PEDERNALES
GROUNDWATER CONSERVATION
DISTRICT
Defendant

424th JUDICIAL DISTRICT

COURT'S ORDER ON DEFENDANT'S PLEA TO THE JURISDICTION

The Court held a hearing on the Defendant's Plea to the Jurisdiction on Thursday, April 5, 2007. No testimony was taken at said hearing. The attorneys for the Defendant and for the Plaintiff made oral argument to the court based upon the Motions on file and the Exhibits attached to said Motions. The Court circulated a "proposed order" to the parties via email correspondence on April 24, 2007 and both parties responded via email to the courts proposed order.

THE FACTS

Defendant is a governmental entity authorized by the Texas Water Code Chapter 36 to manage groundwater resources within Blanco County. Plaintiffs are residents of Blanco County who assert they filed written protest in opposition to a water permit and/or they actually appeared at a meeting the Defendant Groundwater District held on March 16, 2006 and

DEBBY ELSBURY
CLERK DISTRICT COURT BLANCO COUNTY, TEXAS

FILED

JUN 27 2007

AT 2:30 O'CLOCK P.M.
BY Dale Sewell
DALE SEWELL, DEPUTY

“contested” the approval of “Well Operating Permit Application” for Rockin J Ranch public water supply. Preserve Our Water Inc., was not formed until May 2006, so it did not submit written opposition to the permit nor did it participate in the March 16, 2006 public hearing.

Defendant argues there was no “**contested hearing**” on March 16, 2006 and the issuance of a permit for the Rocking J approved on that date was done without “***Notice of Protest***”. As such, the Defendant argues the pending lawsuit is barred, asserting it is an attempt to bring an administrative appeal pursuant to Texas Water Code § 36.251. The Defendant asserts governmental immunity and argues the Defendant may only be sued when authorized by statute. The Defendant recognizes Chapter 36 of the Texas Water Code authorizes suit against a groundwater conversation district under certain circumstances, but argues no such circumstances exist in the instant matter.

Plaintiff asserts it is entitled to file suit pursuant to § 36.251 of the Texas Water Code claiming Plaintiffs exhausted their administrative remedies as required by Subchapter M of Chapter 36 of the Texas Water Code. Specifically, § 36.412 (a) of Subchapter M of Chapter 36 of the Texas Water Code requires a party to request findings of fact and conclusions or a request for rehearing before the board, not later than the 20th day after the date of the Board’s decision. Section 36.412(b) of Subchapter M. Requires the board “no later than the 35th day after the date the board received the request for findings or a rehearing” to “make written findings and conclusions” and “to provide certified copies of the findings and conclusions to the person who requested them and to each party who provided comments or each designated party.” The attachments to Plaintiffs’ pleadings provide evidence the Plaintiffs complied with the time limits imposed by Subchapter M of Chapter 36 of the Texas Water Code.

In the Defendant's email response to the Courts "proposed order," the Defendant urges the Court not rule on the issue of whether the administrative remedies have been exhausted. The Court, for judicial economy, has concluded the Court should rule on the issue of "exhaustion of administrative remedies." The evidence before the Court thru the argument of counsel and the pleadings on file prove the "public hearing" was held on March 16, 2006 to consider the well operating permit for the Rockin J Ranch public water supply. In an affidavit of John Watson, attached to the pleading, Mr. Watson asserts he filed a request for "finding of fact and conclusions of law" on March 27, 2006 (well within the 20 days required by law). It is not disputed the Blanco-Pedernales Groundwater Board, thru counsel, notified John Watson on April 27, 2006, the Board would not make "findings of fact and conclusions of law" (and to date, it is not disputed the Board has not made any such finding of fact and conclusions of law). It is not disputed on May 17, 2006, a "Request for Rehearing" was filed by John Watson and this request for rehearing was filed within the 20 day time period allowed by law. It is also not disputed the Board "denied" the request for rehearing on August 15, 2006, the last day of the 90 day time period allowed by law.

The basis for the Plea to the Jurisdiction and Motion to Dismiss filed by the Defendants rest upon their assertion "**no contested hearing**" occurred on March 16, 2006. Pursuant to § 36.412(a), "An **applicant** in a **contested** or **uncontested** hearing on application or a party to a contested hearing may administratively appeal a decision of a board on a permit ..." Under 32.412 (b), " an applicant or a **party** to a **contested hearing** may file a suit against the district under Section 36.251 to appeal a decision on a permit ..." Defendant assert the March 16, 2006 hearing was not a "contested hearing" and argue the Plaintiffs, who are not the "**applicant** for

the permit,” are barred from filing this lawsuit and only have a right to an administrative appeal.

What must be determined is whether the public hearing on March 16, 2006 was a “**contested hearing.**” Texas Water Code § 36.415(b) requires the District to define when an application is contested. The **District established in Rule 8.3.C of the District Rules** when a permit is considered “**contested.**” The Rule reads:

An application, appeal, motion, or proceeding pending before the Board is considered **contested** when either the protestants or intervenors, or both, file the notice of protest as set out “*or*”(emphasis added) appear at the hearing or proceeding and present evidence or testimony in support of their contentions, or present a question of law regarding the application, motion or proceeding. When neither protestants nor intervenors so appear and offer testimony or evidence in support of their contentions, or raise a question of law with reference to any pending application, motion or proceeding, the same shall be considered as **not contested.**

Rule 8.3.A of the District’s rules requires a **notice of protest** to be filed with the District on or before the date of hearing. The **notice is required by rule to include the name and address of the protestant, identify the injury that will result from the proposed permit, explain how the permit will interfere with the rights of the protestant, and explain how the permit could be changed to address the protestant’s concerns.** Attached to Plaintiff’s Response to the Defendant’s Pleas to the Jurisdiction are documents Plaintiffs contend show the hearing held on March 16, 2006 was in fact a contested hearing. Behind Tab “A” and “D” of Plaintiff’s response are affidavits of two of the named plaintiffs in the instant lawsuit. Behind Tab “C” are copies of eleven (11) letters received by the Defendant evidencing objection to the

Rocking J. Ranch water permit to be heard on March 16, 2006 at the public hearing.

Defendant argues the affidavits and letters described above do not comport with Rule 8.3B of the District Rules. Rule 8.3 B requires the protest to be submitted in writing with a duplicate copy for the applicant. The protest is to contain the name and address of the person filing the protest, identify the injury that will result from approval of the permit, explain how the permit will interfere with the rights of the of the protesting party, and explain how the permit could be changed to address the concern of the protesting party. The court has reviewed the affidavits and letters behind Tabs "A", "C", and "D" and is of the opinion **these items do constitute a Notice of Protest**. The items behind these tabs identify the name of the party registering a protest, they identify the injury likely to occur to them, and some of the letters make alternative suggestions as to what type of permit should be approved.

Some of the persons who wrote letters of protest also appeared at the March 16, 2006 hearing. See Tab "E" of Plaintiff's pleadings. **Behind Tab E** are the names of **seventy two (72) people who appeared at the hearing** held on March 16, 2006. ~~The court would also note~~ the Public Notice for this meeting indicates the location for the meeting is being changed "**due to expected high attendance.**" The public notice for said hearing can be found in the last 3 pages of the items in Tab "A" of Plaintiff's pleadings. The court is of the opinion this act by the Ground Water District gives rise to some inference the Ground Water District anticipated "**opposition**" to the permit being considered.

In the Defendants email response of May 10, 2007, to the Courts "proposed order," Counsel for the Defendant argues the court misstates the District's position regarding whether the March 16, 2006 public hearing was contested. **Counsel for the Defendants** assert

there was “**serious opposition**” to the permit but argues “**opposition to a permit, no matter now many people voice it, is not the same as contested hearing under Subchapter M and the District Rules.**” Counsel for the Defendants urge there was no “actual request for a contested hearing” pursuant to the rules and although there was “ a lot of opposition, expressions of concern, and many questions, ” this did not, pursuant to a “**judgment call**’ of the **General Manager**, rise to the level of a “Notice of Protest requesting a contested hearing”.(Quoted items are from the email response of Defendants Counsel dated May 10, 2007)

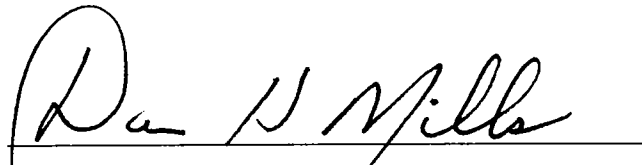
The court notes the Blanco-Pedernales Groundwater District Rules are attached to the pleadings in this matter behind Appendix 2 of Plaintiff’s pleadings. **Rule 8 details the procedures for “Public Hearings.”** Portions of Rule 8 have been discussed earlier in this Order. However, **Rule 8.2 A** describes the **hearing process** and states “**technical rules of legal and court procedure need not be applied.**” The rule further states “**it is the purpose of the Board to obtain all relevant information and testimony pertaining to the issue before it as conveniently, inexpensively, and speedily as possible without prejudicing the rights of either applicants of protestants.**” This language strongly suggest “formality” is not to be utilized in hearing matters. As such. The court is of the opinion **wide latitude** should be given in determining whether the items filed in opposition to a permit should constitute notice of an intent to contest an application **based upon Rule 8.2A.**

The court notes § 36.408 of the Texas Water Code requires the Conservation District to record each hearing in the form of audio, video, or by use of a court reporter. In the instant matter, the parties agree no recording exist for the March 16, 2006 public hearing even though the Board knew this matter had substantial “opposition.” Without a recorded record of

the March 16, 2006 hearing, the court can only rely on the items attached to the pleading to determine whether the March 16, 2007 was in fact a “contested hearing.”

The court after considering the argument of the parties and reviewing the motions filed by the parties is of the opinion the **Defendant’s Plea to the Jurisdiction** should be in all things **DENIED**.

IT IS SO ORDERED THIS THE 27 DAY OF June, 2007.


DAN H. MILLS—424TH DISTRICT JUDGE