TCEQ DOCKET NO. 2025-0373-MIS

PETITION FOR INQUIRY COCKRELL INVESTMENT PARTNERS, L.P., SEEKING REVIEW OF MIDDLE PECOS GROUNDWATER CONSERVATION DISTRICT	§ § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

FORT STOCKTON HOLDINGS, L.P. & CLAYTON WILLIAMS FARMS, INC.'s JOINT RESPONSE IN SUPPORT OF THE MIDDLE PECOS GROUNDWATER CONSERVATION DISTRICT & OPPOSITION TO THE PETITION OF COCKRELL INVESTMENT PARTNERS, L.P.

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, Fort Stockton Holding, L.P., a Texas limited partnership ("FSH"), and Clayton Williams Farms, Inc., a Texas Corporation ("Williams Farms") (collectively "FSH/Williams"), and file this response in support of the Middle Pecos Groundwater Conservation District ("MPGCD" or the "District") and in opposition to the unwarranted Restated Petition filed by Cockrell Investment Partners, L.P. ("Cockrell), and would show the Commissioners as follows:

The Restated Petition filed by Cockrell contending the MPGCD has failed to fulfill its purpose to adopt and implement rules and programs to protect the groundwater resources subject to the District's regulatory jurisdiction is without merit and should be dismissed.

I. INTRODUCTION

Fort Stockton Holdings L.P. ("FSH") and Clayton Williams Farms, Inc. ("Williams Farms"), both own real property rights in Pecos County, Texas subject to the jurisdiction of MPGCD, and they both own or lease, and use and benefit from the groundwater resources subject to MPGCD regulation. The FSH/Williams real property interests are located in the Leon-Belding Area of Pecos County west of the City of Fort Stockton, which is the region within the MPGCD's

Management Zone No. 1 ("MZ1"). Additionally, FSH/Williams are parties to an ongoing cooperative groundwater study with MPGCD that began in 2020. Finally, FSH holds both (i) an Historic and Existing Use Permit issued by MPGCD, which dates back to the beginning of the District, *circa* 2004, and (ii) a regular Production Permit issued by the District. It is FSH's Regular Permit, which authorizes the beneficial use of groundwater for agricultural, domestic, industrial and municipal purposes, which is the focus of Cockrell's attempted collateral attack by its baseless Petition.

Accordingly, both FSH and Williams Farms are "interested persons" entitled to respond to Cockrell's unfounded allegations. FSH and Williams Farms urged the Commission to dismiss Cockrell's original petition for its failure to present any credible evidence. Cockrell, having been called out for failing to follow Commission rules, has filed its Restated Petition, now introducing new improper and inaccurate "evidence" that has no basis in fact, science, or law. FSH and Williams Farms urge the Commission to dismiss this Restated Petition based upon Cockrell's continued failure to present any credible evidence required by 30 TAC § 293.23(b)(1)-(9).

II.
SUMMARY OF ARGUMENT

Cockrell's Petition is the latest flawed effort in a series of more than a half-dozen collateral attacks on FSH's Regular Production Permit. Cockrell's earlier actions include five separate lawsuits against the MPGCD, and four rulemaking petitions.

Of the five lawsuits, the courts have ruled in favor of MPGCD and FSH in the first three, including affirmances of the first two cases appealed to the El Paso Court of Appeals. The third case Cockrell lost in the trial court is pending in the Court of Appeals and has been briefed but abated by the Court pending decisions on the Petitions for Review filed by Cockrell with the

Supreme Court in the first two cases affirmed *against* Cockrell by the El Paso Court of Appeals. The remaining two lawsuits of the five are still pending in the District Court in Pecos County.

With respect to the four rulemaking petitions Cockrell filed with MPGCD, Cockrell filed the first one prematurely, presumably because Cockrell failed to carefully read the statute authorizing landowners to file rulemaking petitions. While the statute became effective September 1, 2023, petitions could not be filed because the statute contemplated MPGCD's adoption of rules to implement the statute, by December 1, 2023, which had not yet taken place when Cockrell filed its first petition. Subsequently, Cockrell filed three more rulemaking petitions.

The District evaluated, provided notice, and conducted hearings on each of the timely filed Petitions. During the hearings the District heard arguments and evidence both in support of and opposition to the Petitions. Following their evaluation of the merits of the Petitions, the Board voted not to approve the Petitions. Thereafter, the Board entered the required findings and statement of rationale for not accepting the Petitions.[1] The District, despite what Cockrell falsely claims, has adopted substantive rules that apply to all permitholders. Cockrell's new claim that the District will see 153% more pumping is not only unsubstantiated in the Restated Petition, ignores that there has been no new water permitted, and has no basis. The majority of the water permitted to date by MPGCD, particularly in Management Zone No. 1, was permitted in the District's early years based upon applications for Historic and Existing Use Permits. This includes the permits granted to Cockrell, and both FSH's Historic and Existing Use Permit and its Regular Permit, which authorizes a volume of production equivalent to the volume of some of FSH's Historic and Existing Use Permits that FSH surrendered by an amendment in 2017. The net total authorized

[1] Details about those Petitions and MPGCD's following its Rules and the applicable statutory mandates are on file and available from the District.

production by permits granted for the area is basically a "net zero sum" – not the 153% increase as Cockrell claims.

Again, Cockrell's claims are disingenuous. The permitted volumes, which control the maximum volumes authorized to be pumped, are undisputedly based largely on Historic and Existing Use Permits MPGCD issued, including to Cockrell. Those permits were granted on the basis of each permittee's demonstrating their historic groundwater production. This included Cockrell's Historic and Existing Use Permits. Accordingly, as much, if not more, than the current permitted volumes for Management Zone No. 1 were pumped historically, and the aquifers are fine. Cockrell's claims are without merit.

Cockrell's motivation to attack the District, mischaracterize the District's actions, and publish false statements similar to the ones published in the "Executive Summary" of Cockrell's Petition to the Commission, are all intended (i) to harass the District for not doing things the Cockrell way, and (ii) to prevent FSH and the Cities of Midland, San Angelo and Abilene from relying upon the FSH Regular Permit to implement a long-term water supply contract that will benefit more than a half-million West Texas residents just so Cockrell can grow pecan trees requiring four to six acre-feet of water per acre per year in the Chihuahuan Desert region of West Texas.

III.
ARGUMENT

Cockrell has presented three claims to the commission with supporting evidence that can be summarized as follows:

1) "[T]he District has failed to adopt rules [that do what Cockrell wants, *i.e.*, limit groundwater *production*, a private property right, in a manner that will guarantee Cockrell that Cockrell always has water]";

2) "[T]he rules adopted by the District will not achieve the Desired Future Conditions ("DFCs") [in the opinion of Cockrell, because the rules are not the ones Cockrell wants the District to adopt.]";

3) "[T]he groundwater management area is not adequately protected by the District's Rules [in the opinion of Cockrell, because the rules are not the ones Cockrell wants the District to adopt]".

In summary, Cockrell's arguments can be classified as "sour grapes."

Cockrell's arguments do not hold water – they have no merit. Cockrell is wasting the resources of the Commission, just as it has wasted the resources of MPGCD and FSH for almost a decade by filing its repeated collateral attacks on the District's issuance of a regular Production Permit to FSH after Cockrell elected not to participate in the contested case hearing process on said Permit.

Cockrell is also being disingenuous with the Commission, much like it has been with the Courts in the five specious lawsuits it has filed.

Here are some examples:

A. Cockrell is not forthright when it tells the story of how MPGCD initially denied FSH's regular permit application in 2011. Specifically, despite having actual and constructive notice of FSH's application for 47,400 acre-feet of groundwater from wells completed in the Edwards-Trinity Aquifer, Cockrell did not avail itself of the opportunity to obtain "Party Status" to participate in the contested case permit hearing. Not only did Cockrell knowingly and consciously waive the opportunity, that decision was announced during a preliminary hearing on the FSH Application by the General Manager of Cockrell's Pecan Operations in the Leon Belding

Area, Mr. Glen Honaker, while he was serving as (i) the President of the Board of Directors of MPGCD, *and* (ii) the presiding Officer of the 2011 contested case hearing on FSH's Application.

B. Cockrell also fails to disclose that (i) FSH's regular Production Permit does not create any greater impact on the Edwards-Trinity Aquifer, and (ii) it actually is more protective of other Parties like Cockrell. Specifically, at the time it applied for its regular Production Permit, FSH had its H&E Permit authorizing production of 47,418 acre-feet per year. In its application for the regular Production Permit, which originally sought 47,418 acre-feet of production, FSH offered to have a special provision in its regular Permit that required FSH forego production under its H&E Permit on a 1 to 1 acre-foot basis for each acre-foot produced under the regular Permit. In the Settlement Agreement negotiated with MPGCD, FSH agreed (i) to reduce its regular Permit to 28,400 acre-feet/year, and (ii) to amend its H&E Permit from 47,418 acre-feet down to 19,018 acre-feet per year. This resulted in a net "zero-impact" to the Edwards Trinity Aquifer demand based upon issued permits.

Additionally, this negotiated step had a significant benefit to other H&E Permittees because regular Permits are subject to curtailment before H&E Permits under the District's Rules. Bottom line, FSH gave up valuable priority rights in the Settlement Agreement.

C. Cockrell claims throughout the Restated Petition that the District will see 153% more pumping, with no explanation or evidence supporting this claim. Cockrell does not provide this explanation or evidence because none exists. As explained above, there has been no new water permitted and there has been zero-impact to the Edwards Trinity Aquifer demand based upon the issued permits. Moreover, the historic pumping in the area has been greater as documented by the Historic and Existing Use Permits issued by the MPGCD.

D. In a similar vein of being less than candid with the Commission, as well as the Courts, Cockrell complains about MPGCD's failure to take steps to protect the aquifers and other pumpers and permittees (*read here "Cockrell Interests"*). Without any documented evidence, Cockrell complains that the special conditions in FSH's regular Production Permit are not stringent enough and react only to a lack of "recharge" in the winter months, without considering reduction of aquifer levels during the summer months. Cockrell's mischaracterizations can be summarized as follows:

(i) FSH's regular Production Permit has the most stringent special conditions ever imposed by MPGCD;

(ii) The "trigger levels" in FSH's Permit are monitored by eleven (11) monitor wells in MZ1 identified in its Permit. Since the Permit was issued the District added other monitor wells;

(iii) The triggers, contrary to Cockrell's argument look at "recovery of the aquifer" *NOT* "recharge;"

(iv) The reason the triggers look at recovery and not recharge, is that you expect the aquifer levels to drop during the summer months both because:

(a) it is the growing season, and all crops require heavy irrigation during this period – West Texas does not get a lot of rain, so agriculture depends on irrigation; and

(b) if the aquifer is healthy, following the conclusion of the growing season in late fall and through the rainy season in the winter months, the aquifer levels will recover.

(v) Cockrell fails to acknowledge the following facts:

(a) MPGCD had established MZ1 over the Leon Belding area years before it reached a settlement with FSH and granted FSH its regular Production Permit;

(b) The Williams Family, currently operating as Williams Farms, has been actively cultivating thousands of acres of land in the Leon Belding area, now subject to MPGCD's MZ1, for over three-quarters of a century;

(c) The region, like the rest of Texas is prone to, has survived multiple severe droughts and, in the case of the Leon Belding Area within MZ1, the aquifer has remained healthy, recovering annually during the winter months following the conclusion of the annual growing seasons;

(d) During the historic drought of the 1950s Clayton Williams, Sr., was named as the lead defendant in what has become one of the cornerstone decisions in Texas' limited groundwater jurisprudence: *Pecos County WCID v. Williams*, 221 S.W.2d 503 (Tex. Civ. App. – El Paso 1954, writ ref'd n.r.e.).[2] The case was filed in 1951 seeking to prevent farmers in the same Leon Belding area from producing groundwater to irrigate their crops because the pumping allegedly interfered with the flow of Comanche Springs in Fort Stockton which supplied surface water controlled by the Pecos County WCID, who in turn allocated it to other farmers for irrigation of their crops. The Court of Appeals decision, which continues to be recognized and cited by Courts today, concluded that Williams and others pumping groundwater had the superior right to do so notwithstanding the impacts on the flows from

[2] A copy of the decision is attached hereto for reference as Appendix "A."

Comanche Springs so long as the groundwater production was (i) not wasted, and (ii) was put to a beneficial use.

Since that Court decision in 1954, the legislature has created the Middle Pecos Groundwater District. Since its creation, the District has required all persons/entities producing groundwater for non-exempt purposes to secure permits. The District has adopted rules consistent with that objective and its mission to protect the aquifer under its regulatory jurisdiction, adopted a Management Plan, created two Management Zones in areas of heavy groundwater production, including MZ1, and established an extensive monitoring well system. The MZ1 has a very robust monitor well system, which is also equipped to be monitored online so that District personnel can view it from the District Offices in daily real time and react, if necessary, to any events of concern.

(e) In its early permitting activities, the District afforded all persons/entities that had historically pumped groundwater to gather supporting records of their historic pumping activities and file them with the District with an application for what became known as an Historic and Existing Use Permit or "H&E Permit." FSH complied with the District's rules and made such an application, as did Cockrell, which is alluded to in Footnote No. 1 (page 3) of its Petition.[3] Contrary to Cockrell's negative characterizations of how the District handled the FSH's original H&E Permit application, the District handled it the same

[3] Based upon information and belief, FSH understands the Cockrell's Manger of its Pecan Operations was a Director, and possibly President, of the MPGCD Board at the time the District evaluated applications for, and issued the Historic and Existing Use Permits Cockrell complains about in Footnote 1 of its Petition.

way it handled every such application it received, including the H&E Permit application it received from Cockrell's Pecan Orchard Operations, the same pecan operations that are the true focus of Cockrell's vendetta evidenced by the pending Petition designed to preclude implementation of FSH's municipal supply contract with Midland, Abilene and San Angelo.

Among the undisputed historical facts that Cockrell does not disclose to the Commission are the following:

Both the regular Production Permit issued to FSH, and the separate amendment to the H&E Permits, were actions taken pursuant to the 2017 Settlement Agreement entered into not just by FSH and MPGCD, but by the multiple parties that participated in the 2011 Contested Case Hearing and the subsequent appeal that resulted in the Settlement Agreement and remand. On remand, the MPGCD and adopted and implemented pursuant to the MPGCD's vote in two separate hearings conducted on remand with the parties to the Contested Case having the opportunity for input on MPGCD's decisions. Because Cockrell had not been, and was not a party to the Contested Case or the Appeal, it was not a party to the hearings on remand, however, Cockrell did have opportunity to participate through the "public comment" process.

The terms of the 2017 Settlement Agreement, and the terms of FSH's regular Production Permit were heavily negotiated and, as ultimately agreed to and implemented, were based upon the available historic pumping and rainfall records, aquifer elevation records, and other factors designed to

protect the Aquifer consistent with the articulated intent of MPGCD to ensure the granting of the regular Production Permit to FSH with terms and conditions that would be conservative, more restrictive than any of the District's existing regulations on groundwater production and curtailment triggers, in order to protect the Aquifers, including the Edwards Trinity Aquifer. The special conditions in the 2017 Settlement Agreement included requirements for monitoring wells and special rulemaking for Management Zone 1 where the FSH wells were located. These conditions were acceptable to the parties to the Contested Hearing and Appellate Litigation, implemented and acted upon by MPGCD and complied with by FSH.

Contrary to Cockrell's suggestion in Footnote No. 1 of its refiled Petition, the District did not accept, and rubber stamp Williams' application as presented. The District's then-General Manager, Mr. Zan Mathis, was both a long-time resident and farmer in the region with first-hand knowledge of the level of agricultural activities, including groundwater production in the region. Mr. Mathis structured the H&E Permit applications, and ultimately recommended the District issue an H&E Permit for 47,418 acre-feet of annual production rights based upon the evidence presented of historic production on the Williams Farms. While a substantial volume, it was less than the volume Williams had made a good faith application for to the District based upon the crops and number of acres cultivated and wells drilled and operated by Williams in its historic and ongoing farming and ranching operations.

> While Cockrell does not discuss the process or scrutiny of the applications by the District for other landowners, including Cockrell's own H&E Permits, the correct presumption is that they too made application for the highest annual production volumes those applicants could substantiate. Additionally, the practice the District, and the various applicants for H&E Permits, including both Cockrell and Williams Farms, followed was similar to the process approved by the Texas Legislature in the creation of the Edwards Aquifer Authority to protect, to the extent practicable, the investment backed expectation of landowners based upon their historic groundwater production as contemplated by Section 36.113(e) and (h), Texas Water Code. *See* EAA Act § 1.16 "Declarations of Historical Use; Initial Regular Permits." The standard set in the EAA Act required that an applicant "establishes by convincing evidence beneficial use of groundwater from the aquifer." (EAA Act § 1.16(d)(2)). Accordingly, contrary to Cockrell's suggestion/speculation in its Footnote No. 1, neither MPGCD nor FSH engaged in any untowardly or inappropriate activity to secure the H&E Permit it was issued for 47,418 acre-feet.

Cockrell's erroneous assertion that MPGCD's only effort to manage groundwater production, and specifically FSH's production, as being through its permit special conditions is another assault on the truth. The special conditions were agreed to by MPGCD and FSH following their analysis of the available historical data related to pumping, rainfall and related factors affecting groundwater in the Leon Belding area. Based upon that analysis, the conclusion was that the trigger levels in the special conditions would be conservative and more likely to limit FSH's production to protect

the aquifer until the completion of a Joint Groundwater Study of the Leon Belding area that MPGCD would lead, and FSH would provide substantial funding to study groundwater production in the heavy agricultural region of the District that was designated as MZ1.

Until, *and only if*, that groundwater study revealed that the special conditions imposed on FSH's production under its Regular Permit were unnecessarily punitive, or if MPGCD adopted other more flexible/less stringent rules applicable to other production in the District, could FSH's special permit conditions be relaxed.

As the Joint Study is ongoing at this time, the strict, restrictive special conditions in FSH's Permit remain in place. This is true despite the fact that Cockrell possessed, and not until after FSH's restrictive regular permit was issued did Cockrell provide the District with data and documentation in Cockrell's files that demonstrated that groundwater production in MZ1 historically (i) was greater than even MPGCD and FSH had conservatively assumed *and* (ii) during periods of heavy historic pumping the levels in the Edwards-Trinity Aquifer in and around MZ1 had been lower than the threshold levels adopted as "triggers" requiring production curtailment of FSH's Regular Permit. In other words, Cockrell's own documentation demonstrates that the aquifer is healthy, and can recover from elevations deeper than those allowed by the thresholds and triggers imposed by MPGCD on FSH – another fact *not* disclosed in the Petition.

In addition to not making full disclosure of these facts to the Commission in its Petition, Cockrell also failed to share the fact that despite the Cockrell data showing the historic recovery of the aquifer, MPGCD has not given FSH any relief from the overly-protective special conditions in its Regular Permit to date. Instead, MPGCD and FSH have continued to pursue the Joint Groundwater Study in good faith, as MPGCD promised its constituents it would when the Joint Study Agreement was executed.

Another point of correction of Cockrell's false declarations is the global complaints of delay and failure to complete the Joint Groundwater Study in the past four years. There are many factors which contribute to the status of the Joint Groundwater Study which reasonably justify where it is today and why, even *assuming arguendo* delay was unwarranted, demonstrate that Cockrell's arguments are unsupported:

(i) Studies of groundwater and aquifer conditions, irrespective of the depth or magnitude of the Study take time. Four years is *not* an unacceptable time period, particularly when the whole story is told – a story Cockrell does not share.

(ii) MPGCD has a small staff and a robust area to manage. The District's territory, which is co-existent with Pecos County, which is the second largest county in Texas, and one of the largest groundwater districts after the EAA.

(iii) Cockrell's continued harassment of the District through its five lawsuits and four rulemaking petitions since 2017, consumes a large portion of the District's manpower and resources.

(iv) In addition to the energy and efforts expended on responding to Cockrell's crusade against MPGCD, FSH and the objective to utilize the Edwards-Trinity Aquifer shown to be a prolific resource over the past 75(+) years, to serve the citizens of Midland, San Angelo and Abilene, and other communities along the way, MPGCD has been engaged in a massive groundwater protection effort to respond to significant pollution/contamination threats from aging and deteriorating injection wells and oil and gas wells. These issues, and the threatened contamination, seismic events (earthquakes) and even collapsing state highways due to subsidence resulting from the groundwater issues MPGCD has been tirelessly fighting to

remedy have been well documented and publicized. In fact, following legislation and funding approved during the 88th Legislative Session in 2023 to address issues within MPGCD's regulatory jurisdiction, and other parts of West Texas, the Commission has been directly involved in crafting rules and protocols to implement the legislative mandates championed by MPGCD. Most recently, on January 29, 2025, the Commission conducted public hearings on the proposed rules.

Recognizing the temporal constraints due to the "capped" 24-hour days and 365-day years, the delays Cockrell whines about in its Petition are not unreasonable. Nor does any amount of delay in completion of the Joint Groundwater Study support the complaints that MPGCD is not listening to, and fully considering Cockrell's concerns.

Cockrell's problem, which it will not own and admit to, is simple – even when its own data contradicts Cockrell's arguments, Cockrell simply refuses to abandon its "my way, or the highway" approach to groundwater management in Pecos County and, in particular, the Leon Belding area designated as MZ1. Cockrell thinks it knows better than MPGCD's Board that has followed the advice of its own expert hydrogeologic consulting team, and in part from other qualified hydrogeologic experts who all disagree with Cockrell's recommendation to deprive landowners of their rights to responsibly produce their privately owned groundwater for application to a beneficial use just so Cockrell never has to worry about running out of groundwater for its desert pecan trees.

IV.
CONCLUSION

Since its creation in 2001, MPGCD has adopted and amended Rules, a Management Plan with timely amendments thereto, and strived to steward the use and production of the aquifers within its jurisdiction. The Permit issued to FSH contains highly restrictive and conservative

special conditions. MPGCD has actively participated in the State and Regional Planning processes and holds the unique distinction of being responsible for development of Desired Future Conditions or "DFCs" in not one, but two West Texas Groundwater Management Areas – GMAs 3 and 7.

The fact that MPGCD will not adopt every rule Cockrell wants, or manage the aquifers as Cockrell dictates it should does not equate to mismanagement, failure to manage, or failure to protect the aquifers, permittees or property rights of landowners within the MPGCD jurisdiction.

The Commission has seen "sour grapes" petitions like Cockrell's in the past. Cockrell has failed to present the information required by statute and Commission Rules for the Commission to take action other than to find Cockrell's Petition to be baseless, and dismiss the same without further action.

Cockrell has failed to sustain its burden. The Commission should dismiss the Petition.

Respectfully submitted,

MCCARTHY & MCCARTHY, L.L.P.

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VERIFICATION

I, Mark Tisdale, in my capacity as Vice President and General Counsel of Clayton Williams Farms, Inc. and Fort Stockton Holdings L.P., hereby certify that I have read the foregoing Response in Support of the Middle Pecos Groundwater Conservation District and Opposition to the Petition of Cockrell Investment Partners, L.P., and that the facts contained herein are within my personal knowledge and are true and correct.

Mark Tisdale,
Vice President & General Counsel of Clayton Williams Farms, Inc. & Fort Stockton Holdings L.P.

STATE OF TEXAS §
§
COUNTY OF MIDLAND §

BEFORE ME, the undersigned Notary Public, on this 7th day of April 2025, personally appeared Mark Tisdale, acting in his capacity as Vice President and General Counsel of Clayton Williams Farms, Inc. and Fort Stockton Holdings L.P., who, after being duly sworn, stated under oath that he has read said Response; and that every factual statement contained in the Petition is within his personal knowledge and is true and correct.

SHEBA ROTAN
Notary Public, State of Texas
Comm. Expires 07-26-2026
Notary ID 11209845

Notary Public, State of Texas

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2025, a true and correct copy of the foregoing Response In Support of the Middle Pecos Groundwater Conservation District, was served on the Persons and Entities identified on the Mailing List attached to the TCEQ's General Counsel's Letter in this Docket No. 2025-0373-MIS, dated March 18, 2025, via e-service at the Commission and e-mail and regular U.S. mail, postage prepaid, to the Mailing List.

/s/ Edmond R. McCarthy, Jr.
Edmond R. McCarthy, Jr.

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TCEQ Docket No. 2025-0017-MIS

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APPENDIX "A"

Pecos County WCID v. Williams, 221 S.W.2d 503 (Tex. Civ. App. – El Paso 1954, writ ref'd n.r.e.)

Pecos County Water Control & Improv. Dist. v. Williams

Court of Civil Appeals of Texas, El Paso

June 21, 1954

No. 5024

Reporter
271 S.W.2d 503 *; 1954 Tex. App. LEXIS 2113 **

Pecos County Water Control and Improvement District No. 1, Appellant, v. Clayton W. Williams et al., Appellees

Subsequent History: Writ of error refused no reversible error

Core Terms

Springs, waters, allegations, percolating water, underground, cases, well defined channel, trial court, appropriation, correlative, injunction, ownership, underground water, well defined, prescription, channel, pumping, rights, dried

Case Summary

Procedural Posture

Plaintiff water district sought review of a decision from the trial court (Texas), which entered a judgment in favor of defendant landowners in the water district's action to enjoin the landowners from interfering with the flow of certain springs and to restrain the landowners from drilling further water wells. The water district also sought a declaration of its right to title to the springs and of its correlative riparian rights.

Overview

The water district brought an action against the landowners to enjoin the landowners from interfering with the flow of certain springs and to restrain the landowners from drilling further water wells. The water district also asked the trial court to declare the water district's right to title to the springs and to declare the water district's correlative riparian rights. The trial court entered a judgment in favor of the landowners. The court affirmed the judgment of the trial court. The court held that: (1) a landowner owned the percolating water under his land and he could make non-wasteful use thereof; (2) there was no authority to grant the water district's plea to have its correlative rights declared; (3) there was no authority in the courts or in the statutes that authorized the water district to extend its appropriation, if any it had, to underground waters; and (4) the bare fact that the water district claimed the source of the springs to be a well-defined underground channel did not make it so.

Outcome

The court affirmed the decision of the trial court, which entered a judgment in favor of the landowners in the water district's action against the landowners for declaratory and injunctive relief.

LexisNexis® Headnotes

Real Property Law > Water Rights > Groundwater

Real Property Law > Water Rights > General Overview

HN1[] **Water Rights, Groundwater**

Case law holds that the landowner owns the percolating water under his land and that he can make a non-wasteful use thereof, and such is based on a concept of property ownership. Tex. Rev. Civ. Stat. Ann. art. 7880-3c recognizes the ownership rights of the landowner in underground water, excepting however the underflow of rivers and defined subterranean streams.

Energy & Utilities Law > Pooling & Unitization > Correlative Rights

Real Property Law > Water Rights > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

HN2[] **Pooling & Unitization, Correlative Rights**

In the field of oil and gas correlative production was created by specific statutory authority, which authority expressly recognizes the ownership of the surface owner and merely regulates the production of said oil and gas and is therefore administrative in nature. There is no similar statute in this field except such as is found in those permitting creation of a water district.

Real Property Law > Water Rights > Groundwater

Real Property Law > Water Rights > General Overview

HN3[] **Water Rights, Groundwater**

The cases holding that the surface owner owns the underground percolating water and may use it at his will in a non-wasteful manner do not authorize but preclude any correlative regulation as far as such percolating water is concerned under the law as it now exists. Surface waters belong to the landowner.

Evidence > Inferences & Presumptions > General Overview

Real Property Law > Water Rights > General Overview

HN4[] **Evidence, Inferences & Presumptions**

All underground waters are presumed to be percolating.

Civil Procedure > Remedies > Injunctions > General Overview

Evidence > Inferences & Presumptions > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN5[] **Remedies, Injunctions**

The petition in an injunction suit must negative every other reasonable hypothesis except the one advanced by plaintiff.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Evidence > Inferences & Presumptions > General Overview

HN6[] **Pleadings, Rule Application & Interpretation**

It is the duty of plaintiff to sustain his own pleading as against a special exception, and this he must do by designating specific allegations of fact to accomplish that result. There are cases holding that only well pleaded facts may be taken as true when passing upon exceptions.

Opinion by: [1]** FRASER

Opinion

[*504] FRASER, Justice.

The plaintiff below is appellant here and the parties will hereinafter be described as they were in the trial court, appellees having been defendants and appellant having been plaintiff.

The controversy arose by virtue of the fact that plaintiff claims and alleges that the properties serviced by it have used and enjoyed the waters of Comanche Springs for some ninety years, and that prior to the institution of this lawsuit about 1951 the defendants, owners of land south and west of said springs, drilled various water wells and began pumping them with mechanical pumps, and that as a result Comanche Springs ceased flowing and plaintiffs were unable to use

the waters therefrom for irrigation, as they had done for many years. The lands of plaintiff are located north and east of the said Comanche Springs. Plaintiff alleges that since the drilling of said wells and the **[*505]** pumping therefrom that the springs have been materially reduced in flow and at times completely dried up.

This suit was brought by plaintiff against the various defendants, asking the trial court to enjoin said defendants from interfering with the normal flow of **[**2]** Comanche Springs, Pecos County, Texas, except for use by the city of Fort Stockton; for a declaration of plaintiff's right and title to the flow of said springs and the sources thereof; and that defendants be restrained from drilling further wells; for the appointment of a test master; and for a declaration of plaintiff's correlative rights and riparian rights to the waters and source of the waters of Comanche Springs.

Plaintiff states that it is entitled by virtue of actual and statutory appropriation to the waters of Comanche Springs and to the sources thereof and to the right to protect said sources. Plaintiff also claims title to said waters by limitation and prescription, and further in the alternative pleads for correlative rights therein. Plaintiff also asserts that the waters produced at Comanche Springs reach the said Springs in well defined channels. Plaintiff bases its lawsuit upon its alleged title by prescription and limitation and appropriation, on its right to its correlative share of the waters of Comanche Springs, and on its right to protect the sources of the waters claimed by it.

Defendants filed a great number of exceptions to plaintiff's fifth amended petition, **[**3]** stating that plaintiff had no cause of action and that its allegations with reference to many items were insufficient and lacking in descriptive content. There were twenty-two paragraphs containing this multitude of exceptions, and the trial court sustained all but paragraph 1, and the plaintiff declining to further amend, the case has reached this court on appeal from the action of the trial judge in sustaining the exceptions.

This case has been exhaustively briefed by both sides, and we will try to dispose of it by taking up the matters as they appear to us in their relative importance.

We deal first with the laws of Texas insofar as they relate to percolating waters. It seems clear to us that percolating or diffused and percolating waters belong to the landowner, and may be used by him at his will. There has been no allegation in this case that the defendants have been wasting any of the water. *Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 66 L.R.A. 738*; *Farb v. Theis, Tex.Civ.App., 250 S.W. 290*; *Texas Company v. Burkett, 117 Tex. 16, 296 S.W. 273, 54 A.L.R. 1397*; *Cantwell v. Zinser et ux., Tex.Civ.App., 208 S.W.2d 577*; *City of Pleasanton v. Lower Nueces River **[**4]** Supply Dist., Tex.Civ.App., 263 S.W.2d 797*, and *Tex.Civ.App., 251 S.W.2d 777*.

HN1[⬆] These cases seem to hold that the landowner owns the percolating water under his land and that he can make a non-wasteful use thereof, and such is based on a concept of property ownership. This rule apparently has been inherited from the English common law rule, which in turn appears to go back to the Roman law. Then too, art. 7880-3c, Vernon's Ann.Civ.St. recognizes the ownership rights of the landowner in underground water, excepting however the underflow of rivers and defined subterranean streams.

With regard to plaintiff's plea in the alternative to have its correlative rights declared we do not find any authority sufficient to authorize the granting of such request. ***HN2***[⬆] In the field of oil and gas correlative production was created by specific statutory authority, which authority expressly recognizes the ownership of the surface owner and merely regulates the production of said oil and gas and is therefore administrative in nature. There is no similar statute in this field except such as is found in those permitting creation of a water district. *Brown v. Humble Oil & Refining Co., 126 Tex. 296, **[**5]** 305, 83 S.W.2d 935, 99 A.L.R. 1107*, reh'g overruled, *87 S.W.2d 1069, 101 A.L.R. 1393*.

HN3[⬆] The cases cited in the paragraph above holding that the surface owner owns the underground percolating water and may use it at his will in a non-wasteful manner do **[*506]** not authorize but preclude any correlative regulation as far as such percolating water is concerned in the situation here presented and under the law as it now exists.

It has also been held that surface waters likewise belong to the landowner. *Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221*.

With reference to plaintiff's claim of appropriation it is clear on the authority of the Texas cases cited above that its appropriation, if any, could extend only to the waters of Comanche Springs at and after their emergence from the ground, and the same is true of riparian rights. We do not find any authority in the courts or the statutes authorizing plaintiff to extend its appropriation, if any it has, to underground waters. There seems to be a different rule in Colorado, and much has been written by the courts and legislatures of other states, but it must be borne in mind that Texas came into the Union claiming ownership **[**6]** of her lands, was not subject to the Desert Land Act, *43 U.S.C.A. § 321 et seq.*, and has no specific statute such as New Mexico, Nevada, Oregon, etc., and the cases cited above hold that such lands, when patented as these have been to the defendants, carry with them as a property right the ownership of percolating underground water. *Motl v. Boyd, 116 Tex. 82, 286 S.W. 458*.

Much has been said and written about plaintiff's claim to the source waters of Comanche Springs by prescription and limitation, but we cannot find authority for either of these claims for the following reasons: Plaintiff is admittedly attempting to assert title by prescription to waters "upper" to them -- in other words, to waters that have not as yet reached them or crossed any lands owned by them. It is therefore difficult to see how they could have asserted any adverse claim or adverse possession to waters before they came into their possession, and to waters beyond the boundaries of their own lands and under lands claimed and used by other parties. We do not see how, with respect to waters, the lower users can be asserting a use hostile to the upper users, and of course such hostile and adverse appropriation **[**7]** or possession is essential to the claim of title by prescription or limitation. *Martin v. Burr, 111 Tex. 57, 228 S.W. 543*; 44 Tex.Jur. 78.

In its second, or reply brief, plaintiff alleges that the waters supplying Comanche Springs flow in well defined channels and urges therefore that the cases cited above relating to percolating water do not apply and do not govern this case. It may well be that a different rule or rules would be and should be applied in the case of a defendant tapping an underground stream flowing in a well defined channel. Such has been true in other states and is suggested in

Cantwell v. Zinser, supra. The lower court held that the allegations of plaintiff with regard to this matter were insufficient and were in effect merely a conclusion of the pleader, because plaintiff did not state sufficient facts to identify the claimed well defined channel, either as to surface indications, probable route, source or destination, but merely states that said waters flow in a well defined channel. We think the trial court was correct in sustaining such exceptions because the bare fact that plaintiff alleges the source of Comanche Springs to be a *well defined* underground **[**8]** channel does not make it so, and it has not sufficiently pled the matter. This is especially true when it seems clear that ***HN4***[⬆] all underground waters are presumed to be percolating. 44 Tex.Jur. 25; *Texas Co. v. Burkett, supra*; *Clinchfield Coal Corp. v. Compton, 148 Va. 437, 139 S.E. 308, 55 A.L.R. 1376*.

We are also confronted with the fact that this case appears on a reasonable construction to be fundamentally an injunction case. We find numerous references in plaintiff's petition speaking about irreparable loss, and suggesting unfortunate results unless the defendants are restrained from interfering with the water supply of Comanche Springs, also describing part of the relief necessary as being a permanent and perpetual injunction. Injunctive relief is expressly prayed for in at least two instances in the prayer of plaintiff's petition. **[*507]** We do not set out these allegations, nor reproduce the prayer, for purposes of brevity, but deem it sufficient to call attention to plaintiff's specific prayer for relief by injunction.

It has been held that ***HN5***[⬆] the petition in an injunction suit must negative every other reasonable hypothesis except the one advanced by plaintiff. *Coleman **[**9]** v. Wright, Tex.Civ.App., 136 S.W.2d 270*.

It is also true that ***HN6***[⬆] it is the duty of the plaintiff to sustain his own pleading as against a special exception, and this he must do by designating specific allegations of fact to accomplish that result. This burden, along with the requirements of petitions asking for injunctions, further serves to convince us that the allegation here is insufficient and merely pleads a conclusion. 8 Tex.Jur. (Sup.) 261; *Harmon v. City of Dallas, Tex.Civ.App., 229 S.W.2d 825*; *Dentler & Sons v. Fuller's Food Products, Tex.Civ.App., 183 S.W.2d 768*; *Martin v. Hunter, Tex.Civ.App., 233 S.W.2d 354*; *Wedgworth v. City of Fort Worth, Tex.Civ.App., 189 S.W.2d 40*; 44 Tex.Jur. 25; 56 Am.Jur. 586.

Also, there are cases holding that only well pleaded facts may be taken as true when passing upon exceptions. *Meyers v. Price, Tex.Civ.App., 247 S.W.2d 574*; *Norsworthy v. Hewgley, Tex.Civ.App., 234 S.W.2d 126*.

Nor do plaintiff's allegations that because the pumping of defendants' wells materially reduced and/or dried up Comanche Springs prove the existence of a well defined underground channel. The Clinchfield case, supra, discusses that fact very thoroughly, and the **[**10]** East case cited above was one where the pumping of the railroad well dried up plaintiff's well, and yet the court found the source of plaintiff's well to be percolating water. In the Cantwell v. Zinser case, supra, defendant's well dried up Spicewood Springs in Travis County, and yet the case was sent back to determine whether the source of the spring water was percolating water or a well defined underground channel. So it seems well decided that the mere fact that the wells of one man dried up springs or the wells of another, neither proves nor indicates a well defined channel of underground water. We do not attempt here to lay down a rule for pleading such a fact, nor do

we necessarily follow at this point the rules suggested in other jurisdictions for describing a well defined underground channel. We merely hold that the trial court was correct in his holding that the allegations in the petition here involved are not sufficient. Nor do we pass, therefore, on the matter of the disposition of the waters of a well defined underground channel or subterranean river.

While the briefs, exhibits and reading material, including the excellent book by Hutchins, have presented a very **[**11]** distinguished and exhaustive exploration of this problem, we have not, for the sake of brevity, felt it proper to quote at length, especially from the decisions of other states. We have as far as possible assumed the allegations of plaintiff's petition to be true. It may be that the answer to this unhappy situation is legislative. Plaintiff has evidenced an intention to seek the overruling of the East case and those following its decision, but that is not a matter before this court. It must be observed that the many cases and statutes cited from Western states, while informative, are not especially persuasive, because many of these states have their applicable statutes speaking on the matter, as well as the further fact that Texas retained ownership of its own lands and was therefore not affected by the Desert Land Act and other Congressional regulations, the absence of any specific statutes really pertinent to the matter here involved, plus the fact that the lands here concerned are not presently included in a statutory water district.

For the reasons set forth above appellant's points are overruled and the decision of the trial court is affirmed.
