

15, 1942 located below Possum Kingdom Reservoir (Suspension Order) complained of in this case. TFB and its members – who are property owners and irrigators – believe the protection of vested property rights in surface water and the health and vitality of our streams and rivers are of critical importance to the State of Texas, and to TFB members.

b. Frank Volleman is a member of the Texas Farm Bureau. He operates a dairy and irrigated farm in Comanche County. Pursuant to Certificate of Adjudication No. 12-3636 (40 acre-feet per year, 1952 priority) and Certificate of Adjudication No. 12-3649 (130 acre-feet per year, 1950 priority), he irrigates and farms approximately 3000 acres of land (only part of which is irrigated by these surface water rights) to produce silage for the dairy. Certificates of Adjudication Nos. 12-3636 and 12-3649 were suspended by the Suspension Order.

c. Frank Destefano is a member of the Texas Farm Bureau. Through the 2008 Destefano Descendant Trust (of which he is beneficiary and trustee) as owner and the 3-D Farms partnership (with three other principals), as operator, he farms a 552 acre farm in Robertson County and irrigates it with Brazos River water pursuant to Certificate of Adjudication No. 12-4371, which authorizes use of 410 acre-feet of water per year with a 1956 priority and 290 acre-feet per year with a 1983 priority. Certificate of Adjudication No. 1204371 is one of the water rights suspended by the Suspension Order.

3. Defendant:

The Texas Commission on Environmental Quality (TCEQ) is the state agency charged with jurisdiction over state surface water rights, including enforcement of water rights. Citation may be served upon TCEQ's Executive Director, Zak Covar, at Building F, 12100 Park 35 Circle, Austin, Texas 78753.

III. JURISDICTION AND VENUE

4. The Court has jurisdiction over this proceeding pursuant to Texas Water Code § 5.351 (Judicial Review of Commission Acts), Government Code § 2001.038 (Declaratory Judgment of Rules) and Civil Practice and Remedies Code § 37.001, *et seq.* (Uniform Declaratory Judgment Act) and § 65.001, *et seq.* (Injunctions). Venue is proper under Texas Water Code § 5.354 and Government Code § 2001.038(b).

IV. NATURE OF THE CASE

5. This is a declaratory judgment action to challenge the validity of rules adopted by TCEQ for Suspension or Adjustment of Water Rights During a Drought or Emergency Water Shortage, 30 Texas Administrative Code §§ 36.1-36.8 (Curtailment Rules) effective May 3, 2012. Plaintiffs believe that TCEQ exceeded its statutory authority in adopting the Curtailment Rules because TCEQ granted itself the authority to modify the prior appropriation doctrine, which is a fundamental part of each surface water right in Texas (and is a vested property right), by exempting certain junior water rights for preferred uses from curtailment or suspension (usually municipal use and power generation), based upon “public health, safety, and welfare concerns.” 30 TEX. ADMIN. CODE § 36.5(c). Plaintiffs submit that the Curtailment Rules exceed the legislature’s authorization found in Texas Water Code § 11.053 for this, and other, reasons.

6. Dow Chemical Company (Dow) made a “priority call” on November 14, 2012, asserting that it could not obtain water to which it was entitled because of diversions by upstream junior water rights. In response to this priority call, under the claimed authority of the Curtailment Rules, TCEQ’s Executive Director on November 19, 2012 entered an order suspending water use under all water rights on the Brazos River located below Possum Kingdom

Reservoir having a priority junior to February 14, 1942 (Suspension Order).¹ However, TCEQ excused all municipal users and power generators from the Suspension Order.

7. TCEQ's Suspension Order is invalid because it is based upon Curtailment Rules that are invalid. For this reason the enforcement of the Suspension Order should be enjoined. Dow Chemical Company would suffer no harm from enjoining the enforcement of the Suspension Order because it has contracts for delivery of over 45,000 acre-feet of water, currently held in upstream reservoirs for delivery to Dow by the Brazos River Authority. This water supply exceeds Dow's current needs and is already bought and paid for. Moreover, beginning in 2013 Dow will have a new authorization for an equivalent amount of stored water deliveries, under those same contracts. Thus, no harm is suffered by Dow from enjoining enforcement of the Suspension Order. On the other hand, farmers with suspended irrigation water rights (over 700 specifically identified by the Suspension Order) are currently in the process of planning crops for 2013 and will be irreparably harmed if the Suspension Order remains in effect and prevents any possibility for crops to be irrigated with surface water. For these reasons, enforcement of the Suspension Order should be enjoined pending final judgment of the Court on this matter.

V. BACKGROUND AND FACTS

8. Priority calls were made on the Brazos River by Dow Chemical Company in 2009 and 2011. In response to both of those calls, TCEQ's Executive Director required junior water rights (prior to 1980 in 2009, and prior to 1960 in 2011) to stop diverting water in order to make water available to Dow. In both cases, TCEQ exempted municipal water users and power

¹ TCEQ Commissioners affirmed and modified the Executive Director's Order on December 5, 2012. The modifications do not impact Plaintiffs' cause of action herein. A copy of the Commission's Order is attached hereto as Exhibit B.

generators from the suspension, even though their rights were junior to other suspended water rights.

9. During Sunset Review of TCEQ by the 82nd Legislature, the Sunset Commission recommended that TCEQ's Executive Director be granted express authority to curtail water rights in response to a priority call. As originally recommended by the Sunset Commission and introduced, that authority would have been broad enough to allow TCEQ to exempt municipal users and power generators from a suspension order. However, as finally adopted, the legislation does not grant TCEQ such authority. To the contrary, Texas Water Code § 11.053, the statute enacted to address this issue, expressly provides:

(a) During a period of drought or other emergency shortage of water, as defined by commission rule, the executive director by order may, *in accordance with the priority of water rights established by Section 11.027:*

(1) Temporarily suspend the right of any person who holds a water right to use the water; and

(2) Temporarily adjust the diversions of water by water right holders.

(Emphasis added). Section 11.027 of the Texas Water Code is the "first in time is first in right" seniority provision of the Texas prior appropriation system. Thus the legislature, rather than authorizing TCEQ to make exceptions for preferred junior uses, required that TCEQ follow the priority system in suspending or curtailing water rights during a drought.

10. In spite of such clear legislative direction, and in spite of multiple comments from water right holders and public officials during its rulemaking process, TCEQ gave itself authority to exempt preferred uses from a suspension or curtailment order in adopting its Curtailment

Rules. 30 TEX. ADMIN. CODE § 36.5(c). TCEQ claimed that its general police power to protect the public health, safety and welfare allowed it to exempt preferred uses from a priority call. 37 Tex. Reg. 3096, 3098-99 (April 27, 2012).

11. Dow Chemical Company made a priority call on November 14, 2012, stating that it was then unable to divert water that was authorized under its water rights due to low flow conditions in the Brazos River. On November 19, 2012, TCEQ's Executive Director entered his Order suspending water rights on the Brazos River (Suspension Order). A true and correct copy of the Suspension Order is attached hereto as Exhibit A. It suspends water rights located below Possum Kingdom Reservoir having a priority date of February 15, 1942 or junior. Appendix A to the Suspension Order identifies 845 water rights as the suspended water rights; 716 of those rights are for irrigation use. Appendix C to the Suspension Order identifies 66 water rights junior to February 15, 1942 for municipal and power use that are expressly not suspended.

12. The number of water rights suspended in each category of use, however, does not tell the whole story. The total authorized annual use under irrigation water rights and others suspended by the Order is **141,090 acre-feet per year**. The total authorized annual use under non-suspended junior municipal and power generation rights is **3,076,056 acre-feet per year**. Not only is agriculture bearing the brunt of making water available for Dow, it is also making water available for municipal and power generation uses that far exceed the amount authorized for irrigation and other suspended uses, while municipal and power uses far in excess of irrigation rights are excused from the priority call by the Suspension Order.

13. The net effect of TCEQ's Curtailment Rules, as exemplified by the Suspension Order, is to cut off irrigation water rights in order to satisfy the needs not only of a senior appropriator, but also of junior municipal users and power generators.

14. The legislature has provided other means to satisfy urgent water needs for public health and safety that override the need to comply with established statutory procedures. Texas Water Code § 11.139 was enacted for precisely that purpose. It allows TCEQ to authorize the transfer of water from water rights for other than municipal or domestic use to meet urgent public health and safety needs. It also requires compensation for the water right holder from whom the water supply is taken. TCEQ's Curtailment Rules amount to a refusal by the agency to follow the means provided by the legislature to address such public health and safety concerns.

VI. CAUSES OF ACTION

15. Declaratory Judgment:

a. Plaintiffs seek the Court's declaratory judgment that the Curtailment Rules are invalid and exceed TCEQ's statutory authority insofar as they allow deviation from the priority system and exemption of water rights for preferred uses from a curtailment or suspension order.

b. Plaintiffs seek the Court's declaratory judgment that the Suspension Order, which is based upon invalid Curtailment Rules, is also invalid.

c. Perfected water rights are vested and constitutionally protected property rights. *Texas Water Rights Comm'n v. Wright*, 267 S.W.2d 641 (Tex. 1971). To the extent that TCEQ's Curtailment Rules may be determined to be valid and allow the suspension of senior water rights for the benefit of preferred use junior water rights, Plaintiffs seek the Court's declaratory judgment that such suspended senior rights have been unconstitutionally taken or impaired without compensation.

d. Plaintiffs seek the Court's declaratory judgment that Texas Water Code § 11.139 is the only mechanism authorized by the legislature to take water from senior water right holders and make it available for junior municipal, domestic, or other public health related uses.

16. Application for Injunctive Relief:

a. Temporary Restraining Order.

i. Plaintiffs Volleman, Destefano and other Texas Farm Bureau members will suffer immediate and irreparable harm if the Suspension Order is not set aside immediately. This is the time of year when farmers are making decisions regarding the crops to be grown next year (including whether the crop will be irrigated or not), taking initial actions to prepare to cultivate the crop, applying for crop insurance (which, again, must specify whether the crop will be irrigated or not), and obtaining financing for the crop. If the Suspension Order, by its terms valid for 180 days, remains in effect during the time that these decisions and arrangements are being made for next year's crop, cultivation of crops irrigated with surface water will not be possible and irrigators will suffer irreparable loss. Specifically, (1) irrigators growing corn need to fertilize the fields in January, and irrigated crops generally require twice the amount of fertilizer as dry land crops; (2) loans are currently being obtained to finance next year's crops; without the ability to irrigate, crop budgets will not support a loan sufficient to produce an irrigated crop; and (3) crop insurance is now being obtained for next year's crops; for irrigators the value of insurance is determined by the "irrigated yield," based upon historic production of irrigated crops; if the crop is not irrigated, and no historic dry land production information is available, much lower "county average" production numbers

are utilized, providing an inadequate level of insurance. These are extremely significant losses because production from irrigated acreage is typically 2-3 times the production for the same crop from dry land farming.

The harm suffered by irrigators cannot be remedied if water becomes available to irrigate later in the year. Only by allowing the irrigator to make his own business decisions, without eliminating all possibility of irrigation under his surface water rights by TCEQ fiat, can this irreparable harm be avoided.

ii. For the reasons set forth above, it is probable that Plaintiffs will prevail upon the merits. The Curtailment Rules' deviation from the priority of water rights that is required by Texas Water Code § 11.027 is not authorized.

iii. No harm will be suffered by TCEQ from its inability to enforce the invalid Curtailment Rules and Suspension Order. No harm will be suffered by Dow. Dow has alternate supplies of stored water available at no additional cost. All Dow needs to do is request that the water be delivered from storage.

iv. Plaintiffs have no adequate remedy at law; money damages are not recoverable from TCEQ.

For these reasons, Plaintiffs request the Court to enter a Temporary Restraining Order preventing TCEQ enforcement of the Suspension Order.

b. Temporary Injunction. Plaintiffs request that the Court set their application for hearing and that, upon hearing, the Court enter its Temporary Injunction restraining TCEQ from taking action to enforce its Curtailment Rules and Suspension Order until Final Judgment in the case. Plaintiffs further request that TCEQ be required to notify all recipients of letters requiring suspension that the Suspension Order is no longer in effect.

c. Permanent Injunction. Plaintiffs request that the Court, following trial on the merits, issue a permanent injunction prohibiting TCEQ from taking any action to enforce the Curtailment Rules or the Suspension Order.

d. Plaintiffs request, pursuant to Rule 684, Texas Rules of Civil Procedure, that the Court fix a minimal or token bond, as the State has no pecuniary interest in the suit and monetary damages are not at issue.

VII. CONDITIONS PRECEDENT

17. All conditions precedent have been performed or have occurred.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendant be cited to appear and answer and, on final trial that Plaintiffs have judgment against Defendant for:

1. Declaratory Judgment that the Curtailment Rules and the Suspension Order are invalid.
2. Alternatively, if the Curtailment Rules and the Suspension Order are determined to be valid, Plaintiffs request that the Court declare that the rights of Plaintiffs Volleman, Destefano and other curtailed water right holders, whose rights are senior to non-curtailed municipal and power generation rights, have been unconstitutionally taken without compensation.
3. Declaratory Judgment that Texas Water Code § 11.139 provides the only procedure available to TCEQ to provide water for public health and welfare needs to junior water right holders during a priority call.

4. Temporary Restraining Order and Temporary Injunction preventing TCEQ from enforcing the Curtailment Rules or the Suspension Order during the pendency of this case.
5. Permanent Injunction, following trial on the merits, preventing TCEQ from enforcing the Curtailment Rules or the Suspension Order.
6. Costs and reasonable and necessary attorneys fees as are equitable and just.
7. Such other and further relief, at law and in equity, to which the Plaintiffs may show themselves entitled.

Respectfully submitted,

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