

District's administrative agency decision determining the Landowners lacked standing to participate as parties in the contested case hearing on End Op's applications for permits to drill wells and produce groundwater. End Op intervenes as a third-party defendant seeking to preserve and protect End Op's investment backed expectation related to its permit applications seeking the right to withdraw groundwater. As a counter-plaintiff, End Op also seeks a declaration that the District correctly decided that the Landowners did not have standing to participate as parties in the contested case hearing held on End Op's applications. As the owner and lessee of substantial groundwater rights and the permit applicant in the underlying administrative contested case hearing that gives rise to the Landowners' appeal, End Op possesses the requisite justiciable interest in the original suit necessary to intervene as a matter of law.

I. DISCOVERY CONTROL PLAN

Pursuant to Rule 190 of the Texas Rules of Civil Procedure, discovery in this case is intended is to be conducted under Level 3. End Op seeks monetary relief of \$100,000.00 or less for attorneys' fees and other nonmonetary relief. Tex. R. Civ. P. 47(c)(2).

II. PARTIES

Intervenor/Third-Party Defendant/Counter-Plaintiff End Op is a Texas limited partnership that owns or leases substantial groundwater rights in Lee and Bastrop Counties and within the District's jurisdiction.

Plaintiff/Third-Party Defendant Meyer is an individual who owns real property within the District's jurisdiction. A copy of this petition will be forwarded to Meyer's attorneys of record, Donald H. Grissom at 509 W 12th St., Austin, Texas, 78701, and Ernest F. Bogart at P.O. Box 690, Elgin, Texas 78621, pursuant to Texas Rules of Civil Procedure 21 and 21a.

Plaintiff/Third-Party Defendant Brown is an individual who owns real property within the District's jurisdiction. A copy of this petition will be forwarded to Brown's attorneys of record, Donald H. Grissom at 509 W 12th St., Austin, Texas, 78701, and Ernest F. Bogart at P.O. Box 690, Elgin, Texas 78621, pursuant to Texas Rules of Civil Procedure 21 and 21a.

Plaintiff/Third-Party Defendant Hanna is an individual who owns real property within the District's jurisdiction. A copy of this petition will be forwarded to Hanna's attorneys of record, Donald H. Grissom at 509 W 12th St., Austin, Texas, 78701, and Ernest F. Bogart at P.O. Box 690, Elgin, Texas 78621, pursuant to Texas Rules of Civil Procedure 21 and 21a.

Plaintiff/Third-Party Defendant ES is a Texas 501(c)(3) nonprofit organization that owns real property within the District's jurisdiction. A copy of this petition will be forwarded to Eric Allmon, attorney of record for ES, at Frederick, Perales, Allmon & Rockwell, P.C., 707 Rio Grande, Suite 200, Austin, Texas, pursuant to Texas Rules of Civil Procedure 21 and 21a.

Defendant Lost Pines Groundwater District has answered and/or made an appearance in this suit.

III. JURISDICTION AND VENUE

Jurisdiction and venue in the original action are proper pursuant to section 36.251 of the Texas Water Code. The jurisdictional allegations in the original suit confer jurisdiction over this petition for intervention since this petition concerns the same subject matter as the original action. Jurisdiction and venue over the petition in intervention are also proper pursuant to sections 37.003 and 15.062 of the Texas Civil Practice and Remedies Code, respectively.

IV. FACTS

A. End Op's Applications have been pending before the District for over seven years.

In July 2007, over seven years ago, End Op filed applications with the District seeking permits to drill and operate fourteen (14) wells to withdraw an aggregate of 56,000 acre-feet per year from the Simsboro member of the Carrizo-Wilcox aquifer ("Simsboro") to be used for municipal purposes in Travis and Williamson Counties (the "Applications").

Before considering End Op's Applications, in December 2009, the District imposed a moratorium on the processing of or action on permit applications that prevented action on End Op's Applications until January 2013.

On March 18, 2013, the District deemed End Op's Applications administratively complete and posted notice that a hearing would be held. Based upon the Applications and all supporting information and under the District's Rules updated to meet the District's planning goals, on March 20, 2013, the District's General Manager recommended that the District grant End Op's Applications under the terms and conditions set out in the draft operating and transfer permits provided and recommended by the General Manager (the "Recommendation").

B. After public comment closed, the Landowners sought party status in the contested case hearing requested by Aqua on End Op's Applications.

On April 10, 2013, Aqua Water Supply Corporation ("Aqua") filed a protest against and requested a contested case hearing on End Op's Applications. On April 18, 2013, the District held a public hearing on End Op's Applications. After completion of the hearing, the District voted to schedule a preliminary hearing on May 15, 2013 to consider Aqua's request for a contested case hearing.

On May 8, 2013, ES filed a request for party status to participate as a party in the contested case hearing requested by Aqua. One day later, on May 9, 2013, Meyer, Brown and

Hanna filed requests for party status and End Op requested that the District contract with the State Office of Administrative Hearings (“SOAH”) to conduct the contested case hearing requested by Aqua.

At the preliminary hearing on May 15, 2013, the District considered Aqua’s request for a contested case hearing and heard arguments regarding the Landowners’ request for party status. The District subsequently issued an order finding that Aqua’s request for a contested case hearing was granted and that although the Landowners’ request for party status was timely, the District referred the fact specific inquiry of whether the Landowners had standing to participate as parties to the administrative law judge (“ALJ”) at SOAH.

C. Upon referral from the District and after a full evidentiary hearing, the ALJ denied the Landowners’ request for party status, certification, and an appeal.

After a full evidentiary hearing on August 12, 2013, the ALJ with SOAH determined that Aqua had established that Aqua had standing as a party under the provisions of chapter 36 of the Texas Water Code to request a contested case hearing and that the Landowners had failed to produce evidence establishing their standing as they did not demonstrate the required interest to participate as parties in the contested case hearing. See Exhibit 1, a true and correct copy of the ALJ’s Order No. 3.

On October 7, 2013, the Landowners filed a request asking the ALJ to certify the question - “Does the ownership of groundwater subject to potential drawdown as the result of groundwater operating permit application constitute a personal justiciable interest in the application?” In the alternative, the Landowners requested the ALJ grant a right to file an interlocutory appeal or a motion to abate. The ALJ denied all of the Landowners’ requests. See Exhibit 2, a true and correct copy of the ALJ’s Order No. 5.

The ALJ held a contested case hearing on Aqua's protest of End Op's Applications on February 11, 2014. On April 10, 2104, the ALJ issued a Proposal for Decision recommending the District denying the Landowners standing and approve End Op's Application with the conditions recommended by the General Manager and other special conditions agreed to by End Op and Aqua. See Exhibit 3, a true and correct copy of the ALJ's Proposal For Decision.

D. By unanimous vote, the District denied Plaintiffs party status and adopted the ALJ's recommendation on standing.

On August 1, 2014, the Landowners filed a motion requesting that the District reject the findings and conclusions recommended by the ALJ and remand the matter to SOAH for another contested case hearing on End Op's Applications with the Plaintiffs as parties.

On August 31, 2014, the District held a final hearing on End Op's Applications. After hearing oral arguments regarding the Landowners' claim that they should be found to have standing and the ALJ's recommendation to grant End Op L.P.'s Applications for operating and a transport permits with certain conditions, the District deferred the decision on both issues and voted unanimously to continue the final hearing to September 10, 2014.

On September 10, 2014, the District voted unanimously to adopt the ALJ's findings, conclusions and recommendation in Order No. 3 and to deny Landowners party status. After taking this action, the District voted to remand the case back to SOAH for further evidentiary fact finding on issues related to beneficial use.

The Landowners filed a motion for rehearing and a request for written findings and conclusions on September 30, 2014. The District has not taken any action on the Landowners' motion or request.

The ALJ held a full evidentiary hearing on the issues remanded on November 7, 2014. The ALJ should issue a proposal for decision on the remand issues upon completion of the briefing in January 2015.

V. STANDARD FOR INTERVENTION

A party with a justiciable interest in a pending suit may intervene in the suit as a matter of right. *In re Union Carbide Corp.*, 273 S.W.3d 152, 154 (Tex. 2008). The essence of “justiciable interest” in this context is that the party would have been entitled to recover in his own name to the extent at least of a part of the relief sought. *In re Union Carbide Corp.*, 273 S.W.3d at 155. The interest asserted by the intervenor may be legal or equitable. *Guaranty Fed. Sav. Bank v. Horseshoe Oper. Co.*, 793 S.W.2d 652, 657 (Tex. 1990).

End Op has the justiciable interest necessary to intervene. End Op owns or leases substantial groundwater rights within the District’s jurisdiction, and was the applicant for the groundwater permits and a party in the contested case hearing in which the Landowners sought to participate. End Op has a substantial interest in preserving and protecting its interests related to its groundwater rights and permit applications.

“[A] person or entity has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof.” *Id.* It is an abuse of a court’s discretion to strike a plea in intervention if (1) the intervenor meets the above test, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenor’s interest. *Id.*

End Op satisfies the above referenced test and elements. If the Landowners had brought the action against End Op, End Op would be able to defeat recovery or some part thereof.

Likewise, if the District had granted the Landowners standing, End Op would have had a statutory right to bring this suit against the District in its own name. End Op's intervention will not complicate the case by an excessive multiplication of the issues and is essential to effectively protect End Op's interests. Judicial economy requires End Op's intervention and participation in this suit to avoid a multiplicity of lengthy lawsuits. It is undisputed that End Op's rights and interests will be affected by the judgment in this case.

VI. ANSWER TO LANDOWNERS' PETITION FOR JUDICIAL REVIEW

End Op denies each and every allegation of the Landowners' Petition for Review, and demands strict proof thereof as required by the Texas Rules of Civil Procedure.

Further, the District's decision should be upheld and the Landowners' request for party status and remand should be denied for the following reasons:

1. Because the District can only change the ALJ's Proposal for Decision in limited circumstances, none of which apply here, the District did not err.
2. Because the Landowners continue to confuse the standing test set out in Section 36.415 as interpreted in *City of Waco* with the rights groundwater ownership confers on an applicant in the permitting process, the Landowners have not established a particularized injury. Ownership of land in the District does not confer standing to a party in a permit application. The party must show, as Aqua did, that they have a specific interest (wells in the aquifer) to meet the standing requirement in § 36.415(b).
3. Because the Landowners' issues were raised at the contested case hearing, the Landowners have not been prejudiced by the District's decision.

A. Because the District can only change the ALJ's Proposal for Decision in limited circumstances, none of which apply here, the District did not err.

The District is only authorized to modify a finding of fact or conclusion of law made by the ALJ, or may vacate or modify an order issued by the ALJ, if the District determines that:

- (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

Tex. Gov't Code § 2001.058(e).

The District must state in writing the specific reason and legal basis for any authorized changes.

The District referred the issue of the Landowners' standing to SOAH "because the determination of standing is a very fact-specific inquiry" and ES agreed that "fact-specific issues were best dealt with by the ALJ at SOAH." The undisputed facts in the record before the ALJ established that the Landowners' do not own or operate wells in the Simsboro member of the Carrizo Wilcox Aquifer or were determinative of whether the Landowners had standing. The ALJ found that the record did not demonstrate that the Landowners had personal justifiable interests necessary to participate as parties in the contested case hearing under § 36.415(b).

The ALJ based his decision on the undisputed facts and the applicable law. There are no District rules, written policies, or prior administrative decisions that the ALJ should have considered and did not, or that he misinterpreted. There is no basis, therefore, for the District to have changed any of the ALJ's findings of fact or conclusions of law regarding the Landowners' party status or modify or vacate the previous orders issued by the ALJ regarding the same.

B. Because the Landowners continue to confuse the standing test set out in Section 36.415 as interpreted in *City of Waco* with the rights groundwater ownership confers on an applicant in the permitting process, the Landowners have not established a particularized injury.

The Landowners continue to confuse the requirements necessary to demonstrate standing and thus participate as a party in a contested case hearing with the rights groundwater ownership

confers in the permitting process. The legal test for whether a person may participate as a party in a contested case hearing is whether the person has a “personal justiciable interest related to a legal right, duty, privilege, power, or economic interest that is within a district’s regulatory authority and affected by a permit or permit amendment application, not including persons who have an interest common to members of the public.” TEX. WATER CODE ANN. § 36.415(b)(2).

In the *City of Waco v. Tex. Comm’n on Env’t. Quality*, 346 S.W.3d 781, 791-92, 802 (Tex. App.—Austin 2011), the appellate court evaluated the reference to a “personal justiciable interest not common to members of the general public” and held that to establish standing under these principles, the protestant had to establish:

- (1) an “injury in fact” from the issuance of the permit as proposed—an invasion of a “legally protected interest” that is (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypothetical”;
- (2) the injury must be “fairly traceable” to the issuance of the permit as proposed, as opposed to the independent actions of third parties or other alternative causes unrelated to the permit; and
- (3) it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision on its complaints regarding the proposed permit (i.e., refusing to grant the permit or imposing additional conditions).

Thus, standing is established when there is a concrete and particularized, actual or imminent injury-in-fact that is traceable and redressable. The *City of Waco* case clearly establishes that groundwater ownership alone does not confer standing. Further, non-use of groundwater is a relevant factor in the standing analysis and the Landowners have cited to no contrary authority.

The District denied the Landowners party status based upon the ALJ’s reasoning in the Proposal for Decision. The ALJ determined that the Landowners could not demonstrate a particularized injury that is not common to the general public because owning land and the

groundwater underneath the land is not sufficient to show a particularized injury not common to the public particularly where, like in the Landowners' case, there was no showing of use or an intent to use groundwater from the Aquifer. Likewise, the ALJ found and the District adopted the recommendation that the Landowners could not demonstrate a personal justiciable interest without demonstrating ownership of wells or plans to exercise their groundwater rights and therefore, lacked standing. The ALJ and the District did not, as the Landowners incorrectly state, conclude that the ownership of groundwater is not an interest warranting protection in the permitting process.

C. Because the Landowners' issues were raised at the contested case hearing, the Landowners have not been prejudiced by the District's decision.

The Landowners' rights have not been prejudiced because a contested case hearing was held on the issues raised by the Landowners and a substantial record was developed on the impact of the production sought in the permit application on aquifer levels and drawdown, the very issues the landowners raise. The record demonstrates that End Op's pumping will not unreasonably affect existing groundwater and surface water users or existing permit holders such that the Landowners who did not have wells or have not provided evidence on impacts associated with their wells cannot be unreasonably affected. The Landowners' interests, therefore, were addressed at the contested case hearing and are now moot.

On the other hand, End Op will be greatly prejudiced if it must repeat the entire contested case hearing process again after having applications pending for seven years and already participated and paid for one full contested case hearing and a remand hearing.

VI. CAUSES OF ACTION

A. Count One - Request For Declaratory Judgment

The foregoing allegations are incorporated by reference as if fully set out herein.

Pursuant to TEX. CIV. PRAC. & REM. CODE §37.001, *et seq.*, End Op, a person whose rights will be affected by the outcome of this original lawsuit, requests a declaratory judgment declaring the rights of the parties under Chapter 36 of the Texas Water Code and the District's Rules including without limitation section 36.415 and Rules 14.3 and 14.4. More specifically, End Op seeks declarations that: (1) the District did not err in denying party status; (2) under Chapter 36 of the Texas Water Code and/or the District's Rules, to establish standing, a person must demonstrate a personal justiciable interest not common to the public that is a concrete and particularized, actual or imminent injury-in-fact that is traceable and redressable; (3) groundwater ownership alone is not enough to establish standing; (4) ownership of wells, plans to exercise groundwater rights, and use/non-use of groundwater are relevant factors when determining standing; (4) the Landowners have not demonstrated a personal justiciable interest not common to the public; and (5) the Landowners have not demonstrated a concrete and particularized, actual or imminent injury-in-fact that is traceable and redressable.

Pursuant to TEX. CIV. PRAC. & REM. CODE §37.009, End Op is entitled to recover an award of costs and reasonable and necessary attorneys' fees as are equitable and just.

REQUEST FOR RELIEF

End Op respectfully requests that the Court:

1. deny the Landowners' request for party status and remand;
2. uphold the District's decision denying the Landowners' request for party status;
3. grant End Op declaratory relief declaring:
 - (i) the District did not err in denying party status;

- (ii) under Chapter 36 of the Texas Water Code and/or the District's Rules, to establish standing, a person must demonstrate a personal justiciable interest not common to the public that is a concrete and particularized, actual or imminent injury-in-fact that is traceable and redressable;
 - (iii) groundwater ownership alone is not enough to establish standing;
 - (iv) ownership of wells, plans to exercise groundwater rights, and use/non-use of groundwater are relevant factors when determining standing;
 - (v) the Landowners have not demonstrated a personal justiciable interest not common to the public; and
 - (vi) the Landowners have not demonstrated a concrete and particularized, actual or imminent injury-in-fact that is traceable and redressable.
4. award End Op its costs and attorneys' fees; and
 5. award End Op all other relief to which it is justly entitled.

Respectfully Submitted,

/s/ Stacey V. Reese
STACEY V. REESE
Bar No. 24056188
STACEY V. REESE LAW PLLC
2405 W 9th Street
Austin, Texas 78703
E-mail: Stacey@reeselawpractice.com
Telephone: (512) 212 -1423
Facsimile: (512) 233 - 5917

MCGINNIS, LOCHRIDGE & KILGORE, L.L.P.
Russell S. Johnson, State Bar No. 10790550
rjohnson@mcginnislaw.com
600 Congress Avenue, Suite 2600
Austin TX 78701
(512) 495-6074
(512) 505-6374 FAX
ATTORNEYS FOR END OP L.P.

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2014, a true and correct copy of the foregoing was served on all counsel of record via e-mail and facsimile:

Ms. David P. Lein
Ms. Robin A. Melvin
GRAVES DOUGHERTY HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
Telephone: (512) 480-5717
Fax: 512-536-9917
E-mail: dlein@gdhm.com
 rmelvin@gdhm.com

Eric Allmon
Lowerre, Frederick, Perales, Allmon & Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701
Fax: (512) 482-9346
E-Mail: eallmon@lf-lawfirm.com

Donald H. Grissom
Grissom & Thompson LLC
509 W. 12th Street
Austin, Texas 78701
Fax: (512) 482-8410
E-Mail: don@gandtlaw.com

Ernest F. Bogart
Owen & Bogart
105 E. 2nd Street
P.O. Box 690
Elgin, Texas 78621
Fax: (512) 281-5094
E-Mail: ebogart@obrllaw.net

/s/ Stacey V. Reese
STACEY V. REESE