Cause No. 29,696

ANDREW MEYER, BETTE BROWN DARWYN HANNA, Individuals, and ENVIRONMENTAL STEWARDSHIP, Plaintiffs	§	IN THE
v.	§	21ST JUDICIAL DISTRICT COURT
LOST PINES GROUNDWATER CONSERVATION DISTRICT, Defendant,	§	OF BASTROP COUNTY, TEXAS
END OP, LP, Intervenor.	§	

LOST PINES GROUNDWATER CONSERVATION DISTRICT'S
REPLY BRIEF

This lawsuit is a Texas Water Code section 36.251 appeal from an interim order of the Lost Pines Groundwater Conservation District (the "District") denying plaintiffs party status in a contested case hearing on permit applications filed by End Op, L.P. ("End Op"). The court lacks subject matter jurisdiction over this suit because section 36.251 does not authorize appeals from interim orders. The District has not yet issued a final order on End Op's applications.

But, if the court were to conclude that it has jurisdiction, the Board's decision to deny the plaintiffs' request for party status should be upheld under the applicable standard of review – the substantial evidence rule. To demonstrate standing to participate as parties, plaintiffs had to first identify a legal interest within the District's regulatory power, which they did – ownership of groundwater rights. But a property interest in groundwater rights alone is not sufficient to confer standing. Plaintiffs were also required to prove a particularized injury to this interest, one that is actual or imminent and not common to the general public. Plaintiffs' evidence that End Op's pumping would lower District-wide water levels in 2050 in an aquifer formation in which plaintiffs do not have any wells is not evidence of any particularized injury to their rights.

STATEMENT OF FACTS

End Op's applications for Operating and Transport Permits. In March 2013, the District General Manager issued a notice setting a public hearing on 14 applications for Operating Permits and Transport Permits filed by End Op. Those applications sought authorization to withdraw an aggregate of 56,000 acre-feet per year from 14 wells located in Bastrop and Lee Counties to be used for drinking water supply purposes in Travis and Williamson Counties. AR Tab 48.[1]

The District regulates pumping from a number of groundwater aquifer units within Bastrop and Lee Counties. From shallowest to deepest, the productive aquifer units are: the Sparta, Queen City, Carrizo, Calvert Bluff, Simsboro, and Hooper. Some wells also produce from shallow "alluvial" deposits along the Colorado River. *See* AR Tab 69 at BCAR 002124-27; AR Tab 75, attached as Attachment 1 to this Brief. End Op sought authority to produce groundwater from the Simsboro formation.

Public hearing and request for contested case hearing. The public hearing on the applications was scheduled for April 17, 2013. District Rules provide that three types of persons can request a contested case, that is, a trial-type, hearing on an application, not later than the fifth day before the public hearing: (1) the District General Manager; (2) the applicant; and (3) "a person who has a personal justiciable interest that is related to a legal right, duty, privilege, power, or economic interest that is within the District's regulatory authority and that is affected by the Board's action on the Application, not including persons who have an interest common to members of the public." Aqua Water Supply Corporation ("Aqua") timely submitted a request for a contested case hearing on End Op's applications on April 10, 2017. AR Tab 2.

[1] The stipulated administrative record filed on February 6, 2015 is cited as "AR." Each citation includes the Tab number of the document identified in the index filed with the administrative record. Individual pages in a document are identified by the BCAR bates number in the lower right hand corner.

On April 17, 2013, the District Board of Directors continued the public hearing on the applications to April 18, 2013. At the completion of the public hearing on April 18, 2013, the Board voted to schedule a hearing on May 15, 2013 to consider Aqua's request for a contested case hearing. After the April 18, 2013 public hearing, but before the May 15, 2013 hearing, the plaintiffs in this case submitted letters to the District requesting party status in any contested case hearing on End Op's applications. AR Tabs 3-6.

At the May 15 hearing, the Board voted to grant Aqua's request for a contested case hearing and refer the issue of whether plaintiffs had standing to participate in the contested case hearing as parties to the State Office of Administrative Hearings ("SOAH"). AR Tabs 11-12. Under the Texas Water Code and District Rules, a party to a contested case hearing has the right to request that a contested case hearing be conducted by SOAH, a state agency. *See* TEX. WATER CODE § 36.416; District Rule 14.4.B. End Op requested a SOAH hearing. AR Tab 7.

Evidentiary hearing on standing. On August 12, 2013, the SOAH Administrative Law Judge ("ALJ") held a full day preliminary hearing on the plaintiffs' requests for party status. At that hearing, both the plaintiffs and End Op presented evidence on whether the plaintiffs had standing to participate in the contested case hearing as parties.

Andrew Meyer. Mr. Meyer testified that he and his wife own 38.9 acres in Bastrop County. AR Tab 38 at BCAR 001683. There are no groundwater wells on the property. *Id.* at 001686. Mr. Meyer stated that he plans to drill a well on his property, but did not indicate the formation in which he plans to complete the well. *Id.* at 001686. End Op presented expert testimony that the estimated depth to the Simsboro on Mr. Meyer's property is 2,350 feet below ground level, and that a well drilled to that depth would cost approximately $250,000. *Id.* at

001759-61; AR Tab 70, attached at Attachment 2. The nearest registered or permitted wells are completed in the shallower Sparta and Carrizo formations. *Id.*

Bette Brown. Ms. Brown testified that she owns a 10-acre tract, a 204.61-acre tract, and a 106.67-acre tract in Lee County, Texas. AR Tab 38 at BCAR 001665. Ms. Brown testified that there are two wells on these three tracts. One of these is a hand-dug well that is not currently in use. *Id.* at 001666, 001675. The other well, which is in use, was drilled in the 1970s. *Id.* Ms. Brown did not know how deep the two wells are or whether they are completed in the Simsboro formation. *Id.* at 001677.

End Op offered expert testimony that the estimated depth to the Simsboro formation on Ms. Brown's properties is 1,600-1,700 feet below ground level, and that a well drilled to that depth would cost approximately $150,000. AR Tab 70, Attachment 2. The registered or permitted wells located nearest to Ms. Brown's properties are completed in the Queen City and Carrizo formations, which are shallower than the Simsboro formation. *Id.* End Op also presented expert testimony that low permeability layers between the various aquifer formations means that pumping from the Simsboro formation has minimal effect on overlying aquifers. AR Tab 38 at BCAR 001762; AR Tab 75, Attachment 1.

Darwyn Hanna. Mr. Hanna testified that he owns about 30 acres in Cedar Creek and about 200 acres in the Upton area in Bastrop County. AR Tab 38 at BCAR 001695-96. Mr. Hanna had no wells and no current plans to drill wells on either property. *Id.* at 001697-98. He currently gets his drinking water from Aqua. *Id.* at 001699. As long as Aqua continues to provide service, Mr. Hanna saw no need to drill a well on his property. *Id.* at 001700.

Environmental Stewardship. Environmental Stewardship presented testimony that it owns an approximately 0.25-acre tract in Bastrop County. AR Tab 38 at BCAR 001649. The tract is

about 75 feet by 150 feet in dimension. *Id.* at 001651. No groundwater well was located on the property, and Environmental Stewardship had no current intention to drill a well on the property. *Id.* at 001650. The current use of the property does not require access to water. *Id.* at 001652.

Environmental Stewardship also presented an expert witness who offered a map showing the drawdown of water levels in the Simsboro formation across the District in 2050 that modeling predicts would result from End Op's pumping. AR Tab 41, attached at Attachment 3.

ALJ ruling on party status. On September 25, 2013, the ALJ issued Order No. 3 denying party status to Andrew Meyer, Bette Brown, Darwyn Hanna, and Environmental Stewardship. AR Tab 22, attached as Attachment 4. The ALJ rejected plaintiffs' argument that their ownership of property over the Simsboro formation and evidence that End Op's proposed pumping would lower water levels in the Simsboro across the District as a whole gave them standing. *Id.* at BCAR 001423.

He held that the plaintiffs had to prove a concrete and particularized injury to their legal interests that was actual or imminent. Andrew Meyer, Darwyn Hanna, and Environmental Stewardship could not show an actual or imminent injury because they do not have any groundwater wells that would be affected by End Op's proposed pumping. *Id.* Although Ms. Brown owns one operational groundwater well, she offered no evidence that the well was completed in the Simsboro formation or that pumping from the Simsboro would affect her well. *Id.* at 001424. Plaintiffs expressed concerns about impacts on District-wide Simsboro formation water levels and the Colorado River are concerns they share with the general public, not the required particularized injury. *Id.* at 001423-24.

Board ruling on party status. After Order No. 3 was issued, the SOAH ALJ held a contested case hearing on the merits of End Op's applications. After the hearing, the ALJ issued

a proposal for decision, which was considered by the Board in a meeting held on September 10, 2014. At that meeting, the Board voted to deny plaintiffs' request for party status and adopt the findings of fact and conclusions of law presented in the ALJ's Order No. 3. AR Tab 36, attached as Attachment 5.

At the same time, the Board voted to remand End Op's applications to SOAH for an additional evidentiary hearing on the issue of beneficial use. That hearing was held and the ALJ issued a proposal for decision on the remand issues. The Board has considered that proposal for decision but has yet to enter a final order on End Op's applications.

STANDARD OF REVIEW

In an appeal under Texas Water Code section 36.251: "The burden of proof is on the petitioner, and the challenged law, rule, order, or act shall be deemed prima facie valid." TEX. WATER CODE § 36.253. The standard of review is "the substantial evidence rule as defined by Texas Government Code section 2001.174." *Id.*

Under section 2001.174, "a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion." The court may reverse or remand the case only "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:"

(A) in violation of a constitutional or statutory provision;

(B) in excess of the agency's statutory authority;

(C) made through unlawful procedure;

(D) affected by other error of law;

(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

TEX. GOV'T CODE § 2001.174(2).

Substantial evidence in the record under subsection (E) requires "only more than a mere scintilla" to support the agency determination. *Railroad Comm'n v. Torch Operating Co.*, 912 S.W.2d 790, 792-93 (Tex. 1995). "[T]he evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence." *Texas Health Facilities Comm'n v. Charter Med.–Dallas, Inc.*, 665 S.W.2d at 452. The true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the agency's action. *Id.*

ARGUMENT

I. Plaintiffs' appeal of an interim order should be dismissed for lack of jurisdiction.

Plaintiffs appeal under Texas Water Code section 36.251. At the time plaintiffs filed suit, Texas Water Code section 36.251 provided: "A person, firm, corporation, or association of persons affected by and dissatisfied with any provision or with any rule or order made by a district is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order. … The suit may only be filed after all administrative appeals to the district are final."

In *West v. Texas Commission on Environmental Quality*, 260 S.W.3d 256 (Tex. App.—Austin 2008, pet. denied), the Austin court of appeals considered the appeal of an interim order under a very similar statute authorizing appeals of decisions of the Texas Commission on Environmental Quality. Texas Water Code section 5.351 provides: "A person affected by a ruling, order, decision, or other act of the commission may file a petition to review, set aside, modify, or suspend the act of the commission."

The appellants in *West* sought judicial review of a Commission order denying their requests for a contested case hearing on the application and an ALJ order remanding the application to the Commission's executive director for decision. The Court held that the orders were "interim orders not subject to appeal or judicial review." *Id.* at 263-64. These interim order were "subsumed within the Commission's final decision to approve the permit application and subject to judicial review on appeal therefrom. To obtain judicial review of these interim orders, appellants were required to seek judicial review of the Commission's final decision in compliance with section 5.351." *Id.* at 264.

"Concern for efficient administrative procedure requires consideration of the validity of interim orders only upon appeal from final orders." *City of Corpus Christi v. Pub. Util. Comm'n*, 572 S.W.2d 290, 299 (Tex. 1978). *See also Sun Oil Co. v. Railroad Comm'n*, 311 S.W.2d 235, 296 (Tex. 1958) ("an administrative order to be judicially reviewable, it must be 'final', that is to say, not a mere intermediate ruling or step which does not terminate the proceeding in which it occurs").

The District Board has not entered a final order on End Op's applications. The order denying plaintiffs party status is an interim order, not a final order. Texas Water Code section 36.251 does not authorize appeals of interim orders. Therefore, plaintiffs' suit must be dismissed because Water Code section 36.251 does not waive the District's immunity from suit in this case.

II. The District Order should be upheld because plaintiffs failed to prove that their legal interests will suffer particularized injury that is actual or imminent.

A. Plaintiffs had the burden to prove they met the statutory and constitutional requirements for standing.

The Texas Water Code expressly authorizes groundwater conservation districts to adopt rules that "limit participation in a hearing on a contested application to persons who have 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 § 36.415(b)(2). The District adopted such a rule. *See* District Rule 14.3.D(3).[2]

The Austin court of appeals has held that the Water Code section 36.415 test for standing – personal justiciable interest not common to the general public – incorporates the constitutional minimum requirements for standing to challenge governmental actions. *See City of Waco v. Tex. Comm'n on Envtl. Quality*, 346 S.W.3d 781, 801 (Tex. App.—Austin 20*11), rev'd on other grounds,* 413 S.W.3d 408 (Tex. 2013)*; Bosque River Coalition v. Tex. Comm'n on Envtl. Quality*, 347 S.W.3d at 356, 375 (Tex. App.—Austin 2011), *rev'd on other grounds*, 413 S.W.3d 403 (Tex. 2013).

To demonstrate standing under these principles, a person must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large. *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 926 (Tex. App.—Austin 2010, no pet.). The person seeking party status must show, among other things:

> an 'injury in fact'— an invasion of a 'legally protected' [or cognizable] interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'

Id., citing *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

A person seeking party status has the burden to plead facts supporting these elements of standing and, if challenged, to prove them. *Lujan*, 112 S.Ct. at 2136-37. Because these elements are "not mere pleading requirements," they "must be supported in the same way as any other

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[2] The District Rules have been amended since the Board denied the plaintiffs' request for party status, and the substance of Rule 14.3.D(3) is now included in Rule 15.1.E(2)(d). This brief cites to the District Rules as they existed on the date the Board denied plaintiffs' request for party status. A copy of the rule as it existed at that time is attached as Attachment 6.

matter on which the plaintiff bears the burden of proof." *Id.* at 2136. "[A]t the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'" *Id.* at 2137. *See also Good Shepherd Med. Ctr. v. State*, 306 S.W.3d 825, 836 (Tex. App.—Austin 2010, no pet.) ("Standing … requires pleadings (and, ultimately, proof)" that elements are met).

Plaintiffs, then, had the burden to prove, at the evidentiary hearing held for that purpose: (1) that they had a "legally protected interest", or, as Water Code section 36.415 provides, "a legal right, duty, privilege, power, or economic interest that is within a district's regulatory authority;" and (2) that granting the permit applications will cause a "concrete and particularized" injury to the plaintiffs, not common to members of the public, that is actual or imminent, not conjectural or hypothetical.

Plaintiffs argue that a challenge to standing should be evaluated under the summary judgment standard and that the person challenging standing is in the position of a movant for summary judgment and bears the burden of demonstrating a lack of standing based on undisputed facts. Plaintiffs' Initial Brief, pp. 16, 24. Plaintiffs are wrong. The summary judgment standard has no application here, where an evidentiary hearing was held at which the parties offered testimony and exhibits and had the opportunity to cross-examine witnesses on undisputed and disputed facts. The plaintiffs had the burden of proof at that trial. Under the substantial evidence rule, the resolution of the disputed facts was a question for the ALJ initially and the District Board ultimately. Their findings of fact and the conclusions of law based on those findings must be upheld if they are supported by substantial evidence in the record and the law.

B. The District's conclusion that plaintiffs did not demonstrate an actual or imminent particularized injury is supported by substantial evidence.

The District does not dispute that the plaintiffs met the first prong for standing. Plaintiffs proved that they had a legally protected interest. They owned property within the District, which,

under the Texas Supreme Court's decision in *Edwards Aquifer Authority v. Day*, 69 S.W.3d 814, 832 (Tex. 2012), includes ownership of the groundwater in place beneath the property. However, the District Board concluded that Plaintiffs did not prove the second prong of the test, a particularized injury not common to the general public that is actual or imminent, and this conclusion is supported by substantial evidence.

1. Plaintiffs failed to prove that End Op's proposed pumping will cause an actual or imminent injury to their current or proposed use of groundwater.

It is undisputed that Andrew Meyer, Darwyn Hanna and Environmental Stewardship do not own any groundwater wells and are not producing any groundwater from any aquifer. End Op's proposed pumping, therefore, cannot cause any actual or imminent injury to Mr. Meyer's, Mr. Hanna's, or Environmental Stewardship's use of groundwater from their properties.

Plaintiffs argue that the District improperly disregarded Mr. Meyer's intent to drill a groundwater well at some time in the future to support his organic farming operation. Plaintiffs' Initial Brief, p. 24. End Op proposes to withdraw water from the Simsboro formation. Mr. Meyer did not say that he intended to complete a well in the Simsboro formation, and there was evidence that a well completed in the Simsboro would cost approximately $250,000 and that nearby wells are completed in shallower formations. AR Tab 70, Attachment 2. Thus, substantial evidence in the record supports the conclusion that Mr. Meyer failed to prove that he intends to complete a well in the Simsboro formation.

Ms. Brown does have one groundwater well in use. Plaintiffs argue that the District also unjustifiably disregarded this fact. Plaintiffs' Initial Brief, p. 24. But plaintiffs offered no evidence that Ms. Brown's well is completed in the Simsboro formation. Ms. Brown said she did not know the depth of this well, and plaintiffs' expert testified that he was not even aware of her wells until the hearing. AR Tab 38 at BCAR 001677, 001748. End Op's expert testified that the