

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

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JUDGE MICHAEL J OMALLEY

FAX TO:

FAX TO:

ROBIN A. MELVIN (GRAVES DOUGHERTY HEARON & MOODY)

(512) 480-5888

MICHAEL A. GERSHON (LLOYD, GOSSELINK, ROCHELLE & TOWNSEND, P.C.)

(512) 472-0532

ERIC ALLMON (LOWERRE, FREDERICK, PERALES, ALLMON & ROCKWELL)

(512) 482-9346

RUSSELL JOHNSON (MCGINNIS LOCHRIDGE & KILGORE, LLP)

(512) 505-6374

STACEY V. REESE

(512) 233-5917

BETTE BROWN

VIA REGULAR MAIL

ANDREW MEYER

VIA REGULAR MAIL

DARWYN HANNA

VIA REGULAR MAIL

cc: Docket Clerk, State Office of Administrative Hearings

NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT LIZ SLICK(lsl) (512) 475-4993

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SOAH DOCKET NO. 952-13-5210

APPLICATIONS OF END OP, L.P. FOR § BEFORE THE STATE OFFICE
WELL REGISTRATION, OPERATING §
PERMITS, AND TRANSFER PERMITS § OF
§
§ ADMINISTRATIVE HEARINGS

ORDER NO. 3
DENYING ENVIRONMENTAL STEWARDSHIP, BETTE BROWN, ANDREW MEYER
AND DARWYN HANNA PARTY STATUS, AND GRANTING AQUA WATER SUPPLY
CORPORATION PARTY STATUS

I. INTRODUCTION

In 2007, End Op, L.P. (“End Op”) filed Applications for groundwater permits with the Lost Pines Groundwater Conservation District (“the District”) seeking to withdraw water from the Simsboro Aquifer (“Simsboro”). The District imposed a moratorium on End Op’s applications, preventing action on them until January 2013. On March 18, 2013 the District posted notice that a hearing would be held to consider End Op’s applications on April 17, 2013.

Prior to the hearing and pursuant to the District’s Rule 14.3(D),¹ Aqua Water Supply Corporation (“Aqua”) filed a timely request for a contested case hearing on End Op’s applications. On April 18, 2013, public comment on End Op’s applications was conducted and closed, and the District’s Board of Directors (the “Board”) set a preliminary hearing on Aqua’s request for May 15, 2013. On May 8, 2013, Environmental Stewardship (“ES”), Bette Brown, Andrew Meyer, and Darwyn Hanna (collectively, the “Landowners”) filed requests for party status in any contested case hearing on End Op’s Applications.

At the May 15th hearing, the District considered the timeliness of the Landowners’ requests for party status and reached the conclusion that the Landowners’ requests were timely. The District then designated the Landowners as parties for this contested case hearing at the

¹ District Rule 14.3(D) provides that: “A request for a contested case hearing on the Application, to be conducted under Rule 14.4, must be made in writing and filed with the District no later than the 5th day before the date of the Board meeting at which the Application will be considered.”

May 15th hearing and referred the issue of the Landowners' standing to the State Office of Administrative Hearings ("SOAH").

II. PARTIES' ARGUMENTS AND ALJ'S ANALYSIS

A. Timeliness

1. End Op Argues Landowners' Requests for Party Status Were Improper and Untimely and Should Be Denied.

First, End Op argues that the Landowners' requests for party status should be denied because a person may not be a party in a contested case proceeding on groundwater permit unless they filed a timely request for a contested case hearing. End Op points to Chapter 36 of the Texas Water Code, which requires groundwater districts to adopt procedural rules limiting participation in a hearing on a contested application to persons with standing² and provides that when hearings are conducted by SOAH only Subchapters C, D, and F of the Administrative Procedure Act ("APA") and district rules consistent with the procedural rules of SOAH apply.³ End Op claims that Chapter 36 does not permit a groundwater district or an Administrative Law Judge ("ALJ") with SOAH to designate a person who has not timely requested a contested case hearing as a party because to do so would violate the District's own procedural rules concerning party status. Since the Landowners did not file such requests, End Op argues, neither the District nor the ALJ may designate them as parties.

Second, End Op claims that the Landowners' requests for party status are untimely and should be denied because they had notice and ample time to request a contested case hearing or party status and did not make such requests. Third, End Op argues that granting party status is unnecessary because the Landowners' interests are already protected by the District. Finally, End Op claims that granting the Landowners party status would render the District's Rule 14.3(D) a nullity, would add considerable delay to an already greatly delayed venture, would burden End Op with substantial additional expense, and would create a loophole precedent which would allow for a continuous flow of new requests for party status beyond the proper deadline.

² See Tex. Water Code § 36.415.

³ See Tex. Water Code § 36.416.

2. Landowners Argue That Since the District Has Already Determined that Landowners' Requests for Party Status Were Timely, It Is Unnecessary for This ALJ to Revisit the Issue of Timeliness.

Landowners note that the District has already determined that Landowners' requests for party status were timely. The Landowners argued that, under District rules, a request for party status presents a separate and independent question apart from whether to grant a request for a contested case hearing. Since the District determined that Protestants requests for party status were timely, they argue, it is unnecessary for this ALJ to revisit the issue.

3. ALJ'S Analysis

District Rule 14.3(D) contemplates who may request a contested case hearing on a permit application.⁴ After a hearing has been properly requested, Rule 14.3(E) governs the District's consideration of that request.⁵ Rule 14.3(E) gives the Board the authority to grant or deny the request at its meeting, to designate parties at its meeting, or to schedule a preliminary hearing where the Board will make a determination of those issues.⁶ End Op admits that Aqua filed a timely request for a contested case hearing on End Op's Applications. Accordingly, the Board was then given the authority to consider that request under Rule 14.3(E). The Board was entirely within its authority when it scheduled such a hearing for May 15, 2013. Under Rule 14.3(E), the Board has the authority to designate parties at this hearing.⁷ The Landowners' requests for party status were filed on May 8, 2013. There is nothing in the District's rules that states that the

⁴ District Rule 14.3(D) reads: "Request for contested case hearing. A request for a contested case hearing on the Application, to be conducted under Rule 14.4, must be made in writing and filed with the District no later than the 5th day before the date of the Board meeting at which the Application will be considered. A request for a contested case hearing may be granted if the request is made by: (1) the General Manager; (2) the applicant; or (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."

⁵ District Rule 14.3(E) reads: "Consideration of request for contested case hearing. (1) If the District receives a timely-filed request for a contested case hearing on the Application, then, at its meeting, the Board may: (a) determine whether to grant or deny a request for a contested case; (b) designate parties... (e) schedule a preliminary hearing at which the Board will determine all of the matters described in subsections (a) to (e) or any matters described in those subsections that were not decided at the meeting."

⁶ *Id.*

⁷ *Id.*

Board may not consider requests that were filed before the date it holds its hearing pursuant to Rule 14.3(E). Accordingly, the Landowners' requests for party status are procedurally adequate.

B. Standing

Having found Landowners' requests for party status procedurally adequate, the next issue is whether the Landowners meet the mandatory standing test set out in section 36.415(b)(2) of the Texas Water Code. This test, which embodies constitutional standing principles, requires that groundwater districts:

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.⁸

In *City of Waco v. Tex. Com'n on Environmental Quality*, the Court of Appeals in Austin determined "an affected person"⁹ must meet the following requirements to have standing to request a contested case hearing before Texas Commission on Environmental Quality ("TCEQ"):¹⁰

- (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).¹¹

⁸ Tex. Water Code § 36.415(b)(2).

⁹ "Affected person" is defined in § 5.115 of the Texas Administrative Code as one "who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest" in the matter at issue, and not merely an "interest common to members of the general public" – a definition that is essentially identical to § 36.415(b)(2) of the Texas Water Code. Additionally, the District adopted the same definition in Section 1, Rule 1.1 of its Rules and Regulations.

¹⁰ Although Landowners are requesting party status, not a contested case hearing, the analysis of the meaning of a "justiciable interest" is applicable.

¹¹ *City of Waco v. Texas Com'n on Environmental Quality*, 346 S.W.3d 781, 802 (Tex.App.-Austin 2011), reh'g overruled (Aug. 2, 2011), review denied (June 29, 2012), order vacated (Feb. 1, 2013), *rev'd*, 11-0729, 2013 WL 4493018 (Tex. 2013); *See Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) (quoting *Raines v. Byrd*, 521 U.S. 811,

The burden is upon the Landowners to present evidence establishing each of these elements, showing they possess a qualifying personal justiciable interest.

1. Landowners' Position

The Landowners argue that under section 36.002 of the Texas Water Code, they own the groundwater beneath their respective properties as a real property interest. Accordingly, they argue they possess standing to challenge the deprivation or divestment of their property interests (what they refer to as a "taking") by virtue of being landowners whose property sits above the aquifer at issue in this case.

The Landowners agree with End Op that a person seeking party status must (1) establish an injury in fact that is (2) fairly traceable to the issuance of the permit as proposed and (3) that it is likely, not merely speculative, that the injury will be redressed by a favorable decision on its complaints regarding the proposed permit. The Landowners argue, however, that particular treatment is given to questions of fact related to standing that overlap with the merits of a case. They argue that they need not prove the merits of their case in order to demonstrate a potential impact, but rather need only show that a fact issue exists. To be deemed an affected person, they argue that they need only show a potential impact.

Landowners also argue that they have demonstrated the necessary justiciable interest with regard to End Op's Applications to warrant admission as parties. The ownership of land over the aquifer at issue, they argue, which brings with it a real property interest in the water beneath the land, constitutes a legally protected interest under the Water Code. Since this interest is protected, they maintain that there is no need to demonstrate ownership of a well or intent to drill a well in order to demonstrate that interest. The Landowners claim that it is undisputed that End Op's pumping operations will result in a drawdown of water within the aquifer extending to their

818-19 (1997), *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 926-27 (Tex.App.-Austin 2010, no pet.); *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 878 (Tex.App.-Austin 2010, pet. denied). Although the *City of Waco* case has been reversed by the Texas Supreme Court, the relevant law on injury-in-fact, relied upon in many other Texas cases, remains valid law. The *City of Waco* case was reversed on grounds other than the law relating to injury-in-fact related to party status.

respective properties. They argue that this drawdown will make it more difficult for each of the Landowners to access water in the aquifer and will make it more likely that they will lose access altogether. They state that this drawdown constitutes the necessary injury in fact required for party standing and that the potential injury would be fairly traceable to End Op's operations.

Further, they argue that demonstrated use of said groundwater is not required for standing. In response to End Op's argument that the Landowners lack standing because they do not have wells or plans to develop wells on their property, the Landowners cite *Edwards Aquifer Authority v. Day* for the proposition that their standing is not affected by use, non-use, or intended use of the groundwater.¹² Landowners argue instead that a person seeking party status must only demonstrate a potential impact, and must only raise a question of fact on issues where standing and the merits overlap.

ES, which owns property in Bastrop County near the Colorado River, additionally argues that it has demonstrated a justiciable interest by virtue of the impact of the proposed permits on the Colorado River's flow. ES argues that the proximity of its property to the river gives it a level of access not common to the general public. ES claims that the damage to its interest is that the pumping to be authorized by the permits would reduce the natural inflows to the Colorado River from Simsboro, reducing the flow of the river and reducing ES's ability to use and enjoy the river and the property it owns near the river.

2. End Op's Position

End Op argues that even if Landowners had filed proper and timely requests, Landowners fail to meet the mandatory standing test set out in Tex. Water Code § 36.415(b)(2) and thus may not participate in the contested case hearing on End Op's applications. End Op maintains that the Landowners fail to meet the test because (1) groundwater ownership alone is insufficient to establish standing, (2) non-use of groundwater is a relevant factor when analyzing standing, and (3) an injury in fact that is traceable and redressable, not system-wide effects, is the standard.

¹² *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012), reh'g denied (June 8, 2012).

a. Groundwater ownership alone is insufficient to establish standing.

End Op argues that mere ownership of groundwater under Texas Water Code section 36.002 as a real property interest does not satisfy the standing test. In *City of Waco*, End Op notes, the court found that the city possessed the requisite legally protected interest to have standing, as an affected person under the Water Code, in light of undisputed evidence that the city had ownership rights over the water, used the water as the sole supply for its municipal water utility, had an obligation to treat the water, and experienced escalating treatment costs.¹³ End Op argues that when the court relied on this combination of factors, instead of relying on ownership alone, it established that mere ownership was insufficient to convey standing.

End Op also claims that the Landowners' reliance on *Edwards Aquifer Authority v. Day* is misplaced. End Op argues that *Day* addresses whether landowners have an interest in groundwater that is compensable under the Takings Clause of the Texas Constitution, not what factors are necessary to obtain third-party standing in a contested case hearing on an applicant's permit. End Op takes the position that the analysis in *Day* addressing whether non-use as the basis for denial of a permit application constitutes a constitutional taking without compensation does not bear on the issue of whether use or non-use establishes a legally protected interest distinct from the general public.

b. Showing a potential impact on system-wide groundwater levels is insufficient; Landowners must prove a specific injury in fact that is traceable and redressable.

End Op also argues that demonstrating a potential impact to groundwater levels, without offering proof of a specific injury to their exercise of their groundwater rights, is insufficient to obtain standing. End Op claims that under *City of Waco*, a potential party must establish both that it has a legally protected personal justiciable interest and an injury to its legally protected

¹³ *City of Waco*, 346 S.W.3d at 809 (“These undisputed *facts* establish, as a matter of law, the type of interest, rooted in property rights, that constitute legally protected interests, distinct from those of the general public) (*emphasis added*).

interest.¹⁴ Further, End Op argues, *City of Waco* expressly dismisses that “allegation or proof of some or any ‘potential’ for harm, however remote, are sufficient” and instead expressly states that the “required ‘potential harm’... must be more than speculative.”¹⁵ End Op cites *United Copper* and *Heat Energy* to demonstrate this injury requirement, arguing that the injury or potential harm that conferred standing was established through proof of potential injury unique to each complainant and different from that suffered by the general public. In *United Copper*, the “potential harm” that conferred standing was established by United Copper's own data indicating that its operations would increase levels of lead and copper particulate at Grissom's home and his child's school, together with proof that Grissom and his child suffered from “serious asthma.”¹⁶ In *Heat Energy*, the “potential harm” was established where the association member's house was located one-and-a-half blocks from the facility, the permit applicant had acknowledged in another Commission proceeding that the facility indeed emitted odors, and the association member claimed to detect strong odors coming from it.¹⁷ The member in *Heat Energy* testified the odors affected his breathing, and that he had sought medical attention for throat problems caused by the odors.¹⁸ End Op argues that none of the Landowners can establish such a concrete and particularized, actual or imminent injury that is traceable and redressable because they have not presented evidence of a unique injury not common to the general public as was the case in *United Copper* and *Heat Energy*.

End Op further argues that the Landowners' claim that a system-wide drawdown will occur if End Op's applications are granted is merely a prediction based on an uncertain mathematical model that cannot by itself establish a specific injury for either persons who do not own wells or persons who own wells that produce from a formation other than the Simsboro aquifer.

¹⁴ *City of Waco* 346 S.W.3d 781 at 810.

¹⁵ *City of Waco* 346 S.W.3d 781 at 805.

¹⁶ *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 803-04 (Tex.App.-Austin 2000, pet. dism'd).

¹⁷ *Heat Energy Advanced Tech., Inc. v. W. Dallas Coal. for Env't. Justice*, 962 S.W.2d 288, 295 (Tex.App.-Austin 1998, pet. denied).

¹⁸ *Heat Energy*, 962 S.W.2d at 295.

i. Environmental Stewardship

End Op argues that ES has not established a specific injury in fact that is traceable and redressable. First, End Op argues that since ES does not have a well and has no existing use, it does not have the requisite legally protected interest, separate and distinct from other landowners that could give rise to a personal justiciable interest as described in *City of Waco*. Second, End Op argues that ES has no specific injury that is traceable and redressable and not merely speculative or hypothetical. End Op points to the Landowners' own expert, who conceded that existing pumping can cause drawdowns and that no specific analysis was performed with regard to any of the Landowners' properties. Third, End Op argues that the record establishes that ES is barred from drilling a well by district rules, and that it is impossible for the claimed drawdown to adversely affect ES's groundwater ownership interest when they cannot drill a well. End Op also claims that any hypothetical impact on the surface flow of the Colorado River would be an impact to the general public regardless of groundwater ownership.

ii. Andrew Meyer

End Op argues that Andrew Meyer has not established a legally protected interest that may give rise to a personal justiciable interest and specific injury because he does not have a well, has not filed a permit application, and has no plans to do so.

iii. Darwyn Hanna

End Op argues that Darwyn Hanna has not established a legally protected interest that may give rise to a personal justiciable interest and specific injury because he does not have a well and sees no need to drill so long as Aqua is his service provider.

iv. Bette Brown

End Op concedes that Ms. Brown has two wells but notes that neither well is registered with the District. End Op argues that while Ms. Brown's alleged current use could help her establish a legally protected interest that may give rise to a personal justiciable interest as outlined in *City of Waco*, Ms. Brown must still establish a specific injury. End Op argues that Ms. Brown has submitted no evidence of specific injury since Ms. Brown has provided no evidence on the amount of use or depth of the operating well, nor has her expert conducted any analysis with regard to the potential impact of End Op's permits on Ms. Brown's wells. Finally, End Op argues that Ms. Brown's wells are not in the Simsboro formation.

3. ALJ's Analysis

The Texas Supreme Court ruled that for a party to have standing to challenge a governmental action, it "must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large."¹⁹ The issue, in other words, is "whether the particular plaintiff has a sufficient personal stake in the controversy to assure the presence of an actual controversy that the judicial declaration sought would resolve."²⁰ As previously discussed, in *City of Waco*, the Court of Appeals determined "an affected person" must have an injury in fact that is concrete, actual, fairly traceable, and likely to be redressed by a favorable decision to have standing to request a contested case hearing before TCEQ. Accordingly, to prevail, the Landowners must show a concrete, particularized injury-in-fact that must be more than speculative, and there must be some evidence that would tend to show that the legally protected interests will be affected by the action.²¹ The *United Copper* and *Heat Energy* further show that the person seeking standing must (1) establish that it has a legally protected personal justiciable interest and (2) demonstrate injury of that personal interest that is concrete, particularized, and not speculative.

¹⁹ *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007).

²⁰ *City of Waco* 346 S.W.3d at 801-02.

²¹ *City of Waco*, 346 S.W.3d at 805; *See Save Our Springs Alliance, Inc.*, 304 S.W.3d at 883.

a. Environmental Stewardship, Andrew Meyer, and Darwyn Hanna

The Landowners, ES, Meyer, and Hanna, who do not have wells,²² are not like the association member in *Heat Energy*. In *Heat Energy*, the odors from the facility were negatively affecting the member and his use of his property. Here, unlike the member in *Heat Energy*, the Landowners in this case cannot demonstrate a particularized injury that is not common to the general public because owning land and the groundwater under the land is not sufficient to show a particularized injury, especially since the Landowners are not using and have not shown that they intend to use groundwater that will be drawn from the Simsboro. Similarly, the Landowners are not like the Gissom family in *United Copper*. In *United Copper*, the potential harm that conferred standing was not just that United Copper's data indicated that its operations would increase the amount of particulates in the air, there was proof that Grissom and his son were injured on a personal level. Here, End Op's data may indicate a potential for aquifer drawdown at some time in the future, but these Landowners cannot demonstrate that they suffer a particularized and concrete injury that is not common to the general public. In the universe of *United Copper*, they would resemble citizens concerned about particulate pollution in general. It is not enough that these Landowners possess an ownership right in the groundwater; that right must be potentially impaired in order for them to possess standing.²³ System-wide aquifer drawdowns affect the general public (all persons who own rights to the groundwater contained within that aquifer). Aqua, a well owner situated in the same field where End Op plans to operate, possesses the requisite protected interest and specific injury. However, without demonstrating ownership of wells or plans to exercise their groundwater rights, the Landowners lack a personal justiciable interest and therefore lack standing to participate in a contested case hearing on End Op's applications.

Furthermore, ES's argument that the water flow of the Colorado River will be negatively impacted by the potential drawdown, thereby impacting its use and enjoyment, is an interest shared by the general public. In addition, there is no credible evidence that the water flow of the

²² Mr. Hanna will likely never build a well so long as he can obtain water from Aqua. Although Mr. Meyer may build a well at some point in the future, he has not filed a permit application for a well.

²³ End Op presented evidence that, even if the Landowners were to build wells, some of the Landowners would not draw their water from the Simsboro, given the formation of the Simsboro and the closer proximity of other aquifers to the Landowners' property and associated groundwater.

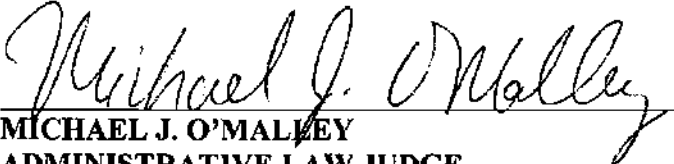
Colorado River will be impacted to such a degree (or at all) that ES's enjoyment of the river will be negatively impacted.²⁴ Finally, the record shows that ES cannot drill a well that complies with the District rules. Although it may be able to seek a variance, it is unlikely given the size of ES's lot and the cost to build a well, that ES will ever build a well.

b. Bette Brown

The facts concerning Bette Brown's request for party standing are slightly different from the other Landowners. The record demonstrates that she has two wells on her property. However, Ms. Brown must still establish a specific injury to a personal justiciable interest. Neither of Ms. Brown's two wells are registered or permitted with the District. Ms. Brown has submitted no evidence demonstrating that her wells draw from the Simsboro aquifer, no evidence on the amount of use or depth of the well that is operational, and no expert analysis with regard to the potential impact of End Op's permits on Ms. Brown's operational well. Without any such showing, Ms. Brown has not demonstrated a potential impact on her groundwater interest. For this reason, along with the reasoning expressed above with regards to the other Landowners, Ms. Brown lacks a personal justiciable interest and therefore lacks standing to participate in a contested case hearing on End Op's applications.

Accordingly, the Landowners' Requests (the requests of ES, Meyer, Hanna, and Brown) for Party Standing are **DENIED**. Aqua's request for party status is **GRANTED**.

SIGNED September 25, 2013.


MICHAEL J. O'MALLEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING

²⁴ Not only is there no credible evidence to support this argument, any impact on water flow is highly speculative.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502

Austin, Texas 78701

Phone: (512) 475-4993

Fax: (512) 322-2061

SERVICE LIST

AGENCY: Lost Pines Groundwater Conservation District (LPG)
STYLE/CASE: APPLICATION OF END OP LP FOR OPERATING PERMITS
SOAH DOCKET NUMBER: 952-13-5210
REFERRING AGENCY CASE:

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ MICHAEL J. OMALLEY**

REPRESENTATIVE / ADDRESS

PARTIES

ERIC ALLMON
ATTORNEY
LOWERRE, FREDERICK, PERALES, ALLMON &
ROCKWELL
707 RIO GRANDE, SUITE 200
AUSTIN, TX 78701
(512) 469-6000 (PH)
(512) 482-9346 (FAX)
eallmon@lf-lawfirm.com

ENVIRONMENTAL STEWARDSHIP

RUSSELL JOHNSON
MCGINNIS LOCHRIDGE & KILGORE, LLP
600 CONGRESS AVENUE, SUITE 2100
AUSTIN, TX 78701
(512) 495-6074 (PH)
(512) 505-6374 (FAX)

END OP, L.P.

MICHAEL A. GERSHON
ATTORNEY
LLOYD, GOSSELINK, ROCHELLE & TOWNSEND, P.C.
816 CONGRESS AVENUE, SUITE 1900
AUSTIN, TX 78701
(512) 322-5872 (PH)
(512) 472-0532 (FAX)
mgershon@lglawfirm.com

AQUA WATER SUPPLY CORP.

ROBIN A. MELVIN
GRAVES DOUGHERTY HEARON & MOODY
401 CONGRESS AVE., SUITE 2200
AUSTIN, TX 78701
(512) 480-5600 (PH)
(512) 480-5888 (FAX)
ramelvin@gdhm.com

LOST PINES GROUNDWATER CONSERVATION
DISTRICT

ANDREW MEYER
144 LEE COUNTY RD
PAIGE, TX 78659
(512) 944-4387 (PH)

ANDREW MEYER

BETTE BROWN
1386 CR 411
LEXINGTON, TX 78947
(979) 220-7746 (PH)
betzbrownm@yahoo.com

BETTE BROWN

DARWYN HANNA
1460 FM 20
CEDAR CREEK, TX 78612
(512) 303-7715 (PH)
darwynhanna@gmail.com

DARWYN HANNA

STACEY V. REESE
STACEY V. REESE LAW PLLC
2405 W. 9TH STREET
AUSTIN, TX 78703
(512) 289-4262 (PH)
(512) 233-5917 (FAX)

END OP, L.P.

Liz Slick

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