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.	§	
END OP, L.P. Third-Party Defendant/Counter-Plaintiff	§	**OF BASTROP COUNTY, TEXAS**

PLAINTIFFS' INITIAL BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Andrew Meyer, Bette Brown, Darwyn Hanna Individuals, and Environmental Stewardship, a non-profit organization, (collectively "Plaintiffs"), and file this brief and in support would show the following:

I. Introduction

1. Lost Pines Groundwater Conservation District ("Lost Pines" or the "District") erred in denying party status to Andrew Meyer, Bette Brown, Darwyn Hanna and Environmental Stewardship (collectively "Plaintiffs"), and the District's decision to deny Plaintiffs' requests for party status should be reversed.

2. Plaintiffs each hold legally-protected interests that will be adversely impacted by the pumping for which End Op LP ("End Op") seeks authorization in the permit at issue. End Op is seeking a permit to pump 18.2 billion gallons of groundwater from the District for export. The District's own modeling predicts that this will cause drawdowns in the Simsboro aquifer beneath Plaintiffs' properties ranging from 50 feet beneath Darwyn Hanna's property to roughly

400 feet beneath Mr. Meyer's property. These drawdowns will adversely impact Plaintiffs' real property rights in their groundwater, and the evidence demonstrated that these drawdowns resulting from End Op's pumping will increase the cost to complete a well into the aquifers beneath Plaintiffs' properties, while also increasing the cost of pumping from the aquifers in the area. Mrs. Brown relies entirely on groundwater for her household and agricultural uses, while Mr. Meyer uses his property to operate an organic farm and has plans to complete a groundwater well in the future, potentially into the same Simsboro Aquifer from which End Op seeks to draw water. While Environmental Stewardship and Darwyn Hanna do not currently have groundwater wells on their properties, both feel that it is important to preserve the ability to utilize their groundwater in the future.

3. In reaching its decision, the District provided two insufficient reasons for its denial of Plaintiffs' requests for party status: (1) The District asserted that in order to show injury, the Plaintiffs were required to demonstrate that they are using or intend to use groundwater drawn from the Simsboro Aquifer through the ownership of a well in the Simsboro or plans to exercise their rights in the Simsboro; and, (2) The widespread drawdowns in the Simsboro Aquifer resulting from End Op's permit assuredly impacted all persons who own rights to the groundwater in the Simsboro, and thus Plaintiffs' interests were common to the general public. Both of these arguments fail. The District's reasoning does not account for the absolute ownership right Plaintiffs hold in their groundwater. Further, the District erred in disregarding Plaintiffs' injuries merely because End Op's massive amount of pumping results in many others in addition to Plaintiffs.

4. The District's contention that Plaintiffs must demonstrate use of the aquifer, and the ownership of wells, runs contrary to the fundamental nature of the property interest held by

Plaintiffs. Plaintiffs own the groundwater beneath their land as real property, and that groundwater is a valuable asset owned by Plaintiffs. End Op's permit will result in the diminution, and potential destruction of this asset. Furthermore, all real estate is recognized under the law as unique. Thus, impacts upon Plaintiffs' groundwater interests as real estate are, by law, unique to the Plaintiffs. Likewise, the issuance of End Op's requested permit potentially damages Plaintiffs' correlative rights in the Simsboro Aquifer. The Plaintiffs possess absolute ownership rights to groundwater in the Simsboro aquifer which is a common pool that End Op seeks to draw from. As such, Plaintiffs are entitled to protect their rights to a fair share of the groundwater in the Simsboro Aquifer, and they are entitled to protect themselves against damage to the Simsboro Aquifer. The issuance of End Op's permit potentially threatens both of these interests.

5. Furthermore, the District's reliance on the widespread nature of the impacts of End Op's proposed withdrawal of 18.2 billion gallons of groundwater from the Simsboro Aquifer as a basis to reject Plaintiffs standing must also be rejected. The District's analysis on this point treats the standing inquiry as if it is merely a matter of quantitatively determining how many people will suffer an injury. This is fundamentally opposed to the properly qualitative analysis that should be involved in evaluating standing. The fact that an injury is widely shared is not sufficient cause to ignore that injury. Furthermore, even if Plaintiffs injury were found to be small (which it is not), the law makes no distinction between small injuries and large injuries.

6. In short, the District's decision to deny Plaintiffs' request for party status was premised on an analysis that improperly failed to recognize the significance of Plaintiffs absolute ownership of the groundwater beneath their property, and which improperly characterized Plaintiffs interests as common to the general public merely because granting End Op's requested

permit will potentially injure a large number of people. For these reasons, the District's decision was arbitrary and capricious. Thus, the District's decision to deny Plaintiff's request for party status must be reversed, and the matter remanded to the District to provide Plaintiffs with the opportunity to participate in a contested case hearing regarding End Op's application.

II. Summary of Facts

7. In July, 2007, End Op, L.P. applied to the District seeking permits to drill, operate and export water from 14 wells in a total volume of 56,000 acre-feet per year (18.2 Billion gallons) from Bastrop and Lee Counties.[1] Aqua Water Supply Corporation requested a contested case hearing with regard to the Application in April of 2013, and on May 8th, 2013 Plaintiffs requested party status in any contested case hearing be held with regard to this application. After considering Aqua's hearing request at its May 15, 2013 Board Meeting, Lost Pines' granted Aqua's hearing request, and by order dated June 19, 2013, the District referred End Op's applications to SOAH.[2] The District ordered that, "the issue of whether Environmental Stewardship, Andrew Meyer, Bette Brown, and Darwyn Hanna have standing to participate in the contested case hearing as parties is referred to SOAH."[3]

8. SOAH held a preliminary hearing on August 12, 2013 to consider whether Plaintiffs should be admitted as parties to the contested case hearing. Each of the Plaintiffs presented uncontroverted testimony demonstrating their ownership of real property in the

[1] AR Item No. 1; By comparison, in order to be exempt from permitting an agricultural well can't produce more than 200 acre-feet per year. AR Item No. 38, at BCAR 1773. (Keester)
[2] AR Item No. 36.
[3] AR Item No. 36.

vicinity of End Op's proposed wells,[4] and each Plaintiff testified that the groundwater rights had not been severed from this property.[5]

9. Plaintiffs also testified as to the uses of their property and groundwater usage on their property. Bette Brown testified that she owns 204 acres of property on which she lives and relies on groundwater as her sole water source.[6] She went on to testify that four households rely upon the currently-producing groundwater well on her property.[7]

10. Mr. Meyer likewise resides upon his 38.9 acre property, and uses the property to run a small organic farm.[8] He felt that the lack or loss of water from beneath his land would have a "catastrophic" impact on both his property value as well as his business.[9] He noted that water was a necessary element for his farming operation, and that he had been planning to drill a well for over a year.[10] He further testified that the depth of his planned well would depend on the quality and yield of the aquifers, and that he would spend the money to complete a well into the Simsboro if necessary in light of these factors.[11]

11. Mr. Hanna testified that he resided on a 30 acre home site, but also owned another 200 acres in the area.[12] He felt that if he did not have a reliable water source for the property, then

[4] AR Item No. 38, at BCAR 1647 & AR 40 (Environmental Stewardship testimony and deed); AR Item No. 38 at BCAR 1665 and AR Item Nos. 43, 44 & 45 (Bette Brown testimony and deeds); AR Item No. 38 at BCAR 1683-1684, AR Item No. 46 (Meyer testimony & deed); AR Item No. 38 at BCAR 1695-1696, AR Item No. 47 (Hanna testimony and deed).
[5] AR Item No. 38 at 1648 (Environmental Stewardship); AR Item No. 38 at BCAR 1668 (Bette Brown); AR Item No. 38 at BCAR 1686 (Meyer); AR Item No. 38 at BCAR 1697 (Hanna).
[6] AR Item No. 38 at BCAR 1666.
[7] AR Item No. 38, at BCAR 1666-1668.
[8] AR Item No. 38, at BCAR 1683-1685.
[9] AR Item No. 38, at BCAR 1686.
[10] AR Item No. 38 at BCAR 1685-1687.
[11] AR Item No. 38 at BCAR 1693.
[12] AR Item No. 38, at BCAR 1695-1696.

the property wouldn't be worth anything to him.[13] Further, he noted that the loss of water sources beneath his property would hinder the value of his property.[14]

12. Mr. Steve Box testified on behalf of Environmental Stewardship as the organization's Executive Director.[15] He noted that the organization's property was located in a platted subdivision, and that the organization had no immediate intention to have a well on the property, but the organization had not made a determination of whether it would intend to drill a well in the future.[16]

13. Plaintiffs also presented expert testimony from Mr. George Rice, a groundwater hydrologist.[17] Mr. Rice testified that he had examined groundwater modeling performed by the District's staff relating to End Op's application.[18] While he acknowledged that the modeling performed was not specifically designed to predict the drawdown occurring at a specific point, Mr. Rice opined that the predictions of the model were sufficiently reliable to determine whether drawdown would occur at a particular location, and roughly the magnitude of the drawdown at that location.[19] With respect to Plaintiffs' properties, Mr. Rice concluded that End Op's pumping under the proposed permit would cause a drawdown of the Simsboro aquifer beneath Mr. Meyer's Property of roughly 200 – 400 feet,[20] a drawdown of the Simsboro Aquifer beneath Environmental Stewardship's property of roughly 100 feet,[21] a drawdown the Simsboro Aquifer beneath Hanna's property of roughly 50-100 feet,[22] and a drawdown the Simsboro Aquifer

[13] AR Item No. 38, at BCAR 1697.
[14] AR Item No. 38, at BCAR 1697.
[15] AR Item No. 38, at BCAR 1646.
[16] AR Item No. 38, at BCAR 1650.
[17] AR Item No. 38, at BCAR 1705.
[18] AR Item No. 38, at BCAR 1708.
[19] AR Item No. 38, at BCAR 1709.
[20] AR Item No. 38, at BCAR 1714.
[21] AR Item No. 38, at BCAR 1710.
[22] AR Item No. 38, at BCAR 1715.

beneath Brown's property of roughly 100 – 150 feet.[23] Mr. Rice had superimposed the location of Plaintiffs' properties upon the General Manager's modeling to visually demonstrate these drawdowns:[24]

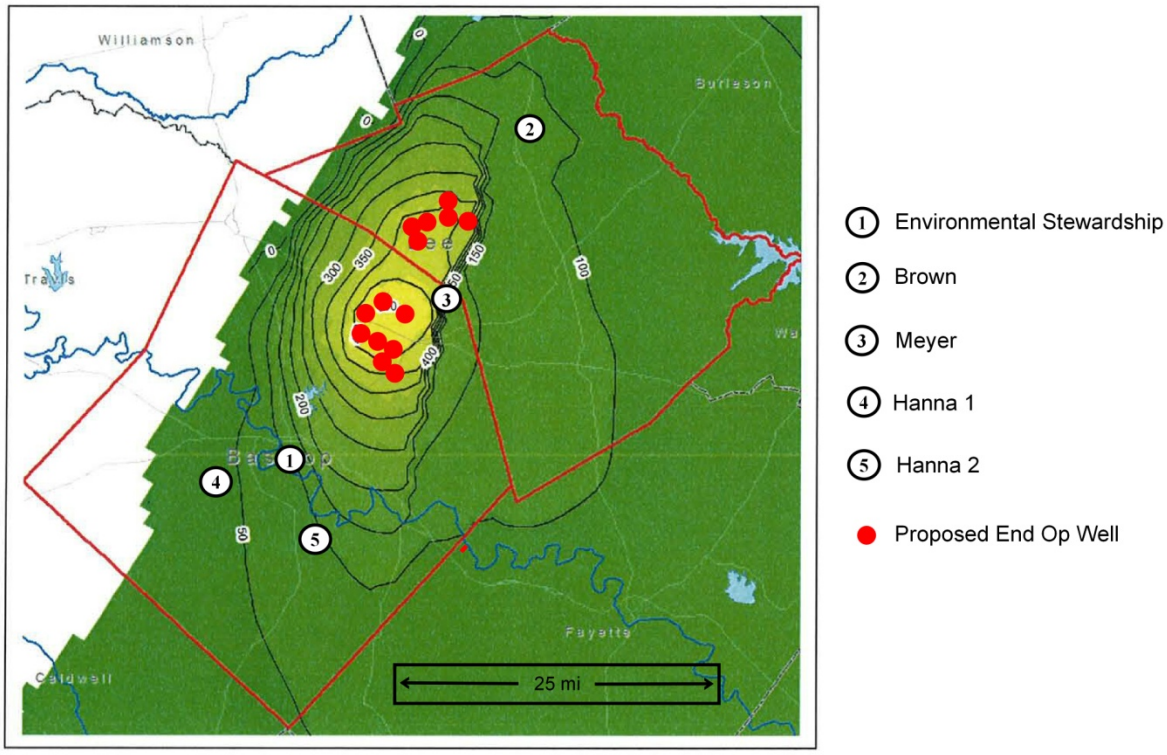

Figure 1
Property Locations
(Adapted from LPGCD memo of March 20, 2013)

14. Mr. Rice testified that these drawdowns could result in increased costs for the Plaintiffs to install a well, since it could require that the pump be set deeper, and he also opined that the drawdown would increase pumping costs.[25] Even though other aquifers are also present in the area, Mr. Rice opined that it is valuable for the landowners to have the Simsboro Aquifer

[23] AR Item No. 38, at BCAR 1713.
[24] AR Item No. 41 (Exh. ES- 3).
[25] AR Item No. 38, at BCAR 1710-1711.

available as a source of groundwater since the Simsboro is the most productive aquifer in the area.[26]

15. In addition, Mr. Rice testified that the drawdowns identified in this modelling solely reflected the impact of End Op's pumping.[27] He expected that other pumping would also occur from the Simsboro Aquifer, and based on this he concluded that End Op's pumping would increase the likelihood that the Plaintiffs would ultimately lack access to water in the Simsboro altogether.[28]

16. Furthermore, Mr. Rice testified that the Simsboro Aquifer was hydrologically connected to other aquifers in the area.[29] Thus, he opined that the pumping proposed by End Op could also impact the ability to pump water from the Carrizo Aquifer,[30] as well as the groundwater well owned by Mrs. Brown.[31] In his opinion, End Op's proposed pumping from the Simsboro could still require that Mrs. Brown drill a well deeper into the aquifer where her wells were currently completed, and would increase the cost of pumping from these other aquifers.[32]

17. He likewise testified that the Simsboro Aquifer discharges water into the Colorado River, and End Op's proposed pumping had the potential to reduce that discharge.[34]

18. End Op presented a hydrologist, Mike Thornhill. Mr. Thornhill did not challenge Mr. Rice's predicted drawdowns at the Meyer, Brown or Hannah properties. With regard to the drawdown at the Environmental Stewardship property, Mr. Thornhill merely testified that it would "not necessarily" be at a magnitude of 100 feet, because he believed that there were

[26]AR Item No. 38, at BCAR 1751.
[27] AR Item No. 38, at BCAR 1749.
[28] AR Item No. 38, at BCAR 1748.
[29] AR Item No. 38, at BCAR 1711.
[30] AR Item No. 38, at BCAR 1712.
[31] AR Item No. 38, at BCAR 1713-1714.
[32] AR Item No. 38, at BCAR 1714.
[34] AR Item No. 38, at BCAR 1712.

hydraulic boundaries in the Simsboro that would mitigate such a drawdown.[35] He further testified that Environmental Stewardship's property was too small to allow it to drill an exempt well,[36] although he conceded that Environmental Stewardship could drill a well into the Simsboro if it obtained an operating permit.[37] Mr. Thornhill devoted much of his testimony to discussing how expensive he believed it would be for the Plaintiffs to complete a groundwater well into the Simsboro, and how he believed that other aquifers beneath the Plaintiffs' properties could serve as alternate sources of groundwater.[38]

19. Subsequent to the preliminary hearing, the administrative law judge (ALJ) considered written briefing regarding Plaintiffs' requests for party status. By that briefing, Plaintiffs noted that they possessed an ownership interest in the Simsboro Aquifer beneath their property, and that the deprivation or divestment of that property constituted a cognizable injury.[39] Plaintiffs further argued that they were particularly impacted in light of the manner in which the proposed pumping would make it more difficult for them to access water in the Simsboro, and increase the likelihood that they would lose access to the Simsboro altogether.[40] End Op opposed Plaintiffs' request for party status, and argued that mere ownership did not suffice to demonstrate an injury, but, instead, that a requester was required to demonstrate use of the aquifer at issue. End Op also contended that since their pumping would cause system-wide drawdowns in a large area of the Simsboro Aquifer, that Plaintiffs interests were not different than those of the general public.[41]

[35] AR Item No. 38, at BCAR 1779.
[36] AR Item No. 38, at BCAR 1776.
[37] AR Item No. 38, at BCAR 1795.
[38] AR Item No. 38 at BCAR 1777-1778 and 1785 – 1789.
[39] AR Item No. 17.
[40] AR Item No. 17 at 1371.
[41] AR Item No. 18.

20. After considering the briefing of the parties, the ALJ denied Requesters' petitions for party status by Order No. 3 issued September 25, 2013.[42] The administrative law judge did not find that a drawdown would not occur in the Simsboro aquifer beneath Requesters' properties.[43] Rather, the ALJ denied Requesters' petitions for party status based on a legal conclusion that a requester must demonstrate an *actual or intended use* of groundwater owned by a person before the person can validly assert an interest in that groundwater.[44] The ALJ rejected Requesters' argument that a person's ownership interest in groundwater must itself be protected.[45]

21. For example, with regard to Environmental Stewardship, Andrew Meyer and Darwyn Hanna, the ALJ stated that:

> [T]he 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.[46]

The ALJ went on to say that:

> [W]ithout 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.[47]

Ms. Brown testified that she had two wells on her property and that these wells were the sole source of water for her personal and farming use. In fact, four leaseholds are dependent upon these wells for their water. Despite these facts, the ALJ found that Ms. Brown could not show herself to be an affected person without presenting evidence on the actual current use of her well, although her water rights have never been severed.

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[42] AR Item No. 22.
[43] AR Item No. 22.
[44] AR Item No. 22.
[45] AR Item No. 22.
[46] AR Item No. 22 Order No. 3 at BCAR 1423.
[47] *Id*.

22. Meyers also testified that as an organic farmer, he intended to drill a water well to support his farming operation. Here too, the ALJ found that he was not an affected person.

23. Additionally, the ALJ found that the modeled potential for drawdowns of roughly 100 feet to roughly 300 feet did not distinguish Requesters from other landowners in the area, equating the predicted drawdowns beneath these properties with "system-wide" aquifer drawdowns.[48]

24. On October 7, 2013, Plaintiffs filed a request for certified question, or, alternatively, a request for interlocutory appeal asking that the District Board be given an opportunity to review the ALJ's decision.[49] By order issued October 8, 2013, this request was denied by the ALJ.[50]

25. After the ALJ conducted a limited hearing on the merits in which Plaintiffs were not allowed to participate, Plaintiffs filed a request with the Board asking that the ALJ's denial of party status be reversed.[51] The Board met on September 10, 2014, to consider the ALJ's proposal for decision regarding the permit application, and to consider Plaintiffs' request that the ALJ's decision on party status be reversed.[52] At that meeting, the District declined to reverse the ALJ's decision on party status, but remanded the application to SOAH for further proceedings with regard to the merits of the application.[53] Afterwards, Plaintiffs filed a Motion for Rehearing on September 30, 2014, asking that the District reverse its decision regarding party status.[54] On November 7, 2014, Plaintiffs filed the immediate judicial appeal with regard to the District's decision to deny their request for party status.

[48] AR Item No. 22.
[49] AR Item No. 23.
[50] AR Item No. 24.
[51] AR Item No. 30.
[52] AR Item No. 78.
[53] AR Item No. 78.
[54] AR Item No. 35.

26. On January 19, 2015, the District issued an order denying party status to Plaintiffs.[55] In this order, the District adopted the findings of fact and conclusions of law in the ALJ's Order No. 3.[56] Thereafter, on February 20, 2015 Plaintiffs again filed their judicial appeal with regard to the District's denial of their request for party status.

III. Standard of Review

27. This case is an administrative appeal pursuant to Texas Water Code § 36.251. Chapter 36 of the Water Code provides that this appeal is governed by the same standard of review as that set forth for administrative appeals under the Texas Administrative Procedures Act.[57] Accordingly, this Court must reverse or remand the case for further proceedings if substantial rights of the Plaintiffs 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).

[55] AR Item No. 36.
[56] AR Item No. 36.
[57] Tex. Water Code 36.253, referencing Tex. Gov't Code Section 2001.174.

Each of these grounds is a distinct basis for reversing the decision of an administrative agency.[58] So, for example, an agency action that is arbitrary and capricious must be reversed even if it is supported by substantial evidence.[59] Each of these grounds presents a question of law.[60]

28. An agency decision is arbitrary if the agency does not consider a factor the Legislature directed it to consider, considers an irrelevant factor, or weighs relevant factors but reaches a completely unreasonable result.[61] An agency decision is also arbitrary if it denies the parties due process or fails to demonstrate a connection between the agency decision and the factors that are made relevant to the decision by the applicable statutes and regulations.[62]

29. Furthermore, the District must follow its own rules and procedures. An agency's failure to follow the clear and unambiguous language of its own rules is arbitrary and capricious.[63] A court cannot defer to an administrative interpretation that is plainly erroneous or inconsistent with the regulation or the underlying statute. [64]

IV. Argument and Authorities

A. The Texas Water Code and The District's Rules Provide for a Contested Case Hearing Upon the Request of a Person With a Justiciable Interest

30. The Texas Water Code establishes a process by which groundwater districts are to consider applications for permits. Each district is required to adopt procedural rules for this process, including a definition of the circumstances under which a permit application is

[58] *Arch W. Helton v. Railroad Commission of Texas et al.,* 126 S.W.3d 111, 115 (Tex. App.—Austin 2003, pet. denied.)
[59] *Texas Health Facilities Commission, et al. v. Charter Medical-Dallas, Inc.,* 665 S.W.2d 446, 454 (Tex. 1984).
[60] *The City of San Marcos v. Texas Commission on Environmental Quality*, 128 S.W.3d 264, 270 (Tex. App.—Austin 2004, pet. denied)
[61] *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 184 (Tex. 1994).
[62] *Occidental Permian, Ltd. v. Railroad Comm'n*, 47 S.W.3d 801 (Tex. App.—Austin 2001, no pet.).
[63] *Bexar Metropolitan Water District v. Texas Commission on Environmental Quality,* 185 S.W.3d 546, 550 (Tex. App. – Austin 2006 pet. denied).
[64] *County of Reeves v. Texas Commission on Environmental Quality*, 266 S.W.3d 516, (Tex. App. – Austin 2008, no pet.).

considered contested.[65] The District has adopted rules which provide for the direct consideration of certain permit applications by the Board of the District, including an application for an Operating Permit, an application for a Transport Permit, and an application to amend an Operating Permit if the amendment results in an increase in the withdrawal rate.[66] The District Rules provide for the opportunity to request a contested case hearing with respect to these types of applications.[67] If the District does not receive a timely-filed request for a contested case hearing, or if the Board denies all requests for a contested case hearing on an application, then the Application is considered uncontested.[68]

31. Under the Texas Water Code, a person may participate in a hearing on a contested groundwater permit application if the person possesses "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing."[69] These same standard is set forth in the District's rules regarding the consideration of a hearing request.[70] The District found that this test embodies constitutional standing principles,[71] and Plaintiffs do not disagree with that legal conclusion. The underlying concern 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."[72] To this end, a person seeking party status must establish:

[65] Tex. Water Code Section 36.415(b)(1). (References to the Water Code in this Brief refer to the versions of the Code as in effect in September of 2014).
[66] District Rule 14.3(A). An Operating Permit authorizes the withdrawal of a particular quantity of groundwater. District Rules Section 5. A Transport Permit Authorizes the transfer of groundwater outside of the District's boundaries for use outside of the District's boundaries. District Rules Section 6.
[67] District Rule 14.3(A) & (D).
[68] District Rule 14.3(H).
[69] Tex. Water Code § 36.415(b)(2).
[70] District Rule 14.3(F)(3).
[71] AR Item No. 36, Incorporating AR Item No. 22.
[72] *Bacon v. Texas Historical Commission,* 411 S.W.3d 161, 174 (Tex. App. – Austin, 2013).

> (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).[73]

32. Notably, the injury-in-fact requirement is qualitative, not quantitative.[74] As the Fifth Circuit has noted, "The Constitution draws no distinction between injuries that are large, and those that are comparatively small."[75] In affirming this principle, the United States Supreme Court has noted that the standing threshold "serves to distinguish a person with a direct stake in the outcome of litigation—even though small—from a person with a mere interest in the problem."[76] Furthermore, the question of whether an injury is particularized, as opposed to generalized, the Texas Supreme Court has observed that, "[t]he bar is based not on the number of people affected—a grievance is not generalized merely because it is suffered by large numbers of people."[77] In sum, when determining whether a person has a concrete and particularized injury, the focus is not on the magnitude of the injury or the number of other persons likewise impacted. Rather, the question is whether the injury is not merely abstract, and whether the plaintiff falls into the category of those injured.

33. The "Injury-in-fact," requirement is conceptually distinct from the question of whether the plaintiff has incurred a *legal* injury—i.e., whether the plaintiff has a viable cause of

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[73] *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 926 (Tex. App. – Austin, 2010).
[74] *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350, 357-358 (5th Cir. 1999).
[75] *Cramer v. Skinner*, 931 F.2d 1020, 1027 (5th Cir. 1991).
[76] *U.S. v. Students Challenging Regulatory Agency Procedures* (SCRAP) 412 U.S. 669, 734 (1973).
[77] *Andrade v. NAACP of Austin,* 345 S.W.3d 1, 7 (Tex. 2011).

action on the merits.[78] Similarly, the required infringement of a "legally protected interest" does not necessarily have to rise to the level of depriving the plaintiff of a "vested right" so as to violate due process.[79]

34. Such a determination of standing presents an issue of subject-matter jurisdiction.[80] In considering a challenge to standing that implicates the merits of an action, the court reviews the relevant evidence to determine if a fact issue exists.[81] In essence, a challenge to standing is evaluated under the motion for summary judgment standard, with the person challenging standing in the position of a movant for summary judgment.[82]

B. Texas law regarding Landowner Possession of Groundwater

35. Plaintiffs' justiciable interest in this case is rooted in their possessory groundwater rights, and so it is worthwhile to review the nature of those rights under Texas Law.

36. Texas Water Code at Section 36.002(a) provides that, "[t]he legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property." This same section goes on to say that, "[n]othing in this code shall be construed as granting the authority to deprive or divest a *landowner,* including a *landowner's* lessees, heirs, or assigns of the groundwater ownership and rights described by [§ 36.002]." This particular language of the statute was established through statutory amendments made in Senate Bill 332, passed in 2011 by the 82nd Legislature.[83]

37. Subsequent to the amendment of Water Code Section 36.002 in 2011, the Texas Supreme Court decided the case of *Edwards Aquifer Authority v. Day,* 369 S.W.3d 814 (Tex.

[78] *STOP at 926.*
[79] *Id.*
[80] *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 445-446 (Tex. 1993).
[81] *Texas Department of Parks and Wildlife v. Miranda,* 133 S.W.3d 217, 227 (Tex. 2002).
[82] *Id.*
[83] Acts 2011, 82nd Leg., Ch. 1207 (S.B. 332), § 1, eff. Sept. 1, 2011

2012). In that case, R. Burrell Day and Joel McDaniel (collectively "Day") owned property within the boundaries of the Edwards Aquifer Authority. The Edwards Aquifer Authority Act, creating the EAA, had created a permitting system by which the withdraw of significant quantities of water from the Edwards Aquifer required a permit from the EAA. Preference for permits was given to "existing users" defined as persons who withdrew water from the aquifer on or before June 1, 1993.[84] Such persons could obtain withdrawal permits based upon the beneficial use of water without waste during the period of June 1, 1972 to May 31, 1993.[85] An existing user who operated a well for three or more years during this historical period was entitled to a permit for at least the average amount of water withdrawn annually.[86]

38. In 1996, Day submitted an application for a permit to withdraw 700 acre-feet of water annually from the Edwards Aquifer. During the historical period, a well had existed on the Day property from which water flowed under artesian pressure. [87] Some of this water was used for irrigation, but most of it flowed down a ditch several hundred yards to a 50-acre lake on the property.[88] From 1983 to 1984, water from this lake had been used to irrigate 300 acres of coastal Bermuda grass.[89] Day's request for 700 acre-feet was apparently based on two acre-feet for the total beneficial use of irrigating the 300 acres plus the recreational use of the 50-acre lake.[90] The EAA denied this application based on a finding that withdrawals on the property during the historic period were not placed to a beneficial use.[91] Day appealed the Authority's

[84] *Day* at 819
[85] *Day* at 819
[86] *Day* at 820
[87] *Day* at 818
[88] *Day* at 818
[89] *Day* at 820
[90] *Day* at 820.
[91] *Day* at 820-821.

decision to the district court and sued the Authority for taking his property without compensation in violation of article I, section 17(a) of the Texas Constitution.[92]

39. Day's taking claim presented the Texas Supreme Court with a question of whether groundwater could be owned in place. The court acknowledged that it had never decided this question, but stated that, "we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently."[93]

40. Certainly, the Edwards Aquifer Authority sought to provide the Court with reasons to treat groundwater differently than oil and gas. Amongst these reasons, EAA noted that groundwater was governed by the rule of capture, which the EAA asserted deprived a landowner of two attributes essential to the ownership of property: a right of possession (i) from which others are excluded and (ii) which may be enforced.[94]

41. The *Day* court rejected EAA's contention that ownership of groundwater in place was precluded by the rule of capture. In doing so, the court relied upon the case of *Texas Co. v. Daugherty*, a seminal case governing oil and gas.[95] In *Daugherty*, the question was whether an oil and gas lessee's interest was subject to ad valorem taxation that is part of the value of the land, or alternatively, merely a usufructory right to appropriate the oil and gas as might be discovered.[96] In *Daugherty*, the Court observed that "the rights and privileges belonging to land contribute in a very substantial way to its value," and that therefore the value of such rights should be included in the valuation of the land for taxation.[97] Considering the fugacious nature of oil and gas, as well as the fact that oil and gas are subject to the rule of capture, the Daugherty

[92] *Day* at 821.
[93] *Day* at 823.
[94] *Day* at 830.
[95] *Day* at 830, referencing *Texas Company v. Daugherty, 176 S.W. 717 (Tex. 1915).*
[96] *Day* at 829, citing Daugherty at 718.
[97] *Daugherty* at 717.

court still found that "with the land itself capable of absolute ownership, everything within it in the nature of a mineral is likewise capable of ownership so long as it constitutes a part of it."[98] The *Day* court extended this principle to groundwater, rejecting the contention that ownership of groundwater was contrary to the rule of capture.[99] In doing so, the *Day* court also noted that they had previously also held that a landowner had the right to exclude others from oil and gas beneath their property through means such as a horizontal well, but not through ordinary drainage.[100] By extension, the *Day* court noted that a landowner had a similar right to exclude others from groundwater beneath their property, excepting ordinary drainage.[101]

42. EAA likewise argued that groundwater could not be owned in place because the law allegedly recognizes no correlative rights in groundwater.[102] The *Day* court likewise rejected this argument, relying heavily on the case of *Eliff v. Texon Drilling Company,* a seminal case establishing that the owner of land containing oil and gas possesses may pursue a valid claim for wrongful drainage despite the applicability of the rule of capture.[103]

43. Mrs. Mabel Eliff, Frank Elliff and Charles Elliff (collectively, "Elliffs") owned the surface and certain royalty interests in 3054.9 acres of land in Nueces County overlying a gas reservoir, and upon which they had a producing well.[104] Texon Company was operating a well on an adjacent property overlying the same reservoir which suffered a blowout, caught fire and cratered.[105] This created a fissure that engulfed the Elliff's own well, which then blew out,

[98] *Daugherty at 720.*
[99] *Day* at 830.
[100] *Day* at 830, citing Hastings Oil Co. v. Tex. Co., 234 S.W.2d 389, 396 (1950).
[101] *Day* at 830.
[102] *Day* at 830.
[103] *Day* at 830 – 832, referencing *Elliff v. Texon Drilling Company,* 210 S.W.2d 558 (1948), *Eliff* at 584.
[104] *Elliff* at 559.
[105] *Elliff* at 559.

cratered, caught fire and burned for several years.[106] This process drained large quantities of gas and distillate from beneath the Elliffs' property.[107] Virtually all of the waste and destruction of the gas and distillate had occurred after the minerals had drained from beneath the Elliffs' property.[108] The Elliff's sued, and obtained damages for various losses including damages for the gas and distillate wasted "from and under" their property due to Texon's actions.[109]

44. The Fourth Court of Appeals had denied these damages, reasoning that under the rule of capture the Elliffs had lost all property rights in the gas and distillate when it migrated from their property prior to being discharged to the surface.[110] The Texas Supreme Court reversed this decision by the Court of Appeals, reasoning that since the landowner is regarded as having absolute title in severalty in the oil and gas beneath his land, then he is accorded the usual remedies against trespassers who appropriate the minerals and destroy their market value.[111] The court recognized that oil and gas will migrate across property lines towards areas of low pressure by production from the common pool, and that this behavior had given rise to the rule of capture absolving a person from liability for normal drainage.[112]

45. Recognizing the apparent conflict between the absolute ownership of oil and gas in place between a landowners' property, as opposed to the rule of capture's absolution for draining oil and gas from the property of another, the Texas Supreme Court found it critically important that these two principles were resolved through the existence correlative rights in the common pool.[113] Such correlative rights afford each landowner a reasonable opportunity to

[106] *Elliff* at 559.
[107] *Elliff* at 559.
[108] *Elliff* at 560.
[109] *Elliff* at 560.
[110] *Elliff* at 560.
[111] *Elliff* at 561.
[112] *Elliff* at 561.
[113] Elliff at 562.

produce his fair share of the oil and gas under his property in consideration of his absolute ownership of the oil and gas in place.[114] Pursuant to such rights, each landowner has privileges against other landowners in the common pool to take oil and gas therefrom by lawful operations; each owner has duties not to exercise his rights in a way that injures the common source of supply; and each owner "has rights that other landowners not exercise their privileges of taking in such a way as to injure the common source of supply."[115]

46. In the *Day* decision, the Texas Supreme Court noted the importance of *Elliff's* observation that such correlative rights between the various landowners over a common reservoir of oil and gas have been recognized through state regulation of the oil and gas production that affords each landowner the opportunity to produce his fair share of the recoverable oil and gas beneath his land."[116] The *Day* court went on to note that the protection of this fair share in the common resource was also one purpose of the Edwards Aquifer Authority Act's regulatory provisions.[117] The court found it important that "in both instances, correlative rights are a creature of regulation, rather than the common law."[118] Thus, the *Day* court rejected the EAA's argument that groundwater should be treated differently than oil and gas based on EAA's contention that correlative rights were not recognized in groundwater.

47. Notably, this regulatory allocation of the common resource plays an important role in such a regulatory scheme, as the Texas Supreme Court noted in the case of *Brown v. Humble Oil and Refining Co.*:

> Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law

[114] *Elliff* at 562.
[115] *Elliff* at 562-563.
[116] *Day* at 830, quoting *Elliff* at 562.
[117] *Day* at 830.
[118] *Day* at 830.

> of capture . . . It is impossible to measure the exact quantity of oil and gas beneath each tract of land. It is equally impossible to fix a standard which will give exact justice to all landowners. Some landowners wish to produce oil and gas to the limit, while others desire to keep their oil and gas in the ground and develop it in less quantities. Hence the conflict of interests. It is now, however, recognized that when an oil field has been fairly tested and developed, experts can determine approximately the amount of oil and gas in place in a common pool, and can also equitably determine the amount of oil and gas recoverably [sic] by the owner of each tract of land under certain operating conditions.[119]

In the oil and gas context, it is the Railroad Commission that serves as this expert to equitably balance the interests of different landowners. In the groundwater context, it is the role of groundwater districts to serve as experts, resolve this conflict of interests between not only landowners who want to produce the groundwater they own "to the limit" versus other landowners who wish to keep their groundwater in the ground, but also non-commercial uses, sustainability, and environmental considerations.

48. The court in *Day* recognized that differences did exist between groundwater versus oil and gas. In particular, the court noted that:

> Unlike oil and gas, groundwater in an aquifer is often being replenished from the surface, and while it may be sold as a commodity, its uses vary widely, from irrigation, to industry, to drinking, to recreation. Groundwater regulation must take into account not only historical usage but future needs, including the relative importance of various uses, as well as concerns unrelated to use, such as environmental impacts and subsidence.[120]

In considering Day's taking claim, the Court went on to note that the potential replenishment of an aquifer, and the various non-commercial uses of groundwater, meant that the regulation of groundwater must consider more than surface area. Even given such differences, however, the

[119] *Brown v. Humble Oil & Refining Company,* 83 S.W.2d 935, 940, (1935).
[120] *Day* at 831.

court felt that these differences were outweighed by the common principle that both represent "a shared resource that *must* be conserved under the Constitution."[121]

49. After restating the *Elliff* court's conclusion that a landowner possesses absolute title in severalty to the oil and gas in place beneath his land, the court in *Day* concluded that a landowner also possesses the same absolute title in groundwater beneath their property.

50. Notably, in evaluating the Days' takings claim, the Supreme court rejected what it described as the EAA's "use-it-or-lose-it limitation."[122] The Court concluded that "a landowner cannot be deprived of all beneficial use of the groundwater beneath his property merely because he did not use it during an historical period and supply is limited."[123]

51. Premised in part on the court's conclusion that groundwater was properly considered to be owned in place by the landowner, the *Day* court found that the trial court had improperly granted summary judgment against Day, and accordingly affirmed the decision by the court of appeals which had reversed the trial court.[124]

C. <u>The Potential Drainage of Plaintiffs' Groundwater, and the Impact of the Permit on Plaintiffs Correlative Rights Constitute Justiciable Interests</u>

52. Lost Pines rejected Plaintiff's hearing requests based on essentially two basis: (1) a conclusion that Plaintiffs could not demonstrate injury without demonstrating current or planned use of their groundwater; and (2) a finding that system-wide aquifer drawdowns affect the general public, comprised of all persons who own rights to the groundwater contained in an aquifer.[125] Both of these basis fail.

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[121] *Day* at 832 (emphasis in original).
[122] *Day at* 842.
[123] *Day* at 843.
[124] *Day* at 843.
[125] AR Item No. 36, Incorporating AR Item No. 22.

D. The District's Finding that Plaintiffs Make No Use of the Impacted Groundwater Was Unjustified

53. The District's conclusion that the Plaintiffs are not using impacted groundwater is contrary to the evidence, and contrary to the applicable evidentiary standard. As noted, standing is to be determined by application of the summary judgment standard.[126] Under this standard, evidence favorable to the person seeking standing must be taken as true, every reasonable inference must be indulged in favor of the person seeking standing, and any doubts resolved in that person's favor.[127] The ALJ completely disregarded the fact that Brown had wells in use. The expert testimony of Rice demonstrated that those wells would be adversely affected by End Op's operations. Likewise, the ALJ disregarding Meyers' "intent" to drill a well to support his organic farming operation. The District was unjustified in its decision to disregard Plaintiffs' evidence of current and planned groundwater usage, and was unjustified in its decision to disregard Mr. Rice's testimony that End Op's planned pumping would impact groundwater usage in aquifers beyond the Simsboro such as those used by Mrs. Brown.

54. Notably, Plaintiffs in this case did not call upon the District to find that *any* amount of drawdown should be recognized as an injury-in-fact. In this case, Plaintiffs presented expert testimony demonstrating that the magnitude of the drawdowns involved would increase the costs for any of the Plaintiffs to complete a well into the Simsboro, and would increase the cost of producing water from that aquifer, as well as other aquifers. While End Op's testifying expert disagreed with the magnitude of drawdowns that would occur, he did not dispute Mr. Rice's testimony that drawdowns such as those identified by Mr. Rice would increase the installation and pumping costs associated with producing water from the Simsboro. This

[126] *Miranda* at 228.
[127] *Gail Nixon v. Mr. Property Management Company Inc., et al.,* 690 S.W.2d 546, 548-549 (Tex. 1985).

particularized demonstrated financial impact distinguishes the Plaintiffs from other landowners who may experience some drawdown, but for whom the drawdown would not be significant enough to increase the financial costs of producing groundwater from the Simsboro or other aquifers.

E. The Potential Diminution in Plaintiffs' Groundwater Assets as a Result of Permit Issuance Constitutes a Concrete and Particularized Injury, Even Without the Existence of a Pump or Current Use.

55. By adoption of the ALJ's order, the District stated that, "owning land and the groundwater under the land is not sufficient to show a particularized injury . . . since the [Plaintiffs] are not using and have not shown that they intend to use groundwater that will be drawn from the Simsboro."[128] Further explaining its position, the District took the position that, "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."[129]

56. Such reasoning could hardly be more contrary to the Texas Supreme Court's holding in *Day* that landowners possess absolute title to the groundwater beneath their property. Just as the Texas Supreme Court rejected the EAA's "use-it-or-lose-it" approach to groundwater rights, so, too, this court should reject Lost Pines' use-it-or lose-it characterization of Plaintiffs' groundwater rights. As reflected by the aquifer drawdowns indicated by the District's own modeling, End Op's proposed pumping of 18.2 billion gallons per year from the Simsboro Aquifer will cause the drainage of groundwater from beneath Plaintiffs' land. This drainage

[128] AR Item No. 1422.
[129] Id.

results in the diminution and potential elimination of groundwater that is a valuable asset held by the Plaintiffs. The value of the groundwater as an asset does not depend upon the existence of a pump within the aquifer, nor does the value of the groundwater as an asset depend upon plaintiffs decision on how or if to use the groundwater. The threatened devaluation of Plaintiffs property as a consequence of End Op's pumping is a concrete injury.

57. Practical considerations in the groundwater context only reinforce the need to recognize groundwater rights even in situations where a landowner does not have a well, or a demonstrated intent to drill a well. If the District's reasoning is allowed to stand, then the District has created an incentive for every landowner to drill a well and pump groundwater in order to protect their interest in that groundwater. This creates an incentive for precisely the type of waste that the regulatory scheme administered by the District is intended to prevent.

F. <u>The Potential Injury to Plaintiffs Groundwater Rights Constitutes an Injury to Real Property, Which, By Law, Is Unique.</u>

58. As noted, Texas Law by statute, "recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property."[130] Importantly, the law further recognizes that, "each and every piece of real estate is unique."[131] Thus, while the pumping allowed by End Op's proposed permit may impact many different pieces of property, the nature of each property must be considered unique, and the impacts upon each landowners property are accordingly unique to those properties. This nature of the impact as upon Plaintiff's own real property uniquely distinguishes the injury threatened by End Op's pumping from the injury suffered by not only the general public, but also distinguishes their injury from that

[130] Tex. Water Code 36.002(a).
[131] Home Savings of America, F.A. v. Van Cleave Development Company, Inc., 737 S.W.2d 58, 59 (Tex. App. San Antonio – 1987), quoted approvingly in *Batnaru v. Ford Motor Company,* 84 S.W.3d 198, 209 (Tex. 2002).

suffered by all other landowners.

G. Plaintiffs demonstrated an Injury to their correlative rights in the Simsboro Aquifer.

59. Furthermore, Plaintiffs' status as owners of groundwater in the Simsboro from which End Op proposes to draw groundwater means that they possess important correlative rights in the Simsboro Aquifer that the general public does not share.[132] End Op's pumping potentially impacts Plaintiffs' ability to draw their fair share of groundwater from the aquifer. This interest is injured as soon as water is drained from beneath their property, as it impedes Plaintiffs' right to keep the groundwater beneath their property. As owners of the groundwater beneath their property, Plaintiffs are entitled to conserve that water. Such conservation is no less a use of the water than the sale of the water, even though no well and no pump is required for Plaintiffs' to make this use of their groundwater in the Simsboro Aquifer. To the degree that End Op's pumping of water is wasteful, it results in the confiscation of Plaintiffs property, since such pumping is not protected by the rule of capture.

H. The fact that End Op's Pumping Would Potentially Injure Many People Does not Render Plaintiffs' Injury Common with the General Public.

60. The District also, apparently, denied Plaintiffs requests for party status based on a finding that many others would be likewise impacted. In denying Plaintiffs' requests for party status, the ALJ also noted that End Op's operation would cause system-wide drawdowns that would impact all landowners above the aquifer, which the ALJ equated with the general public. In argument to the District, End Op has alleged that Requesters' groundwater interest is not

[132] In proceedings before the District, Plaintiffs did not use the legal term "correlative rights." But, Plaintiffs evidence and argument regarding the impact of End Op's pumping on their own ability to ultimately utilize the Simsboro raised this issue in substance.

concrete and particularized because it is assuredly "common to the landowner community."[133] End Op argued that Plaintiffs bore a burden to present "evidence of an injury unique to each protestant."[134]

61. These arguments fail because they reduce the injury-in-fact analysis to nothing more than a quantitative consideration of how many persons may be impacted. As noted above, the courts have explicitly rejected such an approach.

62. While it is true that groundwater beneath many other properties in the District will also experience drawdown in the Simsboro, this is a function of the massive quantity of water End Op proposes to withdraw rather than an indication that Requesters' interests are common with the general public. The mere fact that an interest is shared with others does not render that interest "common with the general public" so as to preclude an injury in fact for purposes of standing. As the Texas Supreme Court has noted, in approvingly quoting the United States Supreme Court, "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody . . . where a harm is concrete, though widely shared, the Court has found injury in fact." *Andrade v. NAACP of Austin,* 345 S.W.3d 1, 7-8 (Tex. 2010) quoting approvingly *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 686-688 (1973) and *FEC v. Akins*, 524 U.S. 11, 24 (1998). In this manner, the Texas Supreme Court has soundly rejected End Op's contention that an interest is common with the general public merely because it is shared by many others. Plaintiffs do not have merely an abstract concern that the District properly follow its rules when evaluating End Op's application. To the

[133] AR Item No. 18 at BCAR 1382.
[134] *Id* at 1383.

contrary, each of the Plaintiffs stands to suffer a loss in the value of their own property if the District does not properly apply the law when considering End Op's application.

I. Participation in a Contested Case Hearing Could Provide Redress for Plaintiffs Injuries.

63. Importantly, in considering End Op's permit, the District was required by the Water Code to consider whether:

- the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders;
- the proposed use of water is dedicated to any beneficial use; and
- the applicant has agreed to avoid waste and achieve water conservation.[135]

64. In seeking party status, Plaintiffs are not required to demonstrate that End Op's proposed pumping is wasteful, nor are Plaintiffs required to show that End Op's pumping unreasonably impacts the Simsboro as an existing groundwater resource. But, these concerns underlie many of the interests asserted by Plaintiffs, and through a contested case hearing on these issues plaintiffs can obtain redress for their concerns regarding End Op's drainage of their groundwater.

V. Conclusion

65. For the reasons stated above, the Districts decision to deny Plaintiffs' request for party was contrary to the statutory standard set forth in Texas Water Code 36.416, and in the District's rules. Accordingly, the decision was in violation of Texas Water Code Chapter 36, in excess of the District's statutory authority, made through unlawful procedure, affected by error of

[135] Tex. Water Code Section 36.113(d)(2),(3) & (6).

law, not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole, arbitrary and capricious, and characterized by an abuse of discretion.

VI. Prayer

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendant be cited to appear and after trial be awarded judgment for Plaintiffs as follows:

(1) Reverse Lost Pines' decision to deny Plaintiffs' requests for party status;

(2) Remand this matter to Lost Pines for proceedings consistent with the Court's decision; and

(3) Grant Plaintiffs all other relief to which they may show themselves justly entitled.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been either hand delivered, sent by U.S. Mail, Facsimile Transmission, and/or electronic service to the following service list on this 13th day of April 2016.

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