CAUSE NO. 29,696

ANDREW MEYER, BETTE BROWN, DARWYN HANNA, Individuals, and ENVIRONMENTAL STEWARDSHIP, Plaintiffs,	§	**IN THE DISTRICT COURT**
v.	§	**21st JUDICIAL DISTRICT**
LOST PINES GROUNDWATER CONSERVATION DISTRICT, Defendant.	§	
END OP, L.P. Third-Party Defendant/Counter-Plaintiff	§	**OF BASTROP COUNTY, TEXAS**

PLAINTIFFS' REPLY BRIEF

TO THE HONORABLE JUDGE:

COMES NOW, Andrew Meyer, Bette Brown, Darwyn Hanna Individuals, and Environmental Stewardship, a non-profit organization, (collectively "Plaintiffs"), and submit this reply brief:

I. Introduction

1. The response briefs filed by Lost Pines Groundwater Conservation District (the "District" or "Defendant"), as well as End Op, L.P. ("End Op" or "Intervenor") do not justify affirming the District's decision to deny Plaintiffs' requests for party status in the contested case hearing held to consider End Op's application to withdraw 18.2 billion gallons of water from the Simsboro Aquifer.

2. Contrary to arguments by the District and End Op, this administrative appeal presents the court with questions of law, not fact. In particular, this case primarily presents the Court with two legal questions: (1) Whether the District must apply a summary judgment evidentiary standard when determining whether a person has a

justiciable interest pursuant to Texas Water Code § 36.415; and, (2) Whether a person must demonstrate an injury to a current or planned use of groundwater in order to demonstrate a particularized injury to groundwater rights as defined at Texas Water Code § 36.002. On both of these issues, the District has applied a statutory interpretation that is contrary to the unambiguous language of the governing statute. Thus, the District's decision was in violation of statutory provision, arbitrary and capricious, characterized by an abuse of discretion, affected by error of law, and made through unlawful procedure.

II. Although abatement of the current proceeding would most efficiently address the jurisdictional issues that have been raised, the Court possesses jurisdiction over Plaintiffs' appeal, given that the District has made its final determination on Plaintiffs' request for party status.

3. Lost Pines has challenged this Court's jurisdiction over Plaintiffs appeal premised on a contention that the order at issue is only an interim order. Plaintiffs contend that the most efficient means of addressing the District's jurisdictional challenge is through an abatement of the current judicial proceedings, to allow the District to reach a final decision on the merits of End Op's application, and to allow the filing of an administrative appeal satisfying the District's objection, which may then be efficiently consolidated into the current administrative appeal. Plaintiffs' have a pending Motion to Abate on these grounds.

4. Even so, the Court possesses jurisdiction over the current appeal. The District's jurisdictional challenge is premised on the District's assertion that the order subject to this appeal is only an interim order, and the District's contention that Texas Water Code Section 36.251 only authorizes the appeal of a final order.

5. The January 19, 2015 Order issued by the District constitutes a final order denying Plaintiffs' request for party status. In determining whether an agency order is final, a court should consider the statutory and constitutional context in which the agency operates and treat as final an agency order that: (1) is definitive; (2) is promulgated in a formal manner; (3) is one with which the agency expects compliance; and (4) imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process. The January 19, 2015 Order is definitive, in that it states that, "Environmental Stewardship, Darwyn Hanna, Bette Brown, Andrew Meyer, and F.D. Brown are hereby denied party status." The order was promulgated in a formal manner, in that it was issued after a formal public meeting as a result of a public vote of the District, and was issued under the signature of the President of the District. The District clearly expected compliance with the order, as it prevented the Landowners from participating as a party in the contested case hearing that had been held, as well as any hearing held afterwards by the State Office of Administrative Hearings. Furthermore, the order was the consummation of the consideration of Plaintiffs' request for party status through the initial filing of hearing requests, the referral of those requests to the State Office of Administrative Hearings at a formal public meeting of the District Board, a preliminary hearing before an administrative law judge (ALJ) to accept evidence on the requests for party status, the consideration of briefing by the ALJ on Plaintiffs' request, the issuance of a decision by the ALJ on the request for party status, the consideration of the ALJ's denial of party status at the September 10, 2014 formal public meeting of the District Board, a Board vote on the request, a refusal to act on Plaintiffs' September 30, 2014 Motion for rehearing, all ultimately leading up to the District's final decision to

deny Plaintiffs' requests for party status. In sum, the January 19, 2015 Order issued by the District denying Plaintiffs request for party status is properly considered to be the final order of the District on Plaintiffs' request for party status.

6. The District's September 10, 2014 decision to adopt the ALJ's denial of party status adversely impacted Plaintiffs substantial rights by denying them the opportunity to participate as a party in the agency proceedings as they progressed to an evidentiary hearing, as did the January 19th issuance of an order further memorializing that decision. The District's decision to deny Plaintiffs' requests for party status further violated their due process rights, which excused Plaintiffs from the obligation to exhaust all administrative remedies. In addition, given the extensive pleading of the issue before the District, and the District's issuance of a final order denying Plaintiffs' request for party status even after Plaintiffs filing of a motion for rehearing on the September 10th, 2014 decision, it was clear that further challenges to the decision at the agency level would be futile, also excusing Plaintiffs from the obligation to exhaust administrative remedies.

III. Plaintiffs' Motion for Rehearing Sufficiently Preserved Error

7. Contrary to End Op's assertion, Plaintiffs have preserved their argument regarding the injury to their correlative rights in groundwater within the Simsboro aquifer. The Texas Supreme Court has established that a motion for rehearing is sufficient when it states "(1) the particular finding of fact, conclusion of law, ruling, or other action by the agency that the complaining party asserts was error; and (2) the legal basis upon which the claim of error rests."[1] In their motion for rehearing, Plaintiffs

[1] *Morgan v. Employees' Retirement System of Texas*, 872 SW. 2d 819 (1994), *Burke v. Central Educ. Agency*, 725 S.W. 2d 393, 397 (Tex. App.—Austin 1987, writ ref'd n.r.e).

fulfilled both of these elements. In satisfaction of the first element, Plaintiffs objected to the District's decision that the ownership of groundwater is not an interest warranting protection in the permitting process and to the District's decision that Plaintiffs' groundwater interest is one common to the general public.[2] In satisfaction of the second, Plaintiffs asserted various legal bases to support their objections to the District's decision. One of these was a correlative rights argument.[3] The Texas Supreme Court has defined the concept of correlative rights in relation to oil and gas interests:

> Our courts . . . have frequently announced the sound view that each landowner should be afforded the opportunity to produce his *fair share* of the recoverable oil and gas beneath his land, which is but another way of recognizing the existence of correlative rights between the various landowners over a common reservoir of oil and gas.
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> *Eliff et al. v. Texon Drilling Co. et al*, 210 S.W. 2d 558, 582 (Tex. 1948) (emphasis added).

8. In their motion for rehearing to the District, Plaintiffs argued that "[o]ne purpose of groundwater regulation is to afford each owner of water in a common, subsurface reservoir a *fair share*. Given this protection, [Plaintiffs] need not demonstrate the ownership of a well, or an intent to drill a well, in order to demonstrate a legally protected interest."[4] As the Austin Court of Appeals has recognized, the purpose of a motion for rehearing is to apprise the agency of the claimed error and allow the agency the opportunity to correct the error or prepare to defend against it.[5] The standard is one of fair notice, and a plaintiff is not required to provide a detailed briefing of the law and the

[2] AR No. 35 at BCAR 001548-49.
[3] AR No. 35 at BCAR 001548-1549.
[4] AR No. 35 at BCAR 001548-1549.
[5] *BFI Waste Systems of North America v. Martinez Environmental Group,* 93 S.W.3d 570, 578 (Tex. App. – Austin 2002, pet. denied)("*BFI*").

facts surrounding his or her complaint.[6] While Plaintiffs did not use the legal term of art "correlative rights," Plaintiffs clearly made a correlative rights argument, as defined by our own courts, as a basis for their objections to the District's decision. Plaintiffs stated the particular District decisions to which they objected and they provided the legal bases for those objections, one of which was a correlative rights argument. Therefore, Plaintiffs have sufficiently preserved the correlative rights argument for judicial review.

IV. Defendant and Intervenor Mischaracterize the Standard of Review

9. Defendant and intervenor mischaracterize the applicable standard of review in two ways.

10. First, Defendant and intervenor indicate that the sole question for the court is whether or not the District's decision is supported by substantial evidence. However, Texas Government Code Section 2001.174, which all parties agree establishes the standard of review in this case, lists five separate types of error requiring reversal of an agency decision, with a lack of substantial evidence being only one type of error requiring reversal of the agency decision.[7] Particularly relevant for this case, an agency decision must be reversed if it is in violation of a statutory provision, arbitrary or capricious, or if it is affected by error of law.[8] An agency's decision is arbitrary or results from an abuse of discretion if the agency: (1) failed to consider a factor the legislature directs it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant

[6] *BFI* at 578, 580.
[7] See *Heritage on the San Gabriel Homeowner's Association v. Texas Commission on Environmental Quality*, 393 S.W.3d 417, 424 (Tex. App. – Austin 2012)("Instances may arise, however, in which the agency's action is supported by substantial evidence, but is nonetheless arbitrary and capricious.") citing *Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 454 (Tex.1984).
[8] Tex. Gov't Code Section 2001.174(2)(D) &(F).

factors that the legislature directs it to consider but still reaches a completely unreasonable result.[9]

11. Furthermore, Intervenor and the District mischaracterize the deference owed to the District. This case involves the application of two statutory provisions: Texas Water Code § 36.002 defining the nature of property rights in groundwater, and section 36.415, defining the standard for determining whether a person is entitled to participate as a party in a contested case hearing. Where a court is considering an agency's formal statutory interpretation, the Texas Supreme Court has made clear that two threshold issues must be addressed.[10] First, is the statute ambiguous? If the statute is not ambiguous, then no deference is owed to the agency's interpretation of the statute.[11] Second, if the statute is ambiguous, is the agency's interpretation reasonable? If the agency's interpretation is not reasonable, then no deference is owed to the agency's interpretation.[12]

12. In this case, the governing statutes are not ambiguous, and, to whatever degree the court may find them to be ambiguous, the District's interpretation is not reasonable. Thus, no deference is owed to the District's statutory interpretations at issue in this case.

V. Plaintiffs' Appeal presents the Court with errors of law on which the District possessed authority to reverse the ALJ, and which warrant

[9] *City of El Paso v. Public Utility Commission of Texas,* 883 S.W.2d 179, 184 (Tex. 1994).
[10] *Railroad Commission of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619 (2011), *quoting Fiess v. State Farm Lloyds, 202 S.W.3d 744, 747-748 (Tex.2006)*("It is true that courts give some deference to an agency regulation containing a reasonable interpretation of an ambiguous statute. But there are several qualifiers in that statement. First, it applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions in a court brief. Second, the language at issue must be ambiguous; an agency's opinion cannot change plain language. Third, the agency's construction must be reasonable; alternative *unreasonable* constructions do not make a policy ambiguous.")
[11] *Id.*
[12] *Id.*

reversal even if it were assumed, *arguendo*, that substantial evidence supported the District's decision.

13. Defendant and Intervenor argue that the Court owes deference to the District in this case based on an assertion that the court is to defer to the District's determination on factual questions. However, the dispositive issues addressed by the District, that are now before this Court on appeal, consist of two legal questions:

> (1) Did the summary judgment standard apply to the consideration of Plaintiffs requests for party status?
> (2) Does the potential diminution or destruction of a person's groundwater held within an aquifer constitute a particularized injury, even absent the person's current use of groundwater from that aquifer?

14. If either of these legal questions is answered in the affirmative, then the District's decision was premised on an erroneous interpretation of the governing law, and therefore must be reversed.

15. The arguments presented by the District reflect the legal nature of the dispute in this case over the applicable evidentiary standard for the District's determination of Plaintiffs' party status:

> 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 are wrong.[13]

The District's assertion here that "Plaintiffs are wrong" presents a disputed question of law, not fact.

16. Likewise, the briefing reflects the legal nature of the dispute over the role of groundwater ownership in this case. In its response brief, End Op states that: "[t]he Legislature's intent is clear. At a minimum, you must be a well owner within the

[13] District's Brief at p. 10.

formation from which the permit seeks to produce water and an existing **user**."[14] Likewise, the District's arguments are grounded in the District's assertion that, "Plaintiffs failed to prove that End Op's pumping will cause an actual or imminent injury to their current or proposed **use** of groundwater."[15] Again, as a legal matter, this argument presumes that the only means by which a particularized injury can be shown is through the demonstration of an impact on the person's **use** of groundwater. Thus, the dispositive question before the court is the legal question of whether an impact on the use of groundwater is required to demonstrate a particularized injury. If Plaintiffs are correct that as a legal matter they need not demonstrate use through the ownership of a well within the formation from which the permit seeks to produce water, then Plaintiffs prevail. No review of the District's resolution of disputed facts is necessary for this determination, and such legal error requires reversal even if it were assumed, *arguendo*, that the District's decision was supported by substantial evidence.

17. Notably, the legal nature of the issues presented also demonstrates the flaw in End Op's argument that the District's decision was mandated by deference to the ALJ's initial decision to deny Plaintiffs' requests for party status.[16] The District is empowered to change a finding of fact or conclusion of law made by the administrative law judge if the District determines that the ALJ did not properly apply or interpret applicable law or agency rules.[17] In this case, the ALJ's failure to properly apply the summary judgment standard, and the ALJ's decision to require that a person demonstrate ownership of a well drawing water from the same aquifer as the permitted withdrawal

[14] End Op Brief at p. 2.
[15] District Brief at p. 11.
[16] End Op Brief V.A, at p. 22 *et seq*.
[17] Tex. Gov't Code Section 2001.058(e)(1).

both constituted a failure to properly apply or interpret the applicable law and agency rules. Thus, the District was fully empowered to reverse the ALJ's decision to deny Plaintiffs' request for party status, and the District erred in failing to reverse the ALJ's decision.

VI. Texas Water Code § 36.415(b)(2) requires application of the summary judgment standard to End Op's challenge to Plaintiffs' request for party status, and under this standard Plaintiffs demonstrated the requisite personal justiciable interest even if an impact on groundwater use is required.

18. As noted, both the District and End Op reject Plaintiffs' legal contention that the summary judgment standard applied to the consideration of Plaintiffs' request for party status, with End Op in the position of the movant when challenging Plaintiffs request for party status.

19. All parties agree that the applicable standard for the determination of party status is set forth at Texas Water Code section 36.415, and all parties agree that this standard is equivalent to the constitutional minimum requirements for standing.[19] Plaintiffs part ways from End Op and the District on the question of whether the application of constitutional standing principles also requires that the District apply the summary judgment standard when considering a request for party status in a contested case hearing.

20. The District argues that the summary judgment standard has no application here because an evidentiary hearing was held.[20] Importantly, the hearing held which served as the basis for denial of Plaintiffs' request for party status was only a

[19] District Brief at p. 9; End Op Brief at page 24.
[20] District Brief at p. 10.

preliminary hearing for the ALJ to accept evidence on the limited question of party status.[21] A similar hearing was held by the trial court in the case of *Texas Department of Parks and Wildlife v. Miranda,* in which the Texas Supreme Court held that the summary judgment standard applied to a determination of standing under constitutional standing principles.[22]

21. In arguing that the summary judgment standard does not apply, the District relies upon the decision by the Austin Court of Appeals in *Good Shepherd Medical Center, Inc. v. State*.[23] In that case, Good Shepherd Medical Center filed a declaratory judgment action against the State of Texas alleging that certain provisions of the Texas Insurance Code were unconstitutional local or special laws.[24] Other hospitals intervened in the matter, and after discovery those hospitals filed a plea to the jurisdiction challenging whether Good Shepherd had standing to assert its action.[25] The trial court held a hearing and accepted evidence on this plea, and after considering the evidence dismissed the Plaintiffs' declaratory judgment claims for lack of standing.[26] In examining the trial court's decision to grant the plea to the jurisdiction, the Austin Court of Appeal relied on *Miranda*, and stated that "[t]o the extent the [plea to the jurisdiction] implicates the merits of the plaintiff's cause of action, the party asserting the plea has the burden of negating a genuine issue of material fact as to the jurisdictional fact's existence, in a

[21] AR Item No. 38, p. BCAR 1615, lines 8-15 ("Today we have a few things on the agenda. We shouldn't be here that long. I want to – we have party status we want to address first, and then we'll get into a procedural schedule[.]")(Administrative Law Judge Michael O'Malley).
[22] *Texas Department of Parks and Wildlife v. Miranda,* 133 S.W.3d 217, 222 (2004) ("*Miranda*")(Noting trial court's hearing on the Department's plea), *Miranda* at 228.
[23] District Brief at p. 9-10, quoting *Good Shepherd Medical Center v. State,* 306 S.W.3d 825 (Tex. App. – Austin 2010, no pet.)("*Good Shepherd*").
[24] *Good Shepherd* at 830.
[25] *Good Shepherd* at 830.
[26] *Good Shepherd* at 834-836.

manner similar to a traditional summary judgment motion."[27] The court continued on to say that, "we take as true all evidence favorable to the pleader and indulge every reasonable inference and resolve any doubts in the pleader's favor."[28] The acceptance of evidence at a hearing on standing had not altered the application of the summary judgment standard. In considering whether the Plaintiff had met the redressability prong of standing, the Austin Court of Appeals did note that "Standing . . . requires pleadings (and ultimately, proof)" that the elements are met, and the Court went on to note that "Good Shepherd's pleadings are simply silent as to the redressability of [the] alleged injury."[29] Since Good Shepherd had not even pled that its injuries were redressible, the Court of Appeals sustained the trial court's grant of the plea to the jurisdiction.[30] It is true that the Austin Court of Appeals imposed a burden on Good Shepherd to demonstrate that the elements of standing had been met, but that demonstration was evaluated under the summary judgment standard advocated in the present case by Plaintiffs, not the preponderance of the evidence standard forwarded by the District and End Op.

22. As a matter of law, the District's decision to require that Plaintiffs demonstrate the elements of standing by a preponderance of the evidence, rather than by application of the summary judgment standard, was plainly inconsistent with the constitutional standing standard established by Texas Water Code Section 36.415 that governs the determination of party status in this case.

23. Taken as true, with reasonable inferences resolved in Plaintiffs favor, the Plaintiffs demonstrated particularized injury to their existing or intended use of their

[27] *Good Shepherd* at 831, *citing Miranda* at 227-228.
[28] *Good Shepherd* at 831.
[29] *Goode Shepherd* at 837.
[30] *Good Shepherd* at 837.

groundwater. As noted in Plaintiffs' Initial Brief, Bette Brown testified that she had a currently producing well on her property that is relied upon by four households, and Plaintiffs' expert hydrologist testified that End Op's pumping from the Simsboro could impact the ability to pump water from the groundwater well owned by Mrs. Brown.[31] The District's decision to dismiss this testimony was contrary to the applicable summary judgment standard, and under the proper standard, by which this testimony is taken as true, Mrs. Brown demonstrated a particularized impact to her current use of groundwater.

24. Furthermore, Mr. Meyer testified that water was a necessary element for his farming operation, that he had been planning to drill a well for more than a year, and that he would spend the money to complete the well into the Simsboro if necessary in light of the necessary quality and yield of water needed.[32] Mr. Rice testified that End Op's proposed pumping would result in a drawdown beneath Mr. Meyer's property of roughly 200 – 400 feet,[33] and that such a drawdown could result in increased costs for the installation of a well, in addition to increased pumping costs.[34] Mr. Rice added that the Simsboro Aquifer is the most productive aquifer in the area.[35] Again, taken as true under the properly applicable summary judgment standard, this testimony demonstrates particularized impact on Mr. Brown's planned use of groundwater from the Simsboro Aquifer.

25. The same is true for each of the other plaintiffs, as explained in Plaintiffs' Initial Brief.

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[31] AR Item No. 38, pp. BCAR 1666-1668; AR Item No. 38, AR Item No. 38, pp. BCAR 1711-1714.
[32] AR Item No. 38, BCAR 1683 – 1693.
[33] AR Item No. 38, BCAR 1714.
[34] AR Item No. 38, BCAR 1710-1711.
[35] AR Item No. 38, BCAR 1751.

VII. As a matter of law, the District failed to recognize the drainage of a person's groundwater constitutes injury, even absent demonstrated ownership of a well, or current consumptive use of the groundwater.

26. The arguments presented by End Op and the District also fail to justify affirming the District's decision that a person must demonstrate an injury to a current use of groundwater in order to obtain party status.

27. Plaintiffs do not contend that "all landowners automatically satisfy the injury-in-fact requirements for standing under section 36.415(b)(2) based on ownership alone" as End Op claims.[36] Plaintiffs have asserted that their justiciable interest is rooted in their possession of groundwater, but Plaintiffs have not claimed that possession alone constitutes an injury. In this case, Plaintiffs contend that a particularized showing of drawdown of groundwater owned by a person as the specific result of a proposed permitting action demonstrates a particularized injury. Contrary to End Op's argument, this particularized concern is not equivalent to a concern regarding the impact of the District's rules on groundwater resources in general.[37] The injury identified by Plaintiffs relates to the specific permitting action proposed by the District in considering End Op's application, and relates to the specific groundwater Plaintiffs own as real property.

28. Plaintiffs' contend that the diminution or destruction of a person's groundwater constitutes an independent injury apart from an impact on a person's use of groundwater. This interpretation is consistent with the applicable law, while the requirement of use imposed by the District, and endorsed by End Op, is directly contrary to the applicable law. End Op claims that, "[the] Legislature's intent is clear. At a minimum, you must be a well owner within the formation from which the permit seeks to

[36] End Op Brief at p. 25, citing Plaintiffs Brief at p. 16.
[37] End Op Brief at p. 29.

produce water and an existing **user**."[38] Similarly, the District claims that, "lower water levels in the Simsboro formation only injure the plaintiffs if they **are using or plan to use** groundwater from the Simsboro formation."[39] End Op goes so far as to claim that Plaintiffs' position renders the applicable provisions of Chapter 36 and the District's rules "meaningless." Yet, it is End Op's interpretation that renders Texas Water Code Section 36.002 meaningless.

29. If, as Intervenor and Defendant claim, the sole basis of injury to groundwater rights is an injury to a person's **use** of groundwater, then a landowner's rights in the groundwater beneath his or her property is only usufructory, the same as the right of use enjoyed by persons who own surface water rights.[40] Section 36.002 of the Water Code makes clear that groundwater rights are not merely usufructory. Instead the statute provides that, "a landowner owns the groundwater below the surface of the landowner's land as real property." This distinction is critical. As noted by the Texas Supreme Court in *Edwards Aquifer Authority v. Day*:

> [N]on-use of groundwater conserves the resource, whereas the non-use of appropriated waters is equivalent to waste. To forfeit a landowner's right to groundwater for non-use would encourage waste.[41]

30. In this way, a primary purpose for the statutory establishment of a landowner's ownership of groundwater is to protect the landowner's right to **non-use**. By requiring that Plaintiffs demonstrate the use of groundwater in order to protect their groundwater rights, the District is acting in direct contravention of the ownership right granted by Texas Water Code Section 36.002. Further, the District's requirement that a

[38] End Op Brief at p. 2.
[39] LPGCD Brief at p. 13.
[40] *Edwards Aquifer Authority v. Day,* 369 S.W.3d 814, 842 (2012)("But riparian rights are usufructuary, giving an owner only a right of use, not complete ownership.")
[41] *Day* at 842.

landowner use his or her groundwater in order to protect his or her groundwater rights is directly contrary to protection of a landowner's right of non-use that is a statutory purpose of the absolute ownership rights granted by Section 36.002. Quite simply, the Plaintiffs possess a right to conserve their groundwater through non-use, and issuance of End Op's requested permit potentially impairs that right due to the drainage of Plaintiffs' groundwater.

31. The District claims that Plaintiffs rely on "district-wide" reductions in water levels as a basis for standing.[42] This is simply not true. Plaintiffs demonstrated drawdowns within the Simsboro beneath their properties ranging from 50 feet to 400 feet.[43] Due to the massive quantity of water that End Op proposes to withdraw from the Simsboro Aquifer, drawdowns of such an extent will occur throughout much of the District, but there are significant portions of the District where the relevant modeling indicates no drawdown will occur.[44] Plaintiffs' do not claim an injury to their groundwater interests merely by virtue of owning water in the Simsboro Aquifer. Plaintiffs' asserted injury rests on the fact that the District's own modeling indicates particular drawdowns in the Simsboro beneath their properties.

VIII. The District's legal errors render its decision arbitrary and capricious, requiring reversal of the decision.

32. The District's decision to deny Plaintiffs' requests for party status was arbitrary and capricious and effected by error of law because that denial was based on interpretations of Texas Water Code 36.415 and 36.002 that were inconsistent with the

[42] District Brief at p. 13.
[43] AR Item No. 41; AR 38, p. BCAR 1714 (Drawdown of roughly 200 – 400 feet beneath Meyer property); BCAR 1710 (Drawdown of approximately 100 feet beneath Environmental Stewardship property); BCAR 1715 (Drawdown of 50 – 100 feet beneath Hannah property); BCAR 1713 (Drawdown of roughly 100 – 150 feet beneath Brown's Property).
[44] AR Item No. 41.

unambiguous language of the statutes. Furthermore, by premising its denial of party status upon an alleged lack of groundwater use by the Plaintiffs, the District's decision was based on a statutorily irrelevant factor. Accordingly, the District's decision must be reversed and remanded, without regard to whether it was supported by substantial evidence in the record.

IX. Prayer

33. For the reasons set forth above, Plaintiffs maintain their request that Defendant be cited to appear and after trial be awarded judgment for Plaintiffs as follows:

(1) Reverse the District's decision to deny Plaintiffs' requests for party status;

(2) Remand this matter to the District 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,
GRISSOM & THOMPSON

/s/ Donald H. Grissom

Donald H. Grissom
State Bar No. 08511550
don@gandtlaw.com
William W. Thompson
State Bar No. 19960050
bill@gandtlaw.com
509 West 12th Street
Austin, Texas 78701
(512) 478-4059
(512) 482-8410 fax

Ernest F. Bogart
State Bar No. 02556500

P.O. Box 690
Elgin , Texas 78621
512-281-3326
Fax 512-281-5094
Attorneys for Brown, Meyer and Hanna

/s/ Eric Allmon
Eric Allmon
State Bar No. 24031819
Frederick, Perales, Allmon & Rockwell, P.C.
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone (512) 469-6000
Facsimile (512) 482-9346
Attorney for Environmental Stewardship

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, Certified Mail, Return Receipt Requested, Electronic Mail, and/or Facsimile Transmission to the following service list on this 18th day of May 2016.

/s/Eric Allmon
Eric Allmon

MCGINNIS, LOCHRIDGE & KILGORE, LLP
Russell S. Johnson
600 Congress Avenue, Suite 2600
Austin, Texas 78701
(512) 495-6074
(512) 505-6374 – fax

STACEY V. REESE LAW PLLC
Stacey V. Reese
2405 West 9th Street
Austin, Texas 78703
(512) 289-4262
(512) 233-5917 – fax
Attorneys for END OP, L.P.

Robin Melvin, General Counsel LPGCD
GRAVES DOUGHERTY HEARON & MOODY
401 Congress Avenue, Suite 220
Austin, Texas 78701
(512) 480-5688
(512) 480-5888 – fax

Lost Pines Groundwater Conservation District
Attn: Mr. James Totten, General Manager
908 NE Loop 230
P.O. Box 1027
Smithville, Texas 78957
(512) 360-5088

Michael A. Gershon
Kristen Olson Fancher
c/o Lloyd Gosselink
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5872 fax

Attachment A

SOAH DOCKET NO. 652-13-5210
TCEQ DOCKET NO. 2009-2058-MSW

IN THE MATTER OF THE	§	**BEFORE THE LOST PINES**
APPLICATIONS OF END OP, L.P.	§	
FOR WELL REGISTRATION,	§	**GROUNDWATER**
OPERATING PERMITS, AND	§	
TRANSFER PERMITS	§	**CONSERVATION DISTRICT**

ANDREW MEYER, BETTE BROWN, DARWYN HANNA, AND ENVIRONMENTAL STEWARDSHIP'S MOTION FOR REHEARING OF THE LOST PINES GROUNDWATER CONSERVATION DISTRICT DECISION ON AFFECTED PERSONS AND REMAND MATTER TO SOAH FOR CONTESTED CASE HEARING AND REQUEST FOR WRITTEN FINDINGS AND CONCLUSIONS

TO THE HONORABLE JUDGE:

COMES NOW, Andrew Meyer, Bette Brown, Darwyn Hannah, and Environmental Stewardship ("Movants") and files their Motion for Rehearing and Request for Written Findings and Conclusions. In support, Movants would show the following:

I. Introduction

Movants request that the Lost Pines Groundwater Conservation District (the "District') reconsider it's decision that they are not affected persons for purposes of a contested case hearing and remand End Op, L.P.'s Application to the State Office of Administrative Hearings ("SOAH") for a contested case hearing including Movants as parties. If the District does not reconsider and reverse this decision, Movant's ask that the District issue written conclusions and findings.

By order dated June 19, 2013, the District referred End Op's applications to SOAH. 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." On August 12, 2013, a preliminary hearing was held at which administrative law judge ("ALJ") Michael O'Malley considered Movants' petitions for party status. On

September 25, 2013 the ALJ issued Order No. 3 denying their party status. On September 10, 2014, the District adopted that Order as a final decision.

II. While the District acknowledges the potential drawdown of the Simsboro, it held that the ownership of groundwater is not an interest protected in a permit proceeding.

There has been no finding that a drawdown would not occur in the Simsboro aquifer beneath Movants' properties. Rather, the Movants petition for party status was denied 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. Movants' argument that a person's ownership interest in groundwater must itself be protected was rejected.

For example, with regard to Environmental Stewardship, Andrew Meyer and Darwyn Hanna, the proposal for decision adopted by the District stated:

> [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.[1]

Further:

> [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.[2]

Ms. Brown's circumstances were distinguishable, since she in fact has two wells on her property. Even so, it was found that Ms. Brown could not show herself to be an affected person without presenting evidence on the actual current use of the Simsboro Aquifer.

Additionally, the District found that the modeled potential for drawdowns of roughly 100

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[1] Order No. 3, p. 11.
[2] Order No. 3, p. 11.

feet to roughly 300 feet did not distinguish Requesters from other landowners in the area,[3] equating the predicted drawdowns beneath these properties with "system-wide" aquifer drawdowns.

III. The Denial of Movants' petitions for party status was in error

The District erred in concluding that the ownership of groundwater is not an interest warranting protection in the permitting process. Movants' ownership of land, with the accompanying vested interest in groundwater, constitutes a legally protected interest within the regulatory framework established by Chapter 36 of the Water Code. At § 36.002(c), this Code provides 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]."

In the case of *Edwards Aquifer Authority v. Day,* 369 S.W.3d 814 (Tex. 2012), the Texas Supreme Court defined the extent of this legally protected interest. Analogizing the treatment of groundwater to that afforded oil and gas, the Court held that a landowner is regarded as having absolute title to the water in place beneath his or her land, and that each owner of land owns separately, distinctly and exclusively all of the water beneath his or her land, subject to the law of capture and state regulation. *Day* 831-832. Founded in this principle, the Court went on to conclude that *landowners* have a constitutionally compensable interest in groundwater,[4] and that, "one purpose of groundwater regulation is to afford each *owner of water* in a common,

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[3] On this point, Requesters will note that under *adopting Texas Department of Parks and Wildlife v. Maria Miranda and Ray Miranda*, 133 S.W.3d 217 (Tex. 2004), all evidence on an issue where the merits of a case overlap with a fact relevant to standing, the evidence presented by the person attempting to demonstrate standing must be taken as true absent conclusive proof otherwise. Protesters contend that they have shown by a preponderance of the evidence that a potential exists for the drawdowns they claim to occur. Even so, since the extent of aquifer drawdown in the Simsboro goes to a factor to be considered in this permitting proceeding (namely compliance with the desired future conditions), Requesters evidence regarding potential drawdowns must be taken as true.

[4] *Day* at 838.

subsurface reservoir a fair share." *Day* at 840 (emphasis added). Given this protection, Movants need not demonstrate the ownership of a well, or an intent to drill a well, in order to demonstrate a legally protected interest.[5]

It is undisputed that Movants own real property overlying the Simsboro aquifer from which End Op seeks authorization to pump 56,000 acre-feet per year,[6] or 18.2 billion gallons per year. It is further undisputed that groundwater modeling performed by the District itself indicates that this massive amount of pumping will result in a drawdown of water within the Simsboro Aquifer extending to Movants' properties.[7] This drawdown of water beneath Movants' properties constitutes an "injury in fact." Movants' interest in the groundwater beneath their properties will be concretely impacted by the anticipated drawdowns, and such drawdowns will only occur in the particular area impacted by the proposed groundwater withdrawal.

The District apparently finds that Movants' groundwater interest is one common to the general public. This ignores the particularized predictions of drawdown within the Simsboro Aquifer that Movants presented at the preliminary hearing. While it is true that groundwater

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[5] End Op also alleges that Environmental Stewardship is precluded from drilling a well pursuant to District Rules 3.1 and 8.2. While ownership of a well is not necessary to demonstrate a legally protected interest, Environmental Stewardship would note that End Op's allegation is incorrect. Rule 3.1, relied upon by End Op, would simply prevent Environmental Stewardship from drilling a well exempt from permitting – it does not prohibit the drilling of a well by obtaining an operating permit from the District. Rule 8.2 establishes buffer zones for a non-exempt well of 100 feet from the property line, and 1,500 feet from the nearest well in the Simsboro. The Environmental Stewardship property is over 1,500 feet from the nearest well in the Simsboro, so the only legal impediment to the drilling of a well into the Simsboro by Environmental Stewardship is 100-foot property-line buffer. This does not constitute a prohibition, however, as District Rule 8.3 provides a variance process by which the District may waive this required buffer. Thus, it is not true that Environmental Stewardship is "precluded" from drilling a Simsboro well on its property.

[6] End Op Ex. 3, p. 1.

[7] Exhibit ES-4.

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 Movants' 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 Statesv. 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. While some drawdown in the Simsboro may occur beneath other properties, Movants' interests are distinguishable by virtue of the demonstrated and acknowledged potential of aquifer drawdowns within the Simsboro.

In addition to such legal considerations, the District's decision should be reversed due to practical considerations. If their decision 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. Importantly, this punishes landowners who may choose to conserve groundwater, since apparently, a landowner who wishes to use or waste their groundwater has a protected interest, while a landowner who opts to limit their use of groundwater has no right to

protect their groundwater interests. The District should not reward needless or wasteful pumping.

IV. No hearing occurred with regard to the issues raised by Movants

Movants were particularly harmed by the denial of party status since no hearing meaningfully occurred on the issues of greatest interest to Movants.

Subsequent to the denial of Movants' petitions for party status, Aqua and End Op reached a settlement agreement by which End Op agreed to the incorporation of certain conditions into the permit and Aqua agreed to limit the evidentiary hearing to only issues of the impact of End Op's proposed pumping on Aqua's operations. The evidentiary hearing consisted of nothing more than a show of the parties presenting evidence to support conditions that End Op had already manufactured.

Thus, no evidentiary hearing case was held to address disputed issues of concern to Movants such as the impact of End Op's pumping on Movants' wells, whether the proposed permits are consistent with the District's desired future conditions, or whether the proposed permits are consistent with the District's management plan.

V. Prayer

For these reasons, Movants respectfully pray:

(1) That this matter be set for rehearing;

(2) That upon rehearing, the District reverse its decision denying Movants' requests for party status;

(3) That End Op's application be remanded to SOAH for a hearing on the merits including Movants as parties;

(4) In the alternative, that the District issue written conclusions and findings if it does

not reverse its decision to deny Movants' requests for party status;

(5) The Movants be granted all other relief to which they may show themselves justly entitled.

Respectfully Submitted,

GRISSOM & THOMPSON

Donald H. Grissom
State Bar No. 08511550
William W. Thompson
State Bar No. 19960050
509 West 12th Street
Austin, Texas 78701
(512) 478-4059
(512) 482-8410 fax

Ernest F. Bogart
State Bar No. 02556500
P.O. Box 690
Elgin , Texas 78621
512-281-3326
Fax 512-281-5094
Attorneys for Brown, Meyer and Hanna

Eric Allmon
State Bar No. 24031819
Lowerre, Frederick, Perales,
Allmon & Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone (512) 469-6000
Facsimile (512) 482-9346
Attorney for Environmental Stewardship

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, Certified Mail, Return Receipt Requested, and/or Facsimile Transmission to the following service list on this 30 day of September 2014.

Donald H. Grissom

MCGINNIS, LOCHRIDGE & KILGORE, LLP
Russell S. Johnson
600 Congress Avenue, Suite 2600
Austin, Texas 78701
(512) 495-6074
(512) 505 6374 fax

STACEY V. REESE LAW PLLC
Stacey V. Reese
2405 W. 9th Street
Austin, Texas 78703
(512) 289-4262
(512) 233-5917 fax
Attorneys for End Op

Lost Pines Groundwater Conservation District
Attn: Mr. Joe Cooper, General Manager
908 NE Loop 230
P.O. Box 1027
Smithville, Texas 78957
(512) 360-5088

Robin Melvin, General Counsel LPGCD
GRAVES DOUGHERTY HEARON & MOODY
401 Congress Avenue, Suite 220
Austin, Texas 78701
(512) 480-5688
(512) 480-5888 fax

Michael A. Gershon
Kristen Olson Fancher
c/o Lloyd Gosselink
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5872 fax

Attachment B

LOST PINES GROUNDWATER CONSERVATION DISTRICT

AN ORDER DENYING PARTY STATUS TO ENVIRONMENTAL STEWARDSHIP, DARWYN HANNA, BETTE BROWN, ANDREW MEYER, AND F.D. BROWN IN CONSIDERING APPLICATIONS OF END OP, L.P. FOR OPERATING PERMITS AND TRANSPORT PERMITS

WHEREAS, End Op, L.P. ("Applicant") submitted applications for Operating Permits and Transport Permits for 14 wells in Bastrop and Lee Counties seeking authorization to withdraw an aggregate of 56,000 acre-feet per year from the Simsboro aquifer to be used for municipal purposes in Travis and Williamson Counties (the "Applications"); and

WHEREAS, after proper notice under District Rule 14.3.C, the Board of Directors of the District (the "Board") held a public hearing on the Applications at 5:00 p.m. on April 18, 2013, at the American Legion Hall in Giddings, Texas; and

WHEREAS, on April 10, 2013, Aqua Water Supply Corporation ("Aqua") submitted to the District a request for a contested case hearing on the Applications; and

WHEREAS, on May 8, 2013, Environmental Stewardship, Darwyn Hanna, Bette Brown, Andrew Meyer, and F.D. Brown (collectively, the "Landowners"), filed requests to be designated as parties in any contested case hearing held on the Applications.

WHEREAS, on May 9, 2013, Applicant requested that the District contract with the State Office of Administrative Hearings ("SOAH") to conduct a hearing on Aqua's request for a contested case hearing; and

WHEREAS, on June 19, 2013, the District issued an order that: (1) granted Aqua's request for a contested case hearing on the Applications; (2) denied all other requests for a contested case hearing on the Applications, if any, as untimely under the District rules; (3) authorized the General Manager to enter into a contract with SOAH to conduct a contested case hearing on the Applications; (4) found that the requests for party status filed by the Landowners were timely under the District rules; and (5) referred the issue of whether the Landowners have standing to participate in the contested case hearing as parties at SOAH; and

WHEREAS, after a preliminary hearing on August 12, 2013, the Administrative Law Judge ("ALJ") determined that Aqua had standing as a party under the provisions of Chapter 36, Water Code, to participate in this contested case hearing and that the Landowners had not demonstrated the required interest to participate as parties in the contested case hearing; and

WHEREAS, On October 7, 2013, the Landowners filed a Request for Certified Question or, Alternatively, Request for Permission to Seek Interlocutory Appeal of Order No. 3, and Motion to Abate, or, Alternatively, Request for Provisional Party Status; and

WHEREAS, on October 10, 2013, End Op, L.P., the General Manager of the District, and Aqua Water Supply Corporation responded to the Landowner's motions, and on October 14, 2013, the Landowners filed a reply to those responses; and

WHEREAS, on October 15, 2013, the Administrative Law Judge issued Order No. 5 denying the Landowners Request for Certified Question or, Alternatively, Request for Permission to Seek Interlocutory Appeal of Order No. 3, and Motion to Abate, or, Alternatively, Request for Provisional Party Status because neither the District Rules or SOAH Rules to certify an issue to the District, nor is there authority to convert an interim order to a Proposal for Decision; and

WHEREAS, on September 10, 2014 the Board held the Final Hearing on the End Op, L.P. Applications and voted to deny Party Status to the Landowners as set forth in this Order.

NOW THEREFORE, the Board ORDERS that:

1. Environmental Stewardship, Darwyn Hanna, Bette Brown, Andrew Meyer, and F.D. Brown are hereby denied party status.

2. The Board hereby adopts the evidence presented, the Findings of Fact and the Conclusions of Law in the Administrative Law Judge's Order No. 3.

ISSUED:

Michael A. Talbot

President, Lost Pines Groundwater
Conservation District Board of Directors

Date: 1-19-15