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CAUSE NO. 29,696

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

END OP, L.P.'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING JURISDICTION

TO THE HONORABLE JUDGE CARSON CAMPBELL:

End Op, L.P. ("End Op") files its Response to Plaintiffs Andrew Meyer, Bette Brown, Darwyn Hanna, and Environmental Stewardship's (collectively, "Plaintiffs") Supplemental Brief Regarding Jurisdiction, and respectfully shows the following:

I. SUMMARY OF RESPONSE

1. The only *substantive* issue for this Court in this administrative appeal brought pursuant to Texas Water Code Section 36.251 ("Section 36.251") is whether the Lost Pines Groundwater Conservation District (the "District") properly denied Plaintiffs' request to participate as parties in the contested case hearing on End Op's applications

for permits to drill wells and produce groundwater.[1] Before reaching that determination, Plaintiffs must first establish the Court has subject-matter jurisdiction over their administrative appeal. Without subject-matter jurisdiction, a court does not have authority to render judgment and must dismiss the claim without resolving the parties' substantive arguments. *See City of Houston v. Rhule,* 417 S.W.3d 440, 442 (Tex. 2013); *DaimlerChrysler Corp. v. Inman,* 252 S.W.3d 299, 304 (Tex. 2008); *Bland ISD v. Blue,* 34 S.W.3d 547, 554 (Tex. 2000).

2. Section 36.251 expressly excludes Plaintiffs as among those entitled to judicial review. In an effort to avoid the statute's fatal outcome, Plaintiffs allege theories of "inherent constitutional jurisdiction" and "trials de novo" that are not supported by Texas law or their pleadings. Regardless of the theory, the outcome is the same. The Court lacks subject-matter jurisdiction because:

i. Section 36.251 expressly denies "non-parties" like Plaintiffs a right to appeal the District's decision;

ii. Plaintiffs fail to demonstrate a deprivation of a vested property right necessary to trigger "inherent constitutional" jurisdiction; and

iii. Section 36.251 and the separation of powers doctrine prohibit a court's *de novo* review of the District's *decision* and Plaintiffs failed to plead a valid, constitutional takings claim that might otherwise grant a trial de novo.

II. APPLICABLE STANDARD

3. Lack of subject-matter jurisdiction is a fundamental error that can be raised at any time. *Sivley v. Sivley,* 972 S.W.2d 850, 855 (Tex. App.—Tyler 1998, no pet.). The

[1] *See* End Op's Response to Plaintiffs' Supplemental Brief Regarding Party Status filed on September 5, 2017, and End Op's Brief and Response to Plaintiffs' Initial Brief filed on May 4, 2016, both of which are incorporated by reference as if set out in full herein.

challenge can be raised for the first time on appeal. *Waco ISD v. Gibson,* 22 S.W.3d 849, 851 (Tex. 2000); *Tullos v. Eaton Corp.,* 695 S.W.2d 568, 568 (Tex. 1985); *see Rusk State Hosp. v. Black,* 392 S.W.3d 88, 95 (Tex. 2012) (defense of governmental immunity implicates subject-matter jurisdiction and can be raised for the first time on appeal). A court can inquire into its jurisdiction on its own initiative without a motion at any time. *See Texas Workers' Comp. Comm'n v. Garcia,* 893 S.W.2d 504, 517 n.15 (Tex. 1995). Standing is a component of subject-matter jurisdiction that cannot be waived and may be raised for the first time on appeal. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 445 (Tex. 1993).

III. THE COURT LACKS JURISDICTION BECAUSE THE STATUTE DENIES NON-PARTIES, LIKE PLAINTIFFS, A RIGHT TO JUDICIAL REVIEW

A. Section 36.251(b) Expressly Denies Non-Parties, like Plaintiffs, a Right to Judicial Review and Case Law Supports Denial of Review.

4. Section 36.251 of the Texas Water Code authorizes judicial review of a groundwater conservation district's decision. Specifically, Section 36.251 states:

> (a) A person, firm, corporation, or association of persons affected by and dissatisfied with any rule or order made by a district, including an appeal of a decision on a permit application, is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order.
>
> (b) Only the ***district, the applicant, and parties to a contested case hearing may participate in an appeal of a decision on the application that was the subject of that contested case hearing***. An appeal of a decision on a permit application must include the applicant as a necessary party.
>
> (c) The suit shall be filed in a court of competent jurisdiction in any county in which the district or any part of the district is located. The suit may only be filed after all administrative appeals to the district are final.

TEX. WATER CODE § 36.251, Tex. H.B. 2767, 84th Leg., R.S. (2015) (emphasis added)(effective June 10, 2015).[2]

5. Section 36.251(a) permits any person affected by and dissatisfied with any rule or order to file suit against the District subject to the subsections (b) and (c). Subsection (b) limits the right to participate in an appeal of a decision on a permit application to the applicant, the District, and "parties" [3] to the contested case hearing. Plaintiffs admit they were not parties to the contested case hearing. Plaintiffs concede Section 36.251(b) (effective June 10, 2015) applies to Plaintiffs' November 2016 request for judicial review.

6. Although there is no case law[4] analyzing a non-party's right to judicial review under the current version of Section 36.251,[5] recent case law under analogous enabling statutes supports denial of judicial review.

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[2] *See also* TEX. WATER CODE § 36.413(b), (specifically limiting right to file suit against District under Section 36.251 to the applicant or a party to the contested case hearing).

[3] "Parties" is not defined in Chapter 36 of the Texas Water Code. *See, e.g.,* TEX. WATER CODE § 36.001. District Rule 15.2(C)(3), defines "parties" as: "(i) the General Manager; (ii) the applicant; and (iii) persons who have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest that is within a district's regulatory authority and affected by the Application, not including persons who have an interest common to members of the public, and who have raised a justiciable issue relating to the Application." DISTRICT RULE 15.2(C)(3), as amended April 20, 2016. Under SOAH's rules, a party is "a person named or admitted to participate in a case before SOAH." 1 TEX. ADMIN CODE § 155.5 (State Office of Administrative Hearings, Rules of Procedure). Under the APA, a party means "a person or state agency named or admitted as a party." TEX. GOV'T CODE § 2001.003(4). Black's Law Dictionary defines a party as "a person who takes part in a legal transaction or proceeding is said to be a party." BLACK'S LAW DICTIONARY 1232 (9th ed. 2009). Thus, Plaintiffs are not "parties" under any definition of the word.

[4] *See, e.g., Wimberley Springs Partners, Ltd., v. Wimberley Valley Watershed Ass'n,* No. 03-13-00467-CV, 2017 Tex. App. LEXIS 4590, 2017 WL 2229876, at *1-3 (Tex. App.—Austin May 19, 2017, no pet. h.) (2011 appeal filed under prior version addressing timeliness of request for contested case hearing in which application was not contested and source of district court's jurisdiction was not discussed).

[5] The prior version of Section 36.251 in effect at the time the appeal was filed (Tex. H.B. 2294, 74th Leg., R.S. (1995)) did not specifically limit a right to judicial review in a contested case to the applicant, the District and parties to the contested case hearing. Rather, Section 36.251 stated:

7. In *Coastal Habitat Alliance v. Public Util. Comm'n of Tex.,* the Third Court of Appeals affirmed the district court's judgment denying an entity's right to judicial review of the Commission's order for lack of subject-matter jurisdiction because the enabling statute authorizing judicial review expressly excluded a right of review to any entity who was not a party to the proceeding. *Coastal Habitat Alliance v. Public Util. Comm'n of Tex.*, 294 S.W.3d 276, 282 (Tex. App—Austin 2009, no pet.). The Commission denied Coastal Habitat Alliance's motion to intervene concluding the Alliance had not shown a justiciable interest in the proceeding (i.e., Alliance lacked standing). Alliance later filed suit in district court seeking reversal of the order denying its motion to intervene and to vacate approval of the application on the basis that the denial of intervention violated the Texas Utility Code and its right to due process and due course of law.[6] The Commission filed pleas to the jurisdiction seeking dismissal of the lawsuit, which were granted. On appeal, the Third Court affirmed the lack of jurisdiction after analyzing the statute authorizing a right to judicial review of decisions by the Commission and concluding that, although the statute specifically authorized judicial review, it did so in a manner that excluded any entity not a party to the proceeding before the Commission.

8. More recently in 2015, the Third Court of Appeals affirmed the analysis it used in *Coastal Habitat* and other decisions. *Tex. Comm'n on Envtl. Quality v. City of Aledo,* No.

"A person, firm, corporation, or association of persons affected by and dissatisfied with any provision or with any rule or order made by a district is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order. The suit shall be filed in a court of competent jurisdiction in any county in which the district or any part of the district is located. The suit may only be filed after all administrative appeals to the district are final."

[6] Notably, the Alliance did not assert an affirmative, constitutional takings claim.

03-13-00113-CV, 2015 Tex. App. LEXIS 6940, 2015 WL 4196408, at *5-7 (Tex. App.—Austin 2015, no pet.) (authorizing a right to judicial review to non-party where Texas Water Code section 5.531(a) did not limit appeals to "parties" and acknowledging it is proper to deny a right to judicial review to non-parties where statute permitted only parties to the proceeding to obtain judicial review) (internal citations omitted).

9. The issue in *Coastal Habitat,* the district court's subject-matter jurisdiction to review an agency's denial of participation in a proceeding before the agency, is the exact issue before this Court. Just as the Third Court of Appeals properly affirmed denial of review for lack of subject matter jurisdiction in an action alleging denial of due process where the enabling statute expressly excluded a right of review to non-parties, this Court should do the same.

B. The Court Only Has Jurisdiction Over Plaintiffs' November 2016 Appeal, and the Statute in Effect at That Time Denies Judicial Review.

10. Plaintiffs filed four requests for judicial review in connection with the District's decision to deny Plaintiffs' request for party status.[7] Only the November 2016 action is based on a final, appealable order. As discussed *supra* Section III.A., the statute in effect

[7] The November 17, 2014 action (original Cause No. 29,696) is based on the District's oral, interim decision on September 10, 2014 to deny Plaintiffs party status. The February 20, 2015 action (originally Cause No. 423-3627, consolidated into Cause No. 29,696 on May 20, 2016) is based on the District's written interim order on January 19, 2015, in which it memorialized its interim oral decision to deny Plaintiffs party status. The November 4, 2016 action (originally Cause No. 393-21, consolidated into Cause No. 29,696 on February 22, 2017) is based on the District's final, written order dated September 21, 2016, in which the District made a final decision on End Op's application and incorporated its prior interim decision to deny Plaintiffs party status. Plaintiffs filed their fourth request for judicial review, Cause No. 398-335, on November 4, 2016 based on the District's final, written order dated September 21, 2016. Plaintiffs' fourth request for judicial review filed on November 4, 2016 (Cause No. 398-335) was an exact duplicate of Cause No. 393-21, filed in error, and non-suited on January 11, 2017. Consolidation of any of these matters does not waive subject-matter jurisdiction.

at the time Plaintiffs filed their appeal in November 2016 expressly prohibits a right to judicial review to Plaintiffs because they are not the applicant, the District, or a party to the contested case hearing.

11. Interim orders are not subject to appeal or judicial review. *West v. Tex. Comm'n on Envtl. Quality,* 260 S.W.3d 256, 264 (Tex. App.—Austin 2008, pet. denied) citing *City of Corpus Christi v. Public Util. Comm'n*, 572 S.W.2d 290, 299-300 (Tex. 1978) (op. on reh'g) (recognizing "[c]oncern for efficient administrative procedure requires consideration of the validity of interim orders only upon appeal from final orders"). An interim order is by definition an order made pending the cause, before a final disposition on the merits. *Corpus Christi,* 572 S.W.2d at 297.[8] In a contested case hearing on a permit at SOAH, an order denying party status in a contested case hearing is an interim order. *Tex. Comm'n on Envtl. Quality v. City of Aledo,* No. 03-13-00113-CV, 2015 Tex. App. Lexis 6940, 2015 WL 4196408, at *28 (Tex. App.—Austin July 8, 2015, no pet.)(acknowledging an order denying party status to a contested case hearing at SOAH is an interim order subsumed within a final order and appealable only when final order becomes appealable); *Tex. Comm'n on Envtl. Quality v. Sierra Club,* No. 03-12-00625-CV, 2014 Tex. App. Lexis 2648, 2014 WL 902513, at *3 (Tex. App.—Austin March 7, 2014, no pet.)(analyzing multiple actions filed and consolidated at different stages in administrative process and concluding the court has subject matter jurisdiction over the final order and appealable only when final order becomes appealable).

[8] If every interim order issued by an agency could be immediately appealed to court (and a decision on the merits stayed while each appeal was pursued through the appellate courts), it would be difficult for agencies to make a final decision on an application in any contested case.

12. Any prior versions of Section 36.251 in effect at the time Plaintiffs filed prior requests for judicial review are not relevant because those requests were not based on a final, appealable order. As such, the Court lacked subject-matter jurisdiction over any of Plaintiffs' previously filed appeals, the basis of which were interim orders not ripe for review. *See, e.g., Tex. Comm'n on Envtl. Quality v. Guadalupe Cnty. Groundwater Conservation Dist.,* No. 04-15-00433-CV, 2016 Tex. App. LEXIS 3491, 2016 WL 1371775, *11-12 (Tex. App—San Antonio April 6, 2016, no pet.) (reversing denial of plea to jurisdiction and determining court lacked jurisdiction because real controversy was not ripe while application was still pending before agency). When a plaintiff does not comply with a jurisdictional requirement, it deprives the court of subject-matter jurisdiction. *See City of DeSoto v. White,* 288 S.W.3d 389, 393 (Tex. 2009); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.,* 84 S.W.3d 212, 220-21 (Tex. 2002) (failing to exhaust administrative remedies before filing suit is jurisdictional if administrative body has exclusive jurisdiction over dispute). The requirements in TEX. GOV'T CODE § 2001.174 (the APA) are jurisdictional because they restrict the kind of case a court may decide and the kind of relief it may be grant.[9] Likewise, the requirements in Chapter 36 of the Texas Water Code are also jurisdictional.[10] When an agency's jurisdiction is exclusive, a party must exhaust all administrative remedies before seeking judicial review of a

[9] *Sierra Club v. Texas Nat. Res. Conserv. Comm'n,* 26 S.W.3d 684, 688 (Tex. App—Austin 2000), *aff'd,* 70 S.W.3d 809 (Tex. 2002).

[10] *See, e.g.,* TEX. WATER CODE § 36.113 (granting groundwater conservation districts the sole authority and discretion to rule on applications for groundwater permits), § 36.251 (defining the limited terms and conditions under which suit against a groundwater district may be brought), § 36.253 (mandating substantial evidence rule as standard of review on appeal), § 36.412 (outlining motion for rehearing as jurisdictional prerequisite to exhaustion of administrative remedies), § 36.413 (restricting right to file suit if motion for rehearing is not filed on time).

decision; until the party exhausts those remedies, a court lacks subject-matter jurisdiction, and dismissal is mandatory. *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006).

13. Even if the Court were to find that it had jurisdiction over one of the previously filed actions based on an interim order(s) and/or a prior version of Section 36.251, at best, Plaintiffs would only be entitled to review of the decision to deny party status not the merits of the application. For example, assuming Plaintiffs are correct in their contention that Section 36.251(b) does not apply to Plaintiffs' November 2016 request for judicial review because it is not a decision on the application,[11] Plaintiffs concede they would only be entitled to review of the decision to deny party status not the merits.[12] Likewise, even if a prior version of the statute applied to one of Plaintiffs' requests for judicial review over one of the interim orders, Plaintiffs concede the statute would only authorize judicial review of the order denying standing (not review of the decision granting End Op's applications).[13]

IV. PLAINTIFFS FAIL TO ESTABLISH THE ELEMENTS NECESSARY TO TRIGGER ANY INHERENT CONSTITUTIONAL JURISDICTION

14. Plaintiffs are landowners who reside miles away from End Op's proposed well field in the Simbsoro formation. With the exception of Plaintiff Brown, Plaintiffs do not have wells or any plans to exercise their groundwater rights. Although Brown has one

[11] This contention ignores the law dictating that an interim order denying party status is subsumed within the final decision on the application.

[12] *See* Plaintiffs' Supplemental Brief Regarding Jurisdiction, pp. 2-3 wherein Plaintiffs argue Section 36.251 (effective June 10, 2015) does not apply to any of Plaintiffs' appeals because the decision at issue is the decision to deny party status not the decision to grant the applications.

[13] *Id.* at pp. 3-7 wherein Plaintiffs argue a prior version of Section 36.251 applies to Plaintiffs' February 20, 2015 action entitling them to review of the order denying party status.

operational well, her well is in a shallower formation and pumping in the Simsboro has very minimal, if even detectable, effect on water levels in formations lying above and over the Simsboro.[14]

15. Under Texas law, a party *may* have a right to judicial review of an administrative order if the order adversely ***affects*** a ***vested*** property right or otherwise violates a constitutional right such as due process. *Coastal Habitat,* 294 S.W.3d at 285-86. Plaintiffs allege the issuance of End Op's permits adversely impacted their vested property rights in their groundwater beneath their land and denial of their requests for party status constituted a deprivation of constitutional due process thereby trigging a court's inherent constitutional jurisdiction[15] to review an agency's order even where the Legislature denies judicial review of agency action.[16] Plaintiffs fail to demonstrate that issuance of the permits adversely ***affects*** a ***vested*** property right and/or that denial of party status violated their due process rights.

A. Plaintiffs Fail to Demonstrate Deprivation of A Vested Property Right As The Texas Supreme Court Has Made Clear that Issuance of a Permit in Itself Does Not Deprive a Liberty or Property Interest

16. The showing of an adverse affect to a vested property right that violates due process is a high burden – it requires a showing of a deprivation of a vested right. *Stop*

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[14] *See* End Op's Brief and Response to Plaintiffs Brief filed May 4, 2016, pp. 11-15 (testimony from End Op's expert and evidence from the administrative record cited therein).

[15] *West v. Tex. Comm'n on Envtl. Quality,* 260 S.W.3d 256, 260-61 (Tex. App.—Austin 2008, pet. denied) (APA gives independent right to judicial review when the agency's statute is silent on the issue). Because TEX. WATER CODE § 36.251 gives an independent right to review, the enabling statute is not silent on a right to review. Thus, there is no independent right to review under the APA (TEX. GOV'T CODE § 2001.174). Plaintiffs do not argue an independent right to review under the APA; instead, Plaintiffs argue they are entitled to an inherent right to judicial review.

[16] *See* Plaintiffs' Supplemental Brief Regarding Jurisdiction, pp. 8-9.

the Ordinance Please v. City of New Braunfels, 306 S.W.3d 919, 926-27 (Tex. App.—Austin 2010)(noting that infringement of legally protected interest in standing test is distinct and does not require a showing rising to the level of "depriving the plaintiff of a 'vested right' so as to violate due process") citing to *Coastal Habitat,* 294 S.W.3d at 287. Noted by Plaintiffs in their Motion for Rehearing filed in support of their November 2016 action, this burden is even higher than the "injury-in-fact" requirement Plaintiffs failed to establish when they requested, and were properly denied, party status at the agency level.[17] In other words, if Plaintiffs failed to meet the lower burden of an "injury-in-fact" of a "legally protected interest" at the agency level necessary to trigger standing, Plaintiffs cannot now satisfy the higher burden of deprivation of a vested property right triggering inherent jurisdiction when the Legislature expressly declines a right to judicial review.

17. Plaintiffs' argue that denial of their requests for party status deprives them of real property interests. The Supreme Court of Texas' opinions in *City of Waco* and *Bosque River Coalition*, and that court's reliance on *Collins*, a court of appeals opinion, refute Plaintiffs' argument. Specifically, the Texas Supreme Court, in consideration of a complainant's argument that his due process rights have been violated because he was denied a contested case hearing to oppose a permit application, the Court rejected the complainant's argument that he was denied due process reasoning that "the issuance of

[17] *See* Plaintiffs' Motion for Rehearing dated September 27, 2016 at p. 4, attached as an exhibit to Plaintiffs' November 2016 action quoting *STOP,* 306 S.W.3d at 926-27("The 'injury-in-fact,' requirement is conceptually distinct from the question of whether the plaintiff has incurred a legal injury … 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.").

a permit in itself does not deprive a landowner of any liberty or property interest," rather, the agency's rules seek to protect such interests and the permit itself requires an operation subject to oversight so that it will not deprive complainant of any liberty or property interest. *Texas Commission on Environmental Quality v. City of Waco*, 413 S.W.3d 409, 423-25 (Tex. 2013); *Texas Commission on Environmental Quality v. Bosque River Coalition*, 413 S.W.3d 403, 407-09 (Tex. 2013); *Collins v. Texas Natural Resource Conservation Commission*, 94 S.W.3d 876, 884—85 (Tex. App. —Austin 2002, no pet). The District's rules protect interests in groundwater and End Op's permits contain specific conditions that provide further protections of these interests. Thus, any argument that a deprivation of property rights warrants invocation of inherent constitutional jurisdiction fails because there is not a deprivation of a vested property right.

18. Further, a person's desire to intervene is not a vested property interest entitled to constitutional protection—a person must show a vested property interest that will be deprived by the denial of its intervention other than a desire or interest to intervene. *Coastal Habitat,* 294 S.W.3d at 287. Plaintiffs have failed to show a sufficient personal stake in the controversy to prevent their action from yielding a mere advisory opinion or drawing the judiciary into the general policy disputes that are the province of other branches. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 576-78 (1992) (discussing the role of standing in preventing judicial incursions into legislative and executive spheres, noting that vindicating the public interest in a government's observance of the Constitution and the laws is the function of legislative and executive branches not the

judiciary, and cautioning courts from permitting a sub-class of citizens who suffer no distinctive concrete harm a right to sue).

B. Plaintiffs' Due Process Rights Have Not Been Violated.

19. Plaintiffs' due process rights have not been deprived. Procedural due process requires notice and an "opportunity to be heard at a meaningful time and in a meaningful manner." *Coastal Habitat,* 294 S.W.3d at 276 (internal citations omitted). Due process "never requires all the trial-like procedures of a contested case hearing." *City of Waco*, 413 S.W.3d at 423 (citing to *Collins* approvingly and concluding that "even if a property interest were at issue, due process would not require a trial-like procedure of a contested case hearing"). Plaintiffs have been afforded due process throughout the application process. Once End Op's applications were contested and referred to SOAH, Plaintiffs were afforded due process through a full day, evidentiary hearing regarding party status on August 12, 2013, conducted by the Administrative Law Judge at SOAH, during which Plaintiffs were provided an opportunity to admit evidence, and examine and cross-examine witnesses. After considering all the evidence, the ALJ issued a reasoned order denying party status. After consideration of the ALJ's order and all the evidence, the District issued an interim decision on party status. Prior to the preliminary hearing on Plaintiffs' party status, Plaintiffs were also afforded an opportunity to make public comments on End Op's applications before the matter was referred to SOAH.

20. Even though Plaintiffs were not parties to the contested case hearing, a contested case hearing occurred with regard to the issues raised by Plaintiffs. Although no direct

evidence of specific impacts with regard to Plaintiffs was presented, the record does include direct evidence on any impacts to Aqua Water Supply Corporation, the largest water utility provider in the area, and other landowners who have a well in the Simsboro or are within one mile of End Op's proposed well field. The record also demonstrates that End Op's pumping will not unreasonably affect existing groundwater and surface water users or existing permit holders such that Plaintiffs, who do not have wells or have not provided evidence on impacts associated with their wells, cannot be unreasonably affected. Plaintiffs' interests, therefore, were addressed at the contested case hearing, and there has been no due process infringement.

V. SUBSTANTIAL EVIDENCE IS THE ONLY STANDARD UNDER WHICH THE DISTRICT'S DECISION CAN BE REVIEWED, AND PLAINTIFFS FAILED TO PROPERLY PLEAD AN AFFIRMATIVE TAKINGS CLAIM THAT MIGHT OTHERWISE AUTHORIZE A TRIAL DE NOVO

21. Plaintiffs allege inherent jurisdiction permits the Court to review the District's decision on the merits for any type of error not just due process errors. As described in Section IV. *supra,* Plaintiffs fail to invoke the court's inherent jurisdiction because they have failed to establish a deprivation of a vested property right. Therefore, the Court has no inherent jurisdiction to review due process violations or other errors in the District's decision to deny standing or issue permits under any other authority other than the substantial evidence rule under the Texas Water Code.

22. The Texas Water Code mandates substantial evidence review.[18] Case law recognizes that the substantial evidence standard applies even if the right to review of

[18] The APA authorizes judicial review of an administrative action by trial de novo in very limited circumstances, which do not apply here and Plaintiffs have not alleged they do. TEX. GOV'T CODE § 2001.173. Instead, Plaintiffs argue de novo review is authorized under the

the decision arises from an inherent constitutional right.[19] The Legislature has granted the sole and exclusive authority and discretion to rule on applications for permits to use groundwater to the administrative agency. TEX. WATER CODE § 36.113. The separation of powers doctrine prohibits the court from substituting itself for the administrative body and thereby usurping the discretionary functions delegated to the administrative body by the Legislature.

23. In attempt to evade the statute's fatal outcome, Plaintiffs admit their complaints are "analogous to a takings claim" but do not affirmatively plead one. Instead, they seek to challenge the orders under the veil of an administrative appeal of the decision, which is clearly governed by the substantial evidence rule. The parties agree that review of an agency's final decision under the APA is governed by Texas Government Code Section 2001.174.[20] Notably, the elements of an affirmative takings claim are different and would be conducted under de novo review (assuming all administrative prerequisites[21] have been satisfied).[22]

Court's inherent jurisdiction and "closely analogous" to, but not affirmatively plead, takings claim.

[19] *See City of Dallas v. Furrh,* 541 S.W.2d 271, 273 (Tex. App.--Texarkana 1976, writ ref'd n.r.e.) (noting general rule that judicial review of agency decision, "whether pursuant to a statutory or inherent right, is generally limited to a determination of whether the administrative agency's action is supported by substantial evidence"); accord *City of Dallas v. Stevens*, 310 S.W.2d 750, 755 (Tex. App.—Dallas 1958, *writ ref'd n.r.e.*).

[20] TEX. WATER CODE § 36.253 referring to TEX. GOV'T CODE § 2001.174. Section 2001.174(2) authorizes a trial court to reverse or remand if an agency's administrative findings, inferences, conclusions or decisions are in violation of a constitutional or statutory provision, in excess of agency's statutory authority, made through unlawful procedure, affected by other error of law, not reasonably supported by substantial evidence, or arbitrary or capricious.

[21] *City of Dallas v. Stewart,* 361 S.W.3d 562, 579 (Tex. 2012)(takings claims must be asserted on appeal from administrative determination and plaintiff must first exhaust administrative remedies and comply with jurisdictional perquisites for suit).

24. Plaintiffs confuse the statutory standard under which a court shall review a decision of an agency with an affirmative constitutional takings claim. The former is not an ordinary civil action; rather, it is a special statutory action to enforce a right that exists only by statute, and not under the constitution or at common law. In an appeal of a *decision* from a groundwater district, the only matter with which the courts are concerned is whether or not there was substantial evidence before the groundwater district to sustain its order. Conversely, under a properly pleaded constitutional takings claims, a court has jurisdiction to review the claim as a direct, ordinary civil action using de novo review after all administrative remedies have been exhausted. Plaintiffs fail to raise an affirmative constitutional takings claim in their motion for rehearing and have failed to plead one in their live petition.

25. Plaintiffs' failure to affirmatively plead a takings claim, like their other creative theories, falls flat. Despite Plaintiffs' failure to plead or cite to any groundwater takings cases, there is ample law on point. A regulatory takings claim in the groundwater context arises from the premise that land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation guaranteed by Tex. Const. Art. I, § 17. TEX. WATER CODE § 36.002; *Edwards Aquifer Auth. v. Day,* 369 S.W.3d 814, 817 (Tex. 2012). The Texas Water Code

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[22] *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 126 (Tex. App.—San Antonio 2013, pet. denied)(reviewing the trial court's judgment entered after de novo review via summary judgment and a bench trial, and applying the *Penn Central* factors to a regulatory takings claim in the groundwater context, which include the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with investment backed expectations, and the character of the governmental action); *Day,* 369 S.W.3d at 817 (holding that land ownership includes an interest in groundwater that cannot be taken for public use without adequate compensation guaranteed by article I, section 17(a) of the Texas Constitution);

recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property; however, that ownership comes with statutory limitations. *See, e.g.,* TEX. WATER CODE § 36.002(b-1). The groundwater ownership and rights under the Texas Water Code do not entitle a landowner the right to capture a specific amount of groundwater below the surface of that landowner's land. *Id.*

26. Instead of relying on law directly on point, Plaintiffs cite to old law outside of groundwater proceedings that actually disproves their theories.

27. Plaintiffs' reliance on the language in *Marrs* is misplaced. Two years after issuing its opinion in *Marrs,* the Texas Supreme Court clarified any confusion created by *Marrs* and clearly stated the review of the agency's decision was to be conducted under the substantial evidence rule. *Trapp v. Shell Oil Co.,* 198 S.W.2d 424, 433 (Tex. 1946) ("We conclude that the rules announced in the Gulf-Atlantic case are now the prevailing rules declared by this court, notwithstanding the conflicting statements in the *Trem Carr* and the *Marrs* cases."). *See also Simpson v. Houston,* 260 S.W.2d 94, 97 (Tex. Civ. App. 1953, writ ref'd)(acknowledging that *Trapp* overruled *Marrs*); *Consolid. Chem. Indust., Inc. v. Railroad Comm'n of Tex.,* 201 S.W.2d 124, 128 (Tex. Civ. App.—Austin 1947, writ ref'd)(acknowledging holding in *Marrs* –where confiscation is involved an independent factual judicial review is essential to meet constitutional requirements of due process— as effectively overruled in *Trapp*).

28. Similarly, although Plaintiffs properly recite the history and holdings of *City of Dallas v. Stewart*, they misapply it to their action. Unlike the plaintiffs in *Stewart*, Plaintiffs have not alleged a takings resulting from the District's decision. The issue in

Stewart involved whether the agency's decision that was affirmed on appeal under the substantial evidence rule, precludes a takings claim, which the Texas Supreme Court determined does not. In *Day,* which was an appeal of a groundwater district's denial of a permit in which the plaintiff also asserted a takings claim, the Texas Supreme Court acknowledged that the substantial evidence rule does not operate to restrict a plaintiff's evidence on a takings claim. *Day,* 369 S.W.3d 814, 844 (citing to *City of Dallas v. Stewart*).

29. If the Legislature intended to grant a *de novo* review of the District's decision, it would have done so. Instead, the Legislature clearly stated the substantial evidence rule in section 2001.174 applied as opposed to the de novo review afforded to certain appeals under section 2001.173. For these reasons, Plaintiffs have no right to de novo review on any live claim, and consequently, the Court lacks jurisdiction.

REQUEST FOR RELIEF

End Op respectfully requests that the Court dismiss Plaintiffs' action and/or claims for lack of subject-matter jurisdiction or affirm the District's order, and award End Op such other and further relief to which it may be justly entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on September 5, 2017, a true and correct copy of the foregoing was filed electronically and thereby served on the following counsel of record.

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