

**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, ALTERNATIVELY,
REQUEST FOR WRITTEN FINDINGS AND CONCLUSIONS**

TO THE HONORABLE BOARD OF THE LOST PINES GROUNDWATER CONSERVATION DISTRICT:

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

I. Introduction

Landowners request that the Lost Pines Groundwater Conservation District (the “District”) reconsider its decision that they are not affected persons for purposes of a contested case hearing and remand End Op, L.P.’s (“End Op”) Application to the State Office of Administrative Hearings (“SOAH”) for a contested case hearing including Movants as parties. Landowners also request that the District reverse its September 7, 2016, decision to issue registrations, operating permits and transfer permits to End Op, , for 14 wells in Bastrop and Lee Counties. If the District does not reconsider and reverse these decisions, Movants 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 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. Subsequently, the District issued a written order denying Movants’ requests for party status on January 19, 2015.

After the District’s denial of hearing requests, further proceedings occurred with regard to End Op’s Application, resulting in the ALJ’s Proposal for Decision that permits be granted to End Op for 46,000 acre-feet per year. Ultimately, as a result of apparent settlement negotiations between the District and End Op that ensued after the Contested Case Hearing, the District Board voted at its September 7, 2016, public meeting to issue End Op’s requested permits in a form which significantly differed from the ALJ’s Proposal for Decision as well as the District General Manager’s recommended permit. The District’s decision to issue the permits in any form was the result of an erroneous procedure, since it was improper to deny Movants’ requests for a contested case hearing. The District’s decision to deny Movants’ hearing requests, and the District’s consequent decision to grant permits to End Op’s, with the inclusion of additional conditions recommended by the ALJ and/or negotiated with End Op, including without limitation, the requirement of a mitigation fund for certain landowners, was in violation of Chapter 36 of the Texas Water Code, in excess of the District’s authority, made through unlawful procedure, affected by error of law, not supported by substantial evidence, arbitrary and capricious, and characterized by an abuse of discretion.

II. In a Denial of Due Process, The District Failed to Recognize Landowners' Vested Property Rights In Denying Their Hearing Requests.

- A. A person possessing a justiciable interest, is entitled to participate in a contested case hearing on a groundwater permit application.

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.”¹ This same standard is set forth in the District’s rules regarding the consideration of a hearing request.² The District found that this test embodies constitutional standing principles,³ and Landowners 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.”⁴ To this end, a person seeking party status must establish:

- (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).⁵

¹ Tex. Water Code § 36.415(b)(2).

² District Rule 14.3(F)(3).

³ January 19, 2015 Written Order Denying Party Status.

⁴ *Bacon v. Texas Historical Commission*, 411 S.W.3d 161, 174 (Tex. App. – Austin, 2013).

⁵ *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 926 (Tex. App. – Austin, 2010).

Notably, the injury-in-fact requirement is qualitative, not quantitative.⁶ As the Fifth Circuit has noted, “The Constitution draws no distinction between injuries that are large, and those that are comparatively small.”⁷ 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 a litigation—even though small—from a person with a mere interest in the problem.”⁸ 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.”⁹ 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.

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 action on the merits.¹⁰ 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.¹¹

Such a determination of standing presents an issue of subject-matter jurisdiction.¹² In considering a challenge to standing that implicates the merits of an action, the court reviews the

⁶ *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350, 357-358 (5th Cir. 1999).

⁷ *Cramer v. Skinner*, 931 F.2d 1020, 1027 (5th Cir. 1991).

⁸ *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 734 (1973)

⁹ *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 7 (Tex. 2011).

¹⁰ *STOP* at 926.

¹¹ *Id.*

¹² *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 445-446 (Tex. 1993).

relevant evidence to determine if a fact issue exists.¹³ 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.¹⁴

B. Landowners possess justiciable interests, including vested property rights, in their groundwater.

It is undisputed that Landowners own real property overlying the Simsboro aquifer from which End Op seeks authorization to pump 56,000 acre-feet per year,¹⁵ or 18.2 billion gallons per year.

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,¹⁶ and that, “one purpose of groundwater regulation is to afford each *owner of water* in a common, subsurface

¹³ *Texas Department of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2002).

¹⁴ *Id.*

¹⁵ End Op Ex. 3, p. 1.

¹⁶ *Day* at 838.

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.¹⁷

C. During the Preliminary Hearing in the Matter, Landowners sufficiently demonstrated the potential for End Op’s requested pumping to adversely impact Landowners’ protected interests, including Movants’ property interests.

During the preliminary hearing in this matter, Mr. George Rice, a groundwater hydrologist, 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

¹⁷ 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.

¹⁸ Tr. 105

¹⁹ Tr. 106

²⁰ Tr. 111

feet,²¹ a drawdown of the Simsboro Aquifer beneath Hannah's property of roughly 50-100 feet,²² and a drawdown of the Simsboro Aquifer 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

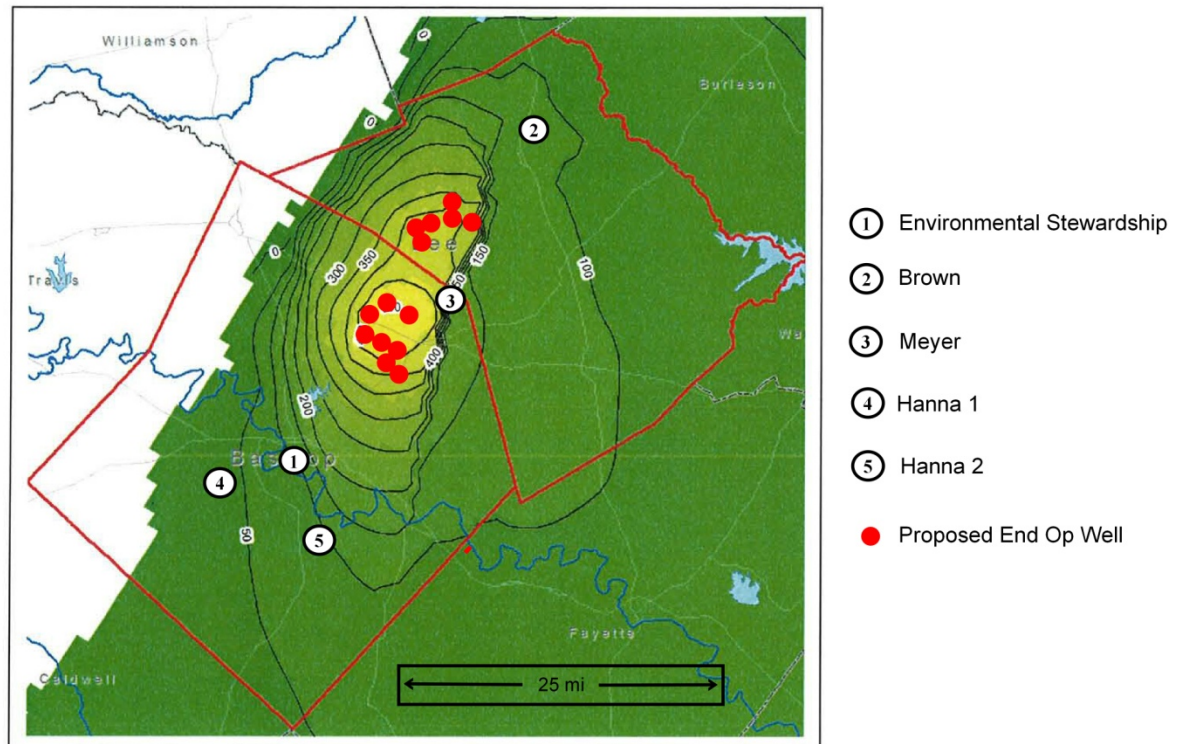


Figure 1
Property Locations
(Adapted from LPGCD memo of March 20, 2013)

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,

²¹ Tr. 107

²² Tr. 112.

²³ Tr. 110.

²⁴ Exh. ES- 3.

²⁵ Tr. 107-108.

Mr. Rice opined that it is valuable for the landowners to have the Simsboro Aquifer available as a source of groundwater since the Simsboro is the most productive aquifer in the area.²⁶

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

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 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.³²

D. The District improperly disregarded Movants' interests, including their property rights, and the impacts upon those interests.

The District has improperly found that an impact on a landowner's groundwater is not a justiciable interest. There has been no finding that the District's modeling is incorrect, and no finding that a drawdown would not occur in the Simsboro aquifer beneath Landowners' properties. Rather, the Landowners' petitions for party status have been 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. Landowners' argument that a

²⁶ Tr. 148.

²⁷ Tr. 146.

²⁸ Tr. 147.

²⁹ Tr. 108.

³⁰ Tr. 109.

³¹ Tr. 110-111.

³² Tr. 109.

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 has 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.³³

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.³⁴

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.

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, the District should reject Lost Pines' use-it-or lose-it characterization of Landowners' 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 Landowners' property. This drainage results in the diminution and potential elimination of groundwater that is a valuable asset held by the Landowners. 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

³³ Order No. 3, p. 11.

³⁴ Order No. 3, p. 11.

decision on how or if to use the groundwater. The threatened devaluation of Landowners' property as a consequence of End Op's pumping is a concrete injury.

Additionally, Landowners demonstrated an Injury to their correlative rights in the Simsboro Aquifer. Landowners' 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. End Op's pumping potentially impacts Landowners' 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 Landowners' right to keep the groundwater beneath their property. As owners of the groundwater beneath their property, Landowners 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 Landowners 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 Landowners' property, since such pumping is not protected by the rule of capture.

As noted, Texas Law by statute, "recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property."³⁵ Importantly, the law further recognizes that, "each and every piece of real estate is unique."³⁶ 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 landowner's property is accordingly unique to that property.

The fact that End Op's pumping would potentially injure many people does not render

³⁵ Tex. Water Code § 36.002(a).

³⁶ *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).

Movants' injury, "common to the general public." In denying Landowners' 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 Landowners' groundwater interest is not concrete and particularized because it is assertedly, "common to the landowner community."³⁷ End Op argued that Landowners bore a burden to present, "evidence of an injury unique to each protestant."³⁸

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.

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 Landowners' 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*

³⁷ Applicant's Response to Environmental Stewardship, Bette Brown, Andrew Meyer and Darwyn Hanna's Opening Brief on Party Status, p. 5.

³⁸ *Id.* p. 6.

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. Landowners do not have merely an abstract concern that the District properly follow its rules when evaluating End Op's application. To the contrary, each of the Landowners 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.

The ALJ completely disregarded the fact that Brown had wells in use. The expert testimony of Mr. Rice demonstrated that those wells would be affected by End Op's operations. Likewise, the ALJ disregarded Meyers' intent to drill a well to support his organic farming operation.

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.

E. The District's denial of Landowners' hearing requests is in violation of applicable statutes and rules, and constitutes a denial of due process.

Since the Landowners demonstrated themselves to hold legally protected interests that will be injured in a concrete and particularized manner by End Op's pumping that the District is now authorizing, Landowners should have been admitted as parties to the contested case hearing with regard to End Op's Application. The denial of Landowners' requests was in violation of Texas Water Code Section 36.002, as it deprived Landowners' of full recognition and protection of their

groundwater rights. This denial was also in violation of Texas Water Code Section § 36.415, and District Rule 14 as applicable at the time of the preliminary hearing in this matter, which establish that the scope of persons entitled to a contested case hearing includes those persons who possess a justiciable interest in the application. Furthermore, this denial deprived Landowners of their constitutional Due Process rights.

III. The District Erred in Granting End Op's Requested Permits

- A. Granting of the requested authorizations was the product of the District's erroneous decision to deny Landowners' hearing requests.

As discussed above, the District erred in denying Landowners' hearing requests. The District violated the applicable statutes and rules when issuing End Op's requested permits without providing Landowners with the hearing to which they were entitled.

- B. Granting of End Op's requested permits results in a violation of the applicable desired future condition.

The groundwater availability modeling (GAM) predicts that End Op's pumping, especially when combined with other permitted pumping in the region, will cause the desired future conditions of the Simsboro Aquifer to be exceeded by 200-300 ft. of drawdown. Such a violation is contrary to the District's management plan, and thus requires denial of the application under Texas Water Code Section 36.113(d)(4) and 36.1132.

- C. Failure to consider whether impacts existing groundwater or surface water resources or existing permit holders

The Conservation Amendment to the Texas Constitution provides that the natural resources of the state, including water (both groundwater and surface water) are public rights and duties³⁹ to be preserved and conserved and that development of those resources be balanced

³⁹ Conservation Amendment of the Texas Constitution: Section 59, CONSERVATION AND DEVELOPMENT OF NATURAL RESOURCES AND PARKS AND RECREATIONAL FACILITIES; CONSERVATION AND

against their conservation. The requirement to achieve balance between development and conservation is likewise affirmed by the Texas Legislature in the Texas Water Code⁴⁰.

The Texas Water Code also requires that groundwater conservation districts, prior to granting groundwater well pumping permits and prior to establishing desired future conditions, consider the impacts of such pumping on surface waters, groundwater and other permits⁴¹. The District has failed to reasonably consider these factors.

Section 36.113(d)(2) requires that “*before granting or denying a permit ...the district shall consider whether the proposed use of water ... unreasonably affects existing groundwater and surface water resources or existing permit holders*”. With regard to End Op’s application, existing groundwater resources includes other aquifers such as the Carrizo, Calvert Bluff, and Hooper aquifers, which the District has not addressed. Existing surface water resources includes rivers, streams and springs, which the District has not addressed. Existing permit holders include exempt domestic wells that are registered with the District, which the District has not sufficiently addressed in this permitting action.

There are only two Lost Pines District documents that reference any evaluation of the impact of End Op's requested pumping on groundwater or surface water. The first is a memorandum from Mr. Andrew Donnelly to Joe Cooper⁴², and the second General Manager Joe Cooper's recommendations to the Board⁴³.

RECLAMATION DISTRICTS: (a) The conservation and development of all of the natural resources of this State, ... And the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.”

⁴⁰ Section 36.1132 of the Texas Water Code.

⁴¹ Section 36.113 (d)(2) regarding permitting; Section 36.108 (d)(4) regarding DFCs.

⁴² Donnelly, Andy. February 6, 2013. Subject: End Op permit review items (2 & 8).

⁴³ Cooper, Joe. March 20, 2013. End Op LP's Applications for Well Registration, Operating Permits and Transfer Permits for Well Nos. 1-4.

Donnelly's report on item 2 - whether the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders - reports on the impact of End Op's pumping on two Aqua wells, two City of Elgin wells, and two Manville wells. With a caveat regarding the use of the GAM to estimate drawdown, the report concludes that

"it is not unreasonable to expect that pumpage from the End Op project would result in additional drawdown of hundreds of feet over 50 years in the two existing Aqua permitted wells"; "it is not unreasonable to expect that pumpage from the End Op project would result in additional drawdown of between 100 and 200 feet in the existing Elgin wells"; and of the Manville wells, "We might expect that these wells may see additional drawdown over 50 years of 100 to 200 feet".

No consideration is given to other known registered Simsboro wells, and no consideration is given to known registered wells in the Carrizo, Calvert Bluff, or Hooper aquifers. No justification is given for the implied conclusion that the impacts are *not unreasonable*.

Donnelly's total evaluation of the impact of the proposed End Op pumping on surface waters is contained in a single paragraph:

"A quantitative evaluation of the impact of the proposed pumpage on surface water resources within the District is difficult to make. The only quantitative tool available is the GAM, and this model is a poor tool to effectively evaluate impacts to surface water within the District based on this application. However, because the majority of the flow of the Colorado River is controlled by the release of water from the Highland Lakes, the impacts from this project on flow in the Colorado River will not be unreasonable."

Unlike in the evaluation of Aqua, City of Elgin and Manville wells, no attempt is made to inform the General Manager or the District of the predictions the GAM makes on the impact on surface waters nor the implications of those predictive trends. Certainly no justification is given for the conclusion that the impacts *"will not be unreasonable"*.

The Cooper memorandum to the Board merely reflected the Donnelly report and dismissed any need to further investigate the impact of End Op's proposed pumping on other aquifers, other permits, other registered wells, or rivers, streams and surface water features without justification.

Donnelly did not use the methodology that he authored⁴⁴ titled *"Instructions for Running the Carrizo-Wilcox Ground-Water Model and Surface Water Models to Determine the Impacts of Carrizo-Wilcox Aquifer Pumping on Surface Water Flows"* to provide the General Manager or the District with estimates of the impacts of End Op pumping on the Colorado River and its tributaries. The following quotes from the report demonstrate the value of such an evaluation:

- *"All of these studies, at least to some degree, recognized that the Carrizo-Wilcox aquifer and the major streams and rivers ... are interrelated in-stream aquifer systems where ground water is in hydraulic connection with the surface-water bodies."*
- *"The outputs from the ground-water model were used with surface-water models to demonstrate how streamflows respond to changes in ground-water levels, and also to demonstrate how water rights, streamflows and fresh-water inflows to the ... estuaries may be affected."*
- *"Additionally, the results of the study indicate that average annual streamflows will be reduced in each of the two major river systems that drain the area."*
- *"The models indicate an interaction between ground water and surface water. As ground-water levels change, surface-water discharge also changes, but we currently lack the data to accurately define the magnitude of these changes."*
- *"The collection of basic hydrogeological data pertaining to the Carrizo-Wilcox aquifer should be continued and expanded in order to better understand the following: (f) degree of hydraulic connection between the Carrizo aquifer and streams, rivers, and other surface-water bodies on the outcrop."*

⁴⁴ Donnelly, Andrew, LBG-Guyton Associates. Date stamped October 1, 1998. "Instructions for Running the Carrizo-Wilcox Ground-Water Model and Surface Water Models to Determine the Impacts of Carrizo-Wilcox Aquifer Pumping on Surface Water Flows in the Nueces and Guadalupe-San Antonio River Basins", preface to "Interaction Between Ground Water and Surface Water in the Carrizo-Wilcox Aquifer" prepared for the Texas Water Development Board, August 1998.

As early as 2009⁴⁵, Landowners attempted to inform the board of their concerns regarding the impact of groundwater pumping on the Colorado River and its tributaries, but Landowners have been denied the opportunity to address the Board other than in public comments (subject to severe time limitations and no discussion). Lacking the opportunity to have a meaningful discussion with the Board, Landowners have provided professional reports by Mr. George Rice to the Board and the District on other permit applications (Forestar and LCRA).

Two reports by George Rice further demonstrate, 1) the impact of End Op's⁴⁶ proposed pumping of 30,000 ac-ft./yr. and 46,000 ac-ft./yr. on the Simsboro, Carrizo, Calvert Bluff and Hooper aquifers (Attachment 1), and 2) the impact of combined⁴⁷ pumping (baseline + End Op + Forestar + LCRA + Vista Ridge) on the Simsboro, Carrizo, Calvert Bluff and Hooper aquifer (Attachment 2). These reports also provide qualitative and quantitative data on the impact of End Op's proposed pumping on the Colorado River and its tributaries. The reports also contain a detailed analysis of the GAM's ability to predict trends related to pumping rate, pumping duration, and distance of pumping from the river that support the use of the trend information in public policy decision-making.

Rice's End OP report concludes that the proposed pumping would:

- Reduce hydraulic heads in the Carrizo, Calvert Bluff, Simsboro, and Hooper aquifers.
 - Where these aquifers are confined, the reduced heads would cause water levels in wells to decline.

⁴⁵ Box, Steve. March 10, 2009. Letter to the Board re: Request to address Board on "Desired Future Conditions". The letter and an email request on January 7, 2009 to Joe Cooper cc: Katie Kaighin, re: GW-SW interaction in Carrizo-Wilcox GAM, were never answered. ES has not been allowed to address the board on the issue of concern in this and other permits.

⁴⁶ Rice, George. August 11, 2014. Evaluation of End Op's Proposal to Pump Groundwater from the Simsboro Aquifer.

⁴⁷ Rice, George. March 22, 2016. GAM Predictions of the Effects of Baseline Pumping Plus Proposed Pumping by Vista Ridge, End OP, Forestar, and LCRA.

- Where these aquifers are unconfined (i.e., recharge areas), the reduced heads would cause dewatering of portions of the aquifers.
- Reduce groundwater discharge to the Colorado River, thereby reducing the amount of water flowing in the river.

Rice's combined pumping report concludes that baseline pumping would:

- Reduce hydraulic heads (i.e., water levels or hydraulic pressure) in the Hooper, Simsboro, Calvert Bluff and Carrizo aquifers.
- Where these aquifers are confined, the reduced heads would cause water levels in wells to decline.
- Where these aquifers are unconfined (recharge areas), the reduced heads would cause dewatering of portions of the aquifers.
- Reduce groundwater discharge to the Colorado River, thereby reducing its flow.
- Additional pumping by Vista Ridge, End Op, Forestar, and LCRA would result in greater head reductions than would baseline pumping alone, and a greater decrease in groundwater discharge to the Colorado River (Figure 1).

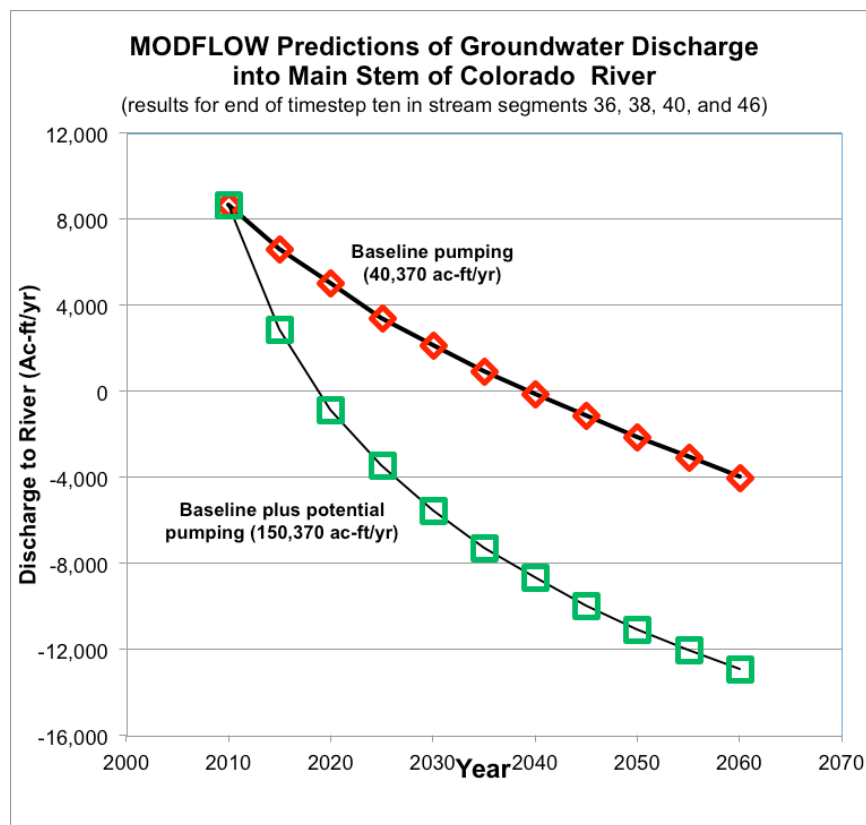


Figure 1: Predicted reduction of discharge of groundwater into the mainstream Colorado River due to combined pumping.

The GAM predicts that there will be a trend toward reduced outflows of groundwater from the aquifers into the Colorado River over the 50-year pumping period (Figure 1). Though

Landowners agree that the GAM is not suitable for making reliable quantitative predictions⁴⁸ regarding the amount of reduction or the rate of reduction, the Rice report confirms that the GAM is reliable in predicting the trend. The trend indicates that, over time, the relationship between the Colorado River -- which is currently a "gaining stream" -- and the Carrizo-Wilcox aquifer group will likely be reversed within the planning period. The GAM estimates that this change from a "gaining stream" to a "losing stream" will occur earlier with the combined pumping (perhaps as early as 2020) than with baseline pumping alone (perhaps as early as 2040). This is a significant and unreasonable impact of groundwater pumping on the Colorado River, especially during drought conditions. This is an impact that deserves due diligence to study, monitor and mitigate potential impacts. The District has not sufficiently considered these impacts, and issuance of the requested permits is unjustified in light of these impacts.

Contrary to Donnelly's conclusion that the flow of the Colorado River is primarily controlled by releases of water from the Highland Lakes, and therefore the impact of the project on the Colorado River will not be *unreasonable*, the Rice Report demonstrates that, during drought conditions, as much as 50% of the flow of the Colorado River is from groundwater in the Austin-Bastrop reach. Furthermore, Highland Lake releases during drought cannot be relied upon to provide critical environmental flows for the river. As demonstrated during the last drought, the LCRA sought, and was granted by TCEQ, relief from the requirement to provide environmental flows to the Colorado River on multiple occasions.

⁴⁸ The limitations of the GAM in making reliable quantitative predictions is discussed in the Rice report and has been reviewed by the GMA-12 District representatives. GMA-12 districts, along with the Lower Colorado River Authority, Brazos River Authority, the Colorado-Lavaca Bay and Basin Stakeholder Committee, and Environmental Stewardship have also recognized this limitation and have raised nearly \$300,000 to enable a robust groundwater-surface water interaction package to be included in the GAM improvements being implemented by INTERA under contract with the Texas Water Development Board (contract currently pending).

The drawdown maps (Figures 2-5) associated with the combined pumping study demonstrate that the effects of groundwater pumping within Lost Pines and Post Oak Savannah Groundwater Conservation Districts (GCD) are predicted to impact not only the Simsboro aquifer, but also the Carrizo, Calvert Bluff and Hooper aquifers extending to points as far away as Gonzales, Lavaca, Colorado, Austin, Grimes and Walker counties. These aquifers are hydraulically connected throughout the Carrizo-Wilcox Aquifer Group.

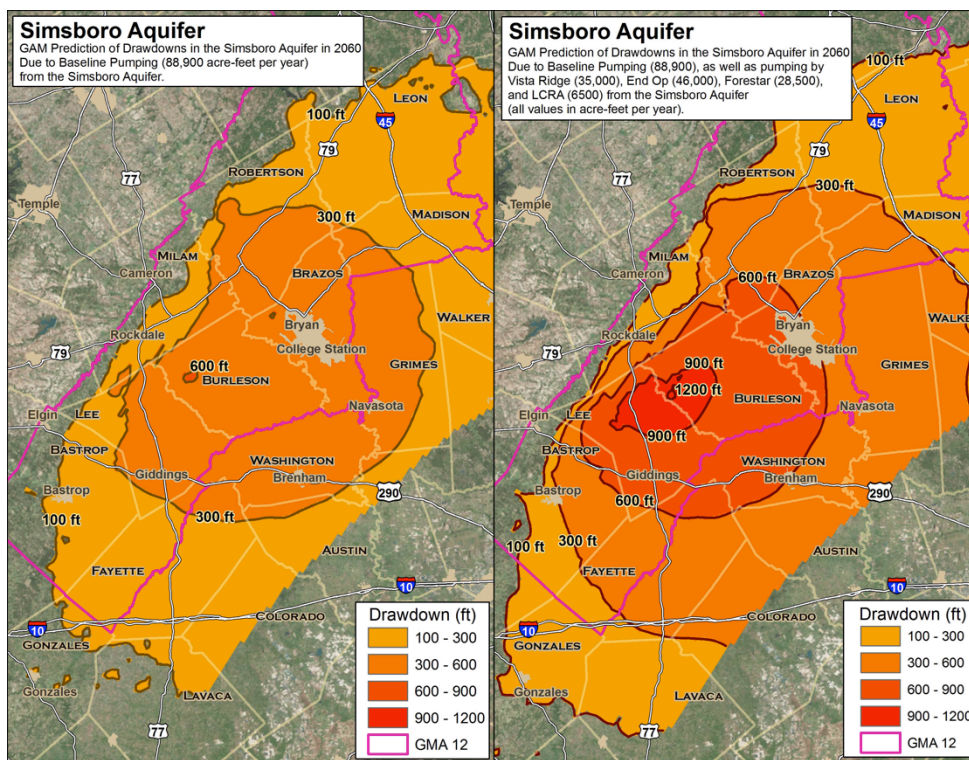


Figure 2. GAM predicted drawdowns in the Simsboro Aquifer due to baseline pumping (left) and baseline pumping plus additional pumping by Vista Ridge, End Op, Forestar, and LCRA 2000-2060 (right).

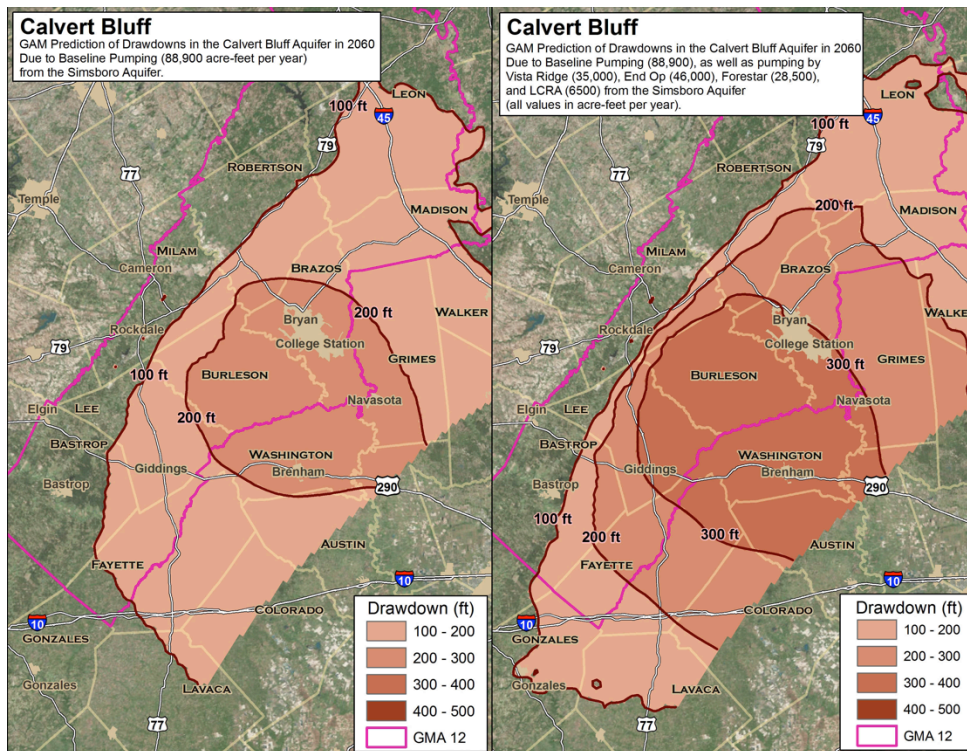


Figure 3. GAM predicted drawdowns in the Calvert Bluff Aquifer due to baseline pumping (left) and baseline pumping plus additional pumping by Vista Ridge, End Op, Forestar, and LCRA 2000-2060 (right).

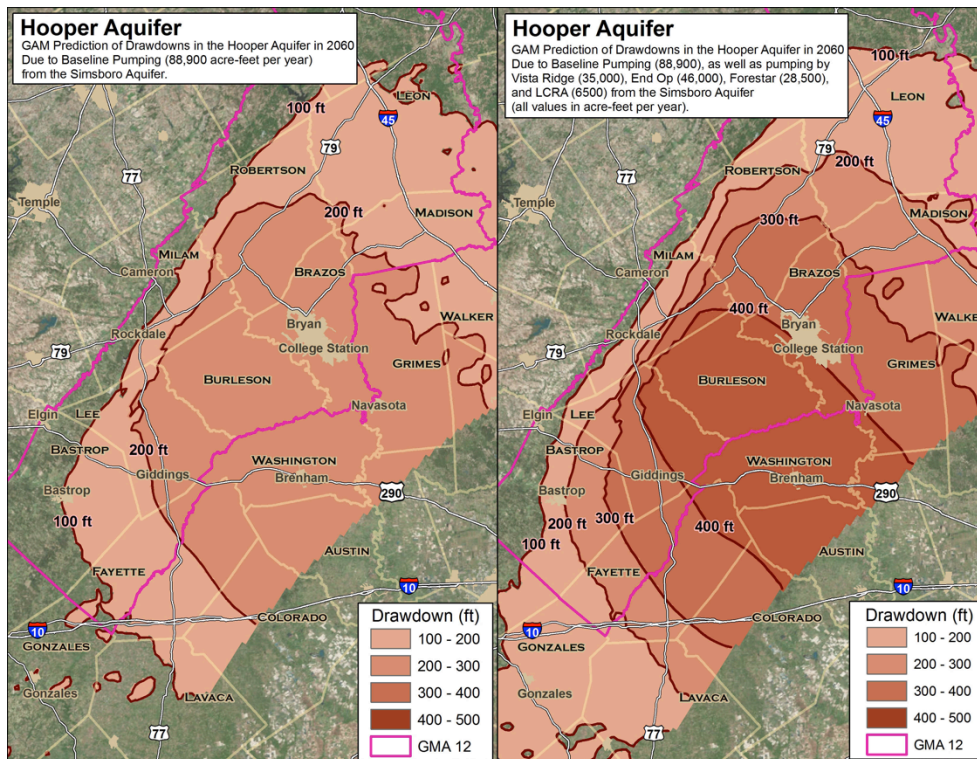


Figure 4. GAM predicted drawdowns in the Hooper Aquifer due to baseline pumping (left) and baseline pumping plus additional pumping by Vista Ridge, End Op, Forestar, and LCRA 2000-2060 (right).

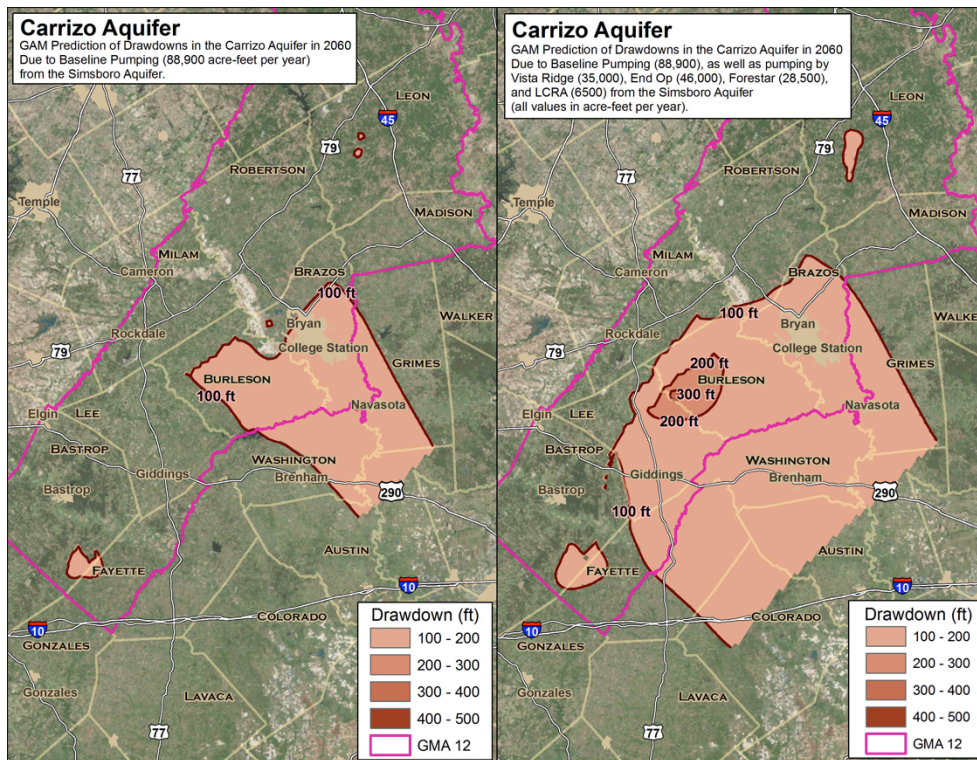


Figure 5. GAM predicted drawdowns in the Carrizo Aquifer due to baseline pumping (left) and baseline pumping plus additional pumping by Vista Ridge, End Op, Forestar, and LCRA 2000-2060 (right).

Permitted (baseline) pumping plus additional planned pumping is predicted to exceed the current and proposed desired future conditions (DFCs) by 200-300 feet of drawdown for the Simsboro Aquifer by 2060 (see Table 3 from Rice Report). Though not tabulated, it is reasonable to expect that the Simsboro pumping will also have a significant effect on the DFCs of the Calvert Bluff, Hooper and Carrizo aquifers. Those impacts should be calculated by the District and included in its evaluation of the effects of the proposed End Op pumping. The maps that follow (Figures 2-5) represent the drawdown of these other aquifers that results from Simsboro pumping. Issuance of the requested permits is unjustified in light of these impacts.

Table 3
GAM Predictions of Average Drawdowns in the
Simsboro Aquifer from 2000 to 2060 Due to Baseline Pumping and
Pumping by Vista Ridge, End Op, Forestar, and LCRA

GCD	DFC (ft)	Baseline drawdown (ft)	Drawdown due to additional pumping (ft)	Baseline plus additional drawdown (ft)
LPGCD	256	209	296	505
POSGCD	318	279	238	517

The District has failed to consider the information provided to it as a member of Groundwater Management Area 12 (GMA-12). GMA-12 has been reviewing the adopted DFCs and will be considering revisions as mandated by the Texas Water Code.⁴⁹ Consultants provided information to the GMA-12 representatives on May 28, 2015, for the PS-4 scenario that included a full water budget for the current planning period through 2070 and the 1975-1999 calibration period. Environmental Stewardship analyzed the water budgets as reported on June 18, 2015⁵⁰. The following observations, which were provided to the District representative, demonstrate that significant impacts to surface waters, other aquifers, and shallow domestic wells are likely as a result of the anticipated pumping. The analysis indicates that:

1. Outflows to surface waters are the most significant contributor of groundwater for pumping: Outflows to surface waters are modeled to have decreased by a total of 100,000 ac.-ft./yr. since 1975 with the greatest declines occurring in Post Oak Savannah, Lost Pines, and Mid-East Texas respectively.
2. Vertical leakage from other aquifers into the Simsboro is the second most significant contributor of groundwater for pumping. Other aquifers have been the second most significant contributors of groundwater for pumping since 1975 and are the most significant contributor during the DFC period. Vertical inflow to the Simsboro is most significant in Post Oak Savannah, Brazos Valley, and Lost Pines respectively during the DFC period.
3. Lateral flow (leakage) from neighboring counties is the third most significant contributor of groundwater for pumping. Lateral flow from other districts into the Simsboro in Brazos Valley is significant during the DFC period. Lateral flows out of Lost Pines and

⁴⁹ Section 36.108(d)

⁵⁰ ES comments to GMA-12 on June 18, 2015, regarding Hydrological Conditions on GMA-12's DFC Form. See comments document for details.

Mid-East Texas are the most significant with moderate outflows from Post Oak Savannah.

4. Storage change is the least significant contributor of water for pumping since 1975. Storage increased during the calibration period and decreases during the DFC period but is net neutral for the period. Thus it is false to state that most of the groundwater pumped is contributed from storage.

The District has not adequately considered these impacts, and issuance of the requested permits is unjustified in light of these impacts.

D. Insufficient mitigation measures

The Permit does not provide for the mitigation fund to include wells in aquifers other than the Simsboro aquifer.

- Drawdown of other aquifers is predicted, and these drawdowns will likely have adverse impacts on shallow domestic wells.
- Mitigation should be extended to include the Carrizo, Calvert Bluff, and Hooper aquifers in addition to the Simsboro.
- Mitigation should extend to all impacted landowners, not only those within 1 mile.

IV. Landowners Suffered Substantial Injury As a Result of the denial of their hearing requests, and the granting of End Op's Permit application, including potential diminution in or destruction of the quantity, value, and usefulness of their groundwater rights.

- A. Landowners 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 petitions for party status, Aqua Water Supply Corporation ("Aqua"), the only protestant of the End Op permit that was granted party status in the contested case, 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 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.

The granting of End Op's permit application has now authorized a level of pumping that will drain water from beneath Landowners' property, and increases the potential that all water in the Simsboro will be drained from beneath Landowners' property.

- B. The District's inclusion of a special condition in the End Op Operating Permit that resulted not from District action but solely from the private Settlement Agreement between End Op and Aqua ("Aqua Settlement"), and that requires End Op to fund physical mitigation of wells for a select few landowners, is an inappropriate, inadequate and non-responsive "remedy" for the deficiencies in the permits that Movants would address if they were permitted to do so in an evidentiary contested case hearing; does not cure the denial to Movants of the right to participate in an evidentiary hearing to address such concerns; and itself represents a further denial of Movants' Due Process Rights.

Pursuant to the Aqua Settlement, End Op agreed to the inclusion in its requested Operating Permit of provisions intended to address the alleged financial impacts of long term pumping by End Op on Aqua by funding up to \$20 million, under Aqua's sole control and discretion, to address Aqua's impacts of End Op pumping. Pursuant to that same settlement, End Op agreed to another special condition which, as included in the Operating Permit as Special Condition 13, provides:

(13) Permittee shall create a fund that is administered by a third party for the benefit of all landowners or persons or entities with an ownership interest in the Simsboro aquifer who have demonstrated an adverse impact on and potential increased costs for groundwater wells existing as of the date of issuance of this Permit caused, at least in part, by production from Permittee's Wells (the "General Mitigation Fund"). Permittee shall pay \$5.00 per acre-foot for groundwater actually produced by Permittee's Wells into the General Mitigation Fund within 20 calendar days of the end of the calendar month during which Permittee produced the groundwater. If the payment is late, a late payment penalty of five percent (5%) of the monthly payment that is overdue shall be imposed and shall be due in the immediately following month. If payment has not been received 15 (fifteen) calendar days after the payment is due, interest of twelve percent

(12%) compounded annually shall accrue and be due on the balance of the late payment that is due. The dollar (\$) per-acre- foot rate applicable to calculate the payment due from Permittee to the General Mitigation Fund shall be increased each January based on the Consumer Price Index-South Urban Region. Permittee's obligation to make payments into the General Mitigation Fund begins when Permittee's Wells commence production and ends at the earlier of twenty (20) years or when total contributions to the fund equals \$3,750,000.00. If the Operating Permits for all of Permittee's Wells are not renewed or extended, Permittee's obligation to pay into the General Mitigation Fund ends when production from all of Permittee's Wells ceases.

The so-called General Mitigation Fund ("Fund") was conceived (per the Settlement Agreement) as available to non-Aqua customers, and was not required by either the District or the ALJ; it was simply created by End Op, and agreed to by Aqua, for apparent mutually self-serving purposes. It is narrowly drawn to benefit only landowners with existing wells as of the date the permit was issued, who have an ownership interest in the Simsboro aquifer, and who "demonstrate", in an unspecified way and presumably to an administrator who is not required to be independent of End Op, an adverse impact on their wells from End Op's pumping. With the possible exception of Movant Brown, who has an existing non-Simsboro well but has an ownership interest in the Simsboro aquifer because her property overlies the Simsboro, the Fund will never benefit the Movants.

In fact, the manner in which and the degree to which the Fund will benefit *any* landowner other than Aqua is not specified by the terms of Special Condition 13. The Fund is capped at funding of \$3,750,000 over time, with no indication of how adequacy of that total amount, or incremental amounts throughout the 20-year life of the funding term, was determined, and exactly how, and whether, the money will ever be accessed for the intended purpose.

Notably, the actual Settlement Agreement provides significantly more detailed provisions with respect to the Fund, but the Operating Permit as approved includes only the bare details quoted above, along with a provision that makes a failure to make payments to the Fund a permit

violation. Further, no mention is made of the consequences of the Fund's failure to satisfy its express purpose. Special Condition 13's interpretation is left vulnerable to ambiguity, and enforceability of the further mechanics of the Fund in the Settlement Agreement is unclear and probably left totally reliant on Aqua's discretion whether to enforce a provision of a private agreement that does not benefit Aqua.

The Movants sought to participate in the contested case hearing to voice a protest of the End Op permit application, in an effort to prevent negative impacts on their protected interests. The Movants have not, at any time, advocated allowing negative impacts of End Op's pumping to occur, in favor of attempts to mitigate these impacts after the fact. Consequently, the existence of the Fund is of no comfort to their desire to protect their interests from impairment or diminution.

In fact, their purpose in challenging the permit, and in seeking to appeal the denial of their participation in that challenge, is based on a desire to defend their constitutionally protected interests, including their private property interests. Further, Movants sufficiently established in the Preliminary Hearing on party status the potential for End Op's requested pumping to adversely impact such interests. By denying the Movants party status, the District determined the Movants have no justiciable interests. That determination requires the District essentially to have made the judgment that Movants would suffer no "injury in fact" from the issuance of the permit. It is no small irony then to attempt to reconcile why the District thought it necessary to fashion a remedy with the purpose of addressing potential injuries to Landowners or to their interests that the District does not recognize as probable, or even possible. The District has exacerbated the impropriety of Special Condition 13 by negating the right of the very landowners the Fund ostensibly protects from participating in negotiating and structuring the Fund.

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 requests for party status;
- (3) That upon rehearing, the District reverse its decision granting End Op's requested permits and authorizations;
- (4) That End Op's application be remanded to SOAH for a hearing on the merits including Movants as parties;
- (5) In the alternative, that the District issue written conclusions and findings if it does not reverse its decisions identified above;
- (6) The Movants be granted 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, Certified Mail, Return Receipt Requested, and/or Facsimile Transmission to the following service list on this 27th day of September 2016.

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