No. 03-18-00049-CV

In the Third Court of Appeals Austin, Texas

END OP, L.P. AND LOST PINES GROUNDWATER CONSERVATION DISTRICT,
Appellants,

v.

ANDREW MEYER, BETTE BROWN, DARWYN HANNA, AND ENVIRONMENTAL STEWARDSHIP,
Appellee.

On Appeal from the 21st Judicial District Court
of Bastrop County, Texas
No. 29,696, Hon. Carson Campbell, Presiding

BRIEF OF APPELLANT END OP, L.P.

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ORAL ARGUMENT CONDITIONALLY REQUESTED

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STATEMENT OF THE CASE

Nature of the Case:

End Op, L.P. ("End Op") filed applications for groundwater well permits with the Lost Pines Groundwater Conservation District (the "District"). 1 CR 110-55. A contested case was held before a SOAH administrative law judge, who recommended End Op's applications be granted, and the District granted the applications. 2 CR 667-68.

Plaintiffs own land in the same counties in which End Op's proposed wells are to be located, but do not have a well in the affected aquifer. 1 CR 14. The District referred to SOAH the issue of whether Plaintiffs were entitled to party status in the contested case. 1 CR 1129-30. A day-long evidentiary hearing was held to determine whether the plaintiffs would be adversely affected by End Op's proposed well permits. The SOAH administrative law judge concluded that Plaintiffs did not have standing to participate in the contested case, 1 CR 1520-31, and the District agreed with the SOAH judge, 1 CR 1662-63.

Plaintiffs filed administrative appeals in district court, contending that the District's denial of their standing to participate in the contested case was not supported by substantial evidence. 1 CR 13; 2 CR 333; 2 CR 368.

Trial Court:

The 21st Judicial District Court for Bastrop County, Texas, the Honorable Carson Campbell presiding.

Trial Court Disposition:

Despite the deferential standard of review under the substantial evidence rule, the district court reversed the District's decision on Plaintiffs' standing, thereby also reversing the final order of the District granting End Op's applications. 2 CR 1519-20.

STATEMENT REGARDING ORAL ARGUMENT

The initial, and dispositive, question in this appeal is a straightforward jurisdictional issue: the Plaintiffs did not file their petition for review of the administrative order timely and they are now jurisdictionally barred from pursuing this appeal. This issue is a matter of calculating timelines from the District's final order denying Plaintiffs' standing, applying settled law with respect to jurisdictional deadlines, and reversing the district court's decision. This issue does not warrant oral argument. If the Court determines that there is jurisdiction to hear this appeal, the secondary issue relating to Plaintiffs' standing involves important issues of how standing is determined by groundwater conservation districts in the State of Texas. Should the Court find that the district court had jurisdiction to hear this case, this Court's opinion will impact the operations of groundwater conservation districts statewide and set the parameters for the types of parties and interest groups that will have standing to participate in contested permit proceedings every time a district considers a well permit application. In the event the Court reaches the standing issue, Appellant End Op, L.P. respectfully requests oral argument to assist this Court in its consideration of the Lost Pines Groundwater Conservation District's well-reasoned decision that Plaintiffs lacked standing to oppose End Op's well applications.

ISSUES PRESENTED

(1) Did the trial court lack subject-matter jurisdiction over the Plaintiffs' administrative appeal because suit was not filed within 60 days after the denial of the Plaintiffs' motion for rehearing at the District level?

(2) Did the trial court err in reversing the District's decision on the Plaintiffs' standing when the District's decision was reasonably supported by substantial evidence, contained no error of law, and was not an abuse of discretion?

TO THE HONORABLE THIRD COURT OF APPEALS:

This case should be decided on the straightforward threshold point that Plaintiffs did not file their petition for review of the District's standing decision within the jurisdictional time period. The District's final order on Plaintiffs' standing was issued January 19, 2015. Plaintiffs timely filed a motion for rehearing which was overruled by operation of law on May 7, 2015. Plaintiffs had 60 days in which to file suit for review of the District's standing decision. They did not do so. This suit is jurisdictionally barred.

If this Court takes up the merits, Plaintiffs' expert witness in this case conceded regarding Plaintiffs, "If they do not drill a well, they will not be adversely affected." As a factual matter, Plaintiffs have no well in the Simsboro Aquifer, and have no plans to drill a Simsboro well. Yet, the district court reversed Appellant Lost Pines Groundwater Conservation District's decision that Plaintiffs lacked standing to challenge the well applications by Appellant End Op, L.P. This was error.

The Carrizo-Wilcox Aquifer at issue in this case extends from the Mexican border in Southwest Texas, across the state in a generally northeast direction, into Louisiana—encompassing 25,409 square miles of land in Texas. The consequence of the district court's reversal of the District's order in this case are profound and disturbing: any person or interest group owning land over an aquifer has standing

to challenge any withdrawal of groundwater from the aquifer. This is contrary to the statutory standard contained in Texas Water Code § 36.415(b)(2), fundamental principles of water law, and is equally contrary to longstanding jurisdictional principles of standing.

Land ownership alone—without regard to facts tied to actual injury such as well ownership, proximity, and the like—is insufficient to demonstrate an injury in fact. There must be some actual or imminent injury that affects the real property. Despite a day-long evidentiary hearing, Plaintiffs in this case were unable to demonstrate any injury to themselves or to their properties. The District's order denying Plaintiffs' party status on End Op's groundwater well applications was well-reasoned and correct. The district court's reversal of the District's order must, itself, be reversed as legal error.

STATEMENT OF FACTS

Appellant End Op, L.P. ("End Op") is an applicant to the Lost Pines Groundwater Conservation District (the "District"). End Op filed its applications in July 2007, seeking to withdraw groundwater within the District for the purpose of municipal use. 1 CR 110.

The Court can and should reverse the district court's judgment below based solely on a jurisdictional point. Plaintiffs Andrew Meyer, Bette Brown, Darwyn Hanna, and the environmental interest group Environmental Stewardship ("Plaintiffs") in 2013 requested party status in the contested case hearing on End Op's applications. 1 CR 1020-46. The District referred the issue of Plaintiffs' standing to the State Office of Administrative Hearings ("SOAH"). 1 CR 1129-30. On August 12, 2013, the SOAH administrative law judge ("ALJ") conducted a day-long evidentiary hearing on whether the Plaintiffs could demonstrate an actual injury sufficient to confer standing to protest End Op's well permit applications. 1 CR 1711-1929. The ALJ found and concluded that Plaintiffs did not have standing to participate in the contested case hearing. 1 CR 1520-31. On January 19, 2015, the District entered its final order agreeing with the ALJ and denied Plaintiffs' party status. 1 CR 1662-63. Plaintiffs filed a motion for rehearing of the January 19, 2015 decision on February 6, 2015. 2 CR 341-48. Plaintiffs then filed suit on February 20, 2015. 2 CR 233. However, such lawsuit was premature and did not

invoke the district court's jurisdiction because Plaintiffs failed to exhaust their administrative remedies. Plaintiffs' February 6, 2015 motion for rehearing had not been heard or ruled on by the District when Plaintiffs filed suit.

Plaintiffs' motion for rehearing was overruled by operation of law on May 7, 2015. By statute, Plaintiffs had 60 days from May 7, 2015 to file a suit for review of the January 19, 2015 final decision of the District denying their standing. Plaintiffs did not file a new lawsuit for review of the standing decision until November 4, 2016, more than 485 days after their July 6, 2015 deadline (60 days from May 7, 2015).

Those uncontroverted facts, alone, are sufficient for Appellants to prevail on this appeal and have the district court's judgment reversed. Otherwise, should the Court decide to take up the merits, the following additional facts may be relevant to the appeal.

The Carrizo-Wilcox Aquifer is a major aquifer in Texas, stretching in a wide band all the way from the Rio Grande in South Texas to Louisiana. 1 CR 1414. According to the Texas Water Development Board—the state agency responsible for mapping and evaluating the state's water resources—the Central Texas Carrizo-Wilcox Aquifer has over 1 *billion* acre-feet of water in storage.[1] There are

[1] *See* GAM Task 13-035 Version 2: Total Estimated Recoverable Storage for Aquifers in Groundwater Management Area 12. http://www.twdb.texas.gov/groundwater/docs/GAMruns/Task13-035_v2.pdf. For perspective on the relative capacity of the Carrizo-Wilcox Aquifer, the

four individual aquifer units within the Carrizo-Wilcox in Lee and Bastrop Counties, which, from upper to lower units, are the Carrizo Formation, the Calvert-Bluff Formation, the Simsboro Formation, and the Hooper Formation.[2] 1 CR 1415-16.

From this prolific source, End Op sought authority to withdraw, from 14 wells, up to 56,000 acre-feet per year from the Simsboro. 1 CR 111-55. The applications were made to the District. Specifically, End Op intended to withdraw the groundwater for the purpose of transporting such produced water to Travis and Williamson Counties for municipal use. *Id.*

The District was created in 1999 by the 76th Texas Legislature, ratified in 2001 by the Texas Legislature, and confirmed by voters in Bastrop and Lee Counties in 2002. 1 CR 1405. The District is a groundwater conservation district that covers Bastrop and Lee Counties. *Id.* As a groundwater conservation district, the District is governed by Texas Water Code chapter 36 and by the District's own promulgated rules. 1 CR 2041.

The Texas Legislature has created groundwater conservation districts as the "state's preferred method of groundwater management" in order to balance the conservation and development of groundwater, use the best available science in the

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total volume of all reservoirs and lakes in Texas at full capacity is about 31 *million* acre-feet. In other words, the Central Texas Carrizo-Wilcox Aquifer has over 32 times the water in storage than all lakes and reservoirs in the state have combined.

[2] There is approximately 288 *million* acre-feet of water stored in the aquifers beneath Lee and Bastrop Counties. 2 CR 260. 288 million acre-feet equates to over 93 trillion gallons.

conservation and development of groundwater, and protect property rights. *See* TEX. WATER CODE § 36.0015. The Legislature recognized that a landowner owns the groundwater below the surface of his land. *See id.* § 36.002(a). While this groundwater ownership entitles the landowner (and his lessees) to drill for and produce groundwater, the landowner has no right to any specific amount, and can have his rights made subject to well spacing or tract size restrictions. *See id.* § 36.002(b), (b-1), (d).

End Op's July 2007 applications were made pursuant to its groundwater ownership and lease rights covering thousands of acres of land in Lee and Bastrop Counties, where the 14 wells were to be drilled. On April 10, 2013, Aqua Water Supply Corporation ("Aqua WSC") requested a contested case hearing on End Op's applications. 1 CR 1010-19. Aqua WSC had both existing and proposed wells in the Simsboro aquifer. 1 CR 1011. On June 19, 2013, the District granted Aqua WSC's request for a contested case hearing, and referred the matter to SOAH. End Op did not contest Aqua WSC's standing to request a contested case hearing on End Op's applications.

However, on May 8, 2013, Plaintiffs submitted form letters to the District requesting party status in the contested case hearing based on their ownership of land in Bastrop and Lee Counties. 1 CR 1020-46. Plaintiffs did not have any existing or proposed Simsboro well. Because none of the Plaintiffs had a

Simsboro well that could be affected by End Op's groundwater production, End Op objected to their party status in the proceedings. 1 CR 1049-1116. Rather than outright deny Plaintiffs standing, on June 19, 2013, the District referred the issue of Plaintiffs' standing to SOAH. 1 CR 1129-30.

The SOAH ALJ presided over a full-day hearing solely on the issue of Plaintiffs' standing. 1 CR 1131. Plaintiffs each testified at the hearing, and Plaintiffs' designated expert witness also testified. 1 CR 1711-1861. Plaintiffs had the opportunity to submit documentary evidence as well. *See* 1 CR 1930-81. Plaintiffs also had the opportunity to cross-examine End Op's expert witness, 1 CR 1862-1913, to present oral argument to the ALJ, 1 CR 1914-28, and to submit post-hearing briefing, 1 CR 1469-84, 1497-1503. However, critically, at the SOAH hearing, Plaintiffs' expert conceded that unless and until any of Plaintiffs drilled a Simsboro well, Plaintiffs "will not be adversely affected" by End Op's wells. 1 CR 1853:14-15. On September 25, 2013, the ALJ entered its Order No. 3 in the SOAH proceedings—finding and concluding that Plaintiffs did not have standing to participate in the contested case hearing. 1 CR 1520-31. Plaintiffs had no Simsboro well on their properties, and had no present intention to drill a Simsboro well.

The contested case then continued with the applicant End Op and the protestant Aqua WSC as parties. The ALJ issued his Proposal for Decision on April 10, 2014. 1 CR 64-98. The matter was then returned to the District.

The District issued two separate orders on the Proposal for Decision. First, the District decided that, on the merits, additional findings and conclusions were necessary on the issue of beneficial use. The District remanded the case to SOAH to address that issue. 1 CR 1651. On September 30, 2014, the District entered the written order of remand. 2 CR 644.

Second, the District separately ruled on the issue of Plaintiffs' standing. The District unanimously moved to adopt the ALJ's Order No. 3 denying party status to Plaintiffs. 1 CR 1650. On January 19, 2015, while the contested case continued on remand before SOAH, the District entered its final written order on Plaintiffs' standing. 1 CR 1662-63. The District denied Plaintiffs' party status, and adopted the ALJ's findings of fact and conclusions of law from Order No. 3. 1 CR 1663.

End Op's applications were eventually granted. On February 25, 2015, the ALJ issued a second Proposal for Decision. 2 CR 644. On September 21, 2016, the District approved the permits for End Op's 14 Simsboro wells. 2 CR 644-65.

Plaintiffs filed three suits in district court to challenge the District's final order on their standing, but none of those suits were timely filed. First, in response to the District's September 10, 2014 board meeting at which the board members

voted to adopt the ALJ's Order No. 3, Plaintiffs filed suit on November 7, 2014. 1 CR 13. This suit was filed before the District had issued a written final order on Plaintiffs' standing. Second, in response to the District's January 19, 2015 written final order on Plaintiffs' standing, Plaintiffs filed suit on February 20, 2015. 2 CR 233. Third, in response to the District's September 21, 2016 order granting End Op's applications, Plaintiffs filed suit on November 4, 2016. 2 CR 368. The three lawsuits were eventually consolidated. 2 CR 732.[3]

At the district court, Plaintiffs' primary argument was that the District's decision on standing was not subject to substantial evidence review but, rather, needed to be reviewed *de novo*. 2 CR 1120-23. A hearing on Plaintiffs' administrative appeal was held on October 18, 2017. At the hearing, Plaintiffs continued to argue to the district court that their administrative appeal was subject to a *de novo* standard of review. 3 RR 23, 29-31, 81-82.

On January 4, 2018, the district court reversed the District's January 19, 2015 decision that Plaintiffs lacked standing and, as a result, reversed the September 21, 2016 granting of End Op's application and remanded to the District for further proceedings. 2 CR 1519-20. End Op and the District have timely appealed the district court's judgment. 2 CR 1523-25, 1530-35.

[3] As pointed out at the outset of this Statement of Facts, none of these three lawsuits were filed within the required 60-day window of time after Plaintiffs' motion for rehearing of the District's final decision on their standing was denied.

SUMMARY OF THE ARGUMENT

The district court erred in reversing the District's decision regarding Plaintiffs' standing to participate in the contested case on End Op's application. To have standing, Plaintiffs needed to demonstrate an injury in fact, which is particularized and is actual or imminent. Plaintiffs could not demonstrate such an injury.

As an initial matter, this Court does not need to address the merits. Texas law is clear that a district court lacks jurisdiction over an administrative appeal if the appellant fails to exhaust all administrative remedies. In this case, the District's final order denying Plaintiffs' standing was entered on January 19, 2015, and Plaintiffs' motion for rehearing to the District was filed on February 6, 2015. The motion for rehearing was overruled by operation of law 90 days later, on May 7, 2015. Plaintiffs failed to file their petition for judicial review within the mandatory 60-day period, which ended on July 6, 2015. Accordingly, Plaintiffs have failed to invoke the jurisdiction of the district court. The district court's judgment must be reversed, and Plaintiffs' lawsuit dismissed with prejudice for want of jurisdiction.

Reversal of the district court's judgment is also required on the merits. The District correctly ruled that a landowner without a well in the affected aquifer has no justiciable interest to challenge another landowner's well application in that

aquifer. Unless and until Plaintiffs have a well accessing the Carrizo-Wilcox aquifer, there is nothing to distinguish Plaintiffs from any of the tens of thousands of landowners in the 66 counties and 25,409 square miles overlying the Carrizo-Wilcox.

The fundamental flaw in the district court's judgment is a failure to apply the substantial evidence rule. Under the substantial evidence rule, courts must give great deference to the findings and conclusions of the administrative agency. Plaintiffs argued to the district court that the substantial evidence rule was inapplicable, and that the District's decision on Plaintiffs' standing needed to be reviewed under a *de novo* standard. This was error, and when the proper standard of review is applied, the District's decision was correct and must be affirmed.

None of the Plaintiffs have a well—or even a proposed well—in the aquifer that is the subject of the well applications. Moreover, the Plaintiffs conceded that even if they did drill a well in the future, they could still produce all the water they would ever need from the Simsboro Formation of the Carrizo-Wilcox Aquifer. The Plaintiffs lack of a well, or even evidence that a future, hypothetical well would go dry, underscores both the Plaintiffs' failure to demonstrate an actual or imminent injury, and the true motive behind this effort.

Environmental Stewardship and the other Plaintiffs are opposed to End Op's wells not because they are concerned about their non-existent wells, but because

they are opposed for essentially political reasons to the export of groundwater for municipal purposes. But those political concerns, though valid for political debate, have no place in a hearing on well permit applications. Balancing End Op's valuable property rights in groundwater with the State's interest in "conservation and development of groundwater to meet the needs of this state" is a matter entrusted to groundwater conservation districts such as Lost Pines Groundwater Conservation District. TEX. WATER CODE § 36.0015(b). The Lost Pines District's decision to limit standing to contest a well application to those landowners with wells that are potentially affected is not only sensible and entitled to deference, but any other rule opening up party status to any landowner over an aquifer, regardless of whether the person has an affected well, removes the necessity of showing actual injury from the standing analysis and will turn well application hearings into political sideshows instead.

Reversal, therefore, is required. The District's decision that Plaintiffs lacked standing is in accordance with the governing law in Texas and the substantial evidence in the administrative record. The district court erred in exercising jurisdiction over Plaintiffs' untimely petitions for judicial review, and further erred in reversing the District's order on Plaintiffs' lack of standing.

ARGUMENT

I. The district court lacked jurisdiction over Plaintiffs' administrative appeal.

The threshold question on this appeal is whether the district court had jurisdiction over Plaintiffs' petition for judicial review. Plaintiffs were required to file suit within 60 days after the District's decision became final. *See* TEX. WATER CODE § 36.413(b).[4]

The District entered its final decision on Plaintiffs' lack of standing on January 19, 2015. 1 CR 1662-63. The District's January 19, 2015 order denied Plaintiffs' party status in the case, and adopted the findings of fact and the conclusions of law that had been made by the ALJ on that issue. 1 CR 1663.

Indeed, Plaintiffs have judicially admitted the January 19, 2015 written order was the District's final decision denying their party status.

> The January 19, 2015 Order is definitive . . . . The order was promulgated in a formal manner . . . . The District clearly expected compliance with the order . . . . Furthermore, the order was the consummation of the consideration of Plaintiffs' request 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.

2 CR 304-05; *see also* 2 CR 1123-26 (citing *Tex.-N.M. Power Co. v. Indus. Energy Consumers*, 806 S.W.2d 230, 232 (Tex. 1991)).

[4] The APA's general rules regarding the filing of a petition for judicial review, *see* TEX. GOV'T CODE § 2001.176, do not apply to Texas Water Code chapter 36 proceedings, *see* TEX. WATER CODE §§ 36.253, .416(a), .418(b).

In order to file suit appealing the decision, Plaintiffs were required to exhaust their administrative remedies with the District by filing a timely request for rehearing. *See* TEX. WATER CODE § 36.413(c). Plaintiffs timely filed a motion for rehearing on February 6, 2015. 2 CR 341-48. Because the District took no action on the motion for rehearing, the motion for rehearing was overruled by operation of law after 90 days had passed, on May 7, 2015. *See* TEX. WATER CODE § 36.412(e); 1 CR 2080 (Dist. Rule 14.6.A(5)). The District's decision, therefore, became final for the purposes of appeal on May 7, 2015. *See* TEX. WATER CODE § 36.413(a)(2)(A).

Accordingly, the 60-day window of time for Plaintiffs to file suit appealing the District's decision was from May 7 to July 6, 2015. *See id.* § 36.413(b). Plaintiffs did not file their lawsuit within this time period.

Plaintiffs filed a lawsuit on November 7, 2014, and a second lawsuit on February 20, 2015. 1 CR 13; 2 CR 333. However, both filings were premature, and failed to invoke the jurisdiction of the district court. The Texas Supreme Court held in *Lindsay v. Sterling*, 690 S.W.2d 560 (Tex. 1985), that a lawsuit filed prior to the window for filing a petition for judicial review does not invoke the district court's jurisdiction. In *Lindsay*, the plaintiff filed a motion for rehearing at the agency, but "appealed to the district court before the motion for rehearing was overruled." *See id.* at 563. The Texas Supreme Court held, "The requirement of

having a motion for rehearing overruled, thus exhausting administrative remedies, is a jurisdictional prerequisite to judicial review by the district court and cannot be waived by action of the parties." *Id.* at 563-64; *see Marble Falls Indep. Sch. Dist. v. Scott*, 275 S.W.3d 558, 567 (Tex. App.—Austin 2008, pet. denied); *El Paso Elec. Co. v. Pub. Util. Comm'n*, 715 S.W.2d 734, 738 (Tex. App.—Austin 1986, writ ref'd n.r.e.). Therefore, in this case, the district court lacked jurisdiction over the lawsuits Plaintiffs filed before May 7, 2015.

Indeed, in their February 20, 2015 Original Petition, Plaintiffs even acknowledged that their lawsuits were premature. Plaintiffs explicitly pleaded:

> [The District] has not made a determination regarding Plaintiffs' Motion for Rehearing . . . . Plaintiffs anticipate that they will also file an Original Petition after disposition of Plaintiffs' pending Motion for Rehearing . . . .

2 CR 339. Plaintiffs did not follow through on their anticipated filing of a *timely* petition for judicial review once the Motion for Rehearing was overruled by operation of law, 76 days later.

Plaintiffs filed a third lawsuit on November 4, 2016. 2 CR 368. However, this filing was too late, and failed to invoke the jurisdiction of the district court. This Court held in *West v. Texas Commission on Environmental Quality*, 260 S.W.3d 256 (Tex. App.—Austin 2008, pet. denied), that a lawsuit filed subsequent to the window for filing a petition for judicial review does not invoke the district court's jurisdiction. In *West*, the thirty-day period for filing suit expired on

January 8, and the plaintiffs did not file their petitions for judicial review until January 18 and February 17. *See id.* at 262-63. This Court held that the deadline for filing suit was "mandatory and jurisdictional" and, thus, the plaintiffs' "failure to comply with this statutory prerequisite deprived the trial court of jurisdiction to consider [their] petitions for judicial review." *Id.* at 263. Therefore, in this case, the district court lacked jurisdiction over the lawsuit Plaintiffs filed after July 6, 2015.

This issue is straightforward. Filing suit within 60 days of the May 7, 2015 denial of the District's motion for rehearing was a jurisdictional prerequisite. Because Plaintiffs did not do so, their lawsuit must be dismissed for lack of jurisdiction.

Plaintiffs might argue to this Court, contrary to their position before the trial court, that it was the later decision of the District, in 2016, on the full merits of End Op's application, which triggered their obligation to file a motion for rehearing and then a petition for judicial review. Under Texas Water Code Chapter 36, this is not correct. Plaintiffs had no right to appeal the District's final decision on the merits that had been the subject of a contested case hearing before SOAH. Only the District, the applicant, and any other *parties* to a contested case hearing can appeal the final decision in the contested case. *See* TEX. WATER CODE § 36.251(b); *Coastal Habitat Alliance v. Pub. Util. Comm'n*, 294 S.W.3d 276, 282 (Tex. App.—

Austin 2009, no pet.). Under Chapter 36, Plaintiffs had no right to appeal the final decision in the contested case, but only had the right to appeal the order denying their party status. That denial was definitively made on January 19, 2015. From Plaintiffs' perspective, there was nothing interim about the January 19, 2015 order. Indeed, Plaintiffs admit this "critical distinction in the statutory language governing judicial review" here. 2 CR 1125-26.

Moreover, under the facts of this case, this is not a situation in which the District entered an interim order on standing in conjunction with a broader proceeding. *See, e.g.*, *West*, 260 S.W.3d at 263-64. In 2014, the SOAH judge decided both Plaintiffs' standing and the merits of End Op's application. 1 CR 1519-31; 2 CR 1079-1113. After the SOAH proceedings concluded, the District considered both issues simultaneously, but bifurcated them by: (1) on September 30, 2014, remanding the permit applications to SOAH for further proceedings only on the merits; and (2) on January 19, 2015, entering a final decision denying party status, while the merits were separately continuing before SOAH. 2 CR 667. Plaintiffs' position as non-parties without standing was definitively adjudicated in January 2015.

As this Court has observed, "[i]n examining administrative orders, no single formula or rule disposes of all finality problems." *See Tex. Utils. Elec. Co. v. Pub. Citizen, Inc.*, 897 S.W.2d 443, 445-46 (Tex. App.—Austin 1995, no writ). In this

case, the January 19, 2015 order was the final order on standing, because (1) the District entered that order after a full evidentiary hearing and remand by the SOAH judge, (2) Plaintiffs have judicially admitted the January 19, 2015 order was the District's final order with respect to the District's decision on Plaintiffs' standing under governing Texas law, and (3) chapter 36 does not allow Plaintiffs to appeal the later, final decision on the merits. Thus, there was nothing interim about the January 19, 2015 order on Plaintiffs' standing.[5]

Plaintiffs failed to file suit in district court within 60 days after the District's denial of Plaintiffs' motion for rehearing. Filing suit within this time window is a jurisdictional prerequisite to maintaining the suit. The district court's judgment must be reversed, therefore, and Plaintiffs' lawsuit must be dismissed with prejudice. Because Plaintiffs failed to timely file a petition for judicial review, the district court lacked jurisdiction over Plaintiffs' judicial appeal of the District's denial of their party status.

II. The district court erred in reversing the District's decision that Plaintiffs lacked standing to be parties to the contested case hearing on End Op's application.

Even if Plaintiffs had timely filed a petition for judicial review, and thereby had invoked the district court's subject-matter jurisdiction, the district court erred

[5] Indeed, Plaintiffs understood this. In response to the January 19, 2015 order, Plaintiffs filed a motion for rehearing on February 6, 2015, and a petition for judicial review on February 20, 2015. Plaintiffs' error was in failing to exhaust their administrative remedies at the District before filing suit.

in entering judgment in favor of Plaintiffs. When the proper standard of review (substantial evidence review) is applied to the District's order, the District's decision that Plaintiffs lacked standing to contest End Op's applications must be affirmed.

A. Plaintiffs' appeal is subject to a substantial evidence review.

The threshold question for a substantive review of the District's order is the proper standard of review. Section 2001.174 of the APA provides that if the agency's enabling act authorizes review of a decision under the substantial evidence rule, "a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion." *See* TEX. GOV'T CODE § 2001.174. Chapter 36, in turn, confirms that this substantial evidence rule applies to the District's orders. *See* TEX. WATER CODE § 36.253 ("[T]he challenged . . . order . . . shall be deemed prima facie valid. The review on appeal is governed by the substantial evidence rule as defined by Section 2001.174, Government Code.").

This Court has confirmed that an agency's order denying party status is subject to a substantial evidence review. *See Collins v. Tex. Natural Res. Conservation Comm'n*, 94 S.W.3d 876, 882 (Tex. App.—Austin 2002, no pet.); *Sw. Prof'l Indem. Corp. v. Tex. Dep't of Ins.*, 914 S.W.2d 256, 268 (Tex. App.—Austin 1996, writ denied). An agency has discretion to weigh and resolve matters

relating to affected-person status. *See Tex. Comm'n on Envtl. Quality v. Sierra Club*, 455 S.W.2d 228, 235-36 (Tex. App.—Austin 2014, pet. denied).

The principles of a substantial evidence review are well settled. The agency itself is the primary fact-finding body. When there is substantial evidence which would support either affirmative or negative findings, the agency's findings must stand, and a reviewing court cannot re-weigh the fact findings, nor substitute its judgment for that of the agency on controverted issues of fact. *See Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984). Substantial evidence review requires "only more than a mere scintilla" of evidence to validate an agency's decision. *See City of Dallas v. Stewart*, 361 S.W.3d 562, 566 (Tex. 2012).

An agency may also make findings of fact by implication. *See Gulf Land Co. v. Atl. Ref'g Co.*, 131 S.W.2d 73, 81 (Tex. 1939). As with an express finding, an implied finding of fact cannot be reversed unless there is no substantial evidence to support it. *See Stewart v. Humble Oil & Ref'g Co.*, 377 S.W.2d 830, 836 (Tex. 1964); *Sohio Petroleum Co. v. Schumacher*, 460 S.W.2d 445, 449 (Tex. Civ. App.—Austin 1970, no writ). While legal conclusions can be reviewed for errors of law, the Court reviews all findings of fact "for support by substantial evidence." *See City of San Marcos v. Tex. Comm'n on Envtl. Quality*, 128 S.W.3d 264, 270 (Tex. App.—Austin 2004, pet. denied).

The level of deference in a substantial evidence review is of particular import in this case, because it likely explains why the district court incorrectly reversed the District's decision. Plaintiffs incorrectly argued to the district court—and likely convinced the district court—that it had to conduct a *de novo* review of the District's findings. 2 CR 1120-23; 3 RR 23, 29-31, 81-82. Once this Court applies the *correct* standard of review here—which the district court below should have applied but was not asked by Plaintiffs to do—the result is that the District's order must be affirmed.

B. A groundwater conservation district has a statutory obligation to limit party status to those landowners actually affected by a well application – *i.e.*, those landowners with wells in the affected aquifer in reasonable proximity to the proposed well.

The District has a statutory obligation to limit party status to those landowners actually affected by a well application. TEX. WATER CODE § 36.415(b)(2). A decision regarding party status is reviewed for an abuse of discretion. *See Tex. Comm'n on Envtl. Quality v. City of Waco*, 413 S.W.3d 409, 424-25 (Tex. 2013); *Sierra Club*, 455 S.W.3d at 235.

Plaintiffs' claims in this case rest on the misguided notion that any landowner over an aquifer is entitled to party status to protest a well application in that same aquifer. Plaintiffs repeatedly argue—as if the point were contested—that they have property rights in groundwater. That argument is both a strawman and a non-sequitur. End Op does not dispute that, as landowners, the Plaintiffs have

certain groundwater rights that are one of the sticks in the bundle of rights that comes with land ownership in Texas. TEX. WATER CODE § 36.002(a) ("The legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property."); *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 838 (Tex. 2012). Indeed, that is the source of rights that End Op relied upon in filing the well applications with the District that are the subject of this appeal.

But inchoate ownership rights in groundwater—standing alone—simply do not confer universal standing to challenge any and every action that might hypothetically affect a groundwater resource under one's property, regardless of the facts necessary to show actual injury. The Carrizo-Wilcox aquifer, of which the Simsboro is a component, stretches from the Rio Grande in south Texas to the Louisiana border in east Texas. It cannot be that every landowner over that vast area of land can protest any application to withdraw water from any groundwater district overlying the aquifer, regardless of facts that would demonstrate injury (such as ownership of a well in the affected aquifer and proximity to the proposed well). That rule is entirely unworkable and would turn well application hearings, which turn on technical questions such as compliance with well spacing regulations, into political circuses bearing no relation to the technical questions actually at issue, nor to the actual injury of the protesting parties.

If land ownership alone were enough to confer standing, then any landowner anywhere could challenge any environmental permit. That is not the law, and loosening standing requirements by removing the actual injury requirement would create a nightmare for regulatory agencies and courts. *Tex. Disposal Sys. Landfill, Inc. v. Tex. Comm'n on Envtl. Quality*, 259 S.W.3d 361 (Tex. App—Amarillo 2008, no pet.) ("[L]ike the chance of a pig growing wings, the purported injury that might befall [a landfill owner located 200 miles away] is mere speculation, and as such, it falls short of establishing a justiciable interest and standing.").

The requirement of showing actual or imminent injury, rather than hypothetical or speculative injury, applies to groundwater resources in the same way that it applies to land ownership. *See Collins*, 94 S.W.3d at 882 (affirming, under substantial evidence review, agency denial of a hearing request by landowner alleging potential harm to groundwater resources 1.3 miles away from facility because landowner failed to demonstrate that he is an "affected person").

Efforts by special interest groups, like Environmental Stewardship, to champion "public interest" issues do not remove or lessen standing requirements either. The same actual or imminent injury requirements apply to those groups as well, regardless of any purported public interest. *See Save Our Springs Alliance v. City of Dripping Springs*, 304 S.W.3d 871, 880 (Tex. App.—Austin 2010, pet. denied) ("In sum, we do not find any Texas case in which an alleged injury to a

plaintiff's environmental, scientific, or recreational interests conferred standing in the absence of allegations that the plaintiff has an interest in property affected by the defendants' actions.")

Consistent with this backdrop, Chapter 36 entitles a groundwater conservation district to adopt procedural rules that "limit participation" in a hearing on a contested application to persons:

> who have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest that is within a district's regulatory authority and affected by a permit or permit amendment application, not including persons who have an interest common to members of the public.

TEX. WATER CODE § 36.415(b)(2). The District adopted such a Rule. 1 CR 2074 (Dist. Rule 14.3.D(3)).

It is a reasonable application of this District Rule, therefore, for the District to require that a person have an actual groundwater well that produces from the aquifer which is the subject of the application—or, at a bare minimum, concrete, imminent plans for such a well—to have standing to challenge another person's application for a well. It is also a reasonable application of this District Rule to require that the landowner's well be within reasonable proximity of the proposed well at issue. Both of these limitations are directly tied to the foundational component of standing—actual or imminent injury. As a practical matter, without such reasonable, common-sense limitations, the District would be required to allow

any landowner over the entire aquifer to demand a contested case to protest any application for a well permit. The District has discretion to draw the line as it has done here. *See R.R. Comm'n v. Ennis Transp. Co.*, 695 S.W.2d 706, 710 (Tex. App.—Austin 1985, writ ref'd n.r.e.).

Land ownership over an aquifer—standing alone—is not sufficient to protest a groundwater well application. Without a well in the Simsboro aquifer, Plaintiffs cannot distinguish themselves from any other landowner in the entire District, or even outside the District overlying the vast Carrizo-Wilcox aquifer. The District based its denial of Plaintiffs' party status on the fact that they lacked a Simsboro well. 1 CR 1530-31, 1663. The District was within its reasonable discretion in denying the Plaintiffs' standing to challenge another landowner's well because Plaintiffs have no actual or imminent Simsboro well that might be impaired by End Op's wells, and their complaints are instead common to members of the public.

C. Substantial evidence supports the District's decision to deny party status to landowners that do not have a potentially affected well.

Once the proper standard of review (substantial evidence) is applied to the proper standard for showing injury (a well in the affected aquifer), the District's order denying the Plaintiff's party status must be affirmed because there is far more than a scintilla of evidence supporting the District's decision.

The initial—and critical—fact of import is that none of Plaintiffs have a Simsboro well. Plaintiffs do not even have any plan to drill a Simsboro well on their respective properties.

The District found that Plaintiff Darwyn Hanna is not using and has not shown that he intends to use groundwater from the Simsboro. 1 CR 1530, 1663. These findings are entitled to deference, and are supported by substantial evidence. Hanna produced no evidence prior to the SOAH hearing of any well or any intention to drill a well on his property, accessing the Simsboro or otherwise. 1 CR 1027-29. At the evidentiary hearing, Hanna admitted that he had no well on his property, 1 CR 1804:1-3, he received water from a utility provider, he had no plans to drill a well on his property, 1 CR 1806:6-12, and he did not foresee any need for a well on his property in the future, 1 CR 1807:6-9.

The District found that Plaintiff Andrew Meyer is not using and has not shown that he intends to use groundwater from the Simsboro. 1 CR 1530, 1663. These findings are entitled to deference, and are supported by substantial evidence. Meyer produced no evidence prior to the SOAH hearing of any well or any intention to drill a well on his property, accessing the Simsboro or otherwise. 1 CR 1031-34. At the hearing, Meyer admitted that there was no well on the property, 1 CR 1793:3-4, that he had made no application to drill a well on the property, 1 CR 1796:3-8, and that he did not know whether any hypothetical future well would

access the Simsboro, 1 CR 1799:23 – 1800:21. Meyer conceded that he would only access the Simsboro in the future if it turned out that was needed. 1 CR 1800:5-8.

The District found that Plaintiff Environmental Stewardship is not using and has not shown that it intends to use groundwater from the Simsboro. 1 CR 1530, 1663. These findings are entitled to deference, and are supported by substantial evidence. Environmental Stewardship produced no evidence prior to the SOAH hearing of any well or any intention to drill a well on its property, accessing the Simsboro or otherwise. 1 CR 1039-42. At the hearing, Environmental Stewardship admitted that there was no well on the property, there was no current plan to have a well on the property, and there was not even any current need for water on the property. 1 CR 1757:1-10, 1759:15-20. In fact, under the District's rules, Environmental Stewardship's small lot in a platted subdivision is not even allowed to drill a well. 1 CR 1758:9-25.

The District found that Plaintiff Bette Brown is not using and has not shown that she intends to use groundwater from the Simsboro. 1 CR 1531, 1663. While, unlike the other three Plaintiffs, Brown has two unpermitted wells on her property, the District found there was no evidence that such wells produce from the Simsboro. *Id.* Additionally, Brown's two unregistered wells are over seven miles from End Op's closest well site. 1 CR 1490. These findings are entitled to

deference, and are supported by substantial evidence. Brown produced no evidence prior to the SOAH hearing of any well or any intention to drill a well on her property, accessing the Simsboro or otherwise. 1 CR 1021-24. At the hearing, evidence of Brown's two wells was provided, but Brown admitted that she did not know whether either of her two wells produced from the Simsboro, or whether any future wells would produce from the Simsboro, and she produced no evidence of any current intention to drill any additional well on her property. 1 CR 1784:13-23, 1789:8-10. Moreover, End Op's expert witness specifically testified that Brown's wells are *not* in the Simsboro. 1 CR 1895:18 – 1896:14. No evidence contradicted this point.[6]

Therefore, under the substantial evidence rule, the District reasonably found that not one of the four Plaintiffs has a well that produces from the Simsboro or has any plan to drill a Simsboro well. No evidence of injury to the Plaintiffs' use of groundwater from the Simsboro is demonstrated by the record evidence, other than mere speculation and conjecture.

The next fact of import is that any impact End Op's wells might have on the Simsboro aquifer will not affect the non-Simsboro water sources underneath Plaintiffs' land, including the shallow aquifer from which Brown's distant wells produce. Although Plaintiffs' expert witness George Rice testified that the

[6] Plaintiffs' expert witness conceded he had no information or opinion regarding which aquifer Brown's wells were completed in. 1 CR 1824:9 – 1825:10.

Simsboro could be "hydrologically connected" to other aquifers, 1 CR 1818:11-22, 1836:8-24, End Op's expert witness, Michael Keester, an expert in groundwater flow modeling, testified that, in fact, End Op's production of water from the Simsboro would not have *any* detectable impact on the overlying aquifers. 1 CR 1864:16-25, 1869:7 -18. Actual testing showed no short-term effect on the overlying aquifers. 1 CR 1869:19 – 1870:6. This was the only physical investigation conducted in the area. 1 CR 1871:1-5. Unlike Mr. Rice's speculative generalities about possibilities of impact, Mr. Keester described all of the layers for groundwater production, and how vertical leakage, if any, is so minimal as to be nondetectable. 1 CR 1871:19 – 1874:16. In effect, according to Mr. Keester's testimony, the separate aquifers are "separate and isolated." 1 CR 1874:17-24.

After hearing this conflicting testimony, the SOAH ALJ rejected the evidence proffered by the Plaintiffs, and found that even Bette Brown, the landowner with two shallow unregistered wells, could not show a "personal justiciable interest" and therefore lacked standing to participate in the contested case hearing. The District adopted the SOAH ALJ's decision, and that decision of highly technical and scientific matters, such as leakage between aquifers, is entrusted to the technical expertise of the agency. *See Collins*, 94 S.W.3d at 881 ("The findings, inferences, conclusions and decisions of an administrative agency

are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise.").

Thus, substantial evidence supported the District's decision rejecting the speculative effect End Op's proposed Simsboro wells might have on Brown's existing shallow wells that are seven miles from End Op's closest proposed well, or on any other non-Simsboro wells that might be drilled by Plaintiffs in the future. Again, Plaintiffs failed to show an actual or imminent injury that would rise above mere speculation and conjecture.

The next fact of import is that any reduction in artesian pressure (sometimes referred to as "drawdown") of the Simsboro beneath Plaintiffs' properties will not actually adversely impact Plaintiffs' ability to obtain groundwater from the Simsboro Aquifer. Thus, this Court is not faced with a case in which landowners are losing any ability to produce their groundwater. The substantial record evidence demonstrated that Plaintiffs' property would "never lose access to water in the Simsboro." 1 CR 1911:10-21. Mr. Rice himself, as Plaintiffs' expert witness, conceded this point as well. 1 CR 1825:23 – 1826:3.[7]

The substantial evidence in the record also demonstrated that the only potential impact of any reduction in artesian pressure caused by End Op's

[7] This is not surprising because the prolific Simsboro Aquifer—with hundreds of millions of acre-feet of water in storage in that area—can be as thick as 800 feet of saturated aquifer. 1 CR 1415.

proposed wells would be in the hypothetical event that a Plaintiff *did* drill a well accessing the Simsboro beneath his property. Mr. Keester testified to this effect:

> Q. But a decline in the pressure would still potentially necessitate drilling or putting the well deeper—putting the pump deeper into the well. Is that correct?
>
> A. If a well existed and there was a pump in there, I would say yes. However, since there's no well, they wouldn't be setting a pump at that level anyway.
>
> Q. And so it would require putting a deeper well?
>
> A. A deeper pump, not a deeper well.

1 CR 1906:4-12. Mr. Rice also testified to this point, agreeing on behalf of Plaintiffs that the only impact was increased costs *if* Plaintiffs drilled a well:

> Q. So this isn't an impact on access to the groundwater. It's a potential impact on potential costs of producing groundwater. Correct?
>
> A. Yes, I'd say that's fair.
>
> . . . .
>
> Q. So based on what you know, there would only be an impact on the cost—potential cost of producing water from this resource. Correct?
>
> A. Yeah. Although it's possible that some aquifers could be dewatered, but I—I haven't seen studies that show that that happened.
>
> Q. And certainly not anything that would reflect that for these particular landowners?
>
> A. No.

1 CR 1827:4-7, 1860:12-20. In short, even if one were to hypothesize that the Plaintiffs would drill a deep Simsboro wells at some time in the future (putting aside all of the practical, economic, and regulatory reasons why that would never happen), they would all be able to fully produce groundwater from the Simsboro Aquifer. Thus, this is not a case in which the Court must determine to what extent, if any, diminution, depletion, or destruction of groundwater conveys standing. Under the substantial evidence, there is *no* diminution, depletion, or destruction of groundwater. As Plaintiffs' expert witness conceded, "If they do not drill a well, they will not be adversely affected." 1 CR 1853:14-15.

This is why the District's finding of fact that Plaintiffs "are not using and have not shown that they intend to use groundwater that will be drawn from the Simsboro" has such import. 1 CR 1530. As a result of such finding of fact, the District's conclusion that Plaintiffs lack standing is correct, and must be affirmed. Absent use, Plaintiffs suffer no harm.

One of the irreducible constitutional minimums of standing is that, to be an injury in fact, the harm to the plaintiff from the defendant's conduct must be actual or imminent, not conjectural or hypothetical. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001) (requiring that injury for purposes of standing be "actual, not merely a

hypothetical or generalized grievance").[8] None of Plaintiffs have an "actual or imminent" Simsboro well. Under basic standing principles, therefore, Plaintiffs have no right to challenge End Op's proposed Simsboro wells.

In *Heat Energy Advanced Tech. v. W. Dallas Coalition for Envtl. Justice*, 962 S.W.2d 288 (Tex. App.—Austin 1998, pet. denied), the agency had determined that the plaintiff did not have standing to challenge a renewal permit by a hazardous and industrial waste storage and processing facility. *See id*. at 289-90. However, the substantial evidence established that the plaintiff lived less than two blocks from the facility and had detected odor from the facility on his property. *See id.* at 295. The odor was actual, not hypothetical. In contrast, Plaintiffs in this case provided no testimony of any actual impact on Plaintiffs from End Op's wells.

In *Lake Medina Conservation Soc'y v. Tex. Natural Resource Conservation Comm'n*, 980 S.W.2d 511 (Tex. App.—Austin 1998, pet. denied), the plaintiffs had standing because the challenged agency order would have the effect of "lowering the lake level." *See id.* at 514. The effect of the lower lake level was actual, not hypothetical, because the plaintiffs owned waterfront property, waterfront businesses, or private wells. *See id.* at 516. Unlike in this case, the plaintiffs in *Lake Medina* had existing, operating wells directly impacted by the water level.

[8] Plaintiffs concede that the general principles of standing apply in the context of these proceedings under the Texas Water Code. 2 CR 183-84.

In other words, mere land ownership is not enough. There must also be an actual or imminent injury to or on that property. In *HEAT*, the property owner had an injury in fact of noxious odors. In *Lake Medina*, the property owners had injuries in fact to their owned waterfront or their owned groundwater wells. This case is instead akin to *Collins*, in which the plaintiff was a nearby property owner (as close as 590 feet from the applicant's property) but failed to show an injury in fact, because substantial evidence supported the agency's rejection of the plaintiff's evidence of noxious odors and polluted groundwater. *See Collins*, 94 S.W.3d at 882-83. Property ownership is not relevant to standing unless there is also some evidence that the property "will be affected by the action of which they complain." *See Save Our Springs Alliance*, 304 S.W.3d at 883-84. Even though Plaintiffs are real property owners—as in *Collins* and *Save Our Springs*—they must show an injury in fact that is actual or imminent, not conjecture or hypothetical.

In briefing below, the Plaintiffs have cited the Texas Supreme Court's opinion in *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012). *Day* offers no support for the Plaintiff's case. In *Day*, the Supreme Court merely affirmed the long-standing common law rule that a landowner has ownership rights in the groundwater underlying his property that, if taken by the government, can result in just compensation. *See Day*, 369 S.W.3d at 838 ("Today we have decided that

landowners do have a constitutionally compensable interest in groundwater."); *see also* TEX. WATER CODE § 36.002(a) ("The legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property."). The question in this case is not whether Plaintiffs have ownership rights to the groundwater beneath their land; rather, the question is whether End Op's well applications will harm those ownership interests for purposes of a standing analysis. As Plaintiffs' expert witness conceded, "If [Plaintiffs] do not drill a well, they will not be adversely affected." 1 CR 1853:14-15. And even then, their properties have not lost access to Simsboro groundwater.

To the extent End Op's proposed wells have any impact on the extraordinarily prolific Simsboro Aquifer, Plaintiffs are not among those affected. *See Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012) ("The plaintiff must be personally injured—he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury."). Indeed, Plaintiffs have alleged no injury beyond what *any* landowner in the District or anywhere over the vast Carrizo-Wilcox Aquifer could allege. This is not a sufficiently particularized injury for standing purposes. *See S. Tex. Water Ass'n v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007) (holding that plaintiff's injury as ratepayer under water supply contract was no different from any other city resident).

It is common, when an applicant seeks a new permit, for party status to be generally limited to nearby well owners or well applicants. It is not enough merely to own land. For this reason, the District's Rules themselves provide for notice of a permit application to owners of "other registered or permitted wells within 5,000 feet of the location of the proposed well." 1 CR 2046 [Rule 5.1.B(2)]; 1 CR 2073 [Rule 14.3.C(3)(a)(ii)]. There is no reason to provide notice to any other landowners in the same county, because they will not be actually or imminently affected by the permit application.

The requirement that injury be actual or imminent to have standing is critical in the context of groundwater regulation. Texas has multiple aquifers, containing vast amounts of water, and extending over large geographic areas. For instance, 66 counties in Texas contain the Carrizo-Wilcox aquifer, with a subsurface area of 25,409 square miles.[9] It could not be, then, that merely owning land overlying that aquifer would be sufficient to give a person standing to insist on a contested case when one person seeks to withdraw water from the aquifer, even in another county. As a practical matter, real property ownership alone cannot be sufficient to establish standing. There must be a particularized injury shown, one which is actual or imminent. The proposed well must injure the party in a manner that rises above conjecture and is not common to members of the public.

[9] http://www.twdb.texas.gov/publications/reports/numbered_reports/doc/R380_AquifersofTexas.pdf?d=14391.99999999255, at p. 25.

In this case, there was a contested case hearing, and there was one party with standing to require the contested case hearing. That party was Aqua WSC. Aqua WSC requested a contested case hearing as the owner and operator of "several existing wells" and the applicant on "several permit applications." 1 CR 1010. Aqua WSC is a water utility that employs its groundwater wells to serve over 50,000 people.[10] *Id.* Its groundwater wells included "Simsboro wells." 1 CR 1013. As a result, End Op did not challenge Aqua WSC's request, but conceded a contested case hearing was required due to Aqua WSC's standing as a nearby owner and operator of Simsboro wells. 1 CR 1048. The District granted Aqua WSC's request for a contested case hearing. 1 CR 1130. Unlike Plaintiffs, Aqua's "groundwater production wells in the Simsboro formation" distinguished it from the general public. 1 CR 1493-94.

The District reasonably concluded that a landowner with an existing Simsboro well in the area of the possible drawdown from End Op's proposed wells (*e.g.*, Aqua WSC) had standing, but a landowner without any Simsboro well (*e.g.*, Plaintiffs) is not actually or imminently affected by End Op's applications and, thus, lacked standing.

If the district court's reversal were correct, then, as a matter of law, every landowner over the affected aquifer—no matter the use or size of the property, and

[10] Plaintiff Hanna admitted she saw so need to drill any well on her property as long as Aqua WSC continued to make water service available to her property. 1 CR 1807:6-9.

no matter the characteristics of the aquifer and its abundance—would be *entitled* to party status. The agency's discretion would be removed, and as a practical matter, every landowner who wants to protest can participate. Any landowner could testify to complain about a distant well in an aquifer the landowner is not even using. 1 CR 1932. In this case, there was already a contested case hearing by Aqua WSC's request. Yet, in other cases, the only person who wants a contested case may be a landowner like Plaintiffs who suffers no actual or imminent impact. The applicant would then be forced to incur significant expense to defend against that one landowner, who might never even drill a well and suffer any impact from the application.

This is precisely the situation that Environmental Stewardship is trying to create. Environmental Stewardship is not a conventional landowner. On the contrary, Environmental Stewardship is an environmental interest group – just as its name denotes. Its ownership of land is for the purpose of attempting to manufacture standing to oppose applications to the District for groundwater permits. This is why Environmental Stewardship's small lot in this case is not large enough to qualify for a well under District rules. 1 CR 1758:9-25. Under Plaintiffs' view of standing, all an environmental organization needs to do to oppose groundwater wells is buy a postage-stamp-sized property in the same county (or in the next county), and claim standing due to its miniscule groundwater

ownership beneath that dirt. Yet, Environmental Stewardship has no intention of ever drilling a well, because doing so would require significant expense, and would obligate a legitimate use of the groundwater to be shown to ensure the absence of waste, when Environmental Stewardship has no actual intended use for the property or the water beneath it. 1 CR 1759:10-23. It makes sense, then, that the District would require an actual well, or least a concrete proposed well, before Environmental Stewardship can distinguish itself from any other member of the public. Unless and until the landowner has any need for groundwater, there is no need to drill a well, and accordingly, there is no need to protest others' wells, when their only demonstrated impact is on an ability to withdraw groundwater by such a well.

On this record, substantial evidence supports the District's conclusion that Plaintiffs lacked standing to participate in the contested case hearing on End Op's application. Under well-established principles of standing, Plaintiffs' alleged harm was, at best, conjectural or hypothetical, not actual or imminent. *See Lujan,* 504 U.S. at 560; *Brown,* 53 S.W.3d at 302.

D. The District's final decision on Plaintiffs' standing must be affirmed.

It follows from the above discussion that the District's final decision that Plaintiffs lacked standing was (A) not in violation of a constitutional or statutory provision, (B) not in excess of the District's statutory authority, (C) not made

through unlawful procedure, (D) not affected by other error of law, (E) reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole, and (F) not arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *See* TEX. GOV'T CODE § 2001.174(2).

At the trial court, Plaintiffs argued that the District's final decision on Plaintiffs' party status was "arbitrary" by lacking a connection to the relevant factors for standing. An agency's decision can be found arbitrary if the agency failed to consider a relevant factor or considered an irrelevant factor. *See City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 184 (Tex. 1994). On the contrary, the District's requiring Plaintiffs' injury to be particularized and actual or imminent was in accord with the governing factors. Both the governing statute and the District rules embody these constitutional standing principles. *See* TEX. WATER CODE § 36.415(b)(2); 1 CR 2074 (Dist. Rule 14.3.D); *see also HEAT*, 962 S.W.2d at 295 (applying constitutional standard to water code proceedings).

At the trial court, Plaintiffs also argued that the District's denial of Plaintiffs' status violated Plaintiffs' "due process rights." 2 CR 402. In accordance with this Court's *Collins* opinion, such argument has no merit. First, Plaintiffs have not shown a property interest subject to deprivation in the first place because, as explained above, any Simsboro groundwater owned by Plaintiffs is not being

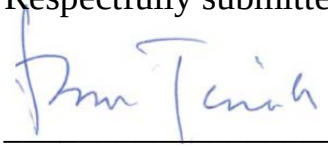
depleted. Mere speculation about a possible future loss of groundwater does not deprive Plaintiffs of protected property rights. *See Collins*, 94 S.W.3d at 883-84. Second, even if any property rights were at issue, Plaintiffs were given due process. This Court does not need to consider the due process rights of a landowner whose party status is rejected without any hearing, because in this case an evidentiary hearing was held on the issue. Plaintiffs fully participated in a full-day evidentiary hearing on the issue of their standing. Plaintiffs provided testimony and exhibits, including expert testimony, and had the opportunity to cross examine End Op's expert witness. This Court has definitively held that plaintiffs in precisely this type of situation have received all the process they were due. *See id.* at 884.

Properly applying the substantial evidence rule to this case, therefore, Plaintiffs lacked a particularized, actual or imminent injury, and the District had discretion to exclude Plaintiffs from the contested case. Plaintiffs' own expert witness conceded that unless and until Plaintiffs drill a well, "they will not be adversely affected." 1 CR 1853:14-15. Substantial evidence supports the District's decision that Plaintiffs do not have an actual or imminent Simsboro well. Therefore, for purposes of standing, Plaintiffs have suffered no actual or imminent harm.

PRAYER

WHEREFORE, Appellant End Op, L.P. respectfully prays that the district court's judgment be reversed, and that either Plaintiffs' claims be dismissed with prejudice for lack of subject-matter jurisdiction, or judgment be rendered in favor of Appellant End Op, L.P., entering a take-nothing judgment on all of Appellees' claims and affirming the Order of the Lost Pines Groundwater Conservation District, except to the extent remand is appropriate for consideration of an award of attorneys' fees and costs to Appellant Lost Pines Groundwater Conservation District against Plaintiffs.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that this brief has been served on all counsel of record, by the Court's electronic filing system, on May 7, 2018.

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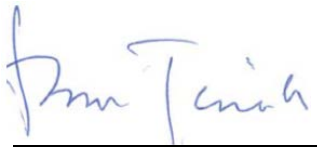

Paul M. Terrill, III

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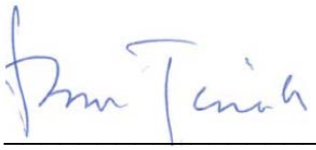

Paul M. Terrill, III

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TAB 38

SOAH DOCKET NO. 952-13-5210

LOST PINES GROUNDWATER CONSERVATION DISTRICT

APPLICATIONS OF END OP, L.P. FOR WELL REGISTRATION, OPERATING PERMITS AND TRANSPORT PERMITS FOR 14 WELLS IN BASTROP AND LEE COUNTIES, TEXAS	STATE OFFICE OF ADMINISTRATIVE HEARINGS

PREHEARING CONFERENCE

MONDAY, AUGUST 12, 2013

BE IT REMEMBERED THAT at 10:00 a.m., on Monday, the 12th day of August 2013, the above-entitled matter came on for hearing at the Bastrop Convention Center, 1408 Chestnut Street, Bastrop, Texas 78602, before MICHAEL O'MALLEY, Administrative Law Judge, and the following proceedings were reported by Kim Pence, a Certified Shorthand Reporter.

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you may well be wrong about that. It may well be that they can drill a well in the future.

Q Well, we'll make it clear to the Court that they cannot under the District's rules. You didn't investigate that?

A I did not investigate that.

Q You just assumed that they could?

A I have no opinion on it one way or the other.

Q And your analysis was that their interest that they could exercise would be adversely affected?

A Yes.

Q And if they had no -- no ability to exercise their right, that would change your opinion. Correct?

A If they do not drill a well, they will not be adversely affected.

Q If they could not drill a well, they would not be adversely affected either?

A I don't know if they could or couldn't.

Q I know, but I'm asking you to assume that they cannot. So they would not be adversely affected if you assume that they cannot drill a well?

MR. ALLMON: Your Honor, I'm going to object; asked and answered. I think Mr. Rice has tried to answer the question as nearly as he can, and I think we've been through this round-robin about five or six

SOAH DOCKET NO. 952-13-5210

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

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

I. INTRODUCTION

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

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

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

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

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

II. PARTIES' ARGUMENTS AND ALJ'S ANALYSIS

A. Timeliness

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

First, End Op argues that the Landowners' requests for party status should be denied because a person may not be a party in a contested case proceeding on groundwater permit unless they filed a timely request for a contested case hearing. End Op points to Chapter 36 of the Texas Water Code, which requires groundwater districts to adopt procedural rules limiting participation in a hearing on a contested application to persons with standing[2] and provides that when hearings are conducted by SOAH only Subchapters C, D, and F of the Administrative Procedure Act ("APA") and district rules consistent with the procedural rules of SOAH apply.[3] End Op claims that Chapter 36 does not permit a groundwater district or an Administrative Law Judge ("ALJ") with SOAH to designate a person who has not timely requested a contested case hearing as a party because to do so would violate the District's own procedural rules concerning party status. Since the Landowners did not file such requests, End Op argues, neither the District nor the ALJ may designate them as parties.

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

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[2] *See* Tex. Water Code § 36.415.
[3] *See* Tex. Water Code § 36.416.

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

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

3. ALJ'S Analysis

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

[4] District Rule 14.3(D) reads: "Request for contested case hearing. A request for a contested case hearing on the Application, to be conducted under Rule 14.4, must be made in writing and filed with the District no later than the 5th day before the date of the Board meeting at which the Application will be considered. A request for a contested case hearing may be granted if the request is made by: (1) the General Manager; (2) the applicant; or (3) a person who has a personal justiciable interest that is related to a legal right, duty, privilege, power, or economic interest that is within the District's regulatory authority and that is affected by the Board's action on the Application, not including persons who have an interest common to members of the public."

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

[6] *Id.*

[7] *Id.*

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

B. Standing

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

> limit participation in a hearing on a contested application to persons who have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest that is within a district's regulatory authority and affected by a permit or permit amendment application, not including persons who have an interest common to members of the public.[8]

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

> (1) an "injury in fact" from the issuance of the permit as proposed—an invasion of a "legally protected interest" that is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical";
> (2) the injury must be "fairly traceable" to the issuance of the permit as proposed, as opposed to the independent actions of third parties or other alternative causes unrelated to the permit; and
> (3) it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision on its complaints regarding the proposed permit (i.e., refusing to grant the permit or imposing additional conditions).[11]

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[8] Tex. Water Code § 36.415(b)(2).

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

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

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

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

1. Landowners' Position

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

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

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

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

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

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

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

2. End Op's Position

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

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

a. Groundwater ownership alone is insufficient to establish standing.

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

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

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

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

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

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

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

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[14] *City of Waco* 346 S.W.3d 781 at 810.
[15] *City of Waco* 346 S.W.3d 781 at 805.
[16] *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 803-04 (Tex.App.-Austin 2000, pet. dism'd).
[17] *Heat Energy Advanced Tech., Inc. v. W. Dallas Coal. for Envt. Justice*, 962 S.W.2d 288, 295 (Tex.App.-Austin 1998, pet. denied).
[18] *Heat Energy*, 962 S.W.2d at 295.

i. Environmental Stewardship

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

ii. Andrew Meyer

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

iii. Darwyn Hanna

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

iv. Bette Brown

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

3. ALJ's Analysis

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

[19] *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007).
[20] *City of Waco* 346 S.W.3d at 801-02.
[21] *City of Waco*, 346 S.W.3d at 805; *See Save Our Springs Alliance, Inc.*, 304 S.W.3d at 883.

a. Environmental Stewardship, Andrew Meyer, and Darwyn Hanna

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

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

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

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

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

b. Bette Brown

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

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

SIGNED September 25, 2013.

Michael J. O'Malley

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

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

TAB 36

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:

Mark D. Talbot

President, Lost Pines Groundwater
Conservation District Board of Directors

Date: 1-19-15

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

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

TO THE HONORABLE JUDGE:

COMES NOW, Andrew Meyer, Bette Brown, Darwyn Hannah, and Environmental Stewardship ("Movants") and files their Motion for Rehearing. 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. Upon reconsideration, Movants ask that the District reverse its decision to deny Movants' request for party status.

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 by vote as a final decision. Thereafter, the District issued a written order on January 19, 2015 reflecting that 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. In the District's decision to deny Movants' request for party status, the District adopted these erroneous conclusions of law made by the ALJ.

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

[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,

[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. Movants 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), Movants' 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 the District's 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 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; and

(4) 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 6 day of February 2015.

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CAUSE NO. 423-3627

ANDREW MEYER, BETTE BROWN, DARWYN HANNA, Individuals, and ENVIRONMENTAL STEWARDSHIP, Plaintiffs,	§	**IN THE**
	§	**_____ JUDICIAL DISTRICT COURT**
v.	§	
LOST PINES GROUNDWATER CONSERVATION DISTRICT, Defendant.	§	**OF BASTROP COUNTY, TEXAS**

ANDREW MEYER, BETTE BROWN, DARWYN HANNA, AND ENVIRONMENTAL STEWARDSHIP'S PETITION FOR JUDICIAL REVIEW

TO THE HONORABLE JUDGE:

Andrew Meyer, Bette Brown, Darwyn Hanna Individuals, and Environmental Stewardship, a non-profit organization, (collectively "Plaintiffs") file this Petition for Judicial Review complaining of the Lost Pines Groundwater Conservation District ("Lost Pines") and would show as follows:

I. OVERVIEW

Plaintiffs seek an order reversing Lost Pines decision denying Plaintiffs party status to a contested case hearing before the State Office of Administrative Hearings ("SOAH"), specifically Docket No. 952-13-5210, Applications of End Op, LP For Well Registration, Operating Permits and Transfer Permits. End Op applied for permits to drill 14 wells and produce 56,000 acre-feet per year of groundwater from the Simsboro aquifer that is within Lost Pines district of Bastrop and Lee Counties. Plaintiffs are landowners situated above the Simsboro aquifer and own the groundwater beneath their land.

At its September 10, 2014 meeting, Lost Pines voted to adopt the Administrative Law Judge's Proposal for Decision that included an Order No. 3 denying party status to Plaintiffs. Lost Pines issued a written order on January 19, 2015. Plaintiffs timely filed a Motion for Rehearing, but no action has been taken on that Motion.

II. DISCOVERY

If discovery is necessary, Level 3, TRCP 190.4, should control it.

III. JURISDICTION AND VENUE

Jurisdiction is proper in this Court pursuant to Texas Water Code §36.251. Plaintiffs timely filed their Motion for Rehearing (Exhibit "A") in the underlying administrative proceeding. Venue is proper in this Court under Texas Water Code §36.251.

IV. PARTIES

Bette Brown is a "landowner" as defined by Rule 1.1 of the Lost Pines Rules and Regulations as she owns the possessory rights to the land and the groundwater situated under it. The land and groundwater is within the jurisdiction of Lost Pines.

Andrew Meyer is a "landowner" as defined by Rule 1.1 of the Lost Pines Rules and Regulations as he owns the possessory rights to the land and the groundwater situated under it. The land and groundwater is within the jurisdiction of Lost Pines.

Darwyn Hanna is a "landowner" as defined by Rule 1.1 of the Lost Pines Rules and Regulations as he owns the possessory rights to the land and the groundwater situated under it. The land and groundwater is within the jurisdiction of Lost Pines.

Environmental Stewardship is a "landowner" as defined by Rule 1.1 of the Lost Pines Rules and Regulations as it owns the possessory rights to the land and the groundwater situated under it. The land and groundwater is within the jurisdiction of Lost Pines.

Lost Pines Groundwater Conservation District is a political subdivision of the State of Texas with responsibility to promote water conservation, preservation, protection, and recharge of groundwater and aquifers within Bastrop and Lee Counties and to ensure that groundwater is used efficiently and at sustainable rates. Defendant may be served through its President, Michael Talbot, at 908 N. Loop 230, Smithville, Texas 78957.

V. BACKGROUND

As referenced above, End Op applied to Lost Pines for permits to drill 14 wells and produce 56,000 acre feet per year of groundwater from the Simsboro aquifer within Lost Pines district located in Bastrop and Lee Counties. Plaintiffs' properties are situated over the Simsboro aquifer and it was determined that a drawdown of the aquifer would occur beneath the properties.

After the filing of the Application, Aqua Water Supply Corporation ("Aqua") filed a protest and sought a contested case hearing. Subsequently, Plaintiffs filed requests for party status in the contested case proceeding.

On June 19th, 2013, Lost Pines issued an order that, inter alia, granted Aqua's contested case hearing and referred the issue of whether Plaintiffs had standing to participate as parties to SOAH.

The SOAH administrative law judge (ALJ) held a preliminary hearing on August 12, 2013, after which the ALJ determined that Plaintiffs had not demonstrated the "required interest" to participate as parties in the contested case hearing. All the evidence presented, however, demonstrated that the wells would impact the aquifer levels beneath Plaintiffs' property. This denial was memorialized in the ALJ Order No. 3 and was adopted by Lost Pines on September 10, 2014. On January 19, 2015 Lost Pines issued a written order also reflecting this decision. While determining that Plaintiffs lacked standing to participate, Lost Pines referred the balance

of the ALJ's Proposal for Decision back to SOAH for development of additional evidence and conclusions. That matter is still pending.

VI. LOST PINES ERRED IN DENYING PLAINTIFFS' REQUESTS FOR PARTY STATUS

A. Plaintiffs demonstrated a justiciable interest related to their vested groundwater rights.

Lost Pines was required to grant each Plaintiff party status once the plaintiff demonstrated a personal justiciable interest related to a legal right, duty, privilege, power or economic interest within Lost Pine's regulatory authority that would be affected by their decision on the application.[1] Plaintiffs demonstrated such an interest.

Each plaintiff in this matter owns groundwater in the Simsboro aquifer that will be adversely impacted by the withdrawal of groundwater pursuant to the permits at issue. The proposed pumping will cause the drawdown of groundwater in the Simsboro aquifer beneath Plaintiffs' properties.

Plaintiffs' 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. Plaintiffs' 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 Lost Pines 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.[2]

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[1] Without limitation, this is required by Constitutional due process, as well as Tex. Water Code § 36.415, and Lost Pines' District Rules 14.3 and 14.4.

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

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.[3]

This reasoning is in error, since it fails to recognize the significance of Plaintiffs' groundwater rights. 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, Lost Pines found that the modeled potential for drawdowns of roughly 100 feet to roughly 300 feet did not distinguish Requesters from other landowners in the area,[4] equating the predicted drawdowns beneath these properties with "system-wide" aquifer drawdowns. This magnitude of the impact does not mean that the resulting injury is any less concrete and particularized. Plaintiffs' interest impacted by the permit applications at issue is not an interest common with the general public.

B. <u>The Denial of Plaintiffs' petitions for party status was in error</u>

Lost Pines erred in concluding that the ownership of groundwater is not an interest warranting protection in the permitting process. Plaintiffs' 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.

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

[4] On this point, Plaintiffs will note that under *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. Plaintiffs 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), Plaintiffs' evidence regarding potential drawdowns must be taken as true.

It is undisputed that Plaintiffs own real property overlying the Simsboro aquifer from which End Op seeks authorization to pump 56,000 acre-feet per year,[5] or 18.2 billion gallons per year. It is further undisputed that groundwater modeling performed by Lost Pines itself indicates that this massive amount of pumping will result in a drawdown of water within the Simsboro Aquifer extending to Plaintiffs' properties.[6] This drawdown of water beneath Plaintiffs' properties constitutes an "injury in fact." Plaintiffs' 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.

Lost Pines apparently finds that Plaintiffs' groundwater interest is one common to the general public. This ignores the particularized predictions of drawdown within the Simsboro Aquifer that Plaintiffs presented at the preliminary hearing.

For these reasons, Lost Pines' decision to deny Plaintiffs' requests for party status was: (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; and (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. The decision deprived Plaintiffs' of their due process rights under the United States Constitution and due course of law rights under the Texas Constitution, as well as violating District Rules 14.3 and 14.4.

C. <u>The substantial rights of the Plaintiffs have been prejudiced by Lost Pines' denial of Plaintiffs' requests for party status.</u>

Plaintiffs were particularly harmed by the denial of party status since no hearing

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

[6] Exhibit ES-4.

meaningfully occurred on the issues of greatest interest to Plaintiffs.

Plaintiffs were denied the opportunity to address disputed issues of concern to Plaintiffs such as the impact of End Op's pumping on Plaintiffs' wells, whether the proposed permits are consistent with Lost Pines' desired future conditions, or whether the proposed permits are consistent with Lost Pines' management plan. Plaintiffs have been denied the opportunity to conduct discovery, present evidence, conduct cross-examination, and present argument regarding the applications and the adverse impacts that the proposed pumping will have on Plaintiffs' interests.

VII. CONCLUSION

Plaintiffs would note that agency proceedings on this matter remain ongoing, since Lost Pines has not made a determination regarding Plaintiffs' Motion for Rehearing and Request for Written Findings and Conclusions. Out of an abundance of caution, Plaintiffs are filing this petition, and the Plaintiffs anticipate that they will also file an Original Petition after disposition of Plaintiffs' pending Motion for Rehearing and Request for Written Findings and Conclusions. Thus, Plaintiffs ask that consideration of this suit be abated pending completion of agency proceedings in this matter.

VIII. PRAYER

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

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

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

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

Respectfully Submitted,
GRISSOM & THOMPSON

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Bastrop County, Texas
By: Sharon Schimank, Deputy

CAUSE NO. 29,696

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

FINAL JUDGMENT

On October 18, 2017, this case was called for trial on Plaintiffs Andrew Meyer, Bette Brown, Darwyn Hanna, Individuals, and Environmental Stewardship, a non-profit organization's (collectively, "Plaintiffs") request for judicial review of Defendant Lost Pines Groundwater Conservation District's ("District") decision to deny Plaintiffs' request for party status.

The Court heard arguments on the District's and Intervenor End Op, L.P.'s jurisdictional challenges, and the Court reviewed the administrative record admitted into evidence and heard arguments on Plaintiffs' request for judicial review of the District's decision to deny Plaintiffs' request for party status, and announced its decision for Plaintiffs.

The Court hereby HOLDS it has jurisdiction over Plaintiffs' request for judicial review of the District's decision to deny Plaintiffs' request for party status and that the District erred in denying party status to Plaintiffs, and RENDERS judgment for Plaintiffs, Andrew Meyer, Bette Brown, Darwyn Hanna, Individuals, and Environmental Stewardship, a non-profit organization.

Accordingly, the Court ORDERS that Lost Pines Groundwater Conservation District's decision to deny Plaintiffs' requests for party status is hereby REVERSED;

The court ORDERS that Lost Pines Groundwater Conservation District's September 21, 2016 Order issuing permits to End Op, L.P. is hereby REVERSED because Plaintiffs are entitled to participate as parties in the contested case hearing on End Op, L.P.'s applications for permits; and,

It is further ORDERED that this case is REMANDED to the Lost Pines Groundwater Conservation District for proceedings consistent with the Court's decision.

This judgment finally disposes of all claims and parties, and is appealable.

All other relief not specifically granted herein is DENIED.

SIGNED on this 4th day of January, 2018, ~~2017~~.

HONORABLE JUDGE CAMPBELL

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