

CAUSE NO. 29,696

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

<p>END OP, L.P.'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING PARTY STATUS</p>
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TO THE HONORABLE JUDGE CARSON CAMPBELL:

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

**I. SUMMARY OF RESPONSE**

1. Assuming the Court determines it has jurisdiction notwithstanding pending pleas to the jurisdiction,<sup>1</sup> the only *substantive* issue for this Court in this administrative appeal is whether the administrative record contains evidence that supports the decision of the Lost Pines Groundwater Conservation District (the "District") to deny

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<sup>1</sup> See End Op's Response to Plaintiffs' Supplemental Brief Regarding Jurisdiction filed on September 5, 2017, which is incorporated by reference as if set out in full herein.

Plaintiffs' request for party status in the contested case hearing on End Op's applications for groundwater permits. The District properly denied Plaintiffs' requests after a full evidentiary hearing and a ruling by a SOAH Administrative Law Judge that the overwhelming record demonstrates Plaintiffs have not proven the elements necessary to confer standing.<sup>2</sup> The granting of End Op's applications and Plaintiffs' inability to participate in the contested case hearing does not deprive Plaintiffs' due process or private property rights because End Op's right to produce its groundwater does not restrict or affect Plaintiffs' rights to produce groundwater, if and when, Plaintiffs ever decide to exercise such rights.

2. The District's decision denying party status must be affirmed because:
  - a. Plaintiffs have only established they have a legal interest in their ownership of groundwater and have failed to present any evidence that they will suffer a specific injury necessary to confer standing under the Texas Water Code;
  - b. There is no law supporting the argument that the application of correlative rights confers standing and even if there were, the doctrine does not negate or alter the statutory standard or well-established test applied across agencies that expressly limits the right to a contested case hearing to only those affected persons who demonstrate a particularized injury; and
  - c. This Court must review the District's decision under the substantial evidence rule.

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<sup>2</sup> See End Op's Brief and Response to Plaintiffs' Initial Brief filed on May 4, 2016, which is incorporated by reference as if set out in full herein.

## II. PLAINTIFFS HAVE NOT PROVEN THE INJURY ELEMENTS.

3. Although Plaintiffs have identified a legal interest within the District's regulatory power (ownership of groundwater rights), Plaintiffs fail to establish the elements necessary to confer standing. Specifically, Plaintiffs have failed to prove:

- i. a particularized injury to the legal interest that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical";
- ii. an injury that is "fairly traceable" to the issuance of the permit as opposed to independent actions of third parties; and
- iii. an injury that is likely to be redressed by a favorable decision on its complaints.<sup>3</sup>

4. Evidence that End Op's pumping would lower district-wide water levels in 2050 in an aquifer formation in which Plaintiffs do not have wells is not evidence of a particularized injury to their rights. Plaintiffs will not be deprived of their right to produce groundwater from the aquifer and their ability to produce will not be limited by End Op's use. Plaintiffs have failed to show any injury that is traceable to issuance of End Op's permits as opposed to other comparable permits issued by the District (*e.g.*, Forestar (USA) Real Estate Group, Inc.). End Op's permits contain specific permit conditions protecting the aquifer and other groundwater interests such that the aquifer and its continued ability to produce will be permanently preserved. The current permit conditions provide substantial protection of the resource.

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<sup>3</sup> TEX. WATER CODE §36.415(b)(2); *City of Waco v. Tex. Comm'n on Env't. Quality*, 346 S.W.3d 781, 791-92, 802 (Tex. App.—Austin 2011), *rev'd on other grounds*, 413 S.W.3d 409 (Tex. 2013).

5. Even assuming Plaintiffs are correct that the correlative rights doctrine is implicated in the standing analysis, (which as explained in *infra* Section III., there is no law supporting its application to the standing test), Plaintiffs still cannot prove the elements necessary to confer standing. For example, Plaintiffs still cannot establish a concrete and particularized, actual or imminent injury that is fairly traceable and likely redressable. This was the specific requirement written into Chapter 36 in Section 36.415 to insure that contested case hearings were not necessary unless a specific and localized harm was alleged. In other words, even if Plaintiffs are deemed entitled to produce their “fair share” of the aquifer, that principle alone does not establish the injury that is specific to the Plaintiffs. At best, the application of correlative rights only further establishes Plaintiffs’ legal interest in groundwater, an element not contested.

### **III. THE APPLICATION OF OIL AND GAS PRINCIPLES SUCH AS CORRELATIVE RIGHTS TO STANDING IS A RED HERRING; THE DOCTRINE DOES NOT CONFER AUTOMATIC STANDING OR OTHERWISE ALTER OR NEGATE THE STANDING TEST**

6. The Legislature has enacted statutes unambiguously limiting participation in contested case hearings before the Texas Railroad Commission and the Texas Commission on Environmental Quality to “affected persons” (i.e., those with a “particularized injury”).<sup>4</sup> Similarly in Chapter 36, the Legislature unambiguously

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<sup>4</sup> See, e.g., TEX. WATER CODE §5.115(a); 30 Tex. Admin Code § 55.103 (Agency rule incorporating statutory definition of “affected person”); TEX. WATER CODE §36.415 (adopting statutory definition of “affected person” in section 5.115(a)); 16 TEX. ADMIN CODE §3.9(5) (requiring administrative approval of disposal well applications unless a protest is received by an “affected person” defined as “person who has suffered or will suffer actual injury or economic damage other than as a member of the general public or as a competitor”); 16 TEX. ADMIN CODE §3.8(d)(6)(D) (limiting right to protest application for a permit to maintain or use a pit for storage to “affected persons” defined in (a)(2) as a “person who, as a result of the activity sought to be permitted, has suffered or may suffer actual injury or economic damage other than

intends to limit participation in contested case hearings before groundwater districts to “affected persons.” TEX. WATER CODE §36.415. Thus, the notion of limiting participation in contested case hearings to affected persons with particularized injuries is a longstanding and well-established rule.

7. The Texas Railroad Commission’s “affected person” requirement is particularly relevant when considering Plaintiffs’ contention that principles conferred by the oil and gas regulatory scheme should be applied to the groundwater regulatory scheme. The consistency in the statutes and rules across agencies solidifies the Legislature’s intent to limit participation in contested case hearings to only those alleging a harm that only they will suffer. Upon further examination, it is also clear that the affected person with particularized injury requirement in the standing analysis previously derived in oil and gas regulation has already been applied to the groundwater regulatory scheme in Chapter 36. Plaintiffs ignore this apple-to-apple comparison. Instead, Plaintiffs focus on the application of oil and gas principles outside the context of a protestant’s right to a contested case hearing presumably to confuse the Court with recent opinions that have zero application to the very limited standing issue before the Court.

8. The Texas Supreme Court has recently issued two opinions (*City of Waco* and *Bosque River Coalition*) where the test necessary to confer standing in a contested case hearing is implicated. In these opinions, the Supreme Court clearly applies the affected person with particularized injury requirement when analyzing the protestant’s right to

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as a member of the general public”); 16 TEX. ADMIN CODE §3.30 (memorandum of understanding dictating collaboration between the Texas Railroad Commission and the Texas Commission on Environmental Quality).

a contested case hearing and then concludes that denial of party status does not deprive a landowner of a property interest. Thus, Plaintiffs' arguments that a denial of their requests is a deprivation of their private property rights is clearly refuted by the Supreme Court of Texas' opinions in *City of Waco* and *Bosque River Coalition*, and that court's reliance on *Collins*, a court of appeals opinion.

9. Specifically, the Texas Supreme Court, in consideration of a complainant's argument that his due process rights have been violated because he was denied a contested case hearing to oppose a permit application, the Court rejected the complainant's argument that he was denied due process reasoning that "the issuance of a permit in itself does not deprive a landowner of any liberty or property interest," rather, the agency's rules seek to protect such interests and the permit itself requires an operation subject to oversight so that it will not deprive complainant of any liberty or property interest. *Texas Commission on Environmental Quality v. City of Waco*, 413 S.W.3d 409, 423-25 (Tex. 2013); *Texas Commission on Environmental Quality v. Bosque River Coalition*, 413 S.W.3d 403, 407-09 (Tex. 2013); *Collins v. Texas Natural Resource Conservation Commission*, 94 S.W.3d 876, 884–85 (Tex. App. – Austin 2002, no pet).

10. Notably, the Supreme Court issued the *City of Waco* and *Bosque River Coalition* opinions in 2013 just a year after its 2012 opinion in *Day* (relied on extensively by Plaintiffs). When analyzing the 2016 *Coyote Ranch* opinion also heavily relied on by Plaintiffs,<sup>5</sup> the Court must carefully analyze the facts and context of that case (and *Day*)

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<sup>5</sup> Plaintiffs cited the issuance of the *Coyote Ranch* opinion as the basis to provide supplemental briefing to the Court. As explained, this opinion has no application to the narrow standing issue before the Court and does not alter or negate the longstanding test.

with other recent opinions by the Texas Supreme Court to understand the leap Plaintiffs attempt to make by arguing the correlative rights doctrine confers automatic standing. *Day* and *Coyote Ranch* do not address a protestant's right to a contested case hearing. Instead, *Day* addresses the nature of the groundwater ownership right and whether regulatory action can be the basis of a takings claim asserted by the applicant who was denied a permit. *Coyote Ranch* addresses the application of the accommodation doctrine borrowed from oil and gas in the context of analyzing the rights of the groundwater estate versus a surface estate owner's rights. The affected person particularized injury requirements are never implicated because the cases do not deal with a third party's right to protest.

11. In contrast, the *City of Waco* and *Bosque River Coalition* address the exact issue before this Court—a party's right to a contested case hearing. Curiously, despite being issued in the same timeframe as *Day* and *Coyote Ranch*, the Supreme Court makes no mention of correlative rights (or even oil and gas principles generally) as implicated in the standing analysis and certainly does not suggest that such principles, even if applied, would confer standing to all landowners or otherwise negate or alter the standing requirements consistently established across agencies. The Supreme Court clearly understood that standing of a party to participate in a contested case hearing was distinct from the issues presented in *Day* and *Coyote Ranch* as evidenced by its refusal to suggest that correlative rights would confer automatic standing in any recent seminal groundwater case.

12. The application of correlative rights is clearly within the province of the Legislature. *Day*, 369 S.W.3d at 834-838 (The *Day* court did not mandate the recognition of correlative rights). In the last legislative session, a “fair share” bill was introduced as an amendment to Chapter 36.<sup>6</sup> The bill did not pass further demonstrating the Legislature’s intent not to mandate correlative rights in the groundwater regulatory scheme outlined in Chapter 36. The application of fair share/correlative rights without instruction from the Legislature is dangerous, not mandated in *Day*, and would lead to absurd results. If correlative rights are applied to a standing analysis in the manner Plaintiffs contend, all landowners would have automatic standing and the provisions of the statute requiring a need to demonstrate injury would be rendered meaningless. Every landowner would have the right to a contested case hearing creating absurd results in direct contravention of the legislative directive and decades of well-established standing principles.

#### **IV. THE COURT MUST REVIEW UNDER THE SUBSTANTIAL EVIDENCE RULE**

13. In an administrative appeal of a groundwater matter, Chapter 36 mandates that a reviewing court apply the substantial evidence rule as defined by Section 2001.174 of the Texas Government Code. TEX. WATER CODE § 36.253 (mandating that review on appeal is governed by the substantial evidence rule as defined in TEX. GOV’T CODE § 2001.174). In the petition for review under Chapter 36, the “burden of proof is on the petitioner, and the challenged law, rule, order or act shall be deemed prima facie valid.” TEX. WATER CODE § 36.253. Thus, the District’s Decision is presumed valid and

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<sup>6</sup> Tex. H.B. 3028, 85<sup>th</sup> Leg., R.S. (2017).



Plaintiffs bear the burden of showing that it was not reasonably supported by substantial evidence or was otherwise arbitrary or capricious.

14. The substantial evidence rule dictates that the District's decision be upheld as long as “there is some reasonable basis in the record for the action taken,” regardless of whether the District reached the “correct” conclusion<sup>7</sup>—i.e., whether the evidence as a whole is such that reasonable minds could have reached the same conclusion the agency reached.<sup>8</sup> Under the substantial evidence standard, the decision is upheld as long it was supported by substantial evidence and the reviewing court is not to substitute its judgment on the credibility or weight of the evidence for that of the District.<sup>9</sup>

15. Essentially, the substantial evidence standard requires the appellate court to review a determination of an agency regarding affected person status for an abuse of discretion.<sup>10</sup> Specifically with regard to the review of an agency’s decision to deny party status under analogous statutes, the Texas Supreme Court and the Austin Court of Appeals have consistently applied the substantial evidence standard reasoning that the discretion of the agency over contested case hearings naturally includes a threshold determination of whether the person seeking the hearing is an affected person as the

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<sup>7</sup> *R.R. Comm’n of Tex. v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995); *see also* Tex. Gov’t Code § 2001.174(2)(E) (stating that a court shall reverse an administrative decision only if it is “not reasonably supported” by evidence).

<sup>8</sup> *Dotson v. Tex. State Bd. of Med. Exam’rs*, 612 S.W.2d 921, 922 (Tex. 1981); *Tex. State Bd. of Dental Exam’rs v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988).

<sup>9</sup> *City of El Paso v. Pub. Util. Comm’n*, 883 S.W.2d 179, 185 (Tex.1994); *see also* Tex. Gov’t CODE ANN. § 2001.174.

<sup>10</sup> *Sierra Club v. Tex. Comm’n on Env’tl. Quality*, 455 S.W.3d 214, 223-224 (Tex. App.—Austin 2014, no pet.); *Sierra Club v. Tex. Comm’n on Env’tl. Quality*, 455 S.W.3d 228, 235 (Tex. App.—Austin 2014, no pet.).

agency has discretion to weigh and resolve matters that may relate to the merits of the underlying application including the likely impact the regulated activity will have on the use of property by the hearing requestor.<sup>11</sup> The decision here was reached after a full evidentiary hearing by a SOAH Judge. The record establishes beyond any doubt or argument that Plaintiffs did not present any evidence of a specific injury or harm to their property.

### REQUEST FOR RELIEF

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

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<sup>11</sup> *City of Waco*, 413 S.W.3d at (reviewing TCEQ's decision to deny a city party status under analogous statute for abuse of discretion and holding that TCEQ did not error); *Sierra Club*, 455 S.W.3d at 223-224 (applying substantial evidence standard to TCEQ's decision to deny an environmental group's request for a contested case hearing under an analogous statute and determining TCEQ did not error); *Sierra Club*, 455 S.W.3d at 235 (applying substantial evidence standard to TCEQ's decision to deny an environmental group's request for a contested case hearing under an analogous statute and determining TCEQ did not error).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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