Electronically Filed 9/26/2017 4:22 PM
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CAUSE NO. 29,696

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

PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF

TO THE HONORABLE JUDGE CAMPBELL:

The responsive briefs filed by Lost Pines Groundwater Conservation District (the "District" or "Lost Pines") and End Op, L.P. ("End Op") do not justify affirming the District's denial of the requests for party status made by Andrew Meyer, Bette Brown, Darwyn Hanna and Environmental Stewardship ("Plaintiffs" or "Landowners"), nor do those briefs justify affirming the District's issuance of End Op's requested permits.

I. Introduction

Landowners each own real property within the boundaries of the District, and own the groundwater beneath that real estate. End Op's permits will cause drainage of that groundwater owned by Landowners. In light of that impact, the Landowners possess a justiciable interest in End Op's applications, and the District was statutorily required to grant Landowners' requests for party status in the contested case hearing held with regard

to the merits of End Op's applications. The District failed to do so. Instead, the District determined that Landowners lacked a justiciable interest because Landowners are not currently using groundwater from the Simsboro Aquifer from which End Op will produce groundwater. This ignores the impact of the permitted withdrawals on Landowners' correlative rights – rights that do not depend on use and may not be lost through non-use.

The Court has statutory jurisdiction over this appeal because it includes the appeal of the District's decision on Landowners' request for party status. Thus, any limitation of appeal rights to a decision "on the application" does not apply. Furthermore, the decision to issue the permits at issue adversely affected Landowners' vested property rights, and that adverse impact confers the Court with jurisdiction over the appeal pursuant to the Court's inherent constitutional authority.

II. Landowners are adversely affected by decisions at issue here.

This action involves statutory appeals of the District's decision to deny Landowners' hearing requests, a constitutional appeal of the District's decision to deny Plaintiffs' hearing requests, and a constitutional appeal of the District's decision to grant End Op's permit. Thus, the court's jurisdiction turns not only on the impacts of the denial of Landowners' requests for party status, but also the District's decision to grant End Op's requested permit.

1. Landowners are adversely affected by the District's decision to issue End Op's requested permit.

Both End Op and the District note that the decision of the District to grant the permit does not itself involve title to real property. But, Landowners need not show that

the decision involves title to real property in order to show they have been adversely affected, nor to show that their vested property rights have been adversely impacted.[1] In order to invoke the statutory right of appeal under Texas Water Code § 36.251, Landowners need only show that they are, "affected by and dissatisfied with any . . . order made by a district." The issuance of the permit authorizes the drainage of groundwater from beneath Landowners' property. Landowners own this groundwater, and Landowners possess correlative rights entitling them to a reasonable opportunity to produce their fair share of the groundwater contained in the Simsboro aquifer. But for the issuance of this permit, End Op would be legally prohibited from pumping groundwater in the tremendous quantity authorized. Without the requested permits, pumping that requested quantity of groundwater would statutorily be considered wasteful per se and a nuisance.[2] Accordingly, while issuance of the permit does not adjudicate the extent of Landowners' property rights, the issuance of the permit does adversely impact Landowners' ability to exercise their rights of absolute ownership and their correlative rights. These impacts are sufficient to invoke the Court's authority under Texas Water Code § 36.251 and the Court's inherent constitutional authority.

[1] In its Response to Plaintiffs' Supplemental Brief Regarding Party Status, End Op asserts that Plaintiffs have not met injury elements necessary to demonstrate a justiciable interest qualifying them for party status (End Op Response Brief at ¶ 3 – 5). This issue was previously addressed extensively in Plaintiffs' Initial Brief submitted April 13, 2016 at ¶ 30 – 62, as well as Plaintiffs' Reply Brief submitted May 18th, 2016 at ¶ 18 – 31. Landowners' refer the Court to that prior briefing in reply to End Op's arguments on that issue.

[2] Texas Water Code § 36.119(a) ("Drilling or operating a well or wells without a required permit or producing groundwater in violation of a district rule adopted under Section § 36.116(a)(2) is declared to be illegal, wasteful per se, and a nuisance.")

Notably, the permitting decisions of the Texas Railroad Commission are subject to review even though those decisions also do not adjudicate title.[3] Questions of title to oil and gas must be settled in the courts.[4] But the courts have recognized that both the ownership of oil and gas in place and the rule of capture are subject to reasonable regulation by the Railroad Commission of Texas.[5] In exercising this power, the Railroad Commission is exercising quasi-judicial powers,[6] and must "treat the owners and operators interested in the field fairly and justly."[7] The mere fact that an agency is not adjudicating title to vested property rights does not mean that the agency decision cannot *adversely affect* vested property rights.

2. Plaintiffs are adversely impacted by the District's denial of their Requests for party status.

End Op contends that Plaintiff's appeal is grounded solely in a desire to intervene in the permitting process without a demonstration of a sufficient personal stake in the issuance of End Op's permit.[8]

To invoke the Court's jurisdiction over a procedural due process claim, Landowners need not show that the denial of their request for party status alone resulted in the deprivation of a vested property interest. A procedural due process claim involves two parts: (1) whether the plaintiff has a liberty or property interest that is entitled to procedural due process protection; and (2) if the plaintiff demonstrates such an interest,

[3] *Magnolia Petroleum v. Railroad Commission,* 170 S.W.2d 189, 191 (Tex. 1943).
[4] *Id.*
[5] *Corzelius v. Harrell,* 186 S.W.2d 961, 964 (Tex. 1945).
[6] *Corzelius* at 967.
[7] *Corzelius* at 972.
[8] End Op brief at p. 12, par. 18

then a showing that the required level of procedural process was denied.[9] In this case, Landowners have met the first part by alleging that they possess a vested property interest in their groundwater that is entitled to due process protection, and Landowners have met the second part in asserting that the District's denial of their requests for party status denied them the process required. In this case, Landowners contend that they were denied the process required by both statute and the Constitution. These allegations of injury sufficiently support Landowners' challenge to the denial of their hearing requests so as to invoke the Court's statutory and constitutional jurisdiction to consider the appeal of the District's decision to deny their requests for party status.

Contrary to End Op's claim, the *Coastal Habitat* case does not stand for the proposition that the denial of a hearing request must itself result in the deprivation of a vested property right in order to constitute an injury. In *Coastal Habitat*, the Court found that the plaintiffs' asserted interests amounted to a claim that, "a vested property right may exist in wildlife, or in the viewing, enjoyment, or hunting thereof."[10] The Court rejected this claim, noting that under Texas law no vested property interest exists in wild animals.[11] In short, the plaintiffs in the *Coastal Habitat* case had failed to meet the first prong of a procedural due process claim. They had not shown an underlying liberty or property interest warranting due process protection. On the other hand, Landowners' property rights in their groundwater are vested property rights warranting protection.

[9] *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011), *Stark v. Geeslin*, 213 S.W.3d 406, 412 (Tex. App. – Austin 2006, pet. denied).
[10] *Coastal Habitat Alliance v. Public Utility Commission of Texas,* 294 S.W.3d 276, 287 (Tex. App. – Austin 2009, no pet.).
[11] *Id.*

The denial of Landowners' hearing request denied them the process due under the constitution, as well as the applicable statutes and rules. As "affected persons", Landowners were entitled to a contested case hearing under both the Constitution and the governing statutes and rules. Yet, they were denied such a hearing, and consequently denied the opportunity for presentation of evidence on the merits of the application, cross-examination, and a decision on the merits of the application by an impartial decisionmaker. This deprivation of Landowners' statutory and constitutional rights is a sufficient injury to invoke the Court's statutory and Constitutional jurisdiction.

III. The appeal of the denial of Landowners' requests for party status presents legal issues that the Court is as qualified to address as the District, and, thus, the standard of review for that appeal is de novo regardless of whether the statutory "substantial evidence" test applies.

End Op asserts that the "substantial evidence" test is the only standard of review that applies in this case, and that the Court must therefore defer to the decision of the District.

Importantly, in the administrative context, the term "substantial evidence" is a term of art referencing the standard for judicial review set forth at Texas Government Code § 2001.174. All parties agree that this is the standard of review that would be applicable to an appeal pursued under Texas Water Code § 36.251. Under this standard, a court may not substitute its judgment for the judgment of the agency on the weight of the evidence, but the court:

> shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (A) in violation of a constitutional or statutory provision;
>
> (B) in excess of the agency's statutory authority;
>
> (C) made through unlawful procedure;
>
> (D) affected by other error of law;
>
> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
>
> (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[12]

Each of these grounds is a distinct basis for reversing the decision of an administrative agency,[13] and each of these grounds presents a question of law.[14] Even if an agency order is supported by substantial evidence in the record, the order may be arbitrary and capricious "if a denial of due process has prejudiced the litigant's rights or if the agency has improperly based its decision on non-statutory criteria."[15] Likewise, an agency decision may be found to be arbitrary and capricious if it is based on legally irrelevant factors or if legally relevant factors were not considered or if the agency reached an unreasonable result.[16]

Even under this statutory standard, de novo review is appropriate for questions of law such as those presented in this case. The Austin Court of Appeals has noted that, "Courts do not defer to administrative interpretation in regard to questions which do not

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[12] Tex. Gov't Code § 2001.174(2).
[13] *The City of San Marcos v. Texas Commission on Environmental Quality*, 128 S.W. 264, 270 (Tex. App. – Austin 2004, pet. denied).
14 *Arch W. Helton v. Railroad Commission of Texas et al*., 126 S.W.3d 111, 115 (Tex. App. – Austin 2003, pet. denied).
[15] *Tex. Dep't of Insurance v. State Farm Lloyds,* 260 S.W.3d 233, 245 (Tex. App. – Austin, 2008, no writ) *citing Kawasaki Motors Corp. U.S.A. v. Texas Motor Vehicle Comm'n,* 855 S.W.2d 792, 794–95 (Tex.App.-Austin 1993, no writ).
[16] *Id.*

lie within administrative expertise, or deal with a nontechnical question of law."[17] In addressing a judicial review of a decision by the Texas Railroad Commission under the "substantial evidence" standard of review, the Texas Supreme Court has noted that, "The construction of a statute is a question of law we review de novo."[18] Consequently, even if End Op was correct that cases such as *Trapp v. Shell Oil Co.* required application of the substantial evidence standard of review in a constitutional appeal,[19] that standard still requires a de novo review where an administrative appeal turns on questions of law where the administrative agency lacks superior expertise to the courts.

With regard to the appeal of the denial of Landowners' requests for party status, the immediate case solely involves such questions of law. None of the dispositive facts are in dispute. In denying Landowners' requests for party status, the District was applying Texas Water Code § 36.415(b)(2), which provides that participation in a hearing on a groundwater permit application is limited 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.

As to the law, all parties agree that this standard is equivalent to the standard for constitutional standing as applied in Texas courts.[20] Standing is a question of law.[21] As to

[17] *Rylander v. Fisher Controls Intern., Inc*., 45 S.W.3d 291 (Tex. App. – Austin 2001, no writ)
[18] *Railroad Commission of Texas v. Texas Citizens for a Safe Future and Clean Water,* **336 S.W.3d 619, 624 (Tex. 2011)**
[19] See End Op's Response to Plaintiffs' Supplemental Brief Regarding Jurisdiction, Sep. 5, 2017, at ¶ 27, *citing Trapp v. Shell Oil Co.,* 198 S.W.2d 424, 433 (Tex. 1946).
[20] Lost Pines Groundwater Conservation District's Reply Brief, May 4, 2016, at p. 9; End Op, L.P.'s Reply Brief, May 4, 2016, at ¶ 54.

the facts, all parties further agree that: (1) Landowners own groundwater rights in the Simsboro Aquifer beneath their surface estates; (2) If End Op fully exercises the rights granted by its permit, then the Simsboro aquifer will consequently experience drawdowns of groundwater in the Simsboro Aquifer beneath Landowners' surface estates; (3) Those drawdowns reflect the drainage of groundwater from beneath Landowners' property. Landowners contend that under Texas Water Code § 36.415 these undisputed facts alone demonstrate that they possess a justiciable interest in End Op's permit, and, thus, their requests for party status should have been granted. In opposition, the District contends that Landowners' undisputed lack of any current use of the Simsboro Aquifer precludes any claim by Protestants that they possess a justiciable interest in End Op's permit applications.

This dispute boils down to two questions of law. First, is the current use of groundwater relevant to a determination of whether Landowners' groundwater interests are affected? This issue, in turn, depends on the legal question of whether Landowners possess correlative rights in the groundwater beneath their surface estates. Correlative rights in groundwater do not depend on use, and may not be lost through non-use. So, as a matter of law, if Landowners possess correlative rights in their groundwater, then the current use of groundwater is legally irrelevant to a determination of whether a landowner's groundwater interests are affected. Instead, the Landowners need only to

[21] *Linegar v. DLA Piper LLP*, 495 S.W.3d 276, 279 (Tex. 2016).

show that the exercise of the permit will impair Landowners' reasonable opportunity to produce their fair share of the groundwater contained in the Simsboro aquifer.

In short, Landowners' challenge to the denial of their requests for party status turns on two questions of law that are more within the Court's expertise than the expertise of the District: (1) Application of the constitutional standard for standing; and (2) The scope of property rights that Landowners possess in their groundwater. These questions of law are properly subject to a de novo review even if the "substantial evidence" test applies to this appeal.

IV. The Court possesses statutory jurisdiction over the February 20, 2015 Petition because the January 19, 2015 Order denying party status was a final order on the issue of Landowners' party status.

The January 19, 2015 written order issued by Lost Pines is properly considered a final order with regard to Lost Pine's decision to deny Landowners' request for party status. The issue of finality was discussed by the Austin Court of Appeals in the case of *Texas Utilities Electric Company v. Public Citizen, Inc.*[22] In that matter, the Court of Appeals noted that, "[i]n examining administrative orders, no single formula or rule disposes of all finality problems."[23] The Court went on to note that, "[a] flexible approach must be employed, recognizing the need to both minimize disruption of the administrative process and to afford regulated parties and consumers with an opportunity for timely judicial review of actions that affect them."[24]

[22] *Texas Utilities Electric Co. v. Public Citizen, Inc.*, 897 S.W.2d 4435 (Tex. App. – Austin 1995, no writ).
[23] *Id.* at 445.
[24] *Id.* at 446 (internal quotations omitted).

The Texas Supreme Court has set forth criteria to help determine whether an agency order is final and appealable. In *Texas-New Mexico Power Co. v. Texas Industrial Energy Consumers*, the Texas Supreme Court explained that an agency order may be treated as final for purposes of appeal if it: (1) is definitive in nature, (2) is promulgated in a formal manner, (3) is one with which the agency expects compliance, and (4) imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process.[25]

Lost Pines and End Op both rely on a formulaic approach in which any order denying party status must be treated as an "interim" order. However, in this case the January 19, 2015 order denying party status definitively addressed Landowners' requests for party status, was promulgated in a formal manner, reflected a decision with which the agency expected compliance, and denied a right as the consummation of an extensive administrative process. The process leading up to the January 19, 2015 order denying party status involved: (1) the consideration of Landowners' hearing requests by the District at a public meeting, (2) referral of those requests for a hearing on the requests, (3) the conduct of a preliminary hearing to take evidence on Landowners' hearing request, (4) the acceptance and consideration of written briefing by the administrative law judge regarding the requests for party status, (5) the issuance of an order by the administrative law judge denying party status, (6) a consideration of that ALJ order by the District at a public meeting, (7) a vote by the District board on the denial of party status, (8) the filing of a motion for rehearing regarding that decision, and (9) the subsequent issuance of the

[25] *Texas-New Mexico Power Co. v. Texas Industrial Energy Consumers*, 806 S.W.2d 230, 231-232 (Tex. 1991).

January 19, 2015 written order denying party status. In short, an extensive administrative process had occurred to consider Landowners' request for party status leading up to the issuance of the January 19, 2015 order which denied Landowners' the right to participate in the contested case hearing on End Op's application.

Lost Pines' and End Op's characterization of the January 19, 2015 order as an interim order is based largely on cases challenging decisions by the Texas Commission on Environmental Quality ("TCEQ"). Those appeals were governed by Tex. Water Code § 5.351, which provides:

> JUDICIAL REVIEW OF COMMISSION ACTS. (a) A person affected by a ruling, order, decision, or other act of the commission may file a petition to review, set aside, modify, or suspend the act of the commission.
>
> (b) A person affected by a ruling, order, or decision of the commission must file his petition within 30 days after the effective date of the ruling, order, or decision. A person affected by an act other than a ruling, order, or decision must file his petition within 30 days after the date the commission performed the act.

This statute governing TCEQ appeals contains no distinction between the ability of a party to seek judicial review versus the ability of a non-party to seek judicial review. Thus, under this statute it is undisputed that a person may challenge the denial of his or her hearing request after a TCEQ decision to grant a permit even if a contested case was held where the plaintiff was not admitted as a party. In the TCEQ context, this weighs in favor of treating a decision on party status as an interim order, since that treatment indisputably does nothing to impair the person's ultimate ability to appeal the TCEQ decision to deny party status. But, if the Court accepts the argument of Lost Pines and

End Op that non-parties are prohibited from seeking judicial review of a groundwater district's decision on party status once a permit has been issued, then the same factor weighs *against* treating a groundwater district's decision on party status as an interim order. With regard to finality, the TCEQ cases relied upon by Lost Pines and End Op (such as *West v. Texas Commission on Environmental Quality*, *Tex. Commission on Environmental Quality v. City of Aledo,* and *Texas Commission on Environmental Quality v. Sierra Club*) are inapplicable to the Court's statutory jurisdiction over the immediate controversy due to this critical distinction in the statutory language governing judicial review.

V. Landowners possess correlative rights in their groundwater.

Contrary to the District's claim, the existence of correlative rights in groundwater has already largely been confirmed by the Texas Supreme Court in the case of *Edwards Aquifer Authority v. Day.*[26] In that case, the Texas Supreme Court rejected arguments premised on a claim that correlative rights did not exist in groundwater, and the Court noted that, "one purpose of groundwater regulation is to afford each owner of water in a common, subsurface reservoir a fair share."[27] This is precisely the goal of the correlative rights doctrine.[28] The Court went on to reject the notion that groundwater rights could be lost through non-use, stating:

[26] *Edwards Aquifer Authority v.Day*, 369 S.W.3d 814, 840 (Tex. 2012)("*Day*").
[27] *Id.*.
[28] *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 582 (Tex. 1948).

> [N]on-use of groundwater conserves the resource, whereas the non-use of appropriated [surface] waters is equivalent to waste. To forfeit a landowner's right to groundwater for non-use would encourage waste.[29]

Despite this position of the Texas Supreme Court, the District argues that correlative rights do not exist in groundwater. In doing so, the District quotes the statement in the *Day* decision that "correlative rights are a creature of regulation rather than the common law."[30] This partial quotation of a sentence in the opinion is misleading. Taken in context, the quoted language confirms the existence of correlative rights in groundwater:

> [T]he [Texas Supreme] Court observed in *Elliff* that 'correlative rights between the various landowners over a common reservoir of oil or gas' have been recognized through state regulation of oil and gas production that affords each landowner 'the opportunity to produce his fair share of the recoverable oil and gas beneath his land.' Similarly, one purpose of the [Edwards Aquifer Authority Act's] regulatory provisions is to afford landowners their fair share of the groundwater beneath their property. **In both instances**, correlative rights are a creature of regulation rather than the common law.[31]

Considered in context, this language of the Court in *Day* is indicative that the regulatory schemes for oil and gas, *as well as groundwater*, create correlative rights among the various landowners over a common reservoir.

Although key differences exist that would prevent the universal application of oil and gas law to groundwater issues, there are strong parallels in the

[29] *Day* at 842 (internal quotations omitted). The District's disregard for Landowners' groundwater rights in this case based on non-use encourages waste in precisely the manner that the Texas Supreme Court sought to reject in *Day*, as reflected in this quoted language.
[30] Lost Pines Groundwater Conservation District's Response to Plaintiffs' Supplemental Briefing at p. 5, *quoting Day at 830.*
[31] *Day* at 830. (emphasis added).

regulatory scheme for groundwater and the regulatory scheme for oil and gas that support application of the correlative rights doctrine to groundwater.

Both the Texas Railroad Commission and Groundwater Districts serve as a means by which the Texas Legislature has chosen to implement the "Conservation amendment" to the Texas Constitution.[32] The Conservation Amendment of the Texas Constitution provides that the conservation and development of the natural resources of Texas are declared public rights and duties, and the Legislature shall pass all laws as may be appropriate to accomplish that conservation and development.[33]

The governing statutes for oil and gas, as well as groundwater, prohibit waste.[34] Similarly, both the Railroad Commission and Groundwater District's have been statutorily empowered to adopt and enforce rules to prevent waste.[35] Both oil and gas and groundwater are governed by the rule of capture.[36] Both are likewise subject to absolute ownership in place.[37]

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[32] *Corzelius v. Harrell.* 186 S.W.2d 961, 964 (Tex. 1945), *Sipriano v. Ozarka Natural Spring Water Co.*, 1 S.W.3d 75, 79-80 (Tex. 1999)("*Ozarka*").

[33] Texas Const. Art. 16, § 59

[34] Tex. Nat. Res. Code § 85.045 ("The production, storage, or transportation of oil or gas in a manner, in an amount, or under conditions that constitute waste is unlawful and is prohibited."); Texas Water Code § 36.119(a) ("Drilling or operating a well or wells without a required permit or producing groundwater in violation of a district rule adopted under Section § 36.116(a)(2) is declared to be illegal, wasteful per se, and a nuisance.")

[35] Tex. Nat. Res. Code § 86.042(1) ("The commission shall adopt and enforce rules and orders to . . . conserve and prevent the waste of gas"), Tex. Nat. Res. Code § 85.042(b) ("When necessary, the commission shall make and enforce rules either general in their nature or applicable to particular fields for the prevention of actual waste of oil or operations in the field dangerous to life or property."), Tex. Nat. Res. Code § 86.082 ("The commission shall exercise its authority to prevent waste when the presence or imminence of waste is supported by a finding based on the evidence introduced at a hearing after proper notice."), Tex. Water Code § 36.101(a)("A district may make and enforce rules to provide for conserving, preserving, protecting, and recharging of the groundwater . . . or prevent waste of groundwater and to carry out the powers and duties provided by this chapter.")

[36] *Coastal Oil & Gas Corp. v. Garza Energy Corp.*, 268 S.W.3d 1, 13 (Tex. 2008), *Ozarka* at 80.

[37] *Brown v. Humble Oil and Refining Co.*, 83 S.W.2d 935, 940 (Tex. 1935), *Day* at 832.

In the oil and gas context, it is recognized that the application of the correlative rights doctrine furthers the regulatory goal of resource conservation:

> Correlative rights means that each owner of an interest in a common source of supply of oil and gas has a legal duty not to injure the source of supply. An injury to the common source of supply of oil and gas which violates the rights of adjacent owners also violates the public interest in conservation of natural resources. For this reason, each landowner has duties to the public not to waste the oil and gas under his or her land. Conservation statutes, defining and prohibiting waste and giving administrative agencies authority to make and enforce rules for its prevention, determine a standard of performance for this duty.[38]

Given this common objective of the regulatory schemes, and the common authority of the administrative agencies to prohibit waste, the application of the correlative rights doctrine is appropriate in both contexts.

VI. Aqua WSC's participation in a hearing on the merits did not cure the denial of Landowners' due process rights.

End Op asserts that the hearing on the merits held with regard to its permit application, which Plaintiffs were barred from participating in, somehow cured any violation of Landowners' due process rights.[39]

First, participation by Aqua WSC ("Aqua") in the hearing on the merits that was held does not constitute adequate representation of the Landowners' interests. Landowners' possessed their own, independent, right to avail themselves of the opportunities afforded by a hearing such as discovery, presentation of evidence, cross-examination and presentation of argument on the merits of the application. Even if Aqua

[38] 1 SUMMERS OIL & GAS 3:3 Correlative rights doctrine for oil and gas.
[39] End Op, L.P.'s Response to Plaintiffs' Supplemental Brief Regarding Jurisdiction, at ¶ 20.

had engaged in such activities, that would not have cured the denial of Landowners' due process rights.

Further, none of the issues of primary concern to Landowners were explored in the hearing held on the application. Aqua and End Op reached a settlement during the hearing that essentially precluded litigation of the issues of concern to Landowners. The settlement provided that Aqua would not explore any issue in the hearing except for whether the permits affected Aqua as an existing permit holder. To this end, the settlement provided that:

> Aqua shall not participate in the portion of the Hearing on the Merits during which End Op presents evidence and witnesses on the factors set out in Chapter 36 (except for Texas Water Code section 36.113(d)(2) as it relates to Aqua) or cross-examine any witnesses or respond to any evidence the General Manager presents (except for Texas Water Code section 36.113(d)(2) as it relates to Aqua).[40]

Aqua further agreed with End Op that if the permits included certain provisions then Aqua would not oppose issuance of the permits.[41] End Op agreed to amend its application to include those provisions. Even though Aqua had agreed not to oppose issuance of the permit applications as amended, Aqua agreed that it would go through with the hearing on the merits, and present evidence.[42]

In light of the agreed stipulations between End Op and Aqua WSC, counsel for the General Manager of the District (who now represents the District before this Court) noted

[40] Second Supp to AR, at 27 (End Op, L.P.'s and Aqua Water Supply Corporation's Agreed Stipulations), *Re: Applications of End Op, L.P. for Well Registration, Operating Permits and Transfer Permits,* SOAH Docket No. 952-13-5210 (Feb 4, 2014).
[41] Second Supp. to AR at p. 38.
[42] Second Supp. AR at 37 (December 11, 2013 Settlement Agreement between End Op, L.P. and Aqua Water Supply Corporation)(Exhibit A to End Op, L.P. and Aqua WSC's Agreed Stipulations)

at the hearing on the merits that, "as between Aqua and End Op there are no longer any contested issues of fact or law."[43] For these reasons, legal counsel for the General Manager of the District asserted at the hearing on the merits that:

> what's happening is that End Op, with Aqua's cooperation, is asking this Court to hold an uncontested case hearing, and there is no provision either in the statute or in the District's rules for an uncontested case hearing.[44]

Briefing by the General Manager further noted that End Op and Aqua had also agreed that Aqua would only introduce evidence at the hearing on the merits on potential impact of the permit on Aqua's wells, that neither party would object to the other party's evidence, and that neither party would cross-examine the other party's witnesses.[45] This "sham" uncontested hearing did not substitute for Plaintiffs' opportunity to fully contest the issues of import to Landowners.

VII. The preliminary hearing did not provide the required due process.

The District asserts that Landowners have already "had an opportunity to plead their case" based on the conduct of the August 12th, 2013 preliminary hearing at which their request for party status was considered. That hearing, however, was conducted for the sole purpose of designating the parties to the hearing on the merits. The merits of the application were not litigated at that preliminary hearing, and that hearing did not provide Landowners with the opportunity to "plead their case" regarding the merits of End Op's applications as the governing statute requires. Thus, the preliminary hearing did not

[43] Second Supp. AR at 56 (Tr. of Feb. 11, 2014 hearing on the merits at p. 14).
[44] Second Supp. AR at 57 (Tr. of Feb. 11, 2014 hearing on the merits at p. 15).
[45] Second Supp. AR at 285 (General Manager's Closing Statement).

satisfy the due process rights to which Landowners are entitled under the applicable statute and the Constitution.

VII. PRAYER

For these reasons, Plaintiffs pray that the Court:

a. reverse Lost Pines' decision to deny Plaintiffs' requests for party status;

b. reverse Lost Pines' decision to issue End Op's requested permits;

c. remand this matter to Lost Pines for proceedings consistent with the Court's decision; and,

d. grant Plaintiffs all other relief to which they may show themselves justly entitled.

In the alternative, Plaintiffs pray for a trial on the merits of the application of End Op followed by:

a. the reversal of Lost Pines' decision to grant End Op's application; or

b. revision of the Lost Pines' decision to authorize End Op to produce water to assure protection of Plaintiffs' interests and rights and to assure the authorization complies with Texas law; and

c. the granting of all other relief to which Plaintiffs 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 sent by U.S. Mail, electronic mail, service via efile, and/or Facsimile Transmission to the following service list on this September 26, 2017.

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