NO. 03-18-00049-CV

IN THE THIRD COURT OF APPEALS

AUSTIN

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

vs.

ANDREW MEYER, BETTE BROWN, DARWIN HANNA, AND
ENVIRONMENTAL STEWARDSHIP
Appellees.

FROM THE 21ST DISTRICT COURT AT BASTROP COUNTY, TEXAS

LOST PINES GROUNDWATER CONSERVATION DISTRICT APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED May 7 , 2018

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STATEMENT OF THE CASE

Nature of the Case: This is an administrative appeal of Lost Pines Groundwater Conservation District's ("District") decision that Appellees Andrew Meyer, Bette Brown, Darwin Hanna, and Environmental Stewardship ("Landowners") lacked standing to participate in contested water permit applications filed by End Op, L.P. The Landowners filed multiple judicial review appeals of the District's decision, which affirmed an order issued by an Administrative Law Judge at the State Office of Administrative Hearings.

Trial Court: 21st District Court of Bastrop County, Texas, Honorable Carson Campbell, Judge Presiding

Trial Court Disposition: The district court held that the District erred in denying party status to the Landowners. It reversed that decision as well as the District's decision issuing permits to End Op and remanded the case to the District for proceedings consistent with the Court's decision. 2CR 1519-22.[1]

Court of Appeals: End Op and the District both timely perfected appeals of the district court's judgment. 2CR 1523-25; 1530-35.

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[1] The Clerk's Record consists of two volumes. References to the Clerk's Record is made by identifying the volume, followed by CR, followed by pages in the record. The bulk of Volume 1 of the Clerk's Record consists of the Administrative Record of the proceedings on standing and includes the transcripts of hearings before the State Office of Administrative Hearings and the District. References to court reporter records are denoted by "CRR" except when those court reporter records are found in the Clerk's Record. In those instances, the court reporter's page and line references are provided in parentheses after citation to the page in the Clerk's Record.

STATEMENT REGARDING ORAL ARGUMENT

This case presents important issues regarding who is entitled to participate in a permit application to a groundwater conservation district under Chapter 36 of the Texas Water Code. Water Code § 36.415(b)(2) requires districts like Lost Pines to "limit participation" in hearings on such permit applications to persons with a "personal justiciable interest" and further requires that interest to be "affected" by the requested permit. This is the first case under § 36.415(b) to be presented at the appellate level, and requires an examination of both the statute's limitations and application of standing jurisprudence to groundwater permit applications. Oral argument will assist the Court in resolving these issues.

ISSUES PRESENTED

<u>Issue 1</u>: Did the District correctly hold that mere ownership of land with attendant ownership of subsurface water in the Simsboro aquifer is not enough to confer standing to participate in End Op's applications for permits to drill wells into the Simsboro?

<u>Issue 2</u>: Did the District's findings that the Landowners failed to establish a personal justiciable interest that would be affected by the permits meet the substantial evidence review requirements in Texas Government Code § 2001.171?

STATEMENT OF FACTS

A. Regulatory Background

In response to Texas droughts occurring in the early part of the 20th Century, the Texas Constitution was amended in 1917, authorizing the Legislature to pass laws to preserve and conserve the State's natural resources. *See Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 77 (Tex. 1999) (discussing history of water regulation in Texas). This amendment "made clear that in Texas, responsibility for the regulation of natural resources, including groundwater, rests in the hands of the Legislature." *Id.* Since the passage of that 1917 amendment, the Texas Legislature has created a number of groundwater conservation districts.

In 1997, the Legislature passed a "comprehensive water management bill" that sought to address Texas' growing needs for water management. *Sipriano*, 1 S.W.3d at 79. The statutes governing groundwater conservation districts are now found in Chapter 36 of the Texas Water Code. Section 36.0015(b) of the Water Code summarizes the purpose of these districts, recognizing that the districts are the "preferred method" to manage groundwater:

> Groundwater conservation districts created as provided by this chapter are the state's preferred method of groundwater management in order to protect property rights, balance the conservation and development of groundwater to meet the needs of this state, and use the best available science in the conservation and development of groundwater through rules developed, adopted, and promulgated by a district in accordance with the provision of this chapter.

The implementation of this comprehensive overhaul of water regulation in Texas included the Legislature's creation of the Lost Pines Groundwater Conservation District (the "District") -- along with twelve other districts -- in 1999. Senate Bill No. 1911, 76th Leg., R.S. ch. 1331 (1999). The District has regulatory authority over groundwater in Bastrop and Lee Counties. *See id.*

The Legislature recognized that district responsibilities in regulating groundwater were substantial and potentially burdensome, both in terms of time and expense. To that end, the Legislature directed groundwater conservation districts to:

> *limit participation* in a hearing on a contested application [for a well permit] *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) (emphasis added). In other words, the Legislature has indicated that districts should not allow broad participation by the public in contested proceedings involving permit applications but should, instead, limit participation to those who have legal rights that will be affected by the permit.

In fact, the Legislature has further discouraged participation in permit proceedings by providing in Water Code § 36.066(g) for an award of attorneys' fees to the district whenever the district prevails in a suit challenging the district's decisions, but denying a similar award to parties challenging the district should they prevail. Rejecting an equal protection challenge to this one-sided attorney's fee provision, the Texas Supreme Court reasoned:

> [T]he State has a legitimate interest in "discourag[ing] suits against groundwater districts to protect them from costs and burdens associated with such suits", and a cost-shifting statute is rationally related to advancing that interest.

Edwards Aquifer Authority v. Day, 369 S.W.3d 814, 845 (Tex. 2012) (quoting the court of appeals' decision in the case). *See also Lone Star Groundwater Conservation Dist. v. City of Conroe*, 515 S.W.3d 406, 410 (Tex. App.—

Beaumont 2017, no pet.) (recognizing Legislature's decision not to give challengers a reciprocal right to recover fees).

It is against this regulatory backdrop that this appeal should be reviewed.

B. Proceedings before the District and SOAH.

1. End Op applies for permits.

In 2007, End Op applied for permits to drill 14 wells to withdraw 56,000 acre-feet per year from the Simsboro member of the Carrizo-Wilcox Aquifer ("Simsboro"). 1CR 66, 110-64. End Op's authority to seek those permits derives from agreements it reached with numerous Bastrop and Lee County landowners, who own real property with attendant ownership of water beneath their property. Those agreements authorized End Op to seek permits to drill water wells on the properties. *See*, *e.g.*, 1CR 167-83.

After meeting with the General Manager of the District regarding its applications, End Op spent nearly $4 million on extensive pumping and hydrological studies to determine how the Simsboro and neighboring aquifers would react to the proposed commercial production. 1CR 66. During the study period, the District imposed a moratorium on granting of

any permits from 2009 to January 2013, delaying action on End Op's applications during that time period. *Id.*

On March 18, 2013, the District deemed End Op's applications administratively complete and posted notice that a hearing would be held on them. *Id.* End Op mailed and published notice as required by District rules. *Id.* The District's General Manager recommended End Op's applications be granted, with certain standard and special conditions imposed. 1CR 67.

In April 2013, Aqua Water Supply Corporation ("Aqua") protested End Op's applications and requested a contested case hearing on them. 1CR 1010-19. Aqua is a non-profit water supply corporation that owns and operates several existing wells in the Simsboro aquifer and had at the time of the protest several permit applications pending for proposed new wells in the Simsboro. 1CR 1010-11.

On April 18, 2013, public comment on End Op's applications was conducted, and the District's Board of Directors set a preliminary hearing on Aqua's request for May 15, 2013. 1CR 46. 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. *Id.*

Both the timeliness and the standing of the Landowners to participate in a contested case hearing was disputed. The District found the Landowners had timely requested party status and referred the issue of the Landowners' standing to the State Office of Administrative Hearings ("SOAH"). 1CR 46-47. Aqua's standing was not contested and it was permitted to participate as a party in the permitting process. *See id.*

2. The SOAH ALJ conducts a hearing on standing and issues a ruling.

The Administrative Law Judge ("ALJ") at SOAH conducted an evidentiary hearing on the standing question, giving the Landowners an opportunity to introduce evidence in support of their claim that they had standing to participate in End Op's contested case hearing. 1CR 1711-1929 (transcript of hearing). The Landowners as well as End Op provided testimony and evidence at that hearing. The District did not take a position on the standing question at the SOAH hearing.

After reviewing the evidence and briefing by the parties, the ALJ ruled in SOAH Order No. 3 that the Landowners lacked standing. 1CR

1519-1533. The ALJ relied on Texas Water Code § 36.415(b)(2), which requires the District to:

> 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.

1CR 1523 (quoting the statute).

The Landowners' principal argument was a legal one -- *i.e.,* that their ownership of lands and the groundwater beneath those lands was sufficient to give them standing. 1CR 1524. The ALJ ruled that mere ownership of land and the water beneath it was not enough. Relying on several Supreme Court decisions, the ALJ ruled that 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." 1CR 1529. He reasoned that the Landowners "cannot demonstrate a particularized injury," emphasizing that they "are not using and have not shown that they intend to use groundwater that will be drawn from the Simsboro." 1CR 1530. He concluded:

> [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.

Id.

The ALJ also addressed the evidence presented at the hearing by the Landowners. None of the Landowners had well permit applications filed with the District. 1CR 1795-96, 1804-05 (at 85, *l.* 23 - 86, *l.* 8; 94, *l.* 25 - 95, *l.* 2). Neither Andrew Meyer nor Darwyn Hanna had existing wells on their properties. *See id.* The ALJ noted that one of the landowners -- Bette Brown -- did have two wells on her property, but she failed to show that either of those wells "draw from the Simsboro aquifer" and provided "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" on her wells. 1CR 1531. He also noted that ES not only had no well and no plans for a well, ES could not drill a well in compliance with District rules unless it obtained a variance. *Id.*

The ALJ also rejected ES's argument that ES had standing because the water flow of the Colorado River would allegedly be negatively impacted by the potential drawdown of water by End Op. 1CR 1530-31.

First, he concluded that interest in use of the Colorado River was an interest shared by the general public. 1CR 1530. Second, he found that there was "no credible evidence that the water flow of the Colorado River will be impacted to such a degree (or at all) that ES's enjoyment of the river will be negatively impacted." 1CR 1530-31.

The Landowners asked that the District be requested to conduct an interim review of the ALJ's Order No. 3. 1CR 1601. In Order No. 5, the ALJ denied this request on the ground that neither District nor SOAH rules provided for it. 1CR 1601-05.

3. The SOAH ALJ conducts a hearing on the merits of End Op's permit applications and recommends they be granted.

End Op's permit applications were set for a contested case hearing on the merits on February 11, 2014. 1CR 68. In December 2013, End Op and Aqua entered into a settlement agreement that, *inter alia*, required End Op to reduce its requested drawdown authorization from 56,000 acre-feet to 46,000 acre-feet per year. *Id.* End Op also agreed to limit production in Bastrop County to no more than 35% of the total authorized amount. *Id.* End Op further agreed to the imposition of conditions on its permits that

were designed to address potential financial impacts on Aqua and other well owners from long-term pumping by End Op. *Id.*

The merits hearing went forward as scheduled, with evidence and testimony introduced by End Op, the General Manager, and Aqua. *See* 1CR 68-70. On April 10, 2014, the ALJ issued a 34-page Proposal for Decision that recommended approval of End Op's applications with the Standard and Special Conditions proposed by the General Manager and the Special Conditions agreed to by End Op and Aqua. 1CR 88.

4. The District upholds the ALJ's ruling on standing, approves End Op's applications, and the Landowners appeal the standing decision.

On August 13, 2014, the Board of Directors of the District heard oral argument on both the ALJ's rulings on standing for the Landowners and the ALJ's PFD recommending granting of End Op's applications. 1CR 1648. The Board continued both items to be further considered at a special-called Board meeting to be held on September 10, 2014. 1CR 1648-49. At the September 10 meeting, the Board voted to approve the ALJ's Order No. 3 denying standing to the Landowners and also voted to remand the PFD to the ALJ to address the absence of required evidence of beneficial use during the first five years of the permit period. 1CR 1650-51. The minutes

reflecting the Board's votes at these two meetings are found at 1CR 1648-51. The transcripts of the two open meetings are found at 1CR 2278-2345.

On September 30, 2014, the Landowners filed a motion for rehearing of the District's vote on standing. 1CR 1652-61. At that time, the District had not issued a written order reflecting its ruling on the standing question.

On November 7, 2014, the Landowners filed a petition for review with the district court, challenging the District's vote to approve the ALJ's ruling on standing. 1CR 13.

On January 19, 2015, the District issued a written order denying the Landowners party status and adopting the findings and conclusions in the ALJ's Order No. 3. 1CR 1662-63; 2CR 667-68. On February 6, 2015, the Landowners filed another motion for rehearing (2CR 341-48), and on February 20, 2015, they filed another petition for review. 2CR 333-40.

On September 7, 2016, the District issued permits to End Op to drill the 14 wells. Plaintiff's Exh. 5 to 3CRR (10/18/2017 hearing). The Landowners filed a motion for rehearing of that order. *See id.* The Landowners filed yet another petition for review on November 4, 2016,

challenging both the order granting the permits and the order on standing. 2CR 368-79.

5. The district court reverses the District's decision on standing.

On October 7, 2015, the district court conducted a hearing on the District's and End Op's pleas to the jurisdiction. 2CRR 5-22 (10/7/2014 hearing). The District and End Op argued that Plaintiffs could not obtain judicial review of their standing claim because (1) their first two appeals were from an interim order and no statute authorized such an appeal and (2) their third appeal was from the permit proceeding and the statute permitted only parties to appeal from such an order. *See id.*

The district court issued an unopposed order consolidating the appeals on May 20, 2016. 2CR 366-67.

On October 18, 2017, the district court reconvened and heard further argument on the jurisdictional pleas. 3CRR 5-31 (10/18/2017 hearing). The court denied the jurisdictional pleas, concluding that it "has jurisdiction to hear this matter." *Id.* at 31, *ll.* 18-19.

The District is addressing the standing issue directly in this appeal rather than rearguing whether the Legislature afforded the Landowners a mechanism for judicial review of the standing issue. The District now

agrees with the Landowners that the District's January 19, 2015 written order was appealable. Moreover, even if the Legislature did not provide for judicial review of SOAH's and the District's rulings, courts have jurisdiction to review appeals of agency decisions where the appealing party claims a constitutionally protected property right that is adversely affected by the agency decision. *See Tex. Dept. of Protective and Regulatory Servs. v Mega Child Care, Inc.*, 145 S.W.3d 170, 172 (Tex. 2004) (recognizing right of judicial review of agency action even when a statute does not authorize review if "the action adversely affects a vested property right or otherwise violates a constitutional right"). In those situations, the courts must decide whether denying standing adversely affected the appealing party of a vested property right. While the District contends the Landowners were not so adversely affected, it agrees that courts have jurisdictional authority to decide that issue.

The district court then conducted an evidentiary hearing on the Landowners' petition for judicial review of the District's denial of their request for party status. 3CRR 31-101 (10/18/2017 hearing). The evidence presented consisted of the administrative record from the proceeding denying Plaintiffs' party status plus selected documents from the

proceeding in which the District approved End Op's permits. 1CR 108-2345); 4CCR and 5CRR (additional exhibits). Thus, the evidence on standing was limited to the evidence presented at SOAH, and the October 18, 2017 hearing was primarily oral argument by the respective parties.

On January 4, 2018, the district court entered a final judgment, holding that the District erred in denying the Landowners' party status. 2CR 1519-20. The court ordered the case remanded to the District for proceedings consistent with the court's decision. 2CR 1520.

SUMMARY OF ARGUMENT

The district court erred in holding that the Landowners have standing to participate in End Op's permit applications. The Water Code requires the District to limit participation in contested permit applications to "persons who have a personal justiciable interest" that is related to a legal right or economic interest within the District's regulatory authority and further requires such an interest to be "affected" by the permit. Tex. Water Code § 36.415(b)(2).

The statute invokes basic constitutional standing requirements. Applying those requirements, the ALJ and the District correctly held that the Landowners were required to show a "concrete, particularized injury-

in-fact" that is "more than speculative" and provide evidence that would tend to show their legally protected interests "will be affected" by the permit. 1CR 1529.

The District and the ALJ correctly held that the Landowners cannot meet these standing requirements simply by establishing that they own real property that sits over the Simsboro aquifer with attendant ownership of the water beneath their property. Those facts merely establish that the Landowners have real property interests; those facts alone provide no showing of justiciable interests that "will be affected" by the permit.

The District and the ALJ also properly weighed the evidence presented in the evidentiary hearing, which afforded the Landowners an opportunity to establish that they had justiciable interests that would be affected by the permit. The District's and the ALJ's determinations that the Landowners failed to make such a showing must be reviewed under the substantial evidence standards in Texas Government Code § 2001.174, which prohibits courts from substituting their judgment for that of the District with respect to "the weight of the evidence on questions committed to agency discretion." The District's decision was reasonable, supported by

substantial evidence, within its discretion, and in no way arbitrary or capricious.

ARGUMENT

I. Standard of Review.

This case is an appeal of an agency decision and is reviewed pursuant to the standard of review set out in the Administrative Procedure Act ("APA"), Texas Government Code § 2001.174. *See* Tex. Water Code § 36.253 (providing that "review on appeal is governed by the substantial evidence rule as defined by Section 2001.174, Government Code"). *See also Cadena Comercial USA Corp. v. Tex. Alcoh. Bev. Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017) ("The APA dictates that '[t]he scope of judicial review of a state agency decision … is as provided by the law under which review is sought.'").

Section 2001.174 provides that "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." The statute goes on to impose what is known as substantial evidence review, which allows courts to reverse the agency decision only "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.

Tex. Gov't Code § 2001.174(2).

In their motions for rehearing filed with the District, the Landowners allege that mere ownership of land with attendant ownership of water in the aquifers beneath that land is sufficient as a matter of law to confer standing. *See*, *e.g.*, 2CR 343. While the substantial evidence standard generally applies to review of the District's decision, whether mere ownership is sufficient in and of itself is a question of law and should be reviewed *de novo*. *See Morath v. Cano*, No. 03-15-00799-CV, 2017 WL 3585252 at *3 (Tex. App.--Austin Aug. 17, 2017, no pet.) (holding that question of law in an administrative appeal is reviewed *de novo*).

With respect to review of the evidence submitted in the hearing on standing, however, that evidence must be reviewed under the substantial

evidence standard. *See id.* Under that standard, the Court should presume that the District's findings are supported by substantial evidence. *Public Util. Comm'n v. Cities of Harlingen*, 311 S.W.3d 610, 626 (Tex. App.--Austin 2010, no pet.). "The issue for the reviewing court is not whether the agency reached the correct conclusion, but rather whether there is some reasonable basis in the record for the action taken by the agency." *Railroad Comm'n v. Torch Operating Co.,* 912 S.W.2d 790, 792 (Tex. 1995). "Substantial evidence requires only more than a mere scintilla, and 'the evidence on the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence.'" *Id.* at 792-93 (citations omitted). Courts "may not substitute [their] judgment for that of the agency on the weight of the evidence." *ASAP Paging, Inc. v. Public Util. Comm'n*, 213 S.W.3d 380, 392 (Tex. App.-Austin 2006, pet. denied) (citation omitted).

II. The District correctly affirmed the ALJ's holding that mere ownership of land with attendant ownership of water in the aquifers beneath that land is not sufficient to confer standing.

It is undisputed that the Landowners own real property that sits over the Simsboro aquifer and that they have ownership of the water in place beneath their property. The Landowners have argued that they do

not have to demonstrate either present or future intended use of water in the Simsboro aquifer in order to have standing. CRR 10/18/17 at 33-34. And they have essentially contended that, as a matter of law, the fact that that they are landowners with ownership of water in the Simsboro aquifer beneath their property is enough to give them standing to request and/or participate in a contest to a permit application. In other words, they contend that whether they would ever try to access groundwater in the Simsboro is irrelevant. According to the Landowners, their mere ownership gives them the right to participate in any application for a permit that would allow drawdown of water in an aquifer that flows beneath their property.

The Landowners are correct that this issue presents a question of law. But the ALJ and the District were correct in rejecting their argument. The ALJ held:

> [T]he 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.

1CR 1529 (Order No. 3 at 10). In its January 19, 2015 Order, the District adopted all of the ALJ's findings and conclusions, including this one. 1CR 1663.

Both the Water Code and constitutional standing principles confirm that it would be improper to grant standing to landowners simply because they are landowners.

The Water Code expressly limits participation in a hearing on a contested application for a permit "to persons who have a personal justiciable interest." Tex. Water Code § 36.415(b)(2). In order to have such a justiciable interest, one must have more than the ownership of a property interest. That property interest must be "affected by" the proposed permit and cannot be nothing more than an "interest common to members of the public." *Id*.

These requirements track the constitutional requirements for standing. "The standing requirement's constitutional underpinnings are found in the separation-of-powers doctrine and, in Texas, the open-courts provision." *South Texas Water Authority v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007). The constitutional separation of powers "prohibits courts from issuing advisory opinions that decide abstract questions of law." *Id.* The

Texas Constitution's open-courts provision "contemplates access to the courts for only those litigants who have suffered an actual injury, as opposed to one that is general or hypothetical." *Id.*

Allowing a party who merely owns land with attendant ownership of the water beneath that land to participate in a contested permit application could lead to precisely the kind of advisory opinions both the federal and state constitutions prohibit. *See Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 926 (Tex. App.--Austin 2010, pet. denied) (recognizing federal standing requirements are "analogous to Texas standing jurisprudence at least with respect to challenges to governmental action"). Parties must have a "particularized interest" in order to participate in a contested proceeding. *Id.* And they must have an "actual or imminent injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). "'[S]ome day' intentions -- without any description of concrete plans, or indeed even any specification of *when* the some day will be -- do not support a finding of the 'actual or imminent' injury that [the] cases require." *Id.*

Were mere ownership of land resting over the Simsboro aquifer sufficient to confer standing, landowners from distant parts of the State --

even from other states -- would have standing to participate in End Op's permit applications. The Simsboro is part of the Carrizo-Wilcox aquifer and stretches from the Rio Grande in South Texas into Arkansas and Louisiana. http://www.ntvgcd.org/images/carrizoaquifer.pdf. If these landowners have standing based on their ownership, cities like Bryan, College Station, Lufkin, Nacogdoches, and Tyler -- and landowning residents of those cities -- would have standing as well. *See id*. Having an interest in the Simsboro aquifer is not "sufficiently peculiar" to allow landowners from across the state to participate, particularly when the Legislature has plainly instructed groundwater districts to limit participants to those who will be truly affected by the permit. *See Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001); Tex. Water Code § 36.415(b)(2).

The Landowners rely on *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), for their argument that land ownership alone is enough. *Day*, however, merely establishes that the Landowners have a property right, holding that -- like the owner of the minerals beneath his or her land -- "the landowner is regarded as having absolute title in severalty" to the water beneath the land. *Id.* at 831. This holding, however, does not speak to how the Landowners' undisputed property rights can suffer the

"actual or imminent injury" required in order to challenge regulation by a water conservation district.

In fact, *Day* recognizes that, while a landowner's ownership of water is akin to the ownership of minerals, the withdrawal of water from an aquifer does not necessarily adversely impact landowners: "Unlike oil and gas, groundwater in an aquifer is often being replenished from the surface … ." *Id.* at 831. *See also id.* ("Groundwater is often a renewable resource, replenished in aquifers … ."). A drawdown of water does not equate to extraction of oil and gas from the ground. A drawdown can be replenished; when oil or gas is extracted, it is gone. As the *Day* Court noted, "groundwater regulation need not result in takings liability." *Id.* at 843.

III. The District and the ALJ's decision that the Landowners failed to demonstrate a justiciable interest that would be affected by the permits is supported by substantial evidence and satisfies all standards in Texas Government Code § 2001.174(2).

A. The Applicable Standards

The District and the ALJ properly held that, under the evidence presented, the Landowners failed to demonstrate the "personal justiciable

interest" required by Water Code § 36.415(b)(2) and, therefore, lacked standing to participate in End Op's permit application proceeding.

The District and the ALJ correctly applied the standards in *City of Waco v. Tex. Com'n on Environmental Quality*, 346 S.W.3d 781 (Tex. App.--Austin 2011), *rev'd on other grounds,* 413 S.W.3d 409 (Tex. 2013). In *City of Waco*, this Court set out detailed requirements for a party to have standing to challenge governmental action. While the statute and rule at issue in *City of Waco* were not the same as the ones here, they have the same requirements that a person be "affected" and have a "personal justiciable interest" that is not merely an "interest common to members of the general public." *Compare id.* at 790-91 (discussing statutes at issue) *with* Tex. Water Code § 36.415(b)(2) and District Rule 1.1, Section 1.

Under *City of Waco*, in order to have standing, a person must establish:

> (1) an "injury in fact" from the issuance of the permit as proposed—an invasion of a "legally protected interest" that is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical";
>
> (2) the injury must be "fairly traceable" to the issuance of the permit as proposed, as opposed to the independent actions of third parties or other alternative causes unrelated to the permit; and

> (3) it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision on its complaints regarding the proposed permit (i.e., refusing to grant the permit or imposing additional conditions).

Id. at 802.

These standards are essentially the same constitutional requirements that federal courts impose for standing to challenge governmental action. *See Lujan*, 504 U.S. at 560-561 (setting out same basic requirements).

The Legislature's directive in Water Code § 36.415(b)(2) to "limit participation" in a contested hearing to persons with a "personal justiciable interest related to a legal right … within a district's regulatory authority and affected" by the permit supports application of all of these limiting principles here. Applying these principles necessarily involves a weighing of the evidence and an exercise of discretion. Determining whether a person is "affected" may require the District to exercise "discretion to weigh and resolve matters that may go to the merits of the underlying impact the regulated activity … will have on the … use of natural resources." *Sierra Club v. Texas Com'n on Environmental Quality*, 455 S.W.3d 214, 223-24 (Tex. App.--Austin 2014, pet. denied). This recognition of the need to afford the regulatory authority some discretion to decide who will

be allowed to intervene in an agency proceeding has long been recognized. *See Railroad Com'n v. Ennis Transp. Co.*, 695 S.W.2d 706, 710 (Tex. App.--Austin 1985, writ ref'd n.r.e.) ("[T]he allowance or denial of petitions for intervention in administrative proceedings rests in the discretion of the agency.").

Because the Landowners here were given a full evidentiary hearing on the standing question, the ALJ and the District properly based their decisions on a weighing of the evidence rather than an examination of Landowners' mere allegations. In this respect, this case differs from *City of Waco*. In *City of Waco*, the TCEQ's rules did not provide for an evidentiary hearing but instead, "impose what are in the nature of pleading requirements." 346 S.W.2d at 812. Because "the City never had the opportunity to develop an evidentiary record before the Commission through contested-case or adjudicative processes," the Court in *City of Waco* held substantial-evidence review was "inapplicable and unavailable." *Id.* at 819. Precisely the opposite is true here, where the Landowners were afforded a full evidentiary hearing on the standing question.

B. The District properly held that, based on the evidence presented, none of the Landowners has standing.

In adopting the ALJ's findings and conclusions, the District properly found that none of the Landowners had standing. The District's determinations are supported by substantial evidence, are in no way arbitrary or capricious, are fully within the District's discretion to determine, and violate none of the provisions in Texas Government Code § 2001.174(2). The key problems with the evidence presented by the Landowners are their admissions that they have no wells in the Simsboro and have no concrete plans to drill any such wells. Absent evidence of such wells or objective evidence of clear plans to drill such wells, they cannot demonstrate a concrete, particularized injury.

Below is a review of the evidence and analysis applied to each of the Landowners.

1. Landowner Environmental Stewardship ("ES") is a nonprofit organization that functions primarily as "an advocate organization looking to provide protection for the natural resources" in the area. 1CR 1753 (at 43, *ll.* 5-11). ES's first claim to standing is based on its ownership of an unimproved lot in the platted subdivision of Tahitian

Village in Bastrop County. 1CR 1754 (at 44, *ll.* 16-18; 49, *ll.* 10-18). The lot, which is less than an acre, has no well on the property and the nonprofit has no "current intention" to drill a well. 1CR 1756-57 (at 46, *l.* 19 - 47, *l.* 10). Moreover, absent a variance, the District's rules would prohibit ES from drilling any sort of well on this lot. 1CR 1883 (at 173, *ll.* 17-19). The ALJ found that even though a variance could be sought, "it is unlikely given the size of ES's lot and the cost to build a well, that ES will ever build a well." 1CR 1531 (Order No. 3 at 12). End Op's expert testified that the cost for a well on this small property would be around $80,000. 1CR 1884-85(at 174, *l.* 10 - 175, *l.* 6).

ES's second claim to standing (raised only on ES witness's redirect) is based on the assertion that water flow of the Colorado River will be negatively impacted by potential drawdown of water from the Simsboro aquifer by End Op's proposed wells. ES's witness testified that ES's lot is approximately 200 feet from the Colorado River and that End Op's withdrawal of water pursuant to its permits "would impact our enjoyment of that river and that property." 1CR 1767 (at 57, *ll.* 15-19). Asked how ES's interests in the Colorado River are "any different than the rest of the general public in the area," ES's witness responded that "[ES] is an

advocate for protecting the rights, the river itself and the relationship between groundwater and surface water." 1CR 1770 (at 60, *ll.* 6-21). The witness further conceded that these interests are "certainly an interest that the public should share." *Id.*

This Court has previously rejected evidence regarding an interest in recreational activities as a basis for standing, finding the impact on such interests are not "concrete and particularized." *See Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 882 (Tex. App.--Austin 2010, pet. denied).

ES also provided an expert who was to testify on the impact of pumping in the Simsboro on other aquifers and on the Colorado River and on other wells. This expert, however, merely testified that the drilling of wells by End Op in the Simsboro "could" affect other aquifers and "could" affect the amount of natural discharge in the Colorado River. *See* 1CR 1818-21 (at 108, *ll.* 5-10; 109, *ll.* 5-24; 111, *ll.* 2-5). The expert conceded that he had not visited any of the properties owned by any of the Landowners (1CR 1824 [at 114, *ll.* 9-14]) and could not speak to any impact on any specific wells (1CR 1825 [at 115, *ll.* 7-10]). His testimony was plainly speculative. Like the testimony in *Save Our Springs*, this expert failed to

"demonstrate that the alleged harm is actual or imminent, rather than hypothetical or conjectural." 304 S.W.3d at 883.

The District and ALJ properly concluded that (1) ES had no particularized injury based on its ownership of the Tahitian Village lot, (2) ES would be unlikely to ever build a well on this lot, (3) ES's concern about the Colorado River was "an interest shared by the general public," and (4) there was "no credible evidence that the water flow of the Colorado River will be impacted to such a degree (or at all) that ES's enjoyment of the river will be negatively impacted." 1CR 1530-31 (Order No. 3 at 11-12).

2. Landowners Andrew Meyer and Darwyn Hanna both own property that sits over the Simsboro. Neither of them, however, has a well on their property. 1 CR 1793, 1804 (at 83, *ll.* 3-4, at 94, *ll.* 1-3). While Mr. Meyer claimed that he had an intent to drill a well in the future (1CR 1793 [at 83, *ll.* 5-15]), he admitted that he had not filed any applications to drill a well and had not even taken the preliminary steps of conferring with the District about a well. 1CR 1795-96 (at 85, *l.* 23 - 86, *l.* 8). Mr. Hanna had no current plans to drill a well. 1CR 1804-05 (at 94, *l.* 25 - 95, *l.* 2). In fact, he conceded that, as long as Aqua -- which is currently providing him with

water -- continued to do so, he did not "foresee any need to drill a well." 1CR 1807 (at 97, *ll.* 6-9).

Mr. Meyer and Mr. Hanna's vague notions about future wells is precisely the kind of "'some day' intentions" that fail to provide a basis for standing. *Lujan*, 504 U.S. at 564.

3. Landowner Bette Brown has two wells on her property, neither of which is registered or permitted with the District and only one of which is currently being used. 1CR 1773, 1782 (at 63, *ll.* 5-9; 72, *ll.* 8-17). Ms. Brown did not know how deep her wells were or which aquifer or formation in which they were located. 1CR 1784-85 (at 74, *l.* 22 - 75, *l.* 1). Moreover, as the ALJ found,

> 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.

1CR 1531 (Order No. 3 at 12). In other words, Ms. Brown's testimony confirms that she has not shown any sort of injury that is (1) "concrete and particularized," (2) "actual or imminent," and (3) "fairly traceable" to the issuance of the permit as proposed -- all requirements for standing under *City of Waco*. 346 S.W.3d at 802. On the contrary, her testimony -- and the

testimony of her expert, who could not testify about the impact of End Op's permit on her wells -- was nothing more than "conjectural or hypothetical" with respect to how End Op's permit could impact her property. Such speculation can never be the basis for conferring standing to participate in a contested well permit proceeding. *See id.* (prohibiting use of "conjectural or hypothetical" injuries from being a basis for standing).

4. End Op's expert testimony further supports the District's decision. All of the District's determinations regarding each of the Landowners are fully supported by the record based simply on the Landowners' own witnesses and expert direct testimony and cross-examination. But End Op also provided expert testimony that further supports the District's decision.

End Op's expert testified that "when you pump from the Simsboro, you have very minimal, if even detectable, effect on overlying -- on the water levels that are in sands and overlying aquifers such as the Carrizo." 1CR 1869 (at 159, *ll.* 14-18). This expert testimony was not only *not* refuted; ES's expert testified in a similar manner, suggesting that the effect of pumping from an aquifer would be "de minimus." 1CR 1841 (at 131, *ll.* 1-3).

Unlike the Landowners' expert, End Op's expert *did* perform an analysis of each of the Landowners' properties, their well ownership (or the absence thereof), and the feasibility of drilling wells on their properties. First, he noted that all of the properties owned by the Landowners were located so far away from End Op's well properties that End Op had not even been required under the District rules to notify them of its permit application. 1CR 1881-82 (at 171, *l.* 21 - 172, *l.* 18). Second, he addressed each of the Landowners' ownership.

He confirmed that under the District's current rules, ES could not have an exempt well because the tract acreage would not meet the spacing requirement that prohibits wells from being too close to one another. 1CR 1883 (at 173, *ll.* 17-23). More important, he rejected Landowners' claims that water beneath ES's property would be drawn down by 100 feet if End Op's permits were granted. 1CR 1886-87 (at 176, *l.* 2 - 177, *l.* 3). He testified that "there may be some drawdown" but "the aquifer itself would remain completely full" and "[t]here would be no reduction in the ability to get water." *See id.* Thus, even if ES *could* have a well, it would have no problem getting water from it. He further testified that pumping in the

Simsboro would not affect the flow of the Colorado River at all. 1CR 1887 (at 177, *ll.* 4-8).

End Op's expert testified that, should Mr. Meyer want to drill a well on his property, the cost to drill a well in the Simsboro would be approximately $250,000, because that aquifer lies far beneath his property. 1CR 1892 (at 182, *ll.* 15-20). He further testified that, should Mr. Meyer drill a well, he would most likely drill it in the Sparta aquifer, which lies only about a 100 to 200 feet beneath his property and would be much less expensive. 1CR 1892-93 (at 182, *l.* 21 - 183, *l.* 2). He stated that End Op's pumping in the Simsboro would not have any detectable effect on a well in the Sparta. 1CR 1893 (at 183, *ll.* 6-11). If Mr. Meyer elected to drill in the Simsboro, he could do so because the "aquifer would still remain completely full." 1CR 1893 (at 183, *ll.* 12-18).

With respect to Mr. Hanna, End Op's expert testified that, if he chose, Mr. Hanna could drill a well in either the Simsboro or the Carrizo or Lower Wilcox aquifers and End Op's project would not have any detectable impact on such endeavors. 1CR 1894-95 (at 184, *l.* 24 - 185, *l.* 7).

Finally, End Op's expert testified that End Op's pumping in the Simsboro would have no detectable effect on Ms. Brown's wells and would

not "affect her ability to obtain the water" from the Simsboro should she ever choose to drill a well in the aquifer. 1CR 1896 (at 186, *ll.* 15-22).

5. Additional authorities relied on by the Landowners are inapposite.

The Landowners also relied on *Heat Energy Advanced Technology, Inc. v. West Dallas Coalition for Environmental Justice*, 962 S.W.2d 288 (Tex. App.--Austin 1998, pet. denied), as support for their standing argument. In that case, a coalition of residents near a hazardous waste facility challenged the TNRCC's denial of their standing to contest renewal of the facility's permit. One of the members of the Coalition, who lived one and one-half blocks from the facility, testified that he could smell odors emanating from the facility, the facility's emissions were affecting his breathing, and he had to seek medical attention for throat problems caused by the odors. 962 S.W.2d at 295. The facility itself conceded that it was planning to "reduce its odor emission in conjunction with the resolution of a separate Commission enforcement proceeding." *Id.* at 296. At a contested case hearing on standing, an ALJ ruled the Coalition had established standing. *Id.* at 290. The TNRCC reversed and denied standing. *Id.* The court of

appeals held the TNRCC's findings were not supported by substantial evidence. *Id.* at 295.

The facts in *Heat Energy* bear no resemblance to the facts here. The ALJ properly found that the Landowners presented no evidence of harm, and End Op presented testimony refuting the Landowners' bare allegations of harm. *See* discussion *supra* at 27-34.

United Copper Industries, Inc. v. Grissom, 17 S.W.3d 797 (Tex. App.--Austin 2000, pet. dism'd), another case cited by the Landowners, is equally distinguishable. As the ALJ noted here, "the potential harm that conferred standing [in *United Copper*] 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." 1CR 1530 (Order No. 3 at 11). More important, the TNRCC in *United Copper* did not even afford Grissom a hearing on the standing question. Reversing the TNRCC's decision, "the district court merely ordered the Commission to provide Grissom a preliminary hearing where he would have a *meaningful opportunity* to offer competent evidence in support of his request." *United Copper*, 17 S.W.3d at 802 (emphasis in original). In affirming the district court, the court of appeals made clear

that "[w]e do not comment on the ultimate issue of whether the Commission should grant Grissom's request for a contested-case hearing on the merits." *Id.*

Unlike the TNRCC in *United Copper*, the District here afforded the Landowners a full opportunity to present evidence in support of their claim that they were at risk of harm from End Op's proposed wells. Both the ALJ and the District properly concluded that their evidence fell short.

IV. On remand, the District is entitled to recover its attorney's fees from the Landowners.

If the Court agrees that the district court's reversal of the District's decision on standing was error, it should reverse the judgment and remand to the district court for an award of attorney's fees to the District pursuant to Water Code § 36.066(g). That provision states:

> If the district prevails in any suit other than a suit in which it voluntarily intervenes, the district may seek and the court shall grant, in the interests of justice and as provided by Subsection (h), in the same action, recovery for attorney's fees, costs for expert witnesses, and other costs incurred by the district before the court. The amount of the attorney's fees shall be fixed by the court.

This provision plainly applies, requiring an award of the attorney's fees expended by the District both in the district court and on appeal.

CONCLUSION AND PRAYER

For the reasons stated, the District respectfully requests that the Court reverse the district court's judgment, affirm the District's decision denying standing to the Landowners, award the District its costs, and remand the case to the district court for an award of attorney's fees pursuant to Water Code § 36.066(g). The District requests such other and further relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE, TEX. R. APP. P. 9.4

Pursuant to Tex. R. App. P. 9.4(i)(3), I certify that the foregoing document complies with the word count limitations set out in Tex. R. App. P. 9.4. It contains 7,625 words, excluding parts exempted by Tex. R. App. P. 9.4(i)(1). In making this Certificate of Compliance, I am relying on the word count provided by the software used to prepare the document. This is a computer-generated document created in Microsoft Word, using 14-point Book Antiqua typeface for body text and 12-point Book Antiqua typeface for footnotes.

/s/ Mary A. Keeney
Mary A. Keeney

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2018, a true and correct copy of the foregoing was served on counsel shown below via email and/or electronic service as shown below:

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APPENDIX

I. Final Judgment

II. ALJ's Order No. 3

III. District's Written Order on Standing

IV. Statutes

A. Texas Government Code § 2001.174

B. Texas Water Code § 36.0015(b)

C. Texas Water Code § 36.066(g)

D. Texas Water Code § 36.253

E. Texas Water Code § 36.415(b)(2)

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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.

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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

3091320.v1

AGREED AS TO FORM ONLY:

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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.

---

[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.

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[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.

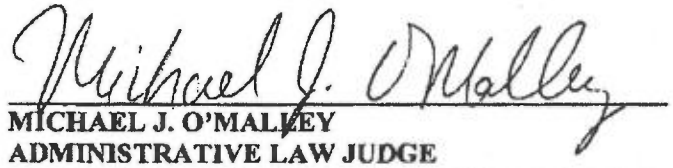
Colorado River will be impacted to such a degree (or at all) that ES's enjoyment of the river will be negatively impacted.[24] Finally, the record shows that ES cannot drill a well that complies with the District rules. Although it may be able to seek a variance, it is unlikely given the size of ES's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

Michael A. Talbot

President, Lost Pines Groundwater
Conservation District Board of Directors

Date: 1-19-15

V.T.C.A., Government Code § 2001.174

§ 2001.174. Review Under Substantial Evidence Rule or Undefined Scope of Review

Currentness

If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, 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 but:

(1) may affirm the agency decision in whole or in part; and

(2) 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.

Credits
Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

V. T. C. A., Government Code § 2001.174, TX GOVT § 2001.174
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

APPENDIX IV.A.

End of Document

V.T.C.A., Water Code § 36.0015

§ 36.0015. Purpose

Effective: September 1, 2015
Currentness

(a) In this section, "best available science" means conclusions that are logically and reasonably derived using statistical or quantitative data, techniques, analyses, and studies that are publicly available to reviewing scientists and can be employed to address a specific scientific question.

(b) In order to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and to control subsidence caused by withdrawal of water from those groundwater reservoirs or their subdivisions, consistent with the objectives of Section 59, Article XVI, Texas Constitution, groundwater conservation districts may be created as provided by this chapter. Groundwater conservation districts created as provided by this chapter are the state's preferred method of groundwater management in order to protect property rights, balance the conservation and development of groundwater to meet the needs of this state, and use the best available science in the conservation and development of groundwater through rules developed, adopted, and promulgated by a district in accordance with the provisions of this chapter.

Credits
Added by Acts 1997, 75th Leg., ch. 1010, § 4.21, eff. Sept. 1, 1997. Amended by Acts 2001, 77th Leg., ch. 966, § 2.30, eff. Sept. 1, 2001; Acts 2015, 84th Leg., ch. 993 (H.B. 200), § 1, eff. Sept. 1, 2015.

V. T. C. A., Water Code § 36.0015, TX WATER § 36.0015
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

APPENDIX IV.B.

V.T.C.A., Water Code § 36.066

§ 36.066. Suits

Effective: September 1, 2015
Currentness

(a) A district may sue and be sued in the courts of this state in the name of the district by and through its board. A district board member is immune from suit and immune from liability for official votes and official actions. To the extent an official vote or official action conforms to laws relating to conflicts of interest, abuse of office, or constitutional obligations, this subsection provides immunity for those actions. All courts shall take judicial notice of the creation of the district and of its boundaries.

(b) Any court in the state rendering judgment for debt against a district may order the board to levy, assess, and collect taxes or assessments to pay the judgment.

(c) The president or the general manager of any district shall be the agent of the district on whom process, notice, or demand required or permitted by law to be served upon a district may be served.

(d) Except as provided in Subsection (e), no suit may be instituted in any court of this state contesting:

(1) the validity of the creation and boundaries of a district;

(2) any bonds or other obligations issued by a district; or

(3) the validity or the authorization of a contract with the United States by a district.

(e) The matters listed in Subsection (d) may be judicially inquired into at any time and determined in any suit brought by the State of Texas through the attorney general. The action shall be brought on good cause shown, except where otherwise provided by other provisions of this code or by the Texas Constitution. It is specifically provided, however, that no such proceeding shall affect the validity of or security for any bonds or other obligations theretofore issued by a district if such bonds or other obligations have been approved by the attorney general.

(f) A district shall not be required to give bond for appeal, injunction, or costs in any suit to which it is a party and shall not be required to deposit more than the amount of any award in any eminent domain proceeding.

APPENDIX IV.C.

(g) If the district prevails in any suit other than a suit in which it voluntarily intervenes, the district may seek and the court shall grant, in the interests of justice and as provided by Subsection (h), in the same action, recovery for attorney's fees, costs for expert witnesses, and other costs incurred by the district before the court. The amount of the attorney's fees shall be fixed by the court.

(h) If the district prevails on some, but not all, of the issues in the suit, the court shall award attorney's fees and costs only for those issues on which the district prevails. The district has the burden of segregating the attorney's fees and costs in order for the court to make an award.

Credits

Added by Acts 1995, 74th Leg., ch. 933, § 2, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 966, § 2.43, eff. Sept. 1, 2001; Acts 2015, 84th Leg., ch. 464 (H.B. 3163), § 2, eff. June 15, 2015; Acts 2015, 84th Leg., ch. 993 (H.B. 200), § 2, eff. Sept. 1, 2015.

V. T. C. A., Water Code § 36.066, TX WATER § 36.066
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

V.T.C.A., Water Code § 36.253

§ 36.253. Trial of Suit

Currentness

The burden of proof is on the petitioner, and the challenged law, rule, order, or act 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.

Credits
Added by Acts 1995, 74th Leg., ch. 933, § 2, eff. Sept. 1, 1995.

V. T. C. A., Water Code § 36.253, TX WATER § 36.253
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

APPENDIX IV.D.

Vernon's Texas Statutes and Codes Annotated
Water Code (Refs & Annos)
Title 2. Water Administration (Refs & Annos)
Subtitle E. Groundwater Management
Chapter 36. Groundwater Conservation Districts
Subchapter M. Permit and Permit Amendment Applications; Notice and Hearing Process

V.T.C.A., Water Code § 36.415

§ 36.415. Rules; Additional Procedures

Effective: June 10, 2015
Currentness

(a) A district by rule shall adopt procedural rules to implement this subchapter and may adopt notice and hearing procedures in addition to those provided by this subchapter.

(b) In adopting the rules, a district shall:

(1) define under what circumstances an application is considered contested;

(2) 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; and

(3) establish the deadline for a person who may participate under Subdivision (2) to file in the manner required by the district a protest and request for a contested case hearing.

Credits
Added by Acts 2005, 79th Leg., ch. 970, § 17, eff. Sept. 1, 2005. Amended by Acts 2015, 84th Leg., ch. 405 (H.B. 2179), § 8, eff. June 10, 2015.

V. T. C. A., Water Code § 36.415, TX WATER § 36.415
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

APPENDIX IV.E.