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

ENVIRONMENTAL STEWARDSHIP, ANDREW MEYER, BETTE BROWN, AND DARWYN HANNA REQUEST THAT THE LOST PINES GROUNDWATER CONSERVATION DISTRICT REVERSE ALJ'S DECISION ON AFFECTED PERSON AND REMAND MATTER TO SOAH FOR CONTESTED CASE HEARING

I. INTRODUCTION

Environmental Stewardship, Andrew Meyer, Bette Brown and Darwyn Hannah (Requesters) ask that the Lost Pines Groundwater Conservation District (the "District') reverse the administrative law judge's decision that they are not affected persons, and in consideration of this reversal, remand End Op, L.P.'s Application to the State Office of Administrative Hearings ("SOAH") for a contested case hearing including Requesters as parties. Requesters will note that through a request for certified question and request for interlocutory appeal, they attempted to bring their objections to the District soon after the ALJ's ruling on party status. The ALJ denied this request.[1] Thus, Requesters made every effort possible to avoid the current circumstance where the District is in a position to review the ALJ's rulings on party status only after the conclusion of the hearing on the merits and the issuance of a proposal for decision.

[1] The ALJ premised his denial on a finding that he lacked the authority to certify a question to the District. In order to facilitate more efficient resolution of such issues in the future, the District may consider either clarifying that such authority exists, or amending its rules to affirm that an ALJ has such authority.

II. Requesters demonstrated End Op's requested pumping would cause a drawdown of the Simsboro Aquifer beneath Requesters' properties.

By order dated June 19, 2013, the District referred End Op's applications to SOAH. The District ordered that, "the issue of whether Environmental Stewardship, Andrew Meyer, Bette Brown, and Darwyn Hanna have standing to participate in the contested case hearing as parties is referred to SOAH." On August 12, 2013, a preliminary hearing was held at which administrative law judge Michael O'Malley considered Requesters' petitions for party status.[2]

During the preliminary hearing, Requesters presented evidence demonstrating that the permitting of End Op's wells would cause a drawdown of the Simsboro Aquifer beneath Requesters' properties. This conclusion was consistent with modeling performed by the District's own General Manager.

[2] End Op did not challenge Aqua's party status. Tr. 38:6-9.

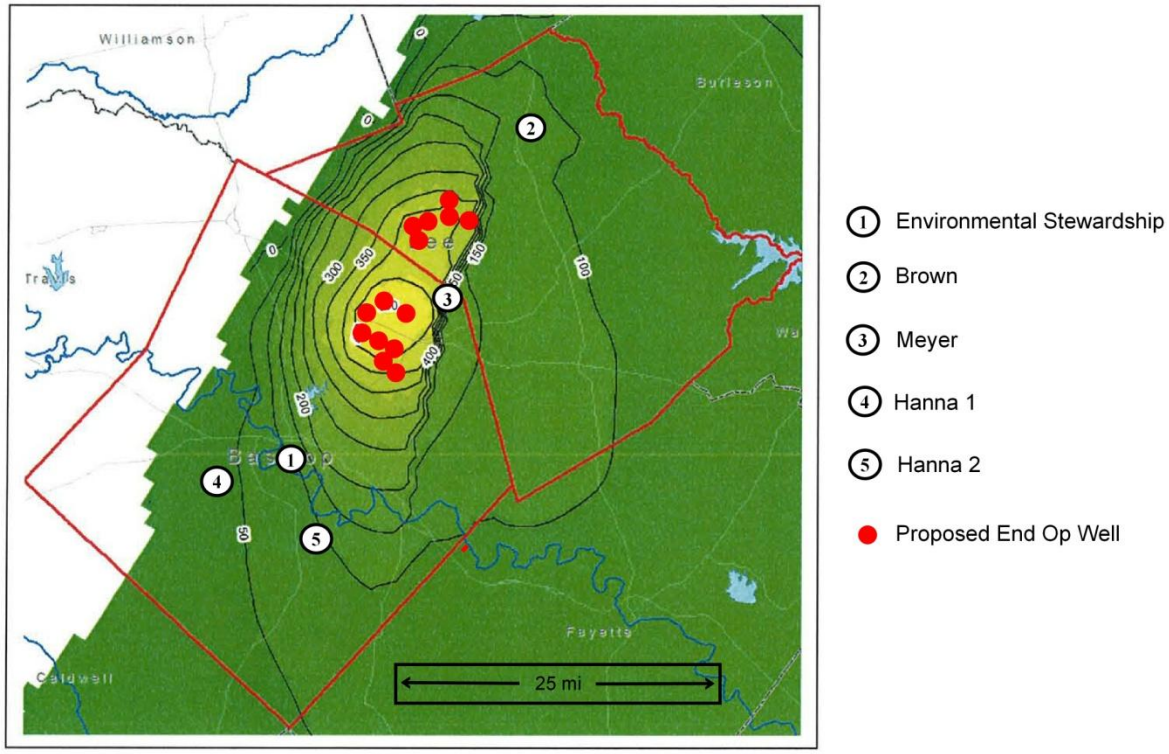

Figure 1
Property Locations
(Adapted from LPGCD memo of March 20, 2013)

Preliminary Hearing Exhibit ES-3

End Op presented an expert who contended that the drawdowns in the Simsboro beneath the Requesters' properties would not be of the magnitude claimed by Requesters, but End Op's expert did not challenge Requesters' assertion that End Op's pumping would cause some drawdown in the Simsboro at the location of Requesters' properties.[3] In fact, modeling performed by End Op's own expert also showed that some drawdown would occur in the Simsboro Aquifer beneath Requesters' properties, although End Op's expert

[3] *See, e.g,* Tr. 176:13-15 ("I believe that there may be some drawdown [at the Environmental Stewardship Property] but not necessarily the full hundred feet just from the aquifer characteristics.")

conveniently could not remember the magnitude of his predicted drawdown.[4]

Requesters presented expert testimony that the modeling performed by the general manager served as a reasonable indication of whether drawdown would occur and roughly how much that drawdown would be.[5] Requesters' expert testified that the General Manager's modeling indicated drawdowns in the Simsboro ranging from roughly 300 feet at the Meyer property, to roughly 100 feet at the Environmental Stewardship property.[6] Requesters' further presented evidence that the drawdown of the Simsboro Aquifer would necessitate the deeper placement of a pump in order for Requesters to draw water from the Simsboro, a contention with which End Op's expert agreed.[7]

Of course, End Op's pumping is not the only pumping that the District is authorizing to occur in the Simsboro. In consideration of the cumulative impacts of End Op's pumping in addition to other potential pumping, Requesters presented expert testimony that the drawdown in the Simsboro caused by the End Op pumping would make it more likely that Requesters would ultimately be denied access to water in the Simsboro.[8]

In addition to impacts upon the Simsboro Aquifer, Requesters also presented information regarding impacts upon other aquifers. In particular, Requesters presented evidence that End Op's proposed pumping would cause the drawdown of water within

[4] *See, e.g,* Tr. 195:9-21; 197:22 – 13. Since Requesters were denied party status, they had no opportunity to perform discovery and determine the magnitude of End Op's predicted drawdown in the vicinity of their properties.
[5] Tr. 106:7-12.
[6] Tr. pp. 106-107, 110-112.
[7] Tr. 195:6-196:12.
[8] Tr. 145:25 – 147:15.

aquifers into which groundwater wells owned by Better Brown are completed.[9]

III. The Administrative Law Judge did not question the potential drawdown of the Simsboro, but ruled that the ownership of groundwater is not an interest protected by the District in a permit proceeding.

After considering the briefing of the parties, the ALJ denied Requesters' petitions for party status. The administrative law judge did not find that a drawdown would not occur in the Simsboro aquifer beneath Requesters' properties. Rather, the ALJ denied Requesters' petitions for party status based on a legal conclusion that a requester must demonstrate an *actual or intended use* of groundwater owned by a person before the person can validly assert an interest in that groundwater. The ALJ rejected Requesters' argument that a person's ownership interest in groundwater must itself be protected.

For example, with regard to Environmental Stewardship, Andrew Meyer and Darwyn Hanna, the ALJ stated that:

> [T]he Landowners in this case cannot demonstrate a particularized injury that is not common to the general public because owning land and the groundwater under the land is not sufficient to show a particularized injury, especially since the Landowners are not using and have not shown that they intend to use groundwater that will be drawn from the Simsboro.[10]

The ALJ went on to say that:

> [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.[11]

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[9] Tr. 111:21 – 111:11.
[10] Order No. 3, p. 11.
[11] Order No. 3, p. 11.

The ALJ found Ms. Brown's circumstances to be distinguishable, since she in fact has two wells on her property. Even so, the ALJ found that Ms. Brown could not show herself to be an affected person without presenting evidence on the actual current use of her well.

Additionally, the ALJ found that the modeled potential for drawdowns of roughly 100 feet to roughly 300 feet did not distinguish Requesters from other landowners in the area,[12] equating the predicted drawdowns beneath these properties with "system-wide" aquifer drawdowns.

IV. The ALJ's denial of Requesters' petitions for party status was in error, and should be denied.

The ALJ erred in concluding that the ownership of groundwater is not an interest warranting protection in the permitting process. Requesters' ownership of land, with the accompanying vested interest in groundwater, constitutes a legally protected interest within the regulatory framework established by Chapter 36 of the Water Code. At § 36.002(c), this Code provides that, "[n]othing in this code shall be construed as granting the authority to deprive or divest a *landowner*, including a *landowner's* lessees, heirs, or assigns of the groundwater ownership and rights described by [§ 36.002]."

In the case of *Edwards Aquifer Authority v. Day,* 369 S.W.3d 814 (Tex. 2012), the Texas Supreme Court defined the extent of this legally protected interest. Analogizing the treatment of groundwater to that afforded oil and gas, the Court held that a landowner

[12] On this point, Requesters will note that under *Texas Department of Parks and Wildlife v. Maria Miranda and Ray Miranda*, 133 S.W.3d 217 (Tex. 2004), all evidence on an issue where the merits of a case overlap with a fact relevant to standing, the evidence presented by the person attempting to demonstrate standing must be taken as true absent conclusive proof otherwise. Protesters contend that they have shown by a preponderance of the evidence that a potential exists for the drawdowns they claim to occur. Even so, since the extent of aquifer drawdown in the Simsboro goes to a factor to be considered in this permitting proceeding (namely compliance with the desired future conditions), Requesters' evidence regarding potential drawdowns must be taken as true.

is regarded as having absolute title to the water in place beneath his or her land, and that each owner of land owns separately, distinctly and exclusively all of the water beneath his or her land, subject to the law of capture and state regulation. Founded in this principle, the Court went on to conclude that *landowners* have a constitutionally compensable interest in groundwater,[13] and that "one purpose of groundwater regulation is to afford each *owner of water* in a common, subsurface reservoir a fair share."[14] Given this protection, Requesters need not demonstrate the ownership of a well, or an intent to drill a well, in order to demonstrate a legally protected interest.[15]

It is undisputed that Requesters own real property overlying the Simsboro aquifer from which End Op seeks authorization to pump 56,000 acre-feet per year,[16] or 18.2 billion gallons per year. It is further undisputed that groundwater modeling performed by the District itself indicates that this massive amount of pumping will result in a drawdown of water within the Simsboro Aquifer extending to Requesters' properties.[17] This drawdown of water beneath Requesters' properties constitutes an "injury in fact." Requesters' interest in the groundwater beneath their properties will be concretely impacted by the anticipated drawdowns, and such drawdowns will only occur in the particular area impacted by the proposed groundwater withdrawal.

In argument to the ALJ, End Op alleged that Requesters' groundwater interest is one common to the general public. This argument ignores the particularized predictions of drawdown within the Simsboro Aquifer which Requesters presented. While it is true that

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[13] *Day* at 838.
[14] *Day* at 840 (emphasis added).
[15] End Op also alleges that Environmental Stewardship is precluded from drilling a well pursuant to District Rules 3.1 and 8.2. While ownership of a well is not necessary to demonstrate a legally protected interest, Environmental Stewardship would note that End Op's allegation is incorrect. Rule 3.1, relied upon by End Op, would simply prevent Environmental Stewardship from drilling a well exempt from permitting – it does not prohibit the drilling of a well by obtaining an operating permit from the District. Rule 8.2 establishes buffer zones for a non-exempt well of 100 feet from the property line, and 1,500 feet from the nearest well in the Simsboro. The Environmental Stewardship property is over 1,500 feet from the nearest well in the Simsboro, so the only legal impediment to the drilling of a well into the Simsboro by Environmental Stewardship is the 100 foot property-line buffer. This does not constitute a prohibition, however, as District Rule 8.3 provides a variance process by which the District may waive this required buffer. Thus, it is not true that Environmental Stewardship is "precluded" from drilling a Simsboro well on its property.
[16] End Op Ex. 3, p. 1.
[17] Exhibit ES-4.

groundwater beneath many other properties in the District will also experience drawdown in the Simsboro, this is a function of the massive quantity of water End Op proposes to withdraw rather than an indication that Requesters' interests are common with the general public. The mere fact that an interest is shared with others does not render that interest "common with the general public" so as to preclude an injury in fact for purposes of standing. As the Texas Supreme Court has noted, in approvingly quoting the United States Supreme Court, "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody . . . where a harm is concrete, though widely shared, the Court has found injury in fact."[18] In this manner, the Texas Supreme Court has soundly rejected End Op's contention that an interest is common with the general public merely because it is shared by many others. While some drawdown in the Simsboro may occur beneath other properties, Requesters' interests are distinguishable by virtue of the demonstrated and acknowledged potential of aquifer drawdowns within the Simsboro.

In addition to such legal considerations, the ALJ's decision should be reversed due to practical considerations. If the ALJ's reasoning is allowed to stand, then the District has created an incentive for every landowner to drill a well and pump groundwater in order to protect their interest in that groundwater. Importantly, the ALJ's decision punishes landowners who may choose to conserve groundwater, since the ALJ has effectively held that a landowner who wishes to use or waste their groundwater has a protected interest, while a landowner who opts to limit their use of groundwater has no right to protect their groundwater interests. The District should not adopt the ALJ's approach that rewards needless or wasteful pumping.

V. No hearing occurred with regard to the issues raised by Requesters.

Requesters were particularly harmed by the ALJ's denial of party status since no

[18] *Andrade v. NAACP of Austin,* 345 S.W.3d 1, 7-8 (Tex. 2010) quoting approvingly *United Statesv. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 686-688 (1973) and *FEC v. Akins,* 524 U.S. 11, 24 (1998).

hearing meaningfully occurred on the issues of greatest interest to Requesters.

Subsequent to the ALJ's denial of Requesters' petitions for party status, Aqua and End Op reached a settlement agreement by which End Op agreed to the incorporation of certain conditions into the permit and Aqua agreed to limit the evidentiary hearing to only issues of the impact of End Op's proposed pumping on Aqua's operations. The evidentiary hearing consisted of nothing more than a show of the parties presenting evidence to support conditions that End Op had already agreed to.

Thus, no evidentiary hearing case was held to address disputed issues of concern to Requesters such as the impact of End Op's pumping on Requesters' wells, whether the proposed permits are consistent with the District's desired future conditions, or whether the proposed permits are consistent with the District's management plan.

VI. Prayer

For these reasons, Requesters respectfully pray:

(1) That the ALJ's decision denying Requesters' requests for party status be reversed;
(2) That End Op's application be remanded to SOAH for a hearing on the merits;
(3) The Requesters be granted all other relief to which they may show themselves justly entitled.

Respecfully Submitted,

/s
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ON BEHALF OF ENVIRONMENTAL STEWARDSHIP

(signing with permission on behalf of ANDREW MEYER, BETTE BROWN, AND DARWYN HANNA)