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Hear Me Now or Hear Me Later
A Review of Standing
Before the Agency and Courts

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I. Introduction

What is the current state of the law regarding the rights of interested persons to participate in a contested administrative case and related judicial proceedings? How do those rights differ before the agency and the court? What are the consequences of opposing such participation? How can current law and practice be improved to ensure efficient proceedings for agencies and applicants while adequately protecting the public interest? This paper will provide an overview of the law of standing in the administrative context.

In January 2018, a state district court in Bastrop County, Texas, reversed a decision by the Lost Pines Groundwater Conservation District to deny requests for party status filed in 2013 by two individuals and an environmental interest organization in a contested case proceeding before the district. The case arose from an application filed by a private entity in July 2007 for permits to withdraw groundwater within the District for municipal use. The District granted party status to one entity without objection from the applicant. The other requests for party status were denied by the District based on the findings of an administrative law judge (ALJ) from the State Office of Administrative Hearings (SOAH) following a one-day evidentiary hearing convened for the limited purpose of determining whether the plaintiffs could demonstrate an actual injury sufficient to confer standing to protest the application. In accordance with the recommendation of the ALJ, the District issued its final order denying party status in January 2015. A series of lawsuits followed, leading to the district court decision in 2018.

The district court's decision was appealed by the applicant and is now pending in the Third Court of Appeals in Austin. The availability of a contested hearing record on the facts relating to standing may better inform the courts in resolving that issue. It may also allow final resolution of the case without further proceedings. However, if the appellate courts affirm the trial court, the applicant may be required to repeat the contested case hearing, with five years of effort and no doubt many thousands of dollars of expense largely wasted. Whatever the ultimate decision may be, the initially unsuccessful applicants for party status will have also incurred five years of effort and expense unrelated to determining the merits of the application. Who has

[1] The opinions and views expressed in this paper are solely those of the author and do not represent any position of the San Antonio Water System.

benefitted from this process? One is reminded of a scene in Sydney Pollack's 1985 classic, "Out of Africa." A lion in search of dinner has entered the camp of the heroine Karen and mauled an ox from a wagon team. Karen chases the lion from the camp with a whip, passing through a grove of thorn bushes in the process. While treating her wounds, her companion observes:

> "Msabu is bleeding. She does not have this ox. This lion is hungry. He does not have this ox. This wagon is heavy. It doesn't have this ox. God is happy, msabu. He plays with us."

II. Standing

What do we mean by "standing"? Interestingly enough, the word is used somewhat loosely in legal discourse. As recently as 1968, the Revised Fourth Edition of Black's Law Dictionary defined "standing" as follows:

> "One's place in the community in the estimation of others; his relative position and social, commercial, or moral relations; his repute, grade, or rank."[2]

Fewer than forty years later, the 1999 Seventh Edition had a very different definition with illuminating scholarly commentary:

> "A party's right to make a legal claim or seek judicial enforcement of a duty or right…
>
> > 'Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing' *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703 (1962) (Brennan, J.).
> >
> > 'The word *standing* is rather recent in the basic judicial vocabulary and does not appear to have been commonly used until the middle of our own century. No authority that I have found introduces the term with proper explanations and apologies and announces that henceforth *standing* should be used to describe who may be heard by a judge. Nor was there any sudden adoption by tacit consent. The word appears here and there, spreading very gradually with no discernible

[2] Black's Law Dictionary, Revised Fourth Edition, West Publishing Co. 1968

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