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Environmental Law

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ENVIRONMENTAL LAW

Scott D. Deatherage*

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I. INTRODUCTION

ENVIRONMENTAL litigation over the large number of federal and state environmental statutes, common law claims, and contract claims continues to present interesting issues for attorneys and judges. During the Survey period, numerous cases were decided by courts applying state and federal environmental laws in disputes between parties in Texas. Some of the most interesting cases involve the question of when a party has the right to challenge a governmental or private action that affects the environment. Not all parties have the ability to challenge actions they feel are adversely impacting the environment. Courts at the federal level and state level have been addressing the question of standing since the first environmental statutes were passed in the 1970s. In several Texas cases, the courts considered which parties have standing in several contexts.

The *Aviall* series of decisions, a series of cases including a case decided during the Survey period, following the decision in the U.S. Supreme Court a few years ago under the federal Comprehensive Environmental

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Response, Compensation and Liability Act, addressed several state law claims including the elements of a contribution claim under the Texas Solid Waste Disposal Act.¹ The court also considered other claims under the Texas Water Code, contract law, and quantum meruit.

The cases heard by Texas courts provide insights into the ability to challenge environmental actions or to recover costs for the impact of environmental conditions.

II. CONTRIBUTION CLAIMS FOR COSTS INCURRED TO CLEANUP CONTAMINATED PROPERTIES UNDER TEXAS LAW

The litigation between Aviall Services, Inc. (“Aviall”) and Cooper Industries, LLC (“Cooper”) over contamination of four sites in the Dallas area has gone on for many years, and one issue in the litigation reached the U.S. Supreme Court.² The litigation set precedent for claims under the federal Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). The case reviewed for the Survey period addressed claims brought by Aviall against Cooper under state as opposed to federal claims. Aviall brought claims under the Texas Solid Waste Disposal Act (“TSWDA”), the Texas Water Code, contract law, and quantum meruit.³ The issues raised in this case are an important aspect of the ability to recover costs incurred for cleaning up contaminated sites.

A. CLAIM UNDER THE TEXAS SOLID WASTE DISPOSAL ACT

The main claim arose under a private right of action provision under the TSWDA.⁴ While other claims were asserted, the claim of most significance was the TSWDA cost recovery action. There have not been many cases in Texas reviewing the elements of this statutory cause of action.

Often in environmental litigation, the first defense is the assertion of the running of the statute of limitations. In this case, Cooper argued that Aviall’s claims were barred by the statute of limitations, and that a two-year statute of limitations applied.⁵ Cooper argued that since Aviall bought Cooper’s business and the employees of Cooper became the employees of Aviall, knowledge of those former Cooper employees became knowledge of Aviall.⁶ The sale closed in 1981 and Cooper therefore argued the statute of limitations expired before the parties entered into the statute of limitations tolling agreement in 1996.⁷

1. See, e.g., *Aviall Servs., Inc. v. Cooper Indus. LLC*, 572 F. Supp. 2d 676, 676 (N.D. Tex. 2008).

2. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 157 (2004).

3. *Aviall Servs., Inc. v. Cooper Indus., LLC*, 694 F. Supp. 2d 567, 567 (N.D. Tex. 2010).

4. *Id.* at 573.

5. *Id.* at 576.

6. *Id.*

7. *Id.*

The court concluded that the 1997 amendment to the TSWDA created a claim for parties engaged in remediation under an agreement (now known as the Texas Commission on Environmental Quality (TCEQ)), rather than make the party wait until an administrative or judicial order is issued commanding the plaintiff to take action and remediate a contaminated site. The court concluded that the cause of action did not exist until 1997 when the TSWDA was amended and that its application to a release of contaminants prior to that time frame did not violate any constitutional bar against retroactive claims.⁸ The court ruled that remedial statutes are applied retroactively under Texas case law.⁹ In order to determine whether Aviall had a claim, the court turned to how “remedial statutes” are defined and whether the TSWDA is a remedial statute. The court reviewed the legislature’s stated purpose of the TSWDA to “safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste.”¹⁰ The court concluded that the statute is remedial, citing other Texas cases reaching the same conclusion.¹¹

An exception applies if the retroactive application of the statute would deny the defendant of a vested right. The court held, however, that the 1997 amendment created the cause of action, so the limitations defense was not voided.¹² Therefore, the retroactive application of the statute was not unconstitutional.¹³

The review of the elements of a claim under this provision of the TSWDA, even if by a federal court rather than a Texas court, provides an interesting analysis for environmental practitioners.¹⁴ The court identified the elements of Aviall’s claim under the TSWDA against Cooper. These elements are critical for parties seeking to recover environmental cleanup costs, as well as those who are defending against such claims.¹⁵ The elements outlined in the case were as follows:

- (1) [Cooper] is a “person responsible for solid waste” as defined in [Tex. Health & Safety Code Ann. §] 361.271; (2) the TNRCC approved [Aviall’s] removal or remedial action; (3) the action was necessary to address a release or threatened release of solid waste; (4) the costs of the action were reasonable and necessary; and (5) [Aviall] made reasonable attempts to notify [Cooper] of both the release

8. *Id.* at 577.

9. *Id.* at 579 (citing *Ex parte* Abell, 613 S.W.2d 255, 258 (Tex. 1981); *Phil H. Pierce Co. v. Watkins*, 263 S.W. 905, 907 (Tex. 1924); *In re* Tex. Dep’t of Protective & Regulatory Servs., 71 S.W.3d 446, 450 (Tex. App.—Fort Worth 2002, orig. proceeding) (per curiam); *Lukes v. Emps. Ret. Sys. of Tex.*, 59 S.W.3d 838, 842 (Tex. App.—Austin 2001, no pet.)).

10. *Id.* (quoting TEX. HEALTH & SAFETY CODE ANN. § 364.002(a) (West 2001)).

11. *Id.* (citing *R.R. Street & Co. v. Pilgrim Enters., Inc.*, 81 S.W.3d 276, 291 (Tex. App.—Houston [1st Dist.] 2001, pet. granted) (“R.R. Street I”) (“Because it is a remedial statute, we must give SWDA a liberal construction, rather than one that would defeat the very purpose for which it was enacted.”)).

12. *Id.* at 581.

13. *Id.* at 580.

14. *Id.* at 574.

15. *Id.*

and [Aviall's] intent to take steps to eliminate the release.¹⁶

Cooper challenged Aviall's claim under the TSWDA asserting that Aviall had not made reasonable attempts to notify Cooper of its plans to perform remediation at the properties before commencing the remediation. The court ruled that Aviall had given notice, and that a jury would have to determine whether that notice was reasonable, thus, a summary judgment on the point was not appropriate.¹⁷

Cooper also argued that Aviall could not recover for the remediation of contamination caused by the release of non-hazardous wastes. Recovery may be made for a "removal or remedial action," as defined by applying the terms to "hazardous waste."¹⁸ However, the federal district court believed that the Texas Supreme Court has ruled that parties may recover under the private right of action provision of the TSWDA for removal or remedial actions to address contamination caused by solid waste.¹⁹

The court reviewed sections of the TSWDA. The focus was on the definitions of "remedial action" and "removal." The court concluded that a "remedial action" can only address "hazardous waste" releases.²⁰ The court concluded that the term "removal" was not limited to actions that address a release of hazardous waste.²¹ The court noted that many of the

16. *Id.* (citing *R.R. Street & Co.*, 166 S.W.3d at 240 (citing TEX. HEALTH & SAFETY CODE ANN. § 361.344) (West 2005)).

17. *Id.* at 581.

18. *Id.* at 582.

19. *Id.*

20. *Id.* at 584 (citing TEX. HEALTH & SAFETY CODE ANN. § 361.003(29) (West 1997)). Section 361.003(29) states "Remedial action" means an action consistent with a permanent remedy taken instead of or in addition to a removal action in the event of a release or threatened release of a hazardous waste into the environment to prevent or minimize the release of hazardous waste so that the hazardous waste does not migrate to cause an imminent and substantial danger to present or future public health and safety or the environment. The term includes:

(A) actions at the location of the release, including storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous waste or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive waste, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, on-site treatment or incineration, provision of alternate water supplies, and any monitoring reasonably required to assure that those actions protect the public health and safety or the environment; and

(B) the costs of permanent relocation of residents, businesses, and community facilities if the administrator of the United States Environmental Protection Agency or the executive director determines that, alone or in combination with other measures, the relocation:

(i) is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition off-site of hazardous waste; or

(ii) may otherwise be necessary to protect the public health or safety.")

21. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 361.003(30) (West 1997), "Removal" includes:

(A) cleaning up or removing released hazardous waste from the environment;

(B) taking necessary action in the event of the threat of release of hazardous waste into the environment;

actions described in the definition of “removal” were not limited to actions relating to hazardous waste.²²

The court also noted that the issuance of an administrative order by the TCEQ could result in cleanup of a non-hazardous solid waste, thus allowing a private right of action for non-hazardous solid waste. The court was unwilling to grant Cooper’s summary judgment on the ground that the cause of action did not apply to non-hazardous solid waste.²³

The next element of the claim by Aviall was that the costs expended to address the release of the solid waste were reasonable and necessary. Aviall sought summary judgment arguing the approval by the TCEQ (then known as the Texas Natural Resource Conservation Commission) established the costs were reasonable and necessary.²⁴ The court turned to the Texas Supreme Court’s review of these issues in *RR Street I*. On the one hand, the holding by the Texas Supreme Court appears to be that agency approval is sufficient to show that costs are reasonable and necessary.²⁵ In *R.R. Street I*, the federal district court noted that the Texas Supreme Court also held that “reasonable and necessary” was established by “showing that costs are (1) incurred in response to a threat to human health or the environment, and (2) necessary to address that threat.”²⁶ The district court noted that the Northern District of Texas held in a separate decision that agency approval alone was not sufficient to meet this test.²⁷ The district court concluded that Cooper has put forth evidence that some of the costs were not reasonable and that Aviall had not proven that all costs were reasonable, and thus a summary judgment was not appropriate.²⁸

The district court then turned to the question of Cooper’s liability. The court went through the elements of the case. First, the court concluded that Cooper was a person responsible for solid waste because Cooper owned the property at the time that disposal of waste occurred.²⁹ Sec-

(C) taking necessary action to monitor, assess, and evaluate the release or threat of release of hazardous waste;

(D) disposing of removed material;

(E) erecting a security fence or other measure to limit access;

(F) providing alternate water supplies, temporary evacuation, and housing for threatened individuals not otherwise provided for;

(G) acting under Section 104(b) of the environmental response law;

(H) providing emergency assistance under the federal Disaster Relief Act of 1974 (42 U.S.C. Section 5121 et seq.); or

(I) taking any other necessary action to prevent, minimize, or mitigate damage to the public health and welfare or the environment that may otherwise result from a release or threat of release.).

22. *Id.*

23. *Id.* at 584–86.

24. *Id.* at 585.

25. *R.R. Street I*, 81 S.W.3d at 302.

26. *Id.* at 301.

27. *Aviall Servs., Inc. v. Cooper Indus. LLC*, 694 F. Supp. 2d 567, 585 (citing *Am. Int’l Specialty Lines Ins. Co. v. 7-Eleven, Inc.*, No. 3:08-CV-807-M, 2010 WL 184444, at *5 (N.D. Tex. Jan. 19, 2010)).

28. *Id.*

29. *Id.* at 586.

ond, the court held that the agency approved the actions taken by Aviall.³⁰ Third, the court found that Aviall showed that its actions were necessary to address the release of solid waste.³¹ Fourth, the court held that at least some of Aviall's costs were reasonable and necessary.³² Fifth, the court ruled that Aviall made reasonable efforts to notify Cooper of its actions prior to conducting them.³³ Sixth, the court concluded that at least some of Aviall's costs were necessary to protect public health, meaning they met the definition of "removal" under the TSWDA.³⁴ As a result of meeting these elements, the court granted partial summary judgment to Aviall as to Cooper's liability under the TSWDA.³⁵

Aviall also sought attorneys' fees in the case. The district court considered both the language of the TSWDA that parties may recover other costs and the evaluation of the ability to recover costs under CERCLA, the federal statute allowing private rights of action for costs incurred in addressing hazardous substances releases.³⁶ The court ruled that Aviall may recover certain attorneys' fees for work related to the site, but not for litigation expenses.³⁷

B. CONTRIBUTION UNDER THE TEXAS WATER CODE

Aviall also sought recovery under Texas Water Code section 26.3513. This section allows parties to seek contribution where storage tanks are owned by multiple parties, or there is more than one petroleum storage tank, or a combination of both cases.³⁸ The court analyzed Aviall's arguments and the statutory language, and concluded that the language applied to current owners, not past owners. The court granted summary judgment to Cooper and dismissed the claim under the Texas Water Code.³⁹

This opinion in the *Aviall* litigation sheds further light on the contribution action provided under the TSWDA. Though the provision has been in existence for many years, the number of cases interpreting this right of action is limited. The Texas Supreme Court has considered the aspects of the claim in two cases involving the same parties. The elements of the cause of action are, at best, inconsistent. The federal district court considered the issue of whether claims can be brought for releases of solid waste or were limited only to hazardous waste. The district court also considered the issue of whether agency approval is all that is needed to meet the

30. *Id.*

31. *Id.* at 587.

32. *Id.* at 588.

33. *Id.* at 586.

34. *Id.*

35. *Id.*

36. *See id.* at 587.

37. *Id.* at 586.

38. TEX. WATER CODE ANN. § 26.3513 (West 2010).

39. *See Aviall Servs., Inc.*, 694 F. Supp. at 588–89.

requirement that costs for addressing environmental conditions are reasonable and necessary. This cause of action will likely be reviewed again in future litigation over the costs to clean up contaminated properties.

III. STANDING TO CHALLENGE ACTIONS THAT MAY IMPACT THE ENVIRONMENT

The question presented is to what extent a party should have the right to participate as an affected person to determine whether it *could be* adversely affected, or stated in the alternative, to what extent the evidentiary question of whether a party is adversely affected should be considered prior to that party being allowed to participate in the proceeding. The courts allowed the TCEQ to make this determination at the earlier stage prior to being allowed to be playing a role in the proceeding. The agency's approach and the court's approval of that approach may serve to limit participation in permit proceedings at the TCEQ.

A. ENVIRONMENTAL HARM AND ASSOCIATIONAL STANDING UNDER TEXAS STATUTES

The assessment of whether a party has standing to challenge governmental action on environmental protection grounds has evolved since federal and state environmental statutes were first passed in the 1920s. At the federal level, courts have consistently recognized that federal statutes grant standing to citizen suits raised by parties with more general environmental concerns.⁴⁰ At the state level, however, where Texas environmental statutes lack similar citizen suit provisions, traditional notions of standing make it more difficult to file suit where direct injury to property or persons are not at issue.⁴¹ A decision issued during the Survey period shines new light on the difficulties faced by citizen groups advancing claims alleging general environmental harms.

The federal jurisprudence on standing begins with a review of the Constitution's case-or-controversy limitation in Article III Section 2 on federal judicial authority. This leads to the analysis of the standing of a party to bring a claim in federal court.⁴² In *Lujan v. Defenders of Wildlife*,⁴³ the Supreme Court held that to satisfy this standing requirement under Article III, the plaintiff in a case must demonstrate three things: (1) it has "suffered an 'injury in fact' which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical'"; (2) "the injury . . . has to be fairly . . . trace[able] to the challenged action of the defendant . . ."; and (3) "it must be 'likely,' as opposed to merely 'specu-

40. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 167 (2007).

41. See, e.g., *City of Waco v. Tex. Comm'n on Envtl. Quality*, No. 03-09-00005-CV, 2011 WL 2437669, at *1 (Tex. App.—Austin June 17, 2011, no pet.).

42. *Friends of the Earth, Inc.*, 528 U.S. at 168.

43. 504 U.S. 555, 560–61 (1992).

lative,³ that the injury will be redressed by a favorable decision.”⁴⁴ For an association, it must have members who have standing to sue, the issues in the case must be germane to the purpose of the organization, and the claim and relief cannot require the participation of the individual members as individualized claims.⁴⁵

What must be kept in mind is that many federal environmental statutes contain “citizen suit” provisions. These provisions specifically grant a citizen, a group of citizens, or an association the right to bring suit to challenge certain actions of private or governmental parties.⁴⁶ One of the more well known provisions is the citizen suit under the federal Clean Water Act, which has resulted in significant litigation and many federal court decisions that have interpreted standing and the scope of citizen suit provisions.⁴⁷ The Clean Water Act citizen suit provision begins with a statement that “any citizen may commence a civil action on his own behalf” and cites the particular governmental or private action or inaction that the citizen may challenge in court under this provision.⁴⁸ Thus, the citizen suit provision provides under federal law, and some state laws, that a citizen may act in a manner similar to a “private attorney general” role where the federal government is not acting against a private party or where the government is not fulfilling its statutory duty.⁴⁹ These types of claims extend the ability and standing of private citizens to use the courts to seek redress for environmental injury or enforcement of federal environmental laws.

These provisions may not exist in state laws, and are not typically permitted under Texas environmental statutes. In *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, the Austin Court of Appeals addressed the question of whether the Save Our Springs Alliance (S.O.S.) had sufficient associational standing for the trial court to hear its claims.⁵⁰ S.O.S. was a non-profit corporation whose mission was to protect the Barton Spring segment of the Edwards Aquifer.⁵¹ The organization filed suit against the City of Dripping Springs and two developers challenging the legitimacy of separate (but largely identical) development agreements between the city and each of the developers.⁵² An essential element of the S.O.S. challenge was its allegation that the proposed developments would be located in the Edwards Aquifer “recharge zone,” and that the development authorized by the development agreements would result in an increase in pollution in the Edwards Aquifer and Barton Springs.⁵³

44. *Id.*

45. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

46. *See Friends of the Earth, Inc.*, 528 U.S. at 168.

47. 33 U.S.C. § 1365(a) (2010).

48. *Id.*

49. *Id.*

50. 304 S.W.3d 871, 877–78 (Tex. App.—Austin 2010, pet. denied).

51. *Id.* at 876.

52. *Id.*

53. *Id.* at 879. More substantively, S.O.S. challenged the Development Agreements on the grounds that they “violate[d] the Texas Constitution by impinging on the right of

The district court granted the defendants' "pleas to the jurisdiction" and dismissed the S.O.S. challenge for lack of standing.⁵⁴

Hearing the case on appeal, the Austin Court of Appeals agreed that the district court lacked subject-matter jurisdiction to hear the challenge because S.O.S. lacked associational standing to challenge the Development Agreements on behalf of its members.⁵⁵ It framed the general test for standing to be an assessment of whether there is a real controversy between the parties, focusing on the question of "who may bring a lawsuit."⁵⁶ Under this assessment, S.O.S. would have associational standing where members of the organization would otherwise have standing to sue in their own right, the interests the organization seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.⁵⁷ The Texas test is the same as the federal test developed by the U.S. Supreme Court and discussed above.

For S.O.S. and other organizations basing claims on generalized environmental concerns under Texas law, the first prong of this analysis can be especially problematic. The first prong provides that an organization will have standing if one of its members would have standing individually.⁵⁸ Here, the Austin Court of Appeals looked to the three-part test for individual standing set out by the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*, which requires that (1) the plaintiff suffered an "injury in fact"—an invasion of a legally protected interest that is concrete and particularized, and actual or imminent rather than conjectural or hypothetical, (2) the injury is fairly traceable to the challenged action of the defendant, and (3) it is likely that the injury will be redressed by a favorable decision.⁵⁹

The requirement of an "injury in fact" was central to the Court's determination in *Save Our Springs*. For purposes of the present analysis, the most notable of the various injuries alleged by S.O.S. as evidence of its associational standing to challenge the Development Agreements was its claim that increased pollution in the aquifer would result in injury of

local self-government, impairing the preservation of a republican form of government, and contracting away legislative powers," and on the grounds that the City of Dripping Springs violated the Open Meetings Act in the scope of its public notice of meetings related to consideration of the Development Agreements. *Id.* at 877.

54. *Id.* at 876. The trial court also granted summary judgment to defendants on the S.O.S. Open Meetings Act claims. *Id.* The Austin Court of Appeals affirmed this decision, holding that the notices met the statutory requirements of section 551.041 of the Texas Government Code, specifically finding that the notices stated (1) the parties involved, (2) the type of agreement at issue, (3) that extraterritorial jurisdiction would be impacted, and (4) that action might be taken at the meeting to approve the agreements. *See id.* at 889–90.

55. *See id.* at 877–78 (noting that "standing is a component of subject-matter jurisdiction," which a plaintiff must establish before a court may decide the merits of the plaintiff's claims).

56. *See id.* at 878 (emphasis added).

57. *Id.* (citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993)).

58. *Id.*

59. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

"members who enjoy Barton Springs pool and its surroundings for its recreational, scenic, or scientific value."⁶⁰ The court of appeals roundly rejected the indirect environmental injuries S.O.S. offered as a basis for standing under Texas law, noting that the cases S.O.S. cited recognized "environmental harm" as a basis for standing for plaintiffs whose own property would be affected by the challenged actions.⁶¹ It took special issue with the organization's reading of *Texas Rivers Protection Association v. Texas Natural Resource Conservation Commission*,⁶² a decision S.O.S. cited as a basis for finding recreational and environmental harm as sufficient injury to establish standing.⁶³ The court clarified that while the *Texas Rivers* court did recognize that "environmental harm *may* be a cognizable injury for purposes of standing," the case "*does not* stand for the proposition that an allegation of any type of recreational or environmental impact, *by itself*, constitutes an injury in fact sufficient to confer standing."⁶⁴ Ultimately, the court reaffirmed that under Texas law, injury to environmental, scientific, or recreational interests will not confer standing without some interest in the plaintiff's own property making the injury "sufficiently particularized" to distinguish it from harm experienced by the general public.⁶⁵

The organization's arguments resting on federal case law were rejected by the court of appeals as well.⁶⁶ Perhaps recognizing the difficulty it would face in proving standing under state law without a property interest in Barton Springs, S.O.S. cited various federal cases recognizing generalized environmental harm as a cognizable injury for purposes of standing.⁶⁷ The court acknowledged that federal courts had found standing based on harm to "aesthetic and recreational values," even when the plaintiff did not possess a property right where the alleged environmental harm occurred.⁶⁸

60. *Id.* S.O.S. also alleged that: members living near the land subject to the Development Agreement were concerned about pollution of their well-water; members who are residents of Dripping Springs suggested the Development Agreements "injured their procedural interests in using democratic means to prevent development activities that would further pollute Barton Springs; . . . members who pay property taxes to the City" were injured by the expenditure of public funds under the Development Agreements; and members living near the proposed developments were injured due to increased lights, increased road traffic, and decreased property values.

61. *Id.* at 879 (emphasis added). The cases cited by S.O.S. included *Lake Medina Conservation Soc'y v. Tex. Natural Res. Conservation Comm'n*, 980 S.W.2d 511 (Tex. App.—Austin 1998, pet. denied), where an organization had standing to sue on behalf of owners of waterfront property and waterfront businesses; and *Heat Energy Advanced Tech., Inc. v. W. Dallas Coal. for Envtl. Justice*, 962 S.W.2d 288 (Tex. App.—Austin 1998, pet. denied), where an organization had standing to challenge a permit application based upon a member's proximity to the proposed facility.

62. 910 S.W.2d 147, 147 (Tex. App.—Austin 1995, writ denied).

63. *Save Our Springs*, 304 S.W.3d at 879.

64. *Id.* at 879–80 (emphasis added).

65. *See id.* at 880.

66. *Id.*

67. *See id.*

68. *See id.* Of the cases presumably cited by S.O.S., the court specifically notes *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *Friends of the Earth, Inc. v. Laidlaw Envtl.*

The court concluded, however, that the federal cases *S.O.S.* cited to support its claim of standing in state court involved the application of federal environmental statutes.⁶⁹ These statutes not only prohibit the type of conduct the plaintiffs challenged in each case, they also provide for a private right of action allowing any “citizen” to bring a challenge to enforce the environmental standard in question.⁷⁰ These are the citizen suits discussed above. The court concluded that a plaintiff citing injury to environmental, scientific, or recreational interests under federal environmental statutes possesses a “legally protected interest for purposes of standing” because the statute grants a private right of action to protect those same interests.⁷¹

This case presents interesting issues and comparisons of Texas environmental statutes and federal environmental statutes that contain citizen suit provisions. The standing for plaintiffs bringing a citizen suit may be somewhat loosened. However, over the last few years, the U.S. Supreme Court has begun to take a harder look at these cases and appears to be tightening the standing requirements, requiring that associations have plaintiffs that have more concrete injuries that address the constitutional standing requirements and the elements of standing under the federal test proscribed by the Supreme Court. The state courts may be moving toward a tighter standard for standing as well. This case may indicate a trend to closer review of the injury a party or its association is asserting it will suffer without being allowed to participate in a legal proceeding.

B. CORPORATE INTERVENTION IN LITIGATION OVER ENVIRONMENTAL IMPACTS TO PROTECT PROPERTY RIGHTS

In another case, the issue of the rights of several business related associations and individual companies attempting to intervene in an environmental suit over the impact of water management raised interesting issues and outcomes with respect to the ability of these organizations to participate in litigation to protect their property rights and other concerns.

The case, *Aransas Project v. Shaw*, was brought to protect whooping cranes and other species under the Endangered Species Act.⁷² The Aransas Project is a non-profit corporation that challenged the TCEQ and the South Texas Watermaster for their management of water entering the San Antonio Bay ecosystem, claiming the reduced water flow resulted in increased salinity and other impacts that adversely affected the whooping

Servs., Inc., 528 U.S. 167 (2000) as the basis for its summary of the test of standing under federal law.

69. *Id.* at 880–81.

70. *Id.* at 880.

71. *See id.* at 881. The Court acknowledges two Texas cases where the court recognized that “harm for purposes of standing may be ‘economic, recreational, or environmental,’” but it dismissed both cases as “connected to federal case law in which a federal statute protected such interests.” *Id.* at 881 n.6.

72. No. C-10-75, 2010 U.S. Dist. LEXIS 59965, at *1 (S.D. Tex. June 17, 2010).

crane.⁷³

The issue before the federal district court was the right of business associations and individual business entities to intervene in the suit to protect their interests.⁷⁴ The organization's concern was that if more water was released to the bay, the vested water rights of the members of the associations or the entities would be reduced, affecting the parties' legal rights.⁷⁵ The parties that sought to intervene were the Texas Chemical Council, Union Carbide Corporation, the Texas Farm Bureau and American Farm Bureau Federation, the San Antonio Water System, and CPS Energy.

The test the court applied was the ability to intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure; whether the party has "a direct, substantial, legally protectable interest in the action, meaning that the interest be one which the substantive law recognizes as belonging to or being owned by the applicant."⁷⁶ The party must also show that other parties will not adequately represent their interests.⁷⁷

With respect to the Texas Chemical Council, the court noted the 66,000 acre feet held by specific members. The court concluded based on Texas precedent that although water rights are the property of the state, the permit to use the water is considered a vested property right that may be impaired by the outcome of the lawsuit.⁷⁸

The court also considered the ability of the governmental defendants to protect the private party rights. The court considered Fifth Circuit precedent and concluded that the governmental agencies would follow the policy interests of the state, but would not necessarily act to protect the interests of the Texas Chemical Council. Thus, the court allowed the association to intervene to protect its members' interests.⁷⁹

The court then reviewed the other parties moving for intervention. The court concluded that they met most of the elements for a right of intervention, including whether the lawsuit would affect the water rights of the parties or its members. The issue was whether their interests would be represented by other parties in the litigation. The court con-

73. *See id.* at *4-5.

74. *Id.*

75. *Id.* at *9.

76. *Id.* at *13-14 (quoting *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 250 (5th Cir. 2009) (internal citations and quotation marks omitted)). "[I]t is plain that something more than an economic interest is necessary." *New Orleans Public Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir. 1984). The "interest" test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994).

77. *Aransas Project*, 2010 U.S. Dist. LEXIS 59965, at *22 (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). "The burden of establishing inadequate representation is on the applicant for intervention." *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996).

78. *Id.* at *14-22.

79. *See id.* at *22-30.

cluded that with the intervention of the Texas Chemical Council combined with the governmental entities, the other parties' rights and interests would be protected.⁸⁰

However, in considering the ability of the other parties to intervene not as of right but under the permissive provision of the intervention rule, the court concluded that the Texas Farm Bureau, the American Farm Bureau Federation, the San Antonio Water System, and CPS Energy could file *amicus curiae* briefs in the case and participate in that limited fashion.⁸¹

The court's review of the ability to intervene in litigation raises questions of whether parties have the right to defend their own property rights or whether the court will allow third parties to act to protect those rights. While judicial resources must be conserved and practical management of cases is necessary, the ability of third parties to address water use rights may present critical questions as to whether parties, who may be affected profoundly by litigation, must rely on other parties to address their interests. One question is what if the third parties settle with the plaintiffs and drop out of the case. Will then the other parties who sought intervention as a matter of right have another opportunity to intervene? Or will the case be too far developed for them to adequately participate at that point? Or would the courts allow such late intervention, since timely intervention is a part of the evaluation of whether parties will be allowed to intervene? These are important questions for affected parties and courts to consider in determining who may intervene in litigation that may impact multiple parties who were not the original plaintiffs or defendants in the matter.

IV. CONCLUSION

The first issue in this Survey period was the important matter of when a party can obtain contribution under Texas law for the costs of remediating contaminated properties from other parties who caused, contributed to, or were otherwise liable for all or part of the contamination. The ability to recover from these parties in many cases provides a fair apportionment of the costs among multiple liable parties. In other cases, it may allow some parties to collect all of the costs from the party or parties that caused the contamination. Thus, these are important issues for courts to work through.

The second issue arises when parties attempt to challenge environmental permits, file lawsuits, or intervene in lawsuits to protect their interests in the relevant proceedings. The question of standing or right of intervention continues to evolve under both federal and state environmental statutes, procedural rules, and constitutional rights.

80. *See id.* at *30-47.

81. *See id.* at *30-50.

The cases discussed in this Survey provide practitioners with key holdings to consider in filing, intervening, or defending claims in administrative and judicial proceedings.