APPLICATIONS OF LOWER COLORADO RIVER AUTHORITY FOR WELL REGISTRATION, OPERATING PERMITS AND TRANSPORT PERMITS FOR EIGHT WELLS IN BASTROP COUNTY FROM THE LOST PINES GROUNDWATER CONSERVATION DISTRICT	§ § § § § § § § § §	**BEFORE THE LOST PINES GROUNDWATER CONSERVATION DISTRICT**

AQUA WATER SUPPLY CORPORATION AND CITY OF ELGIN'S JOINT BRIEF ADDRESSING CERTAIN POINTS OF ERROR IN LOWER COLORADO RIVER AUTHORITY'S MOTION FOR REHEARING

TO THE BOARD OF DIRECTORS OF THE LOST PINES GROUNDWATER CONSERVATION DISTRICT:

Aqua Water Supply Corporation ("Aqua WSC") and the City of Elgin (the "City") jointly submit this brief focused on certain points of error raised in the Lower Colorado River Authority's ("LCRA's") revised motion for rehearing, and respectfully show as follows:

I. Introduction

LCRA, in nine points of error, claims that the Lost Pines Groundwater Conservation District ("District") Board of Directors' ("Board's") final decision on LCRA's applications violated the District's rules and state law. LCRA's points of error are meritless, however, and Aqua WSC and the City support the District's final decision. This brief focuses on the flaws in LCRA's Points of Error 1 and 3.

II. Point of Error 1 Misinterpreted the Texas Water Code

Texas Water Code Section 36.4165 authorizes the board of a groundwater conservation district to change a finding of fact or conclusion of law made by an Administrative Law Judge ("ALJ") if the board determines: (1) that the ALJ did not properly

apply or interpret applicable law, district rules, written policies, or prior administrative decisions; (2) that a previous administrative decision on which the ALJ relied is incorrect; or (3) that a technical error in a finding of fact should be changed. In Point of Error 1, LCRA insisted that the District's Board erred by changing the ALJs' findings of fact and conclusions of law without making an express determination that the ALJs improperly applied or interpreted the law, District rules, or written policies.[1] The Water Code does not impose such a requirement on the District's Board.

The Water Code *does* require districts to document *certain* findings and make *certain* written determinations in *other* contexts:

> Section 36.412(b) requires district boards to "make *written findings and conclusions* regarding a decision of the board on a permit or permit amendment application."[2]
>
> Section 36.1011 allows a board to adopt an emergency rule without prior notice if the board "*prepares a written statement for the reasons for its finding*."[3]
>
> Section 36.306 requires district boards to "adopt the following [rules and policies] *in writing*."[4]
>
> Section 36.416 allows districts to provide an ALJ with a "*written statement* of applicable rules or policies."[5]

Section 36.4165, however, does not contain any such requirement for a written or express determination by a district board. Rather, Section 36.4165 merely sets forth several narrow instances in which it is permissible for a board to change a finding of fact or conclusion of law. In Point of Error 1, LCRA's attempt to impose new requirements into the plain language of Section 36.4165 highlights LCRA's misinterpretation of the Water Code rather than any

[1] LCRA's Mot. for Rehearing at pp. 3-4.
[2] (emphasis added).
[3] (emphasis added).
[4] (emphasis added).
[5] (emphasis added).

error by the District.

Additionally, in Point of Error 1 LCRA complained that "the Board's addition of entirely new Findings of Fact contravenes the authority granted to the Board [by the Water Code]." Again, LCRA is attempting to impose new requirements into the language of the Water Code. Section 36.4165 simply states that a "board may change a finding of fact or conclusion of law," but does not include any limitations as to how a district board may change a finding or conclusion.[6] LCRA's position that Section 36.4165 only allows a district board to make minor changes and prohibits rewriting a finding of fact or conclusion of law in its entirety is insupportable.[7] LCRA also alleged that the District erred by declining to make a determination as to the exceptions filed by the parties, but LCRA failed to cite any rule requiring the District to make such a determination. Because Point of Error 1 ignores the plain language of the Water Code and attempts to impose LCRA's own requirements into Section 36.4165, it is without merit. On rehearing, if the District wishes to buttress its final decision against Point of Error 1, the District may consider supplementing its findings of fact or conclusions of law with one or more of the findings referenced in Section 36.4165, though such additions are not necessary.

III. Point of Error 3 Failed to Identify Any Contradiction in the District's Final Decision

In its Point of Error 3, LCRA complained that the Board's decision to limit LCRA's pumping to 8,000 acre-feet per year contradicted the finding that LCRA's proposed pumping of 25,000 acre-feet per year, in conjunction with the Special Conditions, would not have

[6] *See* Tex. Water Code § 36.4165.
[7] LCRA's Mot. for Rehearing at p. 4.

unreasonable effects.[8] But looking to the findings and ultimate decision at issue shows that LCRA's allegation of inconsistency is baseless and misrepresents the final decision. LCRA's Point of Error 3 referred to the findings set forth in Finding of Fact No. 29, which stated that "[t]he Special Conditions proposed by the GM in the Revised Draft Operating Permit…will help ensure that LCRA's proposed use will not unreasonably affect existing groundwater resources or existing permit holders."[9]

Finding No. 29 was a narrow determination addressing the potential for unreasonable effects in light of the Special Conditions. LCRA, however, misinterpreted Finding No. 29 to be a broad declaration that its proposed pumping was unobjectionable. This misinterpretation is the basis for LCRA's claim that the District has taken inconsistent positions. In reality, Finding No. 29 is wholly consistent with the District's decision to limit LCRA's pumping to 8,000 acre-feet annually.

LCRA has failed to identify any finding or conclusion indicating that the District limited LCRA's pumping due to concerns about unreasonable impacts. Looking to the District's findings, there are a myriad of reasons why the District may have limited LCRA's pumping. Because Finding No. 29 is consistent with the District's decision to issue production permits up to 8,000 acre-feet per year, and because LCRA has failed to show any actual contradiction in the District's final decision, the District need not address Point of Error 3.

[8] LCRA's Mot. for Rehearing at p. 5.
[9] Final decision at p. 56.

IV. Conclusion

Aqua WSC and the City support the District Board's final decision and offer this briefing in support of that decision.

Respectfully submitted,

LLOYD GOSSELINK ROCHELLE
& TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5800 (phone)
(512) 472-0532 (facsimile)

/s/ Michael A. Gershon
Michael A. Gershon
mgershon@lglawfirm.com
State Bar No. 24002134
James A. Muela
jmuela@lglawfirm.com
State Bar No. 24105676

ATTORNEYS FOR AQUA WATER SUPPLY CORPORATION

/s/ C. Cole Ruiz
C. Cole Ruiz
cruiz@lglawfirm.com
State Bar No. 24117420

ATTORNEY FOR CITY OF ELGIN

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2022, a true and correct copy of the foregoing document was served via email to the parties on the Service List below.

/s/ Michael A. Gershon
Michael A. Gershon

SERVICE LIST

Eric M. Allmon
Marisa Perales
Perales, Allmon & Ice, P.C.
1206 San Antonio Street
Austin, TX 78701
eallmon@lf-lawfirm.com
marisa@lf-lawfirm.com

Paul M. Terrill III
Shan S. Rutherford
Terrill & Waldrop, P.C.
810 West 10th Street
Austin, TX 78701
pterrill@terrillwaldrop.com
srutherford@terrillwaldrop.com

Lyn E. Clancy
LCRA
P.O. Box 220
Austin, TX 78703
lyn.clancy@lcra.org

Stacey V. Reese
Stacey V. Reese Law, PLLC
910 West Avenue, Suite 15
Austin, TX 78701
stacey@staceyreese.law

Gregory M. Ellis
Attorney at Law
2104 Midway Court
League City, TX 77573
greg@gmellis.law

Elvis and Roxanne Hernandez
644 Herron Trail
McDade, TX 78650
ranchozunzun@gmail.com

Natasha J. Martin
Mary A. Keeney
Hailey L. Suggs
Graves Dougherty Hearon & Moody
401 Congress Avenue, Suite 2700
Austin, TX 78701
nmartin@gdhm.com
mkeeney@gdhm.com
hsuggs@gdhm.com

Verna L. Dement
9621 N. Hwy 77
Lexington, TX 78947
verna101@yahoo.com

Donald H. Grissom
Grissom & Thompson, LLP
509 W. 12th Street
Austin, TX 78701
don@gandtlaw.com

Charles W. Carver
P.O. Box 49402
Austin, TX 78765
charles@cwcarverlaw.com

Emily W. Rogers
Douglas G. Caroom
Bickerstaff Heath Delgado Acosta LLP
3711 S. Mopac Expressway
Building One, Suite 300
Austin, TX 78746
erogers@bickerstaff.com
dcaroom@bickerstaff.com