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Sarah Loucks, District Clerk
Bastrop County, Texas
By: Krystyn Johnston, Deputy

2130-335

**Cause No. ___________**

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| **LOWER COLORADO RIVER AUTHORITY,** | § | |
| **Plaintiff,** | § | **IN THE DISTRICT COURT,** |
| | § | |
| | § | **___ JUDICIAL DISTRICT COURT** |
| **v.** | § | |
| | § | **BASTROP COUNTY, TEXAS** |
| **LOST PINES GROUNDWATER CONSERVATION DISTRICT,** | § | |
| **Defendant** | § | |

**PLAINTIFF'S ORIGINAL PETITION**

**TO THE HONORABLE COURT:**

**COMES NOW**, the Lower Colorado River Authority ("Plaintiff" or "LCRA"), and files this its Original Petition and would show the Court as follows:

## I. DISCOVERY

1. LCRA will conduct discovery under Level 3, pursuant to Rule 190.4, Texas Rules of Civil Procedure. This is an appeal of the action by the Lost Pines Groundwater Conservation District ("Defendant" or "the District") on LCRA's applications for permits to produce underground water from its groundwater rights on the Griffith League Ranch in Bastrop County. It is an administrative appeal on the record that would normally not require discovery; however, potential procedural irregularities, constitutional issues, and other issues not subject to the contested case hearing may require limited discovery.

## II. PARTIES AND SERVICE OF PROCESS

2. Plaintiff is the LCRA, a conservation and reclamation district created under the authority of Texas Constitution Article XVI, § 59 and Texas Special District Local Laws Code §§ 8503, et seq.

3. Defendant is a groundwater conservation district created under the authority of Texas Constitution Article XVI, § 59 and Texas Special District Local Laws Code §§ 8849.01, et. seq. Its boundaries include all of Bastrop and Lee counties. Process may be served on the District by service upon the District's General Manager at its office: 908 NE Loop 230, Smithville, TX 78957.

4. LCRA requests that the District file with the Court, within the time allowed for an answer or such additional time as may be allowed by the Court, the original or a certified copy of the entire record of proceedings under review. *Cf.*, Government Code § 2001.175(b).

5. Other parties to the contested case proceeding were as follows: the District's General Manager ("GM"); Aqua Water Supply Corporation; Environmental Stewardship; the City of Elgin; Recharge Water, LP; Peggy Jo and Marshall Hilburn; Elvis and Roxanne Hernandez; Vera L. Dement; Catherine and Charles L. White; and the "Brown Landowners," as identified in the Administrative Law Judges' Order No. 5. Plaintiff is providing copies of its Original Petition to all persons, or their representatives, identified as parties in proceedings below.

## III. JURISDICTION AND VENUE

6. Jurisdiction to appeal an action of the District on LCRA's permit applications is explicit under Texas Water Code § 36.251. Venue is appropriate in either Bastrop County or Lee County pursuant to that statute.

## IV. GOVERNMENTAL IMMUNITY

7. Governmental immunity is waived and consent to suit provided by Texas Water Code § 36.251.

## V. BACKGROUND AND PROCEEDINGS BELOW

8. LCRA is a regional water supplier, supplying untreated water to people, cities, businesses, farmers, and industries within its 35-county water service area.

9. In 2015, to secure additional water supplies to meet the growing demands of existing and future customers within central Texas, and to diversify and help "drought proof" its water supply, LCRA acquired groundwater rights from the 4,847-acre Griffith League Ranch in Bastrop County, owned by the Boy Scouts of America. In February 2018, LCRA filed applications with the District for eight operating permits to produce up to 25,000 acre-feet per year from the Simsboro Formation on this property. Similar to operating permits of this magnitude previously approved by the District for private entities, LCRA proposed to phase in production over time as demand for the water increased, with the production starting at 8,000 acre-feet per year, then increasing to 15,000 acre-feet per year, then the full 25,000 acre-feet per year. As with other District permits, LCRA also sought to tie its phased production to special conditions requiring monitoring of aquifer

conditions over time. LCRA also applied for transport permits to authorize transport and use of this water outside the District. (LCRA's applications for operating permits and transport permits are collectively referred to as the "Applications.") LCRA later amended its transport permit request to limit use of the groundwater to Bastrop, Lee, and Travis counties, which comprise some of the fastest growing areas in the country.

10. Following mailed and newspaper notice, the District held a public hearing on the Applications on September 26, 2018. Numerous persons made public comments objecting to issuance of the permits and filed written requests for a contested case hearing. LCRA also objected to some of the special conditions included in the General Manager's proposed draft permits included with the public notice. At the request of LCRA and others, the District contracted with the State Office of Administrative Hearings ("SOAH") to conduct a preliminary hearing, determine party status and, if necessary, conduct an evidentiary hearing on the Applications consistent with Texas Water Code § 36.416. As described above, numerous persons were recognized as affected persons and admitted as protesting parties, opposed to LCRA's Applications.

11. LCRA's Applications were fully litigated over the course of 16 months (December 2018 – June 2020), including several rounds of written discovery, multiple depositions of experts, thousands of pages of pre-filed written direct and rebuttal testimony and exhibits, and a 6-day in-person hearing before two SOAH administrative law judges ("ALJs"), Rebecca S. Smith and Ross Henderson, who applied the rules of evidence and

assessed the credibility of witnesses. The primary contested issues at the hearing were as follows:

a. Whether the proposed use of water unreasonably affects existing groundwater or surface water resources or existing permit holders (Texas Water Code § 36.113(d)(2) and District Rule 5.2.D(2));[1]

b. Whether the proposed use of water is dedicated to any beneficial use (Texas Water Code § 36.113(d)(3) and District Rule 5.2.D(3));

c. Whether the proposed use is consistent with the District's approved management plan (Texas Water Code § 36.113(d)(4) and District Rule 5.2.D(4));

d. Whether various special conditions proposed in the General Manager's (GM) draft operating and transport permits should be modified (District Rule 5.2.D(9) and District Rule 5.3);

e. Whether LCRA should be required to develop a "mitigation fund" to compensate other property owners for impacts of production under the Applications;

f. Whether a Monitoring Well Agreement should be required of LCRA and, if so, whether it should include monitoring the impacts of groundwater production (by LCRA and others) on both groundwater and surface water resources;

[1] The citations to the District Rules are to the Amended April 20, 2016 Rules of the Lost Pines Groundwater Conservation District. These rules were in effect when LCRA filed its Applications and are applicable to LCRA's Applications.

g. Whether granting the Applications is consistent with the District's duty to manage total production of groundwater on a long-term basis to achieve the desired future condition (District Rule 5.2.D(8));

h. Whether the conditions and limitations of the draft permits will achieve water conservation, minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure, or lessen interference between wells (District Rule 5.2.D.(9)); and,

i. Whether the District has authority under the Transport Permits to prohibit as "waste" the discharge and transport of groundwater through the bed and banks of surface watercourses.

Numerous other issues were also raised that directly or indirectly bore on these key issues.

12. The ALJs considered the evidence and argument of the parties and, following extensive briefing, issued their Proposal for Decision ("PFD"), along with proposed Findings of Fact and Conclusions of Law on March 31, 2020. The PFD as issued by the ALJs, with Findings and Conclusions, is attached hereto as "Exhibit 1" and incorporated for all purposes. On July 20, 2020, the ALJs recommended minor changes to the PFD in response to the parties' exceptions to the PFD; the letter reflecting their rulings is attached hereto as "Exhibit 2" and incorporated herein for all purposes. The PFD recommended granting the Operating Permits for phased production of up to 25,000 acre-feet per year subject to conditions (many of which were identical or very similar to those included in prior phased District permits). The PFD also recommended that LCRA be

required to enter a Monitoring Well Agreement and monitor the impacts of groundwater production on both groundwater and surface water resources. Finally, the PFD agreed with LCRA that the District could not prohibit as "waste" LCRA's use of surface watercourses to transport the groundwater, as the GM had proposed.

13. Even though the District had a fully litigated PFD on July 31, 2020, it took almost two full years to reach a final and appealable decision on LCRA's Applications.[2] Initially, the District's Board of Directors ("Board" or "District Board") voted to set the final hearing on LCRA's Applications for September 9, 2020, which was subsequently canceled. On October 21, 2020, the District held a remote meeting of the Board with an agenda item to reschedule the final hearing. Citing the coronavirus pandemic, the District Board refused to hold a final hearing, and indicated its intent not to do so until the pandemic was "over."[3] Nevertheless, all the while, the District continued to hold its regular meetings using telephone and video conferencing. The Board finally convened an in-person meeting in a socially-distancing setting with masks on January 28, 2021 to consider SOAH's PFD that had been issued six months prior. The District Board made no decision on the PFD, LCRA's Applications, or the requested permits. Nearly six months later, on July 14, 2021, the District held another hearing on SOAH's PFD.

[2] Compounding the delays on the Board's consideration was the fact that three of the ten board members were recused from participating in any deliberations or votes on LCRA's Applications because they were parties to the contested case.

[3] *See* official recording of LPGCD 10/21/20 Board Meeting, available at https://www.lostpineswater.org/CivicMedia?VID=3 (last viewed 11/6/20), at 59:24.

14. Three months later, on October 12, 2021, the District Board, after a lengthy Executive Session and with no public presentation or deliberation among the Board, *finally* took action, voting to "grant to LCRA a five-year production permit for 8,000 acre-feet of water per year, striking every finding of fact and conclusion of law referencing the definition of waste, and granting a 30-year transport permit to transport 24,000 acre-feet per year." *See* The Transcript Excerpts of the Lost Pines Groundwater Conservation District Board Meeting, Tuesday, October 12, 2021 at p. 19. The Transcript Excerpts of the Lost Pines Groundwater Conservation District Board Meeting, Tuesday, October 12, 2021 are attached hereto as "Exhibit 3" and incorporated herein. On October 13, 2021, LCRA requested findings and conclusions of the District's decision on the Applications, as required by Texas Water Code § 36.412. On November 8, 2021, the Board voted to adopt findings and conclusions. Transcript Excerpts of the Lost Pines Groundwater Conservation District Board Meeting, Monday, November 8, 2021 are attached hereto as "Exhibit 4" and incorporated herein.

15. On November 15, 2021, the District issued its written order approving a final decision with Findings of Fact and Conclusions of Law on LCRA's Applications ("First Order"). The First Order included – without explanation – significant and substantive changes to the PFD, including substantial modifications to and elimination of findings and conclusions recommended by the PFD and the addition of several new findings and conclusions not included in the PFD. As adopted, the First Order granted permits for a maximum combined authorized production of only 8,000 acre-feet per year and eliminated

the additional phased production recommended by the PFD. The First Order retained all groundwater and surface water monitoring requirements and several other special conditions. Consistent with the PFD, the District's First Order granted the requested transport permits for the full 25,000 acre-feet per year without any restrictions regarding transport of the groundwater using state watercourses.

16. LCRA timely filed a Motion for Rehearing on the First Order on November 22, 2021 ("First MFR"), which was granted by the District on February 16, 2022. The Transcript Excerpts of the Lost Pines Groundwater Conservation District Board Meeting, Wednesday, February 16, 2022 are attached hereto as "Exhibit 5" and incorporated herein.

17. After additional briefing and argument on April 4, 2022, the Board voted to revise its decision and to adopt a written explanation for its decision. The Transcript Excerpts of the Lost Pines Groundwater Conservation District Board Meeting, Monday, April 4, 2022 are attached hereto as "Exhibit 6" and incorporated herein. On May 18, 2022, the Board adopted a revised final order ("Second Order"). The Transcript Excerpts of the Lost Pines Groundwater Conservation District Board Meeting, May 18, 2022 are attached hereto as "Exhibit 7" and incorporated herein.

18. The District issued its second order adopting the (second) Final Decision, Findings, Conclusions and associated operating and transport permits on May 18, 2022. The Second Order is attached hereto as "Exhibit 8" and incorporated herein. The Second Order included written Findings of Fact and Conclusions of Law as well as a written explanation of the changes in the Second Order compared to the PFD. A "red-line" version

of the Boards (second) Final Decision, Findings of Fact and Conclusions of Law and Permits, showing changes made from the ALJs' PFD, along with an affidavit supporting how the redline was created, is attached hereto as "Exhibit 9," and incorporated herein.

19. Although the Second Order adopted on May 18, 2022 already included findings and conclusions, LCRA filed its request for Findings of Fact and Conclusions of Law on May 19, 2022, as required by Water Code Section 36.412(c).

20. LCRA filed its Second Motion for Rehearing ("Second MFR") June 7, 2022, which remains pending before the District.

21. Out of an abundance of caution, LCRA files this Appeal of the District's decision on LCRA's Application, prior to action by the District, if any, on its Second MFR, in anticipation of possible arguments that LCRA's First MFR satisfied statutory requirements, making the Second MFR unnecessary. Once the Second MFR is finally disposed, LCRA anticipates filing another comparable appeal of the District's action on LCRA's Application and consolidating that appeal with this one to preclude any jurisdictional objections.

## VI. CAUSE OF ACTION

22. Under Texas Water Code § 36.253, the District's Second Order on LCRA's Application is reviewed on the administrative record under the substantial evidence rule as defined by the Administrative Procedure Act, Texas Government Code § 2001.174. According to that provision, the reviewing court:

> (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.

As described below, the District's action on LCRA's Applications violates these standards on nearly every one of these grounds. The Second Order violates applicable constitutional and statutory provisions, exceeds the District's statutory authority, is affected by clear error of law, is not reasonably supported by substantial evidence, and is arbitrary and capricious and characterized by abuse of discretion.

**Grounds for Reversal 1: The District violated Texas Water Code § 36.4165.**

23. The District violated Texas Water Code § 36.4165(b) when it adopted changes to the ALJ's proposed Findings of Fact and Conclusions of Law without providing reasons for the changes that comply with Section 36.4165. Texas Water Code § 36.4165 applies to the District Board's treatment of a PFD resulting from a SOAH contested case hearing. It provides:

> Sec. 36.4165. FINAL DECISION; CONTESTED CASE HEARINGS.
>
> (a) In a proceeding for a permit application or amendment in which a district has contracted with the State Office of Administrative Hearings for a contested case hearing, the board has the authority to make a final decision on consideration of a proposal for decision issued by an administrative law judge.

> (b) A board may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, **only if the board determines**:
>
> > (1) that the administrative law judge did not properly apply or interpret applicable law, district rules, written policies provided under Section 36.416(e), or prior administrative decisions;
> >
> > (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
> >
> > ((3) that a technical error in a finding of fact should be changed.
>
> (Emphasis added).

24. When a case is referred to SOAH for hearing, the ALJs become the fact finders, responsible for weighing and evaluating the evidence presented and the Board is not free to substitute its opinions; the Board is essentially limited to correcting errors of law. *Hyundai Motor America v. New World Car Nissan, Inc.*, 581 S.W. 3d 831, 838 (Tex. App. Austin, 2019 no pet.). When the Board voted to change the ALJ's proposed Findings of Fact or Conclusions of Law, the Board was required to "articulate a rationale" for the changes and "to explain with particularity its specific reason and legal basis for each change made." *Sanchez v. Tex. State Bd. of Medical Examiners*, 229 S.W.3d 498, 515 (Tex. App. – Austin 2007, no pet.); *Hyundai Motor America*, 581 S.W.3d at 837. Articulating its reasons for making the changes to the findings and conclusions in some form enhances the fairness of the adjudicative process for the parties appearing before the District and ensures that a reviewing court can judge whether the Board has followed the procedures set out in Section 36.4165 and the District's rules and statutes. *Flores v. Employees Ret. Sys.,* 74 S.W.3d 532, 534 (Tex. App. – Austin 2002, pet. denied).

25. Here, the Board, without making any finding of legal error by the ALJs or other allowable justification set forth in Section 36.4165, twice adopted orders that substantially modified the PFD, including its proposed Findings and Conclusions, and modified the recommended action of the ALJs with regard to the requested permits. The Board failed to correct this flagrant error from its First Order when it issued its Second Order. By not complying with Texas Water Code § 36.4165, the District exceeded its statutory authority, violated TWC provisions, acted arbitrarily and capriciously, and abused its discretion. On this ground alone, the Board's action should be reversed.

26. Additionally, the Board failed to make any determination as part of any discussion or a motion in open session regarding the basis on which it was voting to modify the PFD or the Findings of Fact and Conclusions of Law. At its meeting on October 12, 2021, the Board went into a closed session at 6:33 p.m. to consult with its attorney. The Board reconvened in open session at 7:59 p.m. Without discussion, Board member Melissa Cole made a motion, which was seconded by Billy Sherrill. Board Chair Sheril Smith called for any discussion or deliberation, but there was none. *See* The Transcript Excepts of the Lost Pines Groundwater Conservation District Board Meeting, Tuesday, October 12, 2021 at p. 19, attached hereto as "Exhibit 3."

27. At its April 4, 2022 meeting, the Board apparently sought to address this obvious error, but it failed to provide the required justification in the Board discussion or in its motion for the changes to the ALJs' proposed Findings of Fact and Conclusions of Law that comply with Section 36.4165. *See* Transcript Excerpts of the Lost Pines

Groundwater Conservation District Board Meeting, Monday, April 4, 2022, at pp. 60-68, attached hereto as "Exhibit 6."

28. The Board provided no additional justifications when it voted to adopt the Second Order on May 18, 2022. *See* Transcript Excerpts of the Lost Pines Groundwater Conservation District Board Meeting, May 18, 2022, at pp. 3-5, attached hereto as "Exhibit 7." The Second Order also continues to lack a legally defensible explanation of the Board's decision to depart so substantially from the recommendations in the PFD and thus remains defective.

**Ground for Reversal 2: The District's reduction of authorized production and elimination of subsequent phases of increased production is arbitrary and capricious and not reasonably supported by substantial evidence.**

29. The District's reduction of the authorized production under LCRA's Operating Permits from 25,000 acre-feet per year to 8,000 acre-feet per year reflects an improper re-weighing of the record evidence, is arbitrary and capricious, and not reasonably supported by substantial evidence, considering the reliable and probative evidence in the record as a whole. The parties presented competing evidence at the contested case hearing focused on the impacts of production of 25,000 acre-feet per year. The ALJs specifically considered the evidence that protestants argued showed "unreasonable" impacts and rejected it, instead concluding that LCRA's evidence demonstrated that, under the terms and conditions in the permits, production of 25,000 acre-feet per year would not unreasonably affect existing groundwater and surface water resources or existing permit holders. By contrast, virtually no credible evidence was

introduced regarding the impact of production of 8,000 acre-feet per year on existing groundwater and surface water resources and permit holders.

**Ground for Reversal 3: The District's Second Order discriminates against LCRA, a transporter of water, violates Texas Water Code § 36.122(c) and the equal protection clause of the Texas Constitution.**

30. The permits issued to LCRA by the District in this matter depart substantially from permits issued to other applicants, in violation of Texas Water Code § 36.122(c). This statute states, "Except as provided in Section 36.113(e), the district may not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users."[4] Permit conditions imposed on LCRA by the District violate Section 36.122(c) because Special Condition (1) requires the construction and maintenance of a Well Monitoring System and execution of a Monitoring Well Agreement, including monitoring of surface water, all of which have never been imposed on in-district users, even though some in-district permittees are authorized to produce comparable or substantially more groundwater than LCRA.

31. Pleading further, and in the alternative, the discriminatory permit conditions and limitations imposed on LCRA by the District's Second Order also violate LCRA's right to equal protection under the Texas Constitution. Although LCRA is a governmental entity, the Texas Supreme Court has long held that property acquired by a political subdivision is protected by the same constitutional guarantees that shield the property of

[4] Texas Water Code § 36.113(e) allows a district, under certain conditions to impose more restrictive conditions if those restrictive conditions are also applied to all subsequent permit applications or permit amendment applications. The District has not imposed comparable conditions on applications that it has considered since its decision on LCRA's Applications, e.g., Application by the City of Bastrop.

individuals. *Brazos River Authority v. City of Houston*, 628 S.W.3d 920, 933 (Tex. App.—Austin 2021, pet. filed), *citing Milam County v. Bateman*, 54 Tex. 153, 165-66 (Tex. 1880). LCRA has a constitutionally protected property interest in the groundwater beneath the Griffith League Ranch in Bastrop County, *see Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 838 (Tex. 2012), and is therefore entitled to equal treatment in permitting conditions and allowances for the withdrawal of groundwater as in-district permittees and others similarly situated. *Klumb v. Houston Municipal Employees Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015). However, as alleged herein, the District's Second Order imposes far greater production restrictions and other conditions on LCRA than other similarly situated permittees, including but not limited to Aqua Water Supply Corporation.

32. These discriminatory limitations and conditions are not rationally related to the protection of existing groundwater uses or any other legitimate governmental purpose of the District. Nor is there any evidence or finding to suggest that the District could reasonably believe that imposing these onerous and unnecessary limitations on LCRA—and only LCRA—would promote groundwater protection or any other authorized purpose. Consequently, in addition to violating the nondiscrimination provision of Texas Water Code § 36.122(c), the District's Second Order unconstitutionally denies LCRA equal protection in the use of its vested groundwater rights.

**Ground for Reversal 4: Special Condition (1) is unauthorized and contrary to numerous statutory and constitutional provisions.**

33. The District exceeded its statutory authority by including a special condition in the permits that requires LCRA, prior to construction of any groundwater

wells, to construct and maintain groundwater monitoring wells and "any scientifically supported tool to monitor surface water."[5] While LCRA does not dispute the District's authority to fund and implement its own groundwater monitoring program, the fact is that the District has neglected to do so. Instead, despite the lack of any authority to do so, it seems intent on arbitrarily imposing groundwater monitoring requirements on only certain groundwater permittees and further requiring LCRA alone to bear the burden of monitoring surface water.

34. Groundwater conservation districts possess only the authority granted by the legislature. *See South Plains Lamesa Railroad Ltd. v. High Plains Water Conservation Dist*., 52 S.W.3d 770, 780-81 (Tex. App. – Amarillo 2001, no pet.). Examination of Texas Water Code §§ 36.113 and 36.1131 demonstrates that, without a rule in place authorizing such a requirement, groundwater conservation districts do not have authority to require surface water or groundwater monitoring or Monitoring Well Agreements. Although the District subsequently, in October 2019, amended its Rules to authorize imposition of a groundwater monitoring well requirement on some applicants, that rule (even if valid) does not apply to LCRA's Applications and cannot justify imposition of Special Condition (1). Applying the new rule to LCRA's then pending applications would be unconstitutionally retroactive and a violation of Local Government Code Chapter 245.

35. Inclusion of this special condition in LCRA's permits as approved by the District is also in error because it is not a reasonable condition rationally related to a

[5] *See* Special Condition (1) in the Operating Permits attached to the Second Order. (Exhibit "8").

legitimate governmental purpose associated with LCRA's proposed groundwater production. Indeed, the data to be collected from the groundwater or surface water monitoring systems is not used in the permits to specifically regulate LCRA's groundwater production.

36. LCRA agrees that aquifer information is a necessary component of the phased permits requested by LCRA and thus, in that context, a nexus exists to justify requiring groundwater monitoring under the District's authority to regulate production. However, when the District limited LCRA's production to 8,000 acre-feet and removed phased production from the permits, it was left with no other basis upon which it could rely to require LCRA to construct and maintain groundwater monitoring wells.

37. Additionally, Special Condition (1)'s requirement that the Monitoring Well Agreement include "any scientifically supported tool to monitor surface water" is overbroad, unconstitutionally vague, and violates LCRA's substantive due process because there is no statutory or regulatory authority that allows groundwater districts to impose this type of special permit condition. Substantive due process generally protects against the arbitrary exercise of governmental powers. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex.1998) (governmental action violates due process when it is clearly arbitrary and unreasonable). An action is arbitrary when it is taken without reference to guiding rules or principles. *See Hendee v. Dewhurst*, 228 S.W.3d 354, 374 n. 27 (Tex. App.—Austin 2007, pet. denied) *citing Neeley v. West-Orange Cove Consolidated Indep. Sch. Dist.*, 176 S.W.3d 746

(Tex.2005). Here, because the District issued the challenged monitoring requirements without reference to any authority in rule or statute, it acted arbitrarily and capriciously by retaining Special Condition (1) in the Permits, notwithstanding the fact that it baselessly removed all phasing and limited production to 8,000 acre-feet/year.

38. The District also acted arbitrarily and capriciously and violated LCRA's right to equal protection when it treated LCRA's Applications differently than how the District has treated other large permit operation and transport requests. The District's prejudicial and unequal treatment of LCRA compared to other permittees is arbitrary and capricious, particularly in light of the ALJs' Findings of Fact that LCRA's proposed production of the full 25,000 acre-feet per year alone will not result in unreasonable impacts to existing groundwater or surface water resources or existing permittees. The District's modified findings therefore demonstrate that the disparate classification and treatment of LCRA is not rationally related to any legitimate governmental purpose, nor is there any evidence or finding to suggest that the District could reasonably believe that denying LCRA what it has so readily granted others would promote groundwater protection or any other legitimate purpose of the District.

39. Finally, the District violated the Texas Constitution when it conditioned LCRA's groundwater pumping on the requirement to provide for groundwater and surface water monitoring. In imposing conditions in a permit, a regulatory governmental authority may not condition approval of a permit on successfully coercing a permittee to spend money to acquire and then relinquish property interests for public benefit, unless there is a

nexus and rough proportionality between the government's demand and the effects of the proposed land use. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 604-07 (2013) and *Town of Flower Mound v. Stafford Estates,* 135 S.W.3d. 620 (Tex. 2004). In this case, there is neither a nexus between LCRA's permitted pumping and the monitoring requirements nor any proportionality between the monitoring requirements and the production authorized for LCRA. The District's imposition of monitoring requirements violates this principle, is unconstitutional, and must be stricken.

## VII. RELIEF REQUESTED

40. LCRA requests that the Court enter its Order declaring the Second Order invalid because the District's action violates applicable constitutional and statutory provisions, exceeds the District's statutory authority, is affected by clear error of law, is not reasonably supported by substantial evidence, and is arbitrary and capricious and characterized by abuse of discretion for the reasons described above.

41. LCRA further requests that the Court enter its Order declaring as invalid all of the modifications made by the District to the ALJs' PFD and proposed Findings of Fact and Conclusions of Law, and related changes to LCRA's operating and transport permits (other than declaring the "waste" issue for transport permits moot)[6] because none of the Board's modifications are within the limited authorization provided by Texas Water

[6] LCRA agrees with the District that the issue about whether the transport of groundwater using the bed and banks of a water course is considered "waste" under Chapter 36 of Texas Water Code is moot, as explained by the Second Order. That is because LCRA's amended its transport permit applications to limit transport of water to Travis County, which the record confirms cannot be accomplished using the bed and banks of a water course.

Code § 36.4165, and they violate other applicable constitutional and statutory provisions, as described above.

42. LCRA further requests that the Court reverse the District's Second Order and remand this matter to the District to issue an order consistent with the ALJs' proposed Findings of Fact and Conclusions of Law and the statutory and constitutional limitations on the District's authority, as described above.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, LCRA respectfully prays that it be granted the following relief, in whole or in part:

1. Defendant Lost Pines Groundwater Conservation District be cited to answer and appear herein;
2. The Court grant relief as requested herein; and
3. LCRA have all such other and further relief, both general and special, at law and in equity, to which it may show itself justly entitled.

Respectfully submitted,

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