

Cause No. 423-9385

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

PLAINTIFF’S ORIGINAL PETITION

COMES NOW, the Lower Colorado River Authority, Plaintiff herein, and files this its Original Petition complaining of the Lost Pines Groundwater Conservation District, Defendant, and would show the Court as follows:

I. DISCOVERY

1. Plaintiff will conduct discovery under Level 3, pursuant to Rule 190.4, Texas Rules of Civil Procedure.

II. PARTIES AND SERVICE OF PROCESS

2. Plaintiff is the Lower Colorado River Authority (LCRA), a conservation and reclamation district created under the authority of Texas Constitution Article XVI, § 59 and Texas Special District Local Laws Code Chapter 8503.

3. Defendant is the Lost Pines Groundwater Conservation District (Defendant or the District), a groundwater conservation district created under the authority of Texas Constitution Article XVI, § 59, Texas Water Code Chapter 36, and Texas Special District Local Laws Code Chapter 8849. 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. TEX. WATER CODE § 36.066(c).

III. JURISDICTION AND VENUE

4. Jurisdiction to challenge the validity of rules adopted by the District is explicit under Texas Water Code § 36.251(a). Venue is proper in Bastrop County, Texas pursuant to that statute. TEX. WATER CODE § 36.251(c).

5. Pursuant to Texas Rule of Civil Procedure 47, LCRA seeks only non-monetary relief through this action.

IV. GOVERNMENTAL IMMUNITY

6. Governmental immunity is waived and consent to suit provided by Texas Water Code § 36.251. Furthermore, LCRA may bring a claim under the Uniform Declaratory Judgments Act regarding the validity of the District's Rules.¹

V. INTRODUCTION AND OPERATIVE FACTS

7. LCRA is a conservation and reclamation district established by the Texas Legislature in 1934 that serves as a regional water supplier within its 35-county water service area.

8. LCRA owns land and has purchased groundwater rights beneath land owned by the Boy Scouts of America in Bastrop County. Therefore, LCRA owns and possesses constitutionally protected rights and property interests in the groundwater below the surface of these lands.²

9. LCRA also holds current and existing permits issued by the District, which allow it to produce specified amounts of groundwater under set terms and conditions.

¹ *Lone Star Groundwater Conservation Dist. v. City of Conroe*, 515 S.W.3d 406, 414 (Tex. App.—Beaumont 2017, no pet.).

² TEX. WATER CODE § 36.002; *see also Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 837-38 (Tex. 2012); *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613, 618 (Tex. App. – San Antonio 2008, pet. denied); *U.S. v. Shurbet*, 347 F.2d 103 (5th Cir. 1965).

10. This case presents a substantive challenge to the validity of new rules and amendments to existing rules that were adopted by the District on March 15, 2023 and June 21, 2023.

11. Some of these rules are invalid and must be set aside because they: 1) exceed the District's statutory authority;³ 2) are inconsistent with the legislative intent of Chapter 36 of the Texas Water Code;⁴ 3) are arbitrary and capricious because they lack a reasoned justification, fail to consider the statutorily required factors, consider irrelevant factors not authorized by the statute, and/or reach an unreasonable result based on the relevant factors;⁵ 4) violate the due course of law provision of the Texas Constitution;⁶ and 5) effect a compensable taking of LCRA's protected property rights.⁷

12. LCRA now brings this action to declare the invalidity of these rules and to prospectively enjoin their application and enforcement by the District in the future.

VI. CAUSES OF ACTION

13. Under Texas Water Code § 36.251, a person, firm, corporation, or association of persons affected by, and dissatisfied with, a rule or order made by a groundwater conservation district such as the District is entitled to file suit against the district or its directors to challenge the validity of the law, rule, or order. Here, LCRA, an affected and dissatisfied party, challenges the validity of the following rules:

³ *Public Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 315 (Tex.2001).

⁴ *Id.*

⁵ *McCarty v. Tex. Parks and Wildlife Dep't*, 919 S.W.2d 853, 854-55 (Tex. App.—Austin 1996, no writ), citing *National Assoc. of Indep. Insurers v. Texas Dep't of Ins.*, 888 S.W.2d 198, 209 (Tex.App.—Austin 1994, writ denied).

⁶ TEX. CONST. art. 1, § 19; see *Brown v. Humble Oil & Refining Co.*, 83 S.W.2d 935, 943 (Tex. 1935).

⁷ *Day*, 369 S.W.3d at 837-38.

A. Rule Challenge No. 1: District Rule 9.1.A – Production Limits – Maximum Allowable Production

14. In amendments approved and adopted on June 21, 2023, the District adopted new Rule 9.1.A, which provides the following:

Rule 9.1. Production Limits. To accomplish the purposes of Texas Water Code chapter 36 and to achieve the stated purposes and goals of the District, including managing the sustainability of the aquifers and preventing significant, sustained water-level declines within the aquifers, the District shall manage total groundwater production on a long-term basis to achieve the applicable Desired Future Condition. The production of water authorized by any permit issued by the District is subject to limitation, adjustment, and reduction. The following production limits in Rule 9.1.A shall apply to applications for Operating Permits and amendment applications for Operating Permits seeking to authorize an increase in production submitted to the District after June 21, 2023. The District may amend production limits from time to time following the procedures set forth in Section 14. Any reductions required by Rules 9.1.B and 9.1.C shall apply to all Operating Permits that have been issued by the District at any time before the reductions.

A. Maximum Allowable Production.

(1) For applications for Operating Permits or amendments to Operating Permits that seek to increase annual production of groundwater submitted to the District after June 21, 2023, the annual groundwater production volume shall be limited to the lesser of the following (“Maximum Allowable Production”):

(a) the amount of water per year determined by the Board that can be beneficially used after considering the factors enumerated in Rule 5.2.D; or

(b) the amount of water per year per one Contiguous Acre for wells completed in an aquifer in the District as designated below.

Aquifer	Amount (acre-foot/acre)
Calvert Bluff	0.5
Carrizo	0.8
Hooper	0.5
Queen City	0.2
Sparta	0.3
Simsboro	1.6

(2) **Eligible Land.** Land, and water rights in land, must be located over the Aquifer Unit from which a well is authorized to produce groundwater, and only land above an Aquifer Unit will be included in calculating the volume of water permitted to be pumped under Rule 9.1.A. For example, if the well is located on one 10,000-acre tract, but the Simsboro aquifer beneath the land surface only covers 5,000 acres of the tract, 5,000 acres will not be considered in determining the Maximum Allowable Production, and under 9.1.A(2), the Maximum Allowable Production would be 8,000 acre-feet per year from the Simsboro Aquifer.

14. LCRA is affected by, and dissatisfied with, Rule 9.1.A because it owns land and groundwater rights within the District for which operating permits or amendments are required and will be adversely affected by this rule as a result. LCRA owns the Lost Pines Power Park (LPPP), and the groundwater beneath it. LCRA's permitted groundwater wells at LPPP are used to support its existing power plants. The production limit adopted by the District would prohibit LCRA from seeking amendments to its LPPP permits or securing new permits to increase its authorized production of groundwater for the LPPP, even if operational or regulatory changes related to electric generation at the site require more water or if generation capacity was added at LPPP to improve reliability of the state's electric grid. In addition, LCRA has eight groundwater production permits at the Griffith League Ranch where it would be similarly prevented from seeking any increase in authorized production under proposed Rule 9.1.A.

15. Rule 9.1.A is void on the grounds that it exceeds the District's statutory authority under Texas Water Code Chapter 36 and the District's enabling legislation. Rule 9.1.A is also invalid on the grounds that it is arbitrary and capricious because, in adopting this rule, the District failed to consider the factors required by the statute, considered irrelevant factors not authorized by the statute, and reached an unreasonable result in light of the relevant factors.⁸

⁸ *McCarty v. Tex. Parks and Wildlife Dep't*, 919 S.W.2d at 854-55; *National Assoc. of Indep. Insurers*, 888 S.W.2d at 209.

16. Texas Water Code § 36.0015(b) requires the District to use the best available science in adopting and promulgating rules relating to groundwater development. TEX. WATER CODE § 36.0015(b). The statute defines “best available science” to mean “conclusions that are logically and reasonably derived using statistical or quantitative data, techniques, analyses, and studies that are publicly available to reviewing scientists and can be employed to address a specific scientific question.” *See id.*

17. The production limits adopted by the District in Rule 9.1.A, including but not limited to the limit for the Simsboro Aquifer, fail to consider the required factors under the statute because they are not based on the best available science as required by Texas Water Code § 36.0015(b). Rather, the District has publicly admitted that it arbitrarily used an unsupported production limit derived from its recent permitting decision involving LCRA’s applications for production permits on the Griffith League Ranch and applied that limit to the Simsboro across the entire district. Those permits limit LCRA’s groundwater production to 8,000 acre feet of water per year from the approximately 5,000 acres of the Boy Scouts’ Griffith League Ranch property, which equates to the 1.6 acre-feet/acre limit (8,000 acre-feet of water divided by 5,000 acres) for the Simsboro Aquifer.

18. Significantly, LCRA has challenged the impermissible production limits imposed by the District in the Griffith League Ranch permits in a separate suit for judicial review, which remains pending. Upon information and belief, the District incorporated the production limit from LCRA’s challenged permits into the new district-wide rule as an improper collateral attack meant to moot LCRA’s ongoing litigation. Obviously, the attempt to gain a litigation advantage in a pending suit with LCRA is not a legitimate or relevant factor that the District is authorized to consider in its rulemaking function. Thus, rather than making the requisite consideration of the

best available science, the production limits set out in Rule 9.1.A are the improper result of considering irrelevant factors not authorized under Chapter 36.

19. In adopting Rule 9.1.A, the District further failed to consider the mandatory factors that govern all groundwater conservation district rulemaking. *See* Texas Water Code § 36.101(a). Specifically, by adopting an arbitrary but uniform, aquifer-specific production limit across the District based on LCRA’s Griffith League Ranch permits, the District clearly did not consider *all groundwater uses and needs* in the District.⁹ Moreover, the production limits in Rule 9.1.A are arbitrarily based on the LCRA permits and fail to take into account the needs and uses of other permit applicants, properties, and aquifer conditions in light of the best available science. Accordingly, the District’s promulgated rule is unfair and does not consider the groundwater ownership and rights of individual applicants.¹⁰ Nor can such arbitrary production limits accurately be said to consider the public interest in conservation or serve the District’s overall management plan, as the rule does not meaningfully account for district or aquifer wide conditions.¹¹

20. Because the District adopted this rule based on irrelevant considerations rather than those mandated by Chapter 36 of the Texas Water Code, the resulting production limits, including but not limited to the Simsboro Aquifer limitation of 1.6 acre-feet of water per acre, are unreasonable in light of the actual factors, and the best available science, that the District was required to consider.

B. Rule Challenge No. 2: District Rule 9.1.B – Desired Future Condition Curtailment

21. In amendments approved and adopted on June 21, 2023, the District adopted new Rule 9.1.B, which provides the following:

⁹ *See* TEX. WATER CODE § 36.101(a)(1).

¹⁰ *Id.* at § 36.101(a)(2) and (3).

¹¹ *Id.* at § 36.101(a)(4) and (5).

B. Desired Future Condition Curtailment.

(1) Using the best available data and science, including without limitation, information received in hydrogeological reports and other hydrogeologic and scientific studies, the Board, by resolution, may reduce the Maximum Allowable Production for all non-exempt Operating Permits issued by the District producing from a particular Aquifer within the District if reductions are necessary to achieve the applicable Desired Future Conditions established for a particular Aquifer of the District (“DFC Curtailment”).

(2) When establishing the DFC Curtailment, the Board must first consider the amount of groundwater used from the particular Aquifer to support exempt uses as estimated by the Texas Water Development Board Executive Director (“Exempt Use Amount”). After taking into account the Exempt Use Amount, the Board must determine how much water remains to be allocated to permits for the particular Aquifer of the District without impairing achievement of the applicable Desired Future Condition(s) established for a particular Aquifer (“DFC Allocated Amount”).

(3) When establishing the reductions to the Maximum Allowable Production for all non-exempt permits in a particular Aquifer, the Board may choose to proportionately reduce permits for the particular Aquifer of the District on a pro rata basis of the DFC Allocated Amount. The Board’s resolution under 9.1.B.1. shall identify reductions to be applied to all applicable non-exempt permits in a particular Aquifer, or Management Zone(s) of the District. The General Manager shall administratively reissue the affected permits containing the adjusted Maximum Allowable Production (“DFC Maximum Allowable Production”) to all affected permit holders.

(4) All persons with permits where the Maximum Allowable Production has been temporarily decreased shall pay Production Fees for the amount of groundwater authorized during the DFC Curtailment.

22. LCRA is affected by, and dissatisfied with, Rule 9.1.B because it owns land and groundwater rights within the District and has operating permits to produce groundwater that would be subject to the invalid curtailment provisions adopted in the rule.

23. Rule 9.1.B is void on the grounds that it exceeds the District’s statutory authority under Chapter 36 of the Texas Water Code or the District’s enabling legislation and is plainly inconsistent with the text and legislative intent of the statute.

24. Texas Water Code § 36.1132 provides that “[a] district, to the extent possible, shall issue permits up to the point that the total volume of exempt and permitted groundwater production will achieve an applicable [D]esired [F]uture [C]ondition [(“DFC”)] under Section 36.108.”¹² The DFCs are adopted by the districts every five years.¹³ This management of groundwater to achieve the DFCs is a prospective analysis—it is a planning tool designed for the issuance of permits to achieve DFCs in the future.

25. In adopting Rule 9.1.B, the District turns DFC planning on its head by attempting instead to give itself authority to *reduce and reissue* existing permits to achieve the DFC without applying any of the substantive and procedural due process protections for permit proceedings enacted by the Legislature in Chapter 36. Indeed, Rule 9.1.B purports to allow the District’s Board to adopt a “Desired Future Condition Curtailment” that would give the District’s General Manager the authority to ministerially amend existing permits to reduce allowed production under those permits. Notably, though, there is nothing in the rule that establishes how the Board would determine when the DFC is not being achieved or is being violated.

26. Nothing in Texas Water Code Chapter 36 or the District’s enabling legislation provides the District with authority to ministerially curtail existing permits to achieve the applicable DFC without a right to a hearing. To the contrary, Chapter 36 provides only four categories of permitting activity that do not require notice and/or the opportunity for a contested case hearing: (1) renewals of existing permits¹⁴; (2) uncontested applications¹⁵; (3) aquifer storage

¹² In preparing and adopting DFCs, districts consider various factors, such as aquifer conditions, hydrological conditions, environmental impacts, impacts on subsidence, socioeconomic impacts, impacts to private property rights, feasibility of achieving the DFC, and other relevant factors. The DFC must provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater and control of subsidence in the management area. *See* TEX. WATER CODE § 36.108(d), (d-2).

¹³ TEX. WATER CODE § 36.108(d).

¹⁴ TEX. WATER CODE § 36.1145.

¹⁵ *Id.* at § 36.4051(a).

and recovery projects authorized by the TCEQ¹⁶; and (4) exempt permits¹⁷. Otherwise, an existing permit can only be modified upon notice to the permittee and the opportunity for a contested case hearing.¹⁸ Thus, Rule 9.1.B is void on the grounds that the District lacked authority to adopt it and it is in direct conflict with the explicit statutory provisions of Chapter 36.

27. Pleading further, Rule 9.1.B is also invalid on the grounds that it violates procedural and substantive due process guarantees under the due course of law clause of the Texas Constitution.¹⁹ Specifically, by allowing the Board to unilaterally reduce production under an existing permit by simple resolution, Rule 9.1.B deprives permit holders such as LCRA of an adequate opportunity to be heard before depriving them of their protected property rights in the groundwater. Furthermore, this rule violates substantive due process because it allows for the arbitrary and capricious reduction of *existing* permits to achieve a future planning goal that is itself subject to change every five years.²⁰ Under this scheme, an existing permit holder has virtually no regulatory certainty because the District could decide to administratively reduce the amount of water authorized under existing permits any time it decides the DFC is going to be exceeded, or by adopting a new, lower DFC to levels that would require curtailment of all existing permits under this rule.

28. Additionally, under this rule, the District could curtail permits to achieve the existing DFC, then subsequently adopt a revised DFC that correlates to increased allowable groundwater production. However, the rules contain no mechanism for the District to reinstate to existing permittees the amount of production that had been previously curtailed. In theory, the

¹⁶ *Id.* at § 36.454.

¹⁷ *Id.* at § 36.117.

¹⁸ *Id.* at §§ 36.114 and 36.1145 and 36.404 and Subch. M.

¹⁹ Tex. Const. art. 1, § 19.

²⁰ TEX. WATER CODE § 36.108(d).

District could then issue new permits that would effectively take groundwater rights from existing permittees and allow different applicants to produce that groundwater. Thus, pleading further, Rule 9.1.B is also invalid on the grounds that it violates the takings clause of the Texas Constitution by depriving LCRA and other existing permit holders of a protected property interest in groundwater without compensation.²¹

C. Rule Challenge No. 3: District Rule 9.1.C – Temporary Drought Curtailment

29. In amendments approved and adopted on June 21, 2023, the District adopted new Rule 9.1.C, which provides the following:

C. Temporary Drought Curtailment.

(1) The Board may, by resolution, adopt a Temporary Drought Curtailment decreasing the Maximum Allowable Production or the DFC Maximum Allowable Production in all Operating Permits issued by the District if (i) the TWDB reports a D4 drought stage, exceptional drought, within the District’s boundaries for at least fourteen (14) days in its Water Weekly reports, and (ii) the District’s hydrogeologist has confirmed that there are water level declines in any of the District’s aquifers as a result of the exceptional drought condition using the best available data and science.

(2) To adopt a Temporary Drought Curtailment resolution, the Board must publish the proposed water level objectives for the relevant aquifers in the District and the associated reductions to the Maximum Allowable Production or the DFC Maximum Allowable Production necessary to obtain the water level objectives during periods of exceptional drought. The District must follow the public notice, public comment, and public hearing procedures set forth in Rules 14.1 or 14.2 before adopting a Temporary Drought Curtailment resolution.

(3) A Temporary Drought Curtailment resolution shall state how long the temporary drought curtailment shall remain in place and can be based on improvement of the drought status according to TWDB Drought report. The Board must review the TWDB Water Weekly reports at each regular board meeting during a Temporary Drought Curtailment.

(4) All persons with permits where the Maximum Allowable Production has been temporarily decreased shall pay Production Fees or the amount of groundwater authorized during the Temporary Drought Curtailment.

²¹ Tex. Const. art. 1, ¶ 17; *see also Day*, 369 S.W.3d at 838-44.

30. LCRA is affected by, and dissatisfied with, Rule 9.1.C because it owns land and groundwater rights within the District and has operating permits to produce groundwater that would be subject to the invalid curtailment provisions adopted in the rule.

31. Rule 9.1.C is void on the grounds that it exceeds the District's statutory authority under Chapter 36 of the Texas Water Code and its own enabling legislation. Rule 9.1.C is also invalid on the grounds that it is arbitrary and capricious because, in adopting this rule, the District failed to consider the factors required by the statute, considered irrelevant factors not authorized by the statute, and reached an unreasonable result in light of the relevant factors.²²

32. Nothing in Chapter 36 or the District's enabling legislation provides the District with authority to ministerially amend an existing permit by resolution and without an opportunity for a contested case hearing. As stated above regarding Rule 9.1.B, Chapter 36 provides only four categories of permitting activity that do not require a contested case hearing. Otherwise, an existing permit can only be modified upon notice to the permittee and the opportunity for a contested case hearing.²³ Thus, Rule 9.1.C is void on the grounds that the District was without authority to adopt it and the provision directly conflicts with the explicit statutory provisions of Chapter 36.

33. Pleading further, Rule 9.1.C is also arbitrary and capricious, and thus invalid, because it fails to consider the required factors in Texas Water Code § 36.101 for rulemaking by a groundwater conservation district and reaches an unreasonable result that has no rational basis.

²² *McCarty v. Tex. Parks and Wildlife Dep't*, 919 S.W.2d at 854-55; *National Assoc. of Indep. Insurers*, 888 S.W.2d at 209.

²³ *Id.* at §§ 36.114 and 36.1145 and 36.404 and Subch. M.

34. As stated earlier, Texas Water Code § 36.0015(b) requires the District to use the best available science in adopting and promulgating rules relating to groundwater development.²⁴ The statute defines “best available science” to mean “conclusions that are logically and reasonably derived using statistical or quantitative data, techniques, analyses, and studies that are publicly available to reviewing scientists and can be employed to address a specific scientific question.”²⁵ The curtailment provision adopted in Rule 9.1.C fails to satisfy this requirement because there is no scientific evidence, and the District offered none, that suggests that aquifer levels within the District are linked to the TWDB’s assigned drought conditions.

35. Likewise, there is no rational connection between the reduction in Maximum Allowable Production and the overall reduction in pumping or withdrawals within the District. Many permittees within the District do not actually pump the Maximum Allowable Production authorized under their permits. Thus, the District’s action to reduce the Maximum Allowable Production may not actually reduce the amount of pumping in the District because only certain users will actually have to reduce water consumption, while others will not. For example, if a permittee’s Maximum Allowable Production is 10,000 acre-feet, but the permittee only actually pumps and uses 5,000 acre-feet, a 10% reduction in the Maximum Allowable Production will not actually require the permittee to reduce its pumping.

36. The District’s proposed rule also results in an impermissibly discriminatory scheme whereby certain permittees are adversely affected based on the ratio of their actual water usage to their authorized Maximum Allowable Production amount rather than being based on their actual water usage. As stated, tying curtailment to Maximum Allowable Production on a permit, rather

²⁴ TEX. WATER CODE § 36.0015(b).

²⁵ *Id.*

than actual usage of the permittee, is not rationally related to reducing the aggregate withdrawal of water for conservation purposes.

D. Rule Challenge No. 4: District Rule 5.2.E – Processing of Operating Permit Application

37. In amendments approved and adopted on March 15, 2023, the District adopted new Rule 5.2.E. which provides the following:

E. Unreasonable Effects. For the purposes of this Rule 5.2, “Unreasonable Effects” shall be a modeled or demonstrated drawdown of the water table or reduction of artesian pressure as a result of pumping from a well or well field, and which contributes to, causes, or will cause any of the following:

(1) well interference with one or more water wells of existing permit holders ceasing to yield water at the ground surface;

(2) well interference related to a decrease in well yields that results in one or more water wells of existing permit holders being unable to obtain an authorized volume or rate from a well maintained and efficient water well as determined by the General Manager;

(3) the degradation of groundwater quality such that the water is unusable or requires the installation of a treatment system; or

(4) a decrease in existing springflow or baseflows to surface streams including a decrease that may cause an established minimum springflow or environmental flow rate to not be achieved.

38. LCRA is affected by, and dissatisfied with, Rule 5.2.E because it owns land and groundwater rights within the District and has operating permits to produce groundwater and will be adversely affected by this rule as a result. Specifically, this new rule would allow the District to deny an application for operating permits by LCRA or other landowners on the ground that the proposed use of water “unreasonably effects [sic] existing groundwater and surface water resources or existing permit holders” without any objectively reasonable basis for making that determination.

39. Texas Water Code § 36.113(d) requires the District, when evaluating a permit or permit amendment, to “consider whether . . . the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders” Chapter 36 does not define the term “unreasonable.” The District’s definition of unreasonable effect in Subsections 5.2.E(1) through .E(4) is arbitrary and capricious because it fails to establish or identify any standards or scientifically acceptable methods to evaluate whether the proposed production will cause unreasonable effects to water resources or existing permit holders. Also, the rule identifies no standard by which the District will determine if a proposed permit will “contribute to” any of the four listed unreasonable effects. Thus, an applicant has no way of knowing how much pumping the District will consider to be unreasonable.

40. Subsection 5.2.E(1) unreasonably, and without a rational basis, provides that an impact to just *one* well (regardless of its use, size, design, or maintenance) could be an unreasonable effect justifying denial of a permit. Further, this subsection is arbitrary and unduly prejudicial against new permittees because it protects an existing well owner regardless of the well’s location, design, and or maintenance history. Impacts to shallow wells, wells in the outcrop, or wells with shallow pump settings could result in permit denial, even if though those existing wells might not have been impacted had their owner(s) elected to drill the well deeper or place the pump deeper in the well.

41. Similarly, Subsection 5.2.E(2) unreasonably, and without a rational basis, provides that an impact to just *one* well (regardless of its use, size, design, or maintenance) could be an unreasonable effect justifying denial of a permit. Further, it also ignores an existing well’s design and the investment, or lack thereof, by the existing well owner in his/her well and pumps. Impacts to shallow wells, wells in the outcrop, or wells with shallow pump settings could result in permit

denial, even if the wells might not have been impacted had the well owner elected to drill the well deeper or place the pump deeper in the well. Additionally, the rule leaves it to the General Manager's discretion to determine if an existing well is "efficient" or "well-maintained," with no definitions or standards to provide guidance.

42. Subsection 5.2.E(3) fails to provide any standard by which a permit application will be evaluated to determine if the proposed pumping will cause groundwater quality degradation. Further, the rule does not establish any objective standards by which an applicant could determine what amount, rate, or type of change in groundwater quality would be considered unreasonable.

43. Subsection 5.2.E(4) fails to provide any information as to how, or by whom, the relevant "minimum spring flows and environmental flow rates" will be "established," making it impossible for an applicant to know what kind of information it needs to prove in a permit application. The rule lacks any specifics regarding the applicable timeframe over which the District will look to determine whether a proposed well will cause "established" "minimum spring flows or environmental flow rates" to not be achieved. Further the rule fails to quantify how much of a decrease or an impact qualifies as an unreasonable effect. Is it unreasonable if "established" flow rates are predicted to drop by less than 1% just once in fifty years?

44. Subsections 5.2.E(1) through .E(4) are also void for vagueness under the due course of law clause of the Texas Constitution. A rule is unconstitutionally vague where persons of common intelligence must guess at what is required or when there is a substantial risk of miscalculation by those whose acts are subject to regulation.²⁶ Here, the absence of any defining objective standards under any of the subsections as to what constitutes an unreasonable effect not only fails to give fair notice to applicants on the standards by which their applications will be

²⁶ *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437-38 (Tex. 1998).

judged, but also invites arbitrary and discriminatory enforcement by its lack of guidance to the District. As such, in addition to being arbitrary and capricious and without a rational basis, these provisions are invalid on the grounds that they are unconstitutionally vague.

E. Rule Challenge No. 5: District Rule 17.1 – Monitoring Groundwater Quality

45. In amendments approved and adopted on June 21, 2023, the District adopted new Rule 17.1, which provides the following:

17.1 Monitoring Groundwater Quality. In order to preserve and protect the aquifer(s) of the District, Well Owners with water wells connected or to be connected to a common gathering/transportation piping system capable of producing greater than or equal to 2,000 acre-feet of groundwater from permitted wells per calendar year, shall be required to assess the water quality effects of the project on the aquifer(s). Water quality sampling and analysis shall be conducted by the Well Owner annually in at least two production wells to assess any changes in water quality that may be attributed to the production. Samples shall be collected and analyzed by a laboratory, acceptable to the District, for major cations (sodium, potassium, calcium, magnesium) and anions (chloride, sulfate, carbonate, bicarbonate) and total dissolved solids. The sampling results shall be submitted to the District annually by February 10.

46. LCRA is affected by, and dissatisfied with, Rule 17.1 because it owns land and groundwater rights within the District and has operating permits to produce groundwater that would be subject to the invalid groundwater monitoring provisions adopted in the rule.

47. Rule 17.1 is arbitrary and capricious, and thus invalid, because it fails to consider the required factors under Texas Water Code § 36.101 for rulemaking by a groundwater conservation district and reaches an unreasonable result that has no rational basis. As alleged herein, Texas Water Code § 36.0015(b) requires the District to use the best available science in adopting and promulgating rules relating to groundwater development.²⁷ The statute defines “best available science” to mean “conclusions that are logically and reasonably derived using statistical

²⁷ TEX. WATER CODE § 36.0015(b).

or quantitative data, techniques, analyses, and studies that are publicly available to reviewing scientists and can be employed to address a specific scientific question.”²⁸

48. The sampling and monitoring provisions adopted in Rule 17.1 fail because there is no scientific evidence, and the District has offered none, that the wells subject to the rule are more likely to impact groundwater quality—and thus necessitate additional monitoring—than other wells.

49. The rule also violates Texas Water Code § 36.101(a)(2), which requires district rules to be fair and impartial, because the rule discriminatorily applies only to permittees with groundwater wells capable of producing 2,000 acre-feet of groundwater and connected or to be connected to a common gathering/transportation piping system. As such it discriminates against larger water users without any rational connection between such users and effects on groundwater quality.

50. The rule is also arbitrary and capricious. It requires affected well owners to conduct testing in at least two production wells but does not account for circumstances in which a permittee has only one well capable of producing 2,000 acre-feet that is not connected to a second well. Under that circumstance, a permittee would be subject to the rule but would be unable to comply because the permittee is not connected to a second well.

F. Rule Challenge No. 6: District Rule 17.2 – Groundwater Quality Standards

51. In amendments approved and adopted on June 21, 2023, the District adopted its Rule 17.2, which provides the following:

17.2 Groundwater Quality Standards. Production from an individual water well or combination of wells in a well field may be restricted if the District determines that production from a water well or combination of wells in a well field is responsible for degrading the water quality of an aquifer in excess of

²⁸ *Id.*

the baseline water quality data collected by the District through groundwater monitoring.

52. LCRA is affected by, and dissatisfied with, Rule 17.2 because it owns land and groundwater rights within the District and has operating permits to produce groundwater that would be subject to the invalid groundwater quality and monitoring provisions adopted in the rule.

53. Rule 17.2 is arbitrary and capricious because it fails to establish any standards or scientifically acceptable methods to determine “baseline water quality,” and further fails to establish any standard or scientifically acceptable method to evaluate whether the production from a well or combination of wells is responsible for degrading the water quality of an aquifer.

54. Rule 17.2 is also void for vagueness under the due course of law clause of the Texas Constitution. A rule is unconstitutionally vague where persons of common intelligence must guess at what is required or when there is a substantial risk of miscalculation by those whose acts are subject to regulation.²⁹ Here the absence of any defining standards for (a) determining “baseline water quality,” (b) establishing the type or degree of “degradation sufficient to trigger potential restrictions,” and (c) establishing the connection between production from a well or combination of wells and any alleged degradation of water quality not only fails to give fair notice to permittees but also invites arbitrary and discriminatory enforcement by its lack of guidance to the District. As such, in addition to being arbitrary and capricious and without a rational basis, these provisions are invalid on the grounds that they are unconstitutionally vague.

G. Rule Challenge No. 7: District Rule 5.1.B(8) – Operating Permit Application

55. In amendments approved and adopted on June 21, 2023, the District amended its Rule 5.1 to change subsection 5.1.B(8) as follows:

(8) if the applicant is not the End User of the water, ~~(a) if the applicant has identified an End User, the applicant must provide~~ the identity of the End User and a

²⁹ *Benton*, 980 S.W.2d at 437-38.

description of the applicant's regulatory, statutory, contractual or other legal obligation with the End User to address the End User's beneficial use water supply needs, or ~~(b) if the applicant has not identified the End User, a statement that the End User has not be identified;~~

56. LCRA is affected by, and dissatisfied with, Rule 5.1.B(8) because it owns land and groundwater rights within the District and has operating permits to produce groundwater and will be adversely affected by this rule.

57. The addition of District Rule 5.1.B(8) is invalid because it goes beyond the scope of the District's statutory authority.³⁰ Groundwater conservation districts derive their authority from the Legislature and have only those powers expressly granted to them.³¹ Because the power of a groundwater conservation district is limited by the terms of applicable statutes authorizing its creation and granting its powers, a district cannot exercise authority that the Legislature has not clearly granted.³²

58. Nothing in Chapter 36 of the Texas Water Code nor anything in the District's enabling act grants it the authority to require a permit applicant to prove it has an End User before it can obtain a groundwater permit. A district is allowed to require that the water be put to beneficial use as provided under Texas Water Code § 36.113(d)(3), but the identity of the End User has no impact on the aquifer, the power or duty of the district, or whether an application should be granted.

59. Although Texas law treats groundwater and surface water differently in many respects, one thing that is consistent between them is that a user of either source of water must put

³⁰ *City Pub. Serv. Bd.*, 53 S.W.3d at 315.

³¹ TEX. CONST. art. XVI, § 59(b); *Tri-City Fresh Water Supply Dist. No. 2 v. Mann*, 142 S.W.2d 945, 948 (Tex. 1940); *South Plains Lamesa Railroad, Ltd. v. High Plains Underground Water Conservation Dist.*, 52 S.W.3d 770, 776 (Tex. App.—2001, no pet.).

³² *Id.*

the water to beneficial use.³³ LCRA agrees the District has the authority to require the groundwater to be put to a beneficial use. However, there is no rational basis for establishing a higher standard for use of privately owned groundwater than the standard the Texas Commission on Environmental Quality (TCEQ) applies for use of state surface water. LCRA is not aware of any instance in which TCEQ has required a water rights applicant to demonstrate beneficial use by establishing the applicant's regulatory, statutory, contractual or other legal obligation with an End User(s).³⁴ An end user of a water supplier could be the supplier's direct customer(s) or might be a customer even further down the supply chain. Instead, TCEQ compares the requested use with the list of beneficial uses the legislature has recognized in Texas Water Code Chapter 11, and if the proposed use is on the list, it is a beneficial use, by definition. The District has no power to impose additional hurdles, conditions, or restrictions on a permit application that are beyond the scope of the relevant statutory requirement for beneficial use in Chapter 36.³⁵ Requiring an applicant to prove it has a specific End User unduly limits the ability of a regional water supplier, like LCRA, to plan for and develop a 50-year water supply, which is the planning horizon required in the State and Regional Water Plans.³⁶ Responsible water supply planning and development means the water supply is in place before the need for the water arises. Further, an End User may be unwilling to obligate itself without the certainty that the water supply is permitted and available.

³³ Compare TEX. WATER CODE § 36.001(9) (groundwater) with § 11.023 (surface water).

³⁴ See e.g. *City of San Antonio v. Texas Water Comm'n*, 407 S.W.2d 752, 759, 761-763 (Tex. 1966) (upholding the Texas Water Commission's grant of a water right to Guadalupe-Blanco River Authority (GBRA), and noting that there were no contracts between the river authority and any municipality for use of water under the water right sought by GBRA).

³⁵ See Tex. Water Code § 36.113(d)(3) (providing only that in granting or denying a permit a groundwater conservation district shall consider whether "the proposed use of water is dedicated to *any beneficial use*." (emphasis added).

³⁶ See 31 Tex. Admin. Code § 357.12(e)(1).

60. Pleading further, and in the alternative, Subsection 5.1.B(8) is void under the due course of law clause of the Texas Constitution because it is arbitrary and capricious and lacks a rational basis.

H. Rule Challenge No. 8: District Rule 5.3.D(1) – Operating Permit Provisions

61. In amendments approved and adopted on March 15, 2023, the District amended its Rule 5.3.D(1) as follows:

D. Other special conditions.

(1) The Operating Permit may include a special condition requiring the Permittee to drill and complete monitoring wells, or provide other monitoring equipment, to be conveyed to the District. Such a special condition shall require no more than one monitoring well for every 5,000 acre-feet of groundwater authorized to be withdrawn under the Operating Permit. The District will negotiate a contract with the Permittee related to the construction, installation, operation, and conveyance of the monitoring wells with an applicant required to install a monitoring well under these Rules.

62. LCRA is affected by, and dissatisfied with, Rule 5.3.D(1) because it owns land and groundwater rights within the District and has operating permits to produce groundwater and will be adversely affected by this rule as a result.

63. The additional language added to District Rule 5.3.D(1) is invalid because it goes beyond the scope of the District's statutory authority.³⁷ Nothing in Texas Water Code Chapter 36 nor anything in the District's enabling act grants the District specific authority to require an applicant to contract with the District for the construction and conveyance of monitoring wells. Rather, the District's statutory authority is limited to requiring permits for the production and transport of groundwater, regulating the spacing of wells, and regulating the production of groundwater by various means as set out in Texas Water Code § 36.116. It has no power to require permittees to also enter contracts to construct and transfer any monitoring wells.

³⁷ *City Pub. Serv. Bd.*, 53 S.W.3d at 315.

64. The rule also fails because it is prejudiced against large well owners. There may be no difference in predicted groundwater impacts from pumping the same amount from a large well owned by a single entity and the same level of pumping from several smaller wells owned by the same person or by several people. Yet, only the large well owners are subject to these requirements.

65. Pleading further, blanket monitoring requirements for larger wells amount to an unconstitutional condition on the grant of a permit. Even if the District had the authority to require monitoring as a condition of a permit, the proposed rule goes too far. A government may not condition approval of a permit by coercing a permittee to spend money to acquire (and then relinquish) property interests for the public benefit, unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use.³⁸ Here, the District's conditioning of the operating permits on a permittee's agreement to implement a groundwater monitoring program would require the permittee to incur substantial costs to design, acquire, install, and maintain groundwater monitoring equipment, as well as the costs to acquire the land rights and easements necessary to install and access the equipment. There is no nexus or rough proportionality between the predicted groundwater impacts of a larger permittee and the unreasonable regulatory and financial burden that the permittee will incur to implement this requirement for the benefit of aquifer users at large.

³⁸ See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-07 (2013) (invalidating District's denial of permit based on applicant's refusal to acquire, enhance, and transfer large wetlands property to District because the requirement was not roughly proportional to the impact of the project); and *Town of Flower Mound v. Stafford Estates*, 135 S.W.3d. 620 (Tex. 2004) (holding that developer was entitled to compensation for costs incurred in rebuilding a road that was not necessary to accommodate impact of subdivision).

I. Rule Challenge No. 9: District Rule 12.6 – Transport

66. In amendments approved and adopted on June 21, 2023, the District adopted its Rule 12.6, which provides the following:

Rule 12.6 Transport. With the exception of groundwater transported along the bed and banks of a stream pursuant to a bed and banks authorization obtained from the Texas Commission on Environmental Quality, to avoid evaporation, groundwater transported inside of the District may not be transported more than 1,500 feet in an open channel.

67. LCRA is affected by, and dissatisfied with, Rule 12.6 because it owns land and groundwater rights within the District and has operating permits to produce groundwater that would be subject to the invalid transport limitations adopted in the rule.

68. Rule 12.6 is void on the grounds that it exceeds the District’s statutory authority under Chapter 36 of the Texas Water Code and the District’s enabling legislation. Nothing in Chapter 36 nor anything in the District’s enabling act grants it the authority to dictate how groundwater is transported. Because “evaporation” is not considered “waste” under the Texas Water Code § 36.001(8) definition, the statute specifically excepts from the definition of “waste” water transported by any means on one’s property. As such, the District’s Rule 12.6 is invalid because it goes beyond its statutory grant of authority and contravenes the plain language and legislative intent of Chapter 36 of the Texas Water Code.

69. Rule 12.6 is also arbitrary and capricious. There is no evidence, and the District provided no evidence that the transport of groundwater for more than 1,500 feet in an open channel is harmful, wasteful, or would otherwise impact the aquifer.

VII. RELIEF REQUESTED

70. LCRA requests relief in the form of a declaratory Judgment of the Court declaring each of the foregoing District Rules to be null and void and of no ongoing effect.

71. LCRA further seeks relief in the form of a permanent injunction, enjoining the District from enforcing the invalid rules challenged herein against LCRA or in regard to any water permit issued by the District to LCRA.

PRAYER

WHEREFORE, PREMISES CONSIDERED, LCRA respectfully prays that Defendant, Lost Pines Groundwater Conservation District, be cited to answer and appear herein and that upon trial on the merits, that the Court find for Plaintiff LCRA on all claims, award LCRA the declaratory and injunctive relief requested herein, and award LCRA such other and further relief, both at law and in equity, to which it may show itself entitled.

Respectfully submitted,

BICKERSTAFF HEATH DELGADO ACOSTA LLP

3711 S. MoPac Expy.

Bldg. 1, Ste. 300

Austin, Texas 78746

512-472-8021 (Telephone)

512-320-5638 (Fax)

By: /s Gunnar P. Seaquist

Gunnar P. Seaquist

State Bar No. 24043358

gseaquist@bickerstaff.com

Emily Rogers

State Bar No. 24002863

erogers@bickerstaff.com

Lyn Clancy

State Bar No. 00796448

Lyn.Clancy@lcra.org

Lower Colorado River Authority

P.O. Box 220

Austin, TX 78701

Telephone: (512) 578-3378

Facsimile: (512) 578-4010

COUNSEL FOR PLAINTIFF