No. 19-0976

IN THE

SUPREME COURT OF TEXAS

MOUNTAIN PURE TX, LLC,
Petitioner,

v.

NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT,
Respondent.

RESPONSE OF NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT IN OPPOSITION TO MOUNTAIN PURE TX, LLC'S PETITION FOR REVIEW

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STATEMENT OF CASE

Nature of the case:	Respondent sued Petitioner to enforce Respondent's Rules and Regulations. Petitioner then filed a counter-claim alleging that Respondent had taken Petitioner's property without compensation. CR 349
Trial Court:	2nd Judicial District Court of Cherokee County, Honorable Chris Day
Trial Court Disposition:	Respondent's Plea to the Jurisdiction and Motion for Partial Summary Judgment as to the takings claim was denied. CR 603
Court of Appeals:	Twelfth Court of Appeals, Tyler. Chief Justice Worthen, Justice Hoyle, and retired Justice Bass, Twelfth Court of Appeals, sitting by assignment. *Neches and Trinity Valleys Groundwater Conservation District v. Mountain Pure TX, LLC* (Tex. App. – Tyler, 2019) 2019 Tex. App. LEXIS 8448; 2019 WL 4462677
Parties in Court of Appeals:	Appellants: Neches and Trinity Valleys Groundwater Conservation District. Appellee: Mountain Pure TX, LLC *Amici Curiae*: Harris-Galveston Subsidence District, Fort Bend Subsidence District, Brazoria County Groundwater Conservation District, Hays Trinity Groundwater Conservation District, Kinney County Groundwater Conservation District, Mid-East Texas Groundwater Conservation District, Lower Trinity Groundwater Conservation District, Southeast Texas Groundwater Conservation District, Trinity Glen Rose Groundwater Conservation District, Bandera County River Authority and Groundwater District, Blanco-Pedernales Groundwater Conservation District, and Gonzales County Underground Water Conservation District.

	Court of Appeals Disposition: District Court's order denying Respondent's Plea to the Jurisdiction and Motion to Dismiss Petitioner's counter-claim was reversed. The Court of Appeals rendered judgment dismissing Petitioner's takings claim against Respondent, and remanded the cause to the trial court for further proceedings consistent with its opinion.

STATEMENT OF JURISDICTION

This Court should dismiss the petition for lack of jurisdiction because Petitioner failed to exhaust administrative remedies required by Tex. Water Code Sec. 36.251 and by Respondent's rules. Section 36.251 provides that a corporation "affected by and dissatisfied with any rule or order made by a district … is entitled to file a suit against the district…to challenge the validity of the law, rule, or order," but "The suit may only be filed after all administrative appeals to the district are final." *Id*.(a), (c). Petitioner did not pursue an administrative appeal.

In addition, Respondent's rules require a request for rehearing, as a prerequisite to judicial action. Appendix 3, Rule 7.2 at 9, "Rules for Hearing." ("Any decision of the Board on a matter may be appealed by requesting a rehearing before the Board within 20 days of the Board's decision . . . Such a rehearing request is mandatory with respect to any decision or action of the Board before any appeal may be brought."). Petitioner never requested a rehearing.

Finally, the dispute is not yet ripe for review and should be dismissed for lack of jurisdiction, because the District Court has not yet determined that Respondent's Rules apply to Petitioner or its property, nor imposed any restrictions, fees, or civil penalties authorized by the Rules.

RESPONSE TO ISSUES PRESENTED

1. The District Court lacked subject matter jurisdiction, because Petitioner failed to state a takings claim under *City of Houston v. Carlson*.

2. The District Court lacked subject matter jurisdiction, and therefore this Court has none, because Petitioner failed to exhaust its administrative remedies, as required by statute and Respondent's Rules, and the dispute is not ripe for review, because the District Court has not yet determined that Petitioner or its property is subject to the Respondent's Rules nor imposed any restrictions on Petitioner or its property.

3. Because of evidentiary gaps in the trial court record, this case would be a poor vehicle for this Court to use to change the law on either immunity or inverse condemnation, which this Court would have to do for Petitioner to prevail.

STATEMENT OF FACTS

The Texas Legislature created Respondent in 2003 to conserve, protect, preserve, recharge, and prevent waste of groundwater in Anderson, Henderson, and Cherokee Counties. Tex. Special Local District Code Chapter 8863. It was empowered to adopt and enforce rules and regulations to carry out its functions. Tex. Water Code §36.101-.102. Respondent adopted rules in 2003. CR 213. Appendix 3 (the "Rules"). Petitioner bought its property in 2007, years after all relevant statutes and rules took effect. CR 558.

The Rules require permits to drill and operate a "water well," defined as "…any artificial excavation constructed for the purpose of exploring for or production of groundwater," Rules 1(u), and the operator must report quarterly the amount of groundwater pumped and pay a small fee based on that amount. App. 2 at 9. The underlying dispute concerns whether this Rule may be applied to Petitioner.

After Petitioner refused repeated requests to comply with the Rules, Respondent's Board of Trustees on April 16, 2015 adopted a Resolution finding that Petitioner was in violation and authorizing this lawsuit. App. 4. Petitioner requested no rehearing or other administrative remedy from the Board, although the Rules required that step of anyone wishing to further contest Board action. Respondent sued Petitioner on August 15, 2016, seeking an injunction to compel compliance

with the Rules and to impose a civil penalty in an amount within the District Court's discretion, per Tex. Water Code §36.102(b). CR 6.

Respondent has never condemned or restricted access to Petitioner's property, stopped Petitioner from operating, or tried to do so.

Petitioner filed a Counterclaim alleging Respondent took its property without compensation. CR 68. Neither it nor Petitioner's first five amended counterclaim filings identified the property Respondent had taken.

After the District Court ordered Petitioner to replead and identify the property taken, Petitioner in its Sixth Amended Counterclaim finally identified the property "taken" as its well and bottling plant located at 777 Willow Creek Drive, Palestine, Texas (the "Property"), and claimed the taking occurred when Respondent filed this lawsuit on August 15, 2016. CR 351 ("On . . . August 15, 2016 . . . Counter-Defendant filed suit against Counter-Plaintiff.") As the Court of Appeals emphasized, that was the only taking Petitioner alleged: "The dispute as to whether the District's rules apply to Mountain Pure's facility remains unresolved. Therefore, as yet, no rules or restrictions have been imposed on Mountain Pure or its property. However, *in its counterclaim, Mountain Pure claims a permanent taking occurred when the District filed suit against it . . . to enforce its regulations applicable to groundwater*." (emphasis supplied). Opinion, App. 3 at 6.

The District Court received evidence on Respondent's Third Amended Plea to the Jurisdiction, CR 585, and Petitioner's appraiser opined that after the August 15, 2016 "taking," *i.e.*, after Respondent filed this lawsuit, the Property was worth $4,090,000.00 and still suitable for the same use as before. CR 484, 379.

The District Court denied Respondent's First Amended Motion for Partial Summary Judgment on the takings claim and Respondent's Third Plea to the Jurisdiction. CR 602-04.

Respondent appealed. CR 605. The Twelfth Court of Appeals reversed the District Court's orders of denial, rendered judgment dismissing Petitioner's takings claim for lack of jurisdiction, and remanded the cause to the District Court for Respondent to pursue its claims. App. 3. There was no motion for rehearing.

Petitioner filed its Petition in this Court, which ordered this Response.

SUMMARY OF ARGUMENT

There are good reasons to deny review without ordering full briefing. The narrowest is that Petitioner failed to exhaust mandatory administrative remedies by failing to request a rehearing of Respondent's action. State law and Respondent's Rules require exhaustion of remedies before Petitioner may sue. Had Petitioner requested a rehearing, it might have convinced Respondent its property was not subject to regulation; instead, Petitioner first made that argument in the District Court. This Court has repeatedly dismissed claims for lack of jurisdiction when parties failed to exhaust administrative remedies, and it should do so here.

In addition, Petitioner's claim is not ripe for review. Only the District Court, not Respondent, can take anything from Petitioner, and it has not ruled yet. As this Court has said, "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes . . . Accordingly, in order for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998). But "No rules or restrictions have as yet been imposed on Mountain Pure or its property and the question of the District's authority over the source of Mountain Pure's water remains pending before the trial court." Opinion, App. 3 at 3. The "final decision" required by *Mayhew* does not exist. Nobody knows "how far the regulation goes" or if the District Court will hold Respondent's Rules

even apply to Petitioner, another independent reason to dismiss for lack of jurisdiction.

Second, "Mountain Pure claims a permanent taking occurred when the District filed suit against it…." Opinion, App. 3 at 6. It cannot be Texas law that filing a lawsuit to enforce state water law either waives immunity or constitutes a compensable taking, but Petitioner must have that holding to prevail. [A]s yet, no rules or restrictions have been imposed on Mountain Pure or its property." Opinion, App. 3 at 6. Holding that filing a lawsuit constituted a taking would be unprecedented, absurd, and would interfere with Respondent's First Amendment rights to speech and with its Texas constitutional rights under the Open Courts provision.

Finally, Petitioner failed to prove Respondent's action "totally" destroyed its property value or "unreasonably" interfered with its use, as required in *Mayhew*. Petitioner has presented a gap-filled record that contains no evidence or findings that would justify jurisdiction of an inverse condemnation claim. One example: Petitioner's own appraiser valued the property at more than $4 million after the alleged taking. Evidence on other *Mayhew* factors is similarly insufficient.

This Court should deny review now, without further briefing.

ARGUMENT

I. The District Court lacked subject matter jurisdiction because Petitioner failed to plead or prove Respondent took its property.

A. Petitioner's takings claim is barred by *City of Houston v. Carlson*.

Respondent, a government entity, is immune from Petitioner's suit, absent a waiver of immunity. *City of Houston v. Carlson*, 451 S.W.3d 828, 826 (Tex. 2014). It was Petitioner's burden to establish waiver. *Blanton Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). As the Court of Appeals held, Petitioner failed to do so. Petitioner failed to present evidence and to secure findings on controlling fact issues.

In *Carlson*, *supra*, the City wrongfully forced the landowners to vacate their property, but like Petitioner, they failed to contest the validity of the City's restrictions. The Carlsons did "not contest any of Houston's property-use restrictions. . . [Their] petition never once refers to the standards imposed by the city's building code. Instead, [they] object only to the penalty imposed and the manner in which the City enforced its standards." *Id.* at 831-32. This Court held that was not enough: "[N]early every civil-enforcement action results in a property loss of some kind. The very nature of the action dictates as much." *Id.* at 832-33. Like the Carlsons, Petitioner failed to complain about the validity of any statute or Rule, but only that Respondent, attempting to enforce the law, filed this lawsuit. The

Carlsons suffered a far greater property "loss" than Petitioner, but still lost in court. Petitioner should lose for the same reason.

Consider: Petitioner sued the District not because some regulation was invalid, but only because the District sued it: "Mountain Pure claims a permanent taking occurred when the District filed suit . . . to enforce its regulations." Opinion at 6; App. 3. Thus, Petitioner cannot win unless this Court holds that filing a lawsuit, by itself, constitutes a taking.

In an *amici curiae* brief filed in this case before the Twelfth Court of Appeals, twelve Texas subsidence and groundwater districts argued:

> The [*Carlson*] court expressly rejected the owners' assertion that "a civil-enforcement procedure alone can serve as the basis of a regulatory-takings claim." *Ibid*. The Court further held that this was so even if the City of Houston had "been mistaken regarding the actual safety of the complex." *Carlson*, 451 S.W.3d at 833. Although not cited in *Carlson*, that opinion's focus upon the underlying regulation itself – rather than enforcement by the City – meshes neatly with the Texas Supreme Court's earlier holding in *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 802 (Tex. 2005), where it stated that "[i]n a regulatory taking, it is the passage of the ordinance that injures a property's value or usefulness."
>
> In our own case, Mountain Pure has clearly failed to meet its *Carlson*-imposed burden to focus its takings claim upon the specific statutes – i.e. Tex. Water Code Ch. 36, and Special District Local Laws Code Ch. 8863 – giving rise to NTVGCD's regulatory powers. Mountain Pure – in its response in the District Court to Appellant's Third Plea to the Jurisdiction, CR 585, – stated that it:
>
> > …does not necessarily view this as a regulatory takings case. Rather, it was the wrongful, intentional actions of the

> District and its commissioners (sic) that resulted in the unlawful taking of Defendant's property.

Moreover, in its brief in the Court of Appeals, Mountain Pure in no way attempted to clarify or disown that earlier statement. Instead, at page 10 of its Brief, Mountain Pure explicitly chose to "double down" on their fatal error by flatly stating:

> Assuming that Appellant intends to state that Appellee has not challenged the constitutionality or enforceability of the regulations themselves, that argument has no bearing on Appellee's counterclaim and takings claim. Appellee does not contend that the rules and regulations are invalid, but rather tha[t] Appellant's action (as opposed to the regulations as written) in fining, filing suit and restricting Appellee and its tenant's access to the spring water on Appellee's property constitutes an unlawful taking.

Accordingly, Mountain Pure's acknowledged attempt to maintain a viable takings claim based upon NTVGCD's actions undertaken to enforce its regulatory powers – rather than the underlying regulations themselves – is patently invalid under the standard laid down by the Texas Supreme Court in *Carlson*. 451 S.W.3d at 831-33.

App. 1 at 9-10.

Failure to attack state law or Respondent's regulations is fatal to Petitioner's case. The District Court found Respondent's rules and regulations were valid, CR 271, Petitioner never contested that ruling and instead contested only their application and enforcement.

B. Lower courts have followed *Carlson*.

Lower courts have followed *Carlson* in *House of Praise Ministries, Inc. v. City of Red Oak*, 2017 WL 1750066 (Tex. App—Waco, May 3, 2017, no pet.), and in

APTBP, LLC v. City of Baytown, 2018 WL 4427403 (Tex. App.--Houston (14th Dist.), September 18, 2018, no pet.). In *Baytown*, the owner complained only that the City misapplied its regulations. The Fourteenth Court held the owner had not pled a viable regulatory taking. *Id*. at 13. In none of these cases did the owners attack any statutes or regulations, only their enforcement, and because of that, they all lost, as Petitioner should.

Petitioner contends lower courts have not followed *Carlson*, citing *CPM Trust v. City of Plano*, 461 S.W.3d 661 (Tex. App. – Dallas 2015, no pet.), and *National Media Corp. v. City of Austin*, 2018 WL 1440454 (Tex. App.—Austin, March 23, 2018, no pet.). Of course, lower courts must follow this Court's decisions, and those two did. Both cited *Carlson*, reversed the trial courts' judgments, and held there was no jurisdiction.

C. Respondent did not take property; Petitioner's hope that Respondent would never sue to enforce the law is not property.

Petitioner has not pled a valid takings claim for the most fundamental reason: Respondent has not taken or used Petitioner's property. True, Respondent frustrated Petitioner's hope or expectation to violate Texas water regulations and never be sued, but lost hope is not "property." "A party's mere expectation of a permit is not a protected property interest." *National Media Corp. v. City of Austin*, 2018 WL 1440454 *6 (Tex. App.—March 23, 2018), no pet.). "[T]he hope that the government will grant a discretionary mitigation permit does not create a

compensable property interest." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 486 (Tex. 2012). Petitioner had only a "unilateral hope or expectation" of not being sued, and that is a long way from a "vested interest" in property required to support its claim. *National Media* at *6.

Note the trenchant irony: Petitioner claims Respondent violated its constitutional rights by suing, but Respondent is the party with a right not to be sued. Petitioner has the rights inventory backward. It has no immunity from suit; only Respondent does.

Most property disputes concern ownership or value. Few raise the foundational question here: "What is property?" The United States Supreme Court answered the question in *United States v. Willow River Power Company*, 324 U.S. 499 (1945).

In *Willow River*, the government changed a river's course and reduced the "head water" (the distance river water fell to create electricity) at a power plant on the owner's land. *Id.* 501-02. That reduced the amount of power the owner could generate, and it claimed a property taking for the value of the lost generating capacity. The owner lost, because the Court held the government had not taken "property":

> The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. *It does not undertake however, to socialize all losses, but those only which result from a taking of property*. If

> damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by implication from the constitutional provision…
>
> *It is clear, of course that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them*, and only when they are so recognized may courts compel others to forebear from interfering with them or to compensate for their invasion…*We cannot start the process of decision by calling such a claim as we have here a 'property right'; whether it is a property right is really the question to be answered*. Such economic uses are rights only when they are legally protected interests.…"

324 U.S. at 502-03 (emphasis supplied).

No court has ever said a private party had a constitutional right not to be sued. For Petitioner to win, this Court would have to be the first, because such claims do not "have the law back of them." *Id*. at 503.

Willow River was a stronger case for the land owner than this one. Two Justices dissented and argued, based on Supreme Court authority, that the government had taken "property." If raising the water level on private land did not take "property," then walking into the Cherokee County courthouse and handing the District Clerk Respondent's original petition certainly didn't.

Texas law yields the same result as *Willow River*. *See Basse Truck Line v. Texas Natural Resource Conservation Commission*, 2003 WL 21554293 *7 (Tex. App.—Austin 2003, pet. denied) ("In order to abate this nuisance, the order required Basse to surface its lots. *This is neither a physical*

nor a regulatory taking of its property for public use. It is a remedial action taken by the TNRCC to cure the violation of a provision of the health and safety code, which the TNRCC has the authority to enforce. What the TNRCC has done is to require compliance with state law prohibiting property to be used to create a nuisance.") (emphasis supplied). Like the TNRCC, Respondent sued "to require compliance with state law."

The rule of law Petitioner advocates is bad enough on its face, but consider also its constitutional side effects. Before holding that filing this lawsuit, by itself, violated Petitioner's Fifth Amendment rights, this Court should first consider Respondent's constitutional rights, including its First Amendment rights to speech and to petition courts for relief. *See Walker v. Texas Div., Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015), (recognizing that state governments have speech rights under the First Amendment); cited in *Texas Democratic Party v. Abbott*, No. 20-50407, 5th Cir., June 4, 2020, at 29-31.

Unsurprisingly, this Court rejected a takings claim based on speech by Texas government agencies addressed to federal agencies: "Public policy argues strongly for our result. The preservation of communication between governmental entities is an important public interest." *Hearts Bluff Game Ranch, Inc v. Texas*, 381 S.W.3d 468, 489 (Tex. 2012). This Court said, "Mere communications without authority are not actionable, whether it be between a state agency and the Legislature, between

the federal government and the State, or between the State and another state government." *Id*. at 489. In that case, how can communication (filing suit) with authority (the Board's resolution) between the Texas executive department (Respondent) and the Texas judicial department (the District Court) be actionable?

Such a holding would also implicate the Open Courts doctrine, Tex. Const. Art. I, Sec. 13. Resolving such issues would require some heavy lifting. Courts wisely avoid constitutional issues when, as here, cases can be decided on narrower grounds. This Court should not undertake an analysis so constitutionally fraught in the service of a rule of law so undeserving.

This Court should instead deny review for the best of reasons: Respondent has not taken property and Petitioner has not yet lost anything. Respondent lacks authority to collect any penalty, enjoin any conduct, enforce any regulations, and has never claimed otherwise. Only the District Court can do those things, and for all we know, it might refuse to and rule for Petitioner. That's why the Twelfth Court concluded: "The dispute as to whether the District's rules apply to Mountain Pure's facility remains unresolved. Therefore, *as yet, no rules or restrictions have been imposed on Mountain Pure or its property."* App. 3 at 6 (emphasis supplied). Petitioner's issue is not ripe for review. This case should end now, with Respondent spared the expense of full briefing.

II. The District Court lacked subject matter jurisdiction because Petitioner failed to exhaust its administrative remedies, and Petitioner's claims are not ripe for review by this Court.

On April 16, 2015, Respondent adopted a resolution finding:

1. Mountain Pure TX, LLC has failed to obtain a permit for non-exempt wells that it owns and operates;

2. Mountain Pure TX, LLC has failed and continues to fail to provide quarterly production reports as required by the Texas Water Code and District Rules;

3. Mountain Pure TX, LLC has failed and continues to fail to pay production fees as authorized by law and required by District Rules.

CR 96. The resolution is the equivalent of an order. *See International Paper Co. v. Harris Co.*, 445 S.W. 3d 379, 383 (Tex. App. Houston--1st Dist. 2013, no pet.) (equating county commissioners' "order" authorizing lawsuit with "resolution" required by Tex. Water Code Sec. 7.352).

Texas Water Code Section 36.251 authorizes jurisdiction over claims like Petitioner's, but on condition: "The suit may only be filed after administrative appeals to the district are final." Petitioner never made an administrative appeal or filed any complaint with Respondent about the resolution, and thus failed to exhaust administrative remedies, as Respondent asserted below. CR 589. Section 36.251 thus bars Petitioner's counterclaim, the District Court lacked subject matter jurisdiction to adjudicate it, and this Court has none.

Rule 7.2 of Respondent's "Rules for Hearings" also bars Petitioner's counterclaim:

> **Requests for Rehearing**: Any decision of the Board on a matter may be appealed by requesting a rehearing before the Board within 20 calendar days of the Board's decision. Such a rehearing request must be filed at the District office in writing and must state clear and concise grounds for the request. Such a rehearing request is mandatory with respect to any decision or action of the Board before any appeal may be brought. . . .

Appendix 2, Rules for Hearings at 9.

This Court has repeatedly dismissed takings claims when owners failed to exhaust administrative remedies. *See Garcia v. City of Willis*, 593 S.W.3d 201, 211-12 (Tex. 2019) (administrative hearing could have mooted takings claim "if officer had ruled in his favor for other reasons"). Like Mr. Garcia, had Petitioner exhausted its remedies, it may have convinced Respondent that its Property was not subject to regulation, as Petitioner instead alleged in the District Court for the first time. *See City of Dallas v. Stuart*, 361 S.W.3d 562, 579 (Tex. 2012) ("[A] party asserting a taking must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit."); *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 237 (Tex. 2011) ("[W]e reject VSC's taking claim because it did not pursue an established remedy to recover its claimed interest….").

"Subject matter jurisdiction cannot be waived and may be raised for the first time on appeal by the parties or the court." *Mayhew v. Town of Sunnyvale*, 964

S.W.2d 922, 928 (Tex. 1998); *accord Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 444-45 (Tex. 1993).

Respondent also raised the issue of ripeness below. CR 589. "Ripeness is an element of subject matter jurisdiction. As such, ripeness is a legal question subject to de novo review that a court can raise sua sponte." *Mayhew*, at 928. "[F]or a regulatory taking claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue." *Id.* at 929. There has been no final or even preliminary decision depriving Petitioner of anything.

Texas and federal courts have not hesitated to dismiss takings claims that were not ripe for review. *See Riner v. City of Hunters Creek*, 403 S.W.3d 919, 922-24 (Houston—14th Dist. 2013, no pet.) (failure to request hearing before the Board of Adjustment barred claim that City misconstrued its ordinance); *Dominican Management, LLC* v. *City of Arlington*, 7 F. Supp.3d 659, 663-67 (N.D. Tex. 2014).

This Court should dismiss the petition for lack of jurisdiction.

III. Because of evidentiary gaps in the record, this case should not be used to change the law of immunity or inverse condemnation, as would be required for Petitioner to prevail.

Petitioner has brought this Court a gap-filled record that cannot support its regulatory taking claim. In *Mayhew*, a developer was denied a permit and it alleged a regulatory taking. 964 S.W.2d at 933. This Court discussed evidence considered in determining a regulatory taking. *Id.* 935 to 938. One was that property value

must have been totally destroyed, but after the alleged taking Mayhew's property retained a value of $2.4 million. This Court concluded: "In such a situation, the governmental regulation has not entirely destroyed the value of the property." *Id.* at 937. Petitioner's property retained millions more value after the alleged taking than Mayhew's did, $4.09 million, according to Petitioner's expert. CR 484. For that failure of evidence alone, Petitioner should lose. *See* Opinion, App. 3 at 6.

Petitioner also failed to establish other *Mayhew* factors:

(a) Respondent did not deny Petitioner all economically viable use of the property. The Property is available for the same use as before suit was filed. CR 379 (Report of Petitioner's appraiser).

(b) Respondent's Rules did not cause an unreasonable or onerous financial impact to Petitioner. Because Petitioner never filed production records, it never proved what it would owe, if anything, in production fees. There would be no economic impact from such fees at all until the District Court ruled, which might be in favor of Petitioner. Any civil penalty is also yet to occur, and would be within the District Court's exclusive discretion, not Respondent's. Opinion, App. 3 at 7 ("There is no pleading that the imposition of a three cent per 1000 gallons fee will be so onerous as to affect the present use of the property or significantly diminish its economic viability.").

(c) Respondent did not interfere with Petitioner's investment-backed expectations. Petitioner bought the Property in 2007, years after all relevant statutes and rules were in effect, and is charged with notice of them. *See* (d) and (j)below.

(d) Respondent has not "denied access to the property's value," reduced its market value, and caused loss of rent. CR 583 (Stack affidavit). "The actions of the State do not constitute a taking simply because Hearts Bluff cannot earn as much money on its investment as it originally hoped." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 490 (Tex. 2012).

(e) Respondent never physically invaded the property of Petitioner.

(f) Respondent has not rendered Petitioner's Property valueless. CR 484 (more than $4 million value retained in the Property).

(g) That Respondent knew of and attempted to regulate Petitioner's contract with Ice River. This is both unproven and irrelevant, because knowledge would not excuse Respondent from executing its statutory duties. "A civil enforcement procedure alone cannot serve as the basis of a regulatory takings claim." Opinion, App. 3 at 5, citing *Carlson*.

(h) That Respondent's Rules only apply to Petitioner. The rules were in place for four years before Petitioner bought its property and for more than thirteen years before it filed its counterclaim.

(i) That Respondent temporarily or permanently denied Petitioner access to its Property. Filing this lawsuit did not deny access.

(j) Any diminution of the market value of Petitioner's Property was not a "taking": "The takings clause does not charge the government with guaranteeing the profitability of every piece of land subject to its authority. Purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk. . . ." *Hearts Bluff*, 381 S.W.3d at 490.

CONCLUSION AND PRAYER

If any one of Respondent's points has merit, the petition is meritless. They all have merit. This Court should deny review now, without making this small, obscure, cash-strapped local government entity bear the expense of full briefing.

Respectfully submitted,

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CERTIFICATE OF COMPIANCE

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ND: 4825-7086-5836 v.

APPENDIX

1.

Amici Curiae Brief

ACCEPTED
12-19-00172-CV
TWELFTH COURT OF APPEALS
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No. 12-19-00172-CV

IN THE COURT OF APPEALS FOR THE STATE OF TEXAS
12TH JUDICIAL DISTRICT AT TYLER, TEXAS

NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT,
Appellant

v.

MOUNTAIN PURE TX, LLC,
Appellee

On Appeal from the 2nd Judicial District, Cherokee County, Texas
Trial Court No. 2016-08-0543

BRIEF OF AMICI CURIAE HARRIS-GALVESTON SUBSIDENCE DISTRICT, FORT BEND SUBSIDENCE DISTRICT, LOWER TRINITY GROUNDWATER CONSERVATION DISTRICT, SOUTHEAST TEXAS GROUNDWATER CONSERVATION DISTRICT, AND OTHER GROUNDWATER CONSERVATION DISTRICTS IN SUPPORT OF APPELLANT

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No. 12-19-00172-CV

IN THE COURT OF APPEALS FOR THE STATE OF TEXAS
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NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT,
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BRIEF OF AMICI CURIAE HARRIS-GALVESTON SUBSIDENCE DISTRICT, FORT BEND SUBSIDENCE DISTRICT, LOWER TRINITY GROUNDWATER CONSERVATION DISTRICT, SOUTHEAST TEXAS GROUNDWATER CONSERVATION DISTRICT, AND OTHER GROUNDWATER CONSERVATION DISTRICTS IN SUPPORT OF APPELLANT

INTRODUCTION

The following is an amicus curiae brief filed in support of the Brief filed by the Appellant Neches and Trinity Valleys Groundwater Conservation District ("NTVGCD"). In so doing, the amici curiae – who are likewise Texas subsidence districts and groundwater conservation districts – intend to both summarize and supplement the central argument set forth in Appellant's Brief, in the hopes of furthering this Court's understanding of the core underlying issue in the present lawsuit, which is whether the Appellee Mountain Pure TX, LLC ("Mountain Pure")

has failed to plead a viable regulatory takings claim. The underlying facts are set forth in Appellant's Brief and adopted herein.

STATEMENT OF INTEREST

This amicus brief is presented by the Harris-Galveston Subsidence District, Fort Bend Subsidence District, Brazoria County Groundwater Conservation District, Hays Trinity Groundwater Conservation District, Kinney County Groundwater Conservation District, Mid-East Texas Groundwater Conservation District, Lower Trinity Groundwater Conservation District, Southeast Texas Groundwater Conservation District, Trinity Glen Rose Groundwater Conservation District, Bandera County River Authority and Groundwater District, Blanco-Pedernales Groundwater Conservation District, and Gonzales County Underground Water Conservation District, (jointly, the "Amici") in support of Appellant. The Amici subsidence districts and groundwater conservation districts[1] – like Appellant NTVGCD – are political subdivisions of the State of Texas, created by the Texas Legislature to accomplish the purposes of Article XVI, Section 59 of the Texas

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[1] *See* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8801.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8834.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8826.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8843.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8846.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8866.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8807.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8868.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8870.001 et seq.; Chapter 629, Acts of the 62nd Legislature, Regular Session, 1971 as amended by Chapter 654, Acts of the 71st Legislature, Regular Session, 1989; TCEQ Order Number 2000-0929 WR (October 11, 2000); and TCEQ Order Number 101692-DO4 (November 12, 1993).*

Constitution.[2] Pursuant to Chapter 36 of the Texas Water Code, as well as their respective enabling acts, they are charged with regulating groundwater withdrawals within their jurisdictions "to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and to control subsidence caused by withdrawal of water from those groundwater reservoirs or their subdivisions."[3] To this end, they are each authorized within their jurisdiction to promulgate and enforce rules,[4] issue permits to owners and operators of wells,[5] and sue to recover civil penalties for rule, permit, or order violations.[6]

To accomplish these goals, Texas groundwater conservation districts must regulate the amount of groundwater that may be withdrawn from aquifers, so as to permit the judicious use of groundwater by all, without causing subsidence or depleting the aquifers. In so regulating groundwater use, one of the primary tools utilized by groundwater conservation districts is the requirement that all nonexempt

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2 *See* TEX. CONST. art. XVI, § 59(a), (b); TEX. SPEC. DIST. LOC. LAWS CODE § 8801.002; TEX. SPEC. DIST. LOC. LAWS CODE § 8834.002; TEX. SPEC. DIST. LOC. LAWS CODE *§ 8826.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8843.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8846.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8866.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8807.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8868.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8870.002; Chapter 654, § 6, Acts of the 71st Legislature, Regular Session, 1989; TCEQ Order Number 2000-0929 WR, P.6. (October 11, 2000); and TCEQ Order Number 101692-DO4, P.8. (November 12, 1993).*

3 *See* TEX. WATER CODE § 36.0015.

4 *See* TEX. WATER CODE § 36.101.

5 *See* TEX. WATER CODE § 36.113.

6 *See* TEX. WATER CODE § 36.102.

owners or operators extracting groundwater obtain a permit to do so – thereby permitting effective monitoring of usage within each district – or else face monetary penalties.

In the present case, Mountain Pure argues that they have pled a viable takings claim because NTVGCD's routine enforcement *actions* supposedly interfered with both Mountain Pure's ability to operate the bottling plant upon its property, as well as its relationship with its tenant. As demonstrated below, however, the Amici would show instead that the Trial Court's ruling is based upon a fundamentally erroneous understanding of Texas "takings" law, because the Texas Supreme Court has explicitly made clear that to plead a viable takings claim a plaintiff must attack a regulation not the governmental actions undertaken to enforce a regulation.

The Amici would further note that they – and indeed, all of the rest of Texas's groundwater conservation districts – frequently undertake enforcement efforts indistinguishable from those NTVGCD actions alleged to have given rise to Mountain Pure's "takings" claim. Accordingly, were this Court to uphold the central premise underlying the Trial Court's ruling – i.e. that a litigant can state a valid "takings" claim merely by complaining of a district's *actions* in carrying out its statutory duties, rather than challenging *the underlying rules* themselves – such a holding would strip groundwater conservation districts (such as Amici) of vital protections afforded them under the governmental immunity doctrine.

In turn, loss of that governmental immunity would expose Texas groundwater conservation districts to the risk of becoming ensnared in lengthy "takings" litigation (as here) every time they sought to fulfill their core duty of requiring groundwater users to obtain a permit. Precisely to prevent such a misapplication of the proper relationship between the takings doctrine and governmental immunity, Amici have filed this brief and are paying all fees and expenses to prepare it.[7]

BACKGROUND

Appellee Mountain Pure owns and operates a water bottling plant within the jurisdiction of Appellant NTVGCD in Palestine, Texas. Mountain Pure's plant utilizes water recovered from an excavated spring, which NTVGCD argues is a "well" requiring a permit as defined in NTVGCD's District Rules. For several years prior to 2016, NTVGCD had sent letters urging Mountain Pure to comply with its Rules.

In 2016, NTVGCD again notified both Mountain Pure and its tenant Ice River Springs Palestine, LLC ("Ice River"), a water bottling company, of the permit requirement and of the possible civil penalties for failure to comply. When neither Mountain Pure nor Ice River applied for a permit, NTVGCD filed suit against both entities seeking an injunction to compel them to comply with NTVGCD's Rules and asking the court to impose civil penalties authorized under Chapter 36 of the Water

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[7] *See* TEX. R. APP. P. 11.

Code. Thereafter, tenant Ice River then terminated its lease with Mountain Pure and abandoned the bottling plant; Ice River would eventually be non-suited from the present litigation.

In answer to NTVGCD's suit, Mountain Pure filed a counterclaim against NTVGCD, claiming that it had tortiously interfered with the Ice River lease; the trial court dismissed that claim via a plea to the jurisdiction. In its Fifth and Sixth Counterclaims, Mountain Pure asserted a "takings" action based upon its loss of use of the bottling plant and of its business relationship with its tenant Ice River. NTVGCD, in turn, filed a plea to the jurisdiction as to Mountain Pure's takings counterclaim, as well as a no-evidence motion for partial summary judgment alleging there was no evidence to support a taking. The Trial Court denied NTVGCD's plea as to the takings claim and also denied its summary judgment motion. NTVGCD has now filed the current interlocutory appeal of both those judgments.

ARGUMENT AND AUTHORITIES

1. Mountain Pure Failed to Plead a Valid "Takings" Claim

In its Appellant's Brief, NTVGCD alleged three distinct points of error committed by the Trial Court, the first two of which pertained to its plea to the jurisdiction and the other to its summary judgment motion. The present amicus brief is concerned solely with those first two points of error concerning NTVGCD's plea

to the jurisdiction. Upon closer examination, it is plain that both of these points of error are necessarily premised upon a common concept: whether Mountain Pure has adequately pled a takings claim. This is because Texas law clearly requires that – when a party has failed to adequately plead a takings claim – a trial court should grant a governmental entity's plea to the jurisdiction by reason of the government's inherent immunity from suit. Governmental immunity deprives the court of jurisdiction to hear any claim against a governmental entity absent a validly-pled exception. See *Edwards Aquifer Authority v. Horton*, 2010 Tex. App. LEXIS 736 at *7 (Tex. App. – San Antonio Feb. 3, 2010, pet. denied), citing *TCI West End, Inc. v. City of Dallas*, 274 S.W.3d 913, 916 (Tex. App. – Dallas 2008, no pet.). See also *City of Houston v. Carlson*, 451 S.W.3d 828, 830 (Tex. 2014) ("In the absence of a properly pled takings claim, the state retains immunity").

In the present case, there simply is no question that Mountain Pure has failed to plead a viable taking claim. To begin with, Mountain Pure has at no time alleged that NTVGCD actually *physically* occupied (or *physically* destroyed) its water bottling plant so as to give rise to a claim for a "physical taking." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998). See also *City of Dallas v. Blanton*, 200 S.W.3d 266, 271 (Tex. App. – Dallas 2006, no pet.), and especially *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-25 (2002), which clearly – and strictly – distinguishes between the two types of

takings by holding that regardless of the severity of the burden imposed only actual physical occupation creates a physical taking. *Tahoe-Sierra*, 535 U.S. at 323, n.18.

As to the other species of taking recognized by Texas courts – i.e. regulatory taking – Mountain Pure's claim likewise fails. This is because Texas caselaw has repeatedly made clear that to sufficiently plead such a claim the plaintiff must complain about the underlying government regulation rather than the manner in which the government entity sought to enforce that regulation. The leading case in this regard is the Texas Supreme Court's decision in *Carlson*.

In *Carlson*, the City of Houston's code enforcement department determined – possibly erroneously – that a condominium complex was structurally unsafe and ordered the condominium owners to either obtain a certificate of occupancy or face a municipal citation. When the owners failed to obtain a certificate, the City then ordered all residents to vacate the complex. After lengthy litigation, the City's evacuation order was overturned on due process grounds and the condominium owners subsequently filed a takings lawsuit to recover lost rents for the years they had been barred from their complex. However, the Texas Supreme Court rejected the regulatory taking claim noting that the owners never once questioned the City of Houston's right to require occupancy certificates nor objected to the various City-mandated standards that a structure must meet to obtain such a certificate. *Carlson*, 451 S.W.3d 831-32.

Instead, the *Carlson* court at page 832 noted that the owners had only objected to the excessive penalty imposed and "the manner in which the city enforced its standards." Faced with such deficient pleadings, the court expressly rejected the owners' assertion that "a civil-enforcement procedure alone can serve as the basis of a regulatory-takings claim." *Ibid.* The court further held that this was so even if the City of Houston had "been mistaken regarding the actual safety of the complex." *Carlson*, 451 S.W.3d at 833. Although not cited in *Carlson*, that opinion's focus upon the underlying regulation itself – rather than enforcement by the City – meshes neatly with the Texas Supreme Court's earlier holding in *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 802 (Tex. 2005), where it stated that "[i]n a regulatory taking, it is the passage of the ordinance that injures a property's value or usefulness."

In our own case, Mountain Pure has clearly failed to meet its *Carlson*-imposed burden to focus its takings claim upon the specific statutes – i.e. Water Code Ch. 36, and Special District Local Laws Code Ch. 8863 – giving rise to NTVGCD's regulatory powers. As repeatedly discussed in NTVGCD's Appellant's Brief, Mountain Pure – in its response to Appellant's Third Plea to the Jurisdiction – stated that it:

> ... does not necessarily view this as a regulatory takings case. Rather, it was the wrongful, intentional actions of the District and its commissioners (sic) that resulted in the unlawful taking of Defendant's property.

CR 475. Moreover, in its recent Brief of Appellee, Mountain Pure in no way attempted to clarify or disown that earlier statement. Instead, at page 10 of its Brief, Mountain Pure explicitly chose to "double down" on their fatal error by flatly stating that:

> Assuming that Appellant intends to state that Appellee has not challenged the constitutionality or enforceability of the regulations themselves, that argument has no bearing on Appellee's counterclaim and takings claim. Appellee does not contend that the rules and regulations are invalid, but rather tha[t] Appellant's action (as opposed to the regulations as written) in fining, filing suit and restricting Appellee and its tenant's access to the spring water on Appellee's property constitutes an unlawful taking.

Accordingly, Mountain Pure's acknowledged attempt to maintain a viable takings claim based upon NTVGCD's actions undertaken to enforce its regulatory powers – rather than the underlying regulations themselves – is patently invalid under the standard laid down by the Texas Supreme Court in *Carlson*. 451 S.W.3d at 831-33.

NTVGCD would further note that in the five years since the *Carlson* decision was issued no less than four different Texas appellate courts have seen fit to apply the *Carlson* holding to fact situations similar to our own. See first *House of Praise Ministries, Inc. v. City of Red Oak*, 2017 Tex. App. LEXIS 4095 *17 (Tex. App. – Waco May 3, 2017, no pet.), citing *Carlson* in similarly holding that where a plaintiff's takings claim complained only about the city's enforcement of its zoning code, rather than any particular provision of the zoning code itself, the plaintiff had failed to viably plead a takings claim. In particular, the *House of Praise* court

reiterated at *22 that "[t]he key to a regulatory taking claim is the offending regulation."

See also *Nat'l Media Corp. v. City Of Austin*, 2018 Tex. App. LEXIS 2093 *13-15 (Tex. App. – Austin, Mar. 23, 2018, no pet.)(granting city's plea to the jurisdiction where plaintiff complained only of city's finding that its billboard did not satisfy city's sign regulations rather than the regulations themselves); *APTBP, LLC v. City Of Baytown*, 2018 Tex. App. LEXIS 7604 *10-14 (Tex. App. – Houston [14th Dist.] Sept. 18, 2018, no pet.)(upholding grant of city's plea to the jurisdiction because "government interference arising from the improper application or misapplication of regulations and standards does not constitute a taking"); and *CPM Trust v. City of Plano*, 461 S.W.3d 661, 673 (Tex. App. – Dallas 2015, no pet.)(upholding grant of city's plea to the jurisdiction, because "appellants do not contest the sign regulations in the city's zoning ordinance, but rather complain about the City's misapplication of certain regulations as to their property. Based on *Carlson*, we conclude appellants have not alleged a taking....").

To the extent Mountain Pure seeks to somehow distinguish these cases by reiterating its above-cited allegation that NTVGCD supposedly "restrict[ed] Appellee and its tenant's access to the spring water on Appellee's property," NTVGCD would note that Mountain Pure's **own** loss of use is simply not determinative of whether a compensable taking "for public use" has occurred so as

to entitle it to compensation. In *Carlson*, 451 S.W.3d at 832-33, the Texas Supreme Court specifically commented on just this distinction:

> We do not doubt, and the city does not deny, that the city's order to vacate interfered with the owners' use of the respondents' property. Yet nearly every civil-enforcement action results in a property loss of some kind. The very nature of the action dictates as much. Nevertheless, that property is not "taken for public use" within the meaning of the Constitution.

Accord, *CPM Trust*, 461 S.W.3d at 673.

In sum, in issuing the *Carlson* opinion, the Texas Supreme Court expressly endorsed a broad view of immunity for governmental entities such as NTVGCD when confronted with "takings" litigation. That is, to even state a viable cause of action a takings claim must be directed against the statutes establishing that entity's regulatory authority and not its enforcement actions undertaken pursuant to that authority. This is so regardless of whether 1) the entity's exercise of authority was mistaken or misguided, or 2) the action substantially interfered with plaintiff's right to use and enjoy its property.

Amici have filed the present brief for the sole purpose of urging this Court to preserve *Carlson's* broad view of the immunity enjoyed by governmental entities so as to permit them to carry out the necessary (though not always popular) tasks assigned to them by the legislature without fear of unwarranted litigation.

CONCLUSION

Accordingly, the amici curiae request that this Court give careful consideration to the arguments set forth in both the present brief, and those submitted by Appellant.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Gregory M. Ellis
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APPENDIX

2.

Respondent's Rules

NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT

DISTRICT RULES

Effective as of June 11, 2003
Amended May 10, 2007

NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT

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RULES OF THE NECHES TRINITY VALLEYS

GROUNDWATER CONSERVATION DISTRICT

Effective as of June 11, 2003
Amended May 10, 2007

In accordance with Section 59 of Article 16 of the Texas Constitution and with the Acts of the 77th Legislature (2001), Ch. 313, S.B. 1821 and Chapters 35 and 36 of the Texas Water Code, Neches and Trinity Valleys Groundwater Conservation District adopts the following Rules as the Rules of the District. Each rule as worded below herein has been in effect since date of passage and as may be amended.

The Rules, regulations, and modes of procedure contained below are and have been adopted for the purposes of achieving the goals of the District Act and the Management Plan, prevent waste, and protect rights of owners of interest in groundwater while simplifying procedure, avoiding delays, saving expense, and facilitating the administration of the groundwater laws of the State and the Rules of this District. To the end that these objectives be attained, these Rules shall be so construed.

These Rules may be used as guides in the exercise of discretion, where discretion is vested. However, under no circumstances and in no particular case shall they, or any of them, be construed as a limitation or restriction upon the exercise of any discretion of the Board, where such exist; nor shall they in any event be construed to deprive the Board of an exercise of powers, duties and jurisdiction conferred by law, nor to limit or restrict the amount and character of data or information which may be required for the proper administration of the law. Any reference to the Texas Water Code includes the section referenced and any subsequent amendments.

RULE 1 – DEFINITIONS AND CONCEPTS

1.1 Unless the context indicates a contrary meaning, the words hereinafter defined shall have the following meaning in these Rules:

(a) "Beneficial use" means:

(1) agricultural, gardening, domestic, stock raising, municipal, mining, manufacturing, industrial, commercial, recreational, or pleasure purposes;
(2) exploring for, producing, handling, or treating oil, gas, sulfur, or other minerals; or
(3) any other purposes that is useful and beneficial to the user and approved by the Board.

(b) The "Board" shall mean the Board of Directors of the Neches and Trinity Valleys Groundwater Conservation District, consisting of seven (7) Board members.

(c) "Commission" means the Texas Commission on Environmental Quality.

(d) "District Act" means acts of the 77th Legislature (2001), Chapter 313, S.B. 1821 and the nonconflict of provisions of Chapter 36, Texas Water Code, as same may be amended.

(e) "District Office or Offices" shall mean the location or locations as may be established by resolution of the Board.

(f) "District" shall mean Neches and Trinity Valleys Groundwater Conservation District.

(g) "Domestic Use" means the use of water at a single-family household to support domestic activities including drinking, washing, and sanitation. Domestic use does not include use for any commercial purpose or at any commercial establishment. Domestic use does not include a use at any commercial establishment with a single-family household.

(h) "Drilling" includes drilling, equipping, or completing wells or modifying the size of wells or well pumps to change pumpage volume.

(i) "Drilling Permit" means a permit issued by the District allowing a water well to be drilled.

(j) "Fee or Fees" means the amount required to be paid as established by the Board of Directors.

(k) "Groundwater" means water percolating below the surface of the earth.

(l) "Hearing Body" means the Board, any committee of the Board, or a hearing examiner at any hearing held under the authority of the District Act.

(m) "Hearing Examiner" means a person appointed by the Board to conduct a hearing or other proceeding.

(n) "Hearing Rules and Procedures" means the rules and procedures for hearings adopted by the Board for hearings and other proceedings of the District, as they may be supplemented or amended from time to time.

(o) "Operator" shall mean the person who operates a well.

(p) "Operating Permit" means a permit issued by the District for a water well, allowing groundwater to be withdrawn from a water well for a designated period.

(q) "Owner" shall mean and include any person that has the right to produce water from the land either by ownership, contract, lease or easement

(r) "Person" shall mean any individual, partnership, firm, or corporation, limited liability company, or other legal entity.

(s) "Rules" shall mean these Rules of the District and the Hearing Rules and Procedures as they may be supplemented or amended from time to time.

(t) "Waste" means any one or more of the following:

(1) withdrawal of groundwater from a groundwater reservoir at a rate and in an amount that causes or threatens to cause intrusion into the reservoir of water unsuitable for agricultural, gardening, domestic, or stock raising purposes;

(2) the flowing or producing of wells from a groundwater reservoir if the water produced is not used for a beneficial purpose;

(3) escape of groundwater from a groundwater reservoir to any other reservoir or geologic strata not containing groundwater;

(4) pollution or harmful alteration of groundwater in a groundwater reservoir by saltwater or by other deleterious matter from another stratum or from the surface of the ground;

(5) willfully or negligently causing, suffering, or allowing groundwater to escape into any river, creek, natural watercourse, depression, lake reservoir, drain, sewer, street, highway, road, or road ditch, or onto any land other than that of the owner of the well unless such discharge is authorized by permit, rule, or order issued by the commission under Chapter 26, Texas Water Code; groundwater released on well startup or well development in order to improve water quality shall not constitute waste as defined above.

(6) groundwater pumped for irrigation that escapes as irrigation tailwater onto land other than that of the owner of the well unless permission has been granted by the occupant of the land receiving the discharge; or

(7) for water produced from an artesian well, "waste" has the meaning assigned by Section 11.205, Texas Water Code.

(u) "Well" or "Water Well" shall mean and include any artificial excavation constructed for the purpose of exploring for or producing groundwater

(v) "Exempt Well" shall mean any well for which the District is prohibited to require a permit under the District Act, Texas Water Code §36.117 or the District Rules.

Exempt wells include wells used solely for domestic or agriculture use or for providing water for livestock or poultry that is either drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons per day and certain wells for hydrocarbon production. Wells to supply water for a subdivision of land for which plat approval is required by law or regulation are not exempt. For all purposes herein, an Exempt Well shall be exempt from permitting requirements and production fees but shall not be exempt from pre-registration or registration requirements.

(w) "Monitor Well," means any well used for the sampling or measurement of any chemical or physical property of subsurface strata or their contained fluids.

(x) "Remediation Well" means any well used to produce contaminated water from a subsurface strata pursuant to a plan approved by the Texas Commission on Environmental Quality or other agency with applicable jurisdiction.

(y) "Agriculture or Agricultural" means:

(1) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(2) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, by a nursery grower;

(3) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial use;

(4) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure;

(5) wildlife management;

(6) raising or keeping equine animals.

(z) "Registration" means the process under Rule 13 of "grandfathering" wells which were in existence and use prior to the Effective Date of these Rules.

1.2 The definitions contained in Texas Water Code Section 36.001 shall also be included to the extent that they are used in these Rules. In the event there is a conflict between these Rules and 36.001, 36.001 shall control.

1.3 Purpose of Rules. The Rules are the foundation for achieving the goals of the District Act and Management Plan.

1.4 Use and Effect of Rules. The District uses these Rules as guides in the exercise of the powers conferred by law and in the accomplishment of the purposes of the District Act and Management Plan.

1.5 Amendment of Rules. The Board may, following notice and hearing, amend these Rules or adopt new Rules from time to time.

1.6 Headings and Caption. The section and other headings and captions contained in these Rules are for reference purposes only. They do not affect the meaning or interpretation of these Rules in any way.

1.7 Construction. A reference to a title, chapter or section without further identification is a reference to a title, chapter or section of the Water Code, Construction of words and phrases are governed by the Code Construction Act, Subchapter B, Chapter 311, Government Code.

1.8 Method of Service under these Rules. Except as otherwise expressly provided in these Rules, any notice or documents required by these Rules to be served or delivered may be delivered to the recipient, or the recipient's authorized representative, in person, by agent, by courier receipted delivery, by certified mail sent to the recipient's last known address, or by telephonic document facsimile transfer to the recipient's current telecopier number. Service by mail is complete upon deposit in a post office or other official depository of the United States Postal Service. Service by telephonic document transfer is complete upon transfer, except that any transfer occurring after 5:00 p.m. will be deemed complete on the following business day. If service or delivery is by mail, and the recipient has the right, or is required, to do some act within a prescribed time after service, three days will be added to the prescribed period. Where service by one of more methods has been attempted and failed, the service is complete upon notice publication in a generally circulated newspaper in Cherokee, Henderson or Anderson County.

1.9 Severability. If any one or more of the provisions contained in these Rules are for any reason held to be invalid, illegal, or unenforceable in any respect, the invalidity, illegality, or unenforceability may not affect any other Rules or provisions of these Rules, and these Rules must be construed as if such invalid, illegal or unenforceable Rules or provision had never been contained in these Rules.

1.10 Burden of Proof: In all matters regarding applications for permits, exceptions, and other matters for which District approval is required, the burden shall be upon the applicant or other persons seeking a permit, exception, or other authority to establish that all conditions, criteria, standards, or prerequisites have been met.

RULE 2 – WASTE

(a) Groundwater shall not be produced within, or used within or without the District, in such a manner or under such conditions as to constitute waste as defined in Rule 1 hereof.

(b) Any person producing or using groundwater shall use every possible precaution, in accordance with the most approved methods, to stop and prevent waste of such water.

(c) No person shall pollute or harmfully alter the character of a groundwater reservoir of the District by means of salt water or other deleterious matter admitted from other stratum or strata or from the surface of the ground.

(d) No person shall commit waste as that term is defined by Rule 1.1 (s).

RULE 3 – PERMIT AND REGISTRATION REQUIRED

3.1 No person shall drill, modify, complete, change type of use, plug, abandon, or alter the size of a well within the District without first registering the well with the District, or making application for a new well even though the well may be exempt from the requirement of a permit under Texas Water Code Section 36.117 or Rule 1.1 (u).

3.2 The District staff will review the application for registration and make a preliminary determination on whether the well meets the requirements, exclusions, or exemptions.

3.3 No permit shall be required for the drilling of wells exempt by Texas Water Code §36.117 or Rule 1.1 (u).

3.4 Exempted Wells shall be registered with the District on forms provided therefore and all Fees and/or deposits paid before drilling. All exempt wells shall be equipped and maintained so as to conform to the District's Rules requiring installation of casing, pipe and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir. Forms for registrations shall be provided by the District.

3.5 Any existing operational well not exempt under Rule 1.1 (u), in existence prior to effective date of these Rules is considered grandfathered and will automatically be granted an operating permit upon completion of the well

registration procedure as provided in Rule 13. These grandfathered wells will not be assessed a registration or permit fee if the procedure is completed by January 1, 2004 and the owner or operator provides all the information requested by the District. The volume allowed by the permit will be determined by past or planned production of the well.

3.6 A water well used solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas well permitted by the Texas Railroad Commission is exempt from District Fees provided the person holding the permit is responsible for drilling and operating the water well and it is located on the same lease or field associated with the drilling rig.

3.7 A well-exempted under provision Rule 1.1 (u) above must be permitted and comply with all District Rules if:

(1) the purpose of the well is no longer solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas; or

(1) the withdrawals are no longer necessary for mining activities or are greater than the amount necessary for mining activities specified in the permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code.

3.8 All permits are granted subject to these rules, orders of the Board, and the laws of the State of Texas. In addition to any special provisions or other requirements incorporated into the permit, each permit issued must contain the following standard permit provisions:

(a) This permit is granted in accordance with the provisions of the Rules of the District, and acceptance of this permit constitutes an acknowledgment and agreement that the permittee will comply with the Rules of the District.

(b) This permit confers only the right to operate and its terms may be modified or amended. Within 10 days after the date of sale, the operating permit holder must notify the District in writing the name of the new owner of a permitted well. Any person who becomes the owner of a currently permitted well must, within 20 calendar days from the date of the change in ownership, file an application for a permit amendment to effect a transfer of the permit.

(c) The operation of the well for the authorized withdrawal must be conducted in a non-wasteful manner.

(d) **(1)** Withdrawals from all non-exempt wells, except wells used for Domestic or agricultural capable of providing more than 25,000 gallons per day but less than 100,000 gallons per day, must be

accurately metered and their pumpage reported to the District quarterly.

(2) Wells which are required to report pumping under rule (d)(1) and pay Production Fees to the District and which are not required to meter or report the amount of water produced for any other purpose or to any other governmental agency may apply for a non-metered permit if the well does not produce more than 3,000,000 gallons annually. Wells qualifying under this rule may apply for a non-metered permit as specified by the Rule 4 with forms and requirements set by action of the Board.

(e) The application pursuant to which this permit has been issued is incorporated in the permit, and the permit is granted on the basis of, and contingent upon, the accuracy of the information supplied in that application. A finding that false information has been supplied is grounds for immediate revocation of the permit.

(f) Violation of a permit's terms, conditions, requirements, or special provisions is punishable by civil penalties as provided by the District Rules and by law and may also result in permit revocation or cancellation.

(g) The permit may also contain provisions relating to the means and methods of transportation of water produced within the District.

3.9 Except as provided below, a permit is not required for a Monitor Well or a Remediation Well. A copy of the Driller's Report must be filed with the District within (30) thirty days. If the use of Monitor Well or Remediation Well is changed to produce non-contaminated water, it then becomes subject to the permitting or registration requirements of these Rules depending upon use and volume.

RULE 4 – FEES AND REPORTS

In accordance with SB 1821, HB 1604, and Section 36.205 of the Texas Water Code, and except as provided below, the Board adopts a production Fee of $0.025 per 1,000 gallons for all nonexempt wells except wells used for Domestic use or Agricultural use, which are not capable of producing more than 100,000 gallons per day. The fee is payable on water produced on or after July 1, 2007. The production Fee for Agricultural use is set at $0.00. Operators of nonexempt wells shall provide payment to the District each quarter. Payment shall be due within thirty (30) days of the last day of March, June, September, and December with their quarterly reports. Operators shall provide monthly production records to document payment amount. The payment shall be accompanied by the report form specified by the Board.

4.1 The District adopts a non-metered production permit for wells as specified in Rule 3.8(d)(2). The annual minimum charge is set at the rate for the production fee as applies to 1,000.000 gallons. The District may establish different levels of permitted usage and a maximum for non-metered permits by Board action. In addition to the production fees, the District by Board action may establish permit application fees.

4.2 In accordance with Section 36.122 of the Texas Water Code the District adopts a transfer fee of 50% of and in addition to the production fee for water transported out of the District.

4.3 Each application for a permit to drill a well shall be accompanied by the Fee or Fees as established herein or by resolution of the Board.

4.4 Each day that a payment remains unpaid after it is due shall constitute a separate violation of these Rules. A late payment charge equal to one percent per month following the due date shall be assessed on past due production fees.

4.5 An entity holding a permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code, that authorized the drilling of a water well shall report monthly to the District:
(1) the total amount of water withdrawn during the month;
(2) the quantity of water necessary for mining activities; and
(3) the quantity of water withdrawn for other purposes.

RULE 5 – ISSUANCE OF PERMITS FOR NON-EXEMPT WELLS

5.1 Every person who drills a water well after the effective date of these Rules, other than an Exempt Well, must file an Application for Permit on a form approved by the Board. Each permit application must be accompanied by the fee.

5.2 Drilling Permit Requirement: The well owner, well operator, or any other person acting on behalf of the well owner must obtain a drilling permit from the District prior to drilling a new water well other than an exempt well, developing a well field or perforating an existing well.

5.3 Operating Permit Requirement: Within 14 days after the completion of a new water well, reworking, or re-equipping of an existing water well as provided in Rule 5.10 below, the well owner or well operator must file a completed operating permit application.

5.4 Permit Applications: Each original application for a water well drilling permit, operating permit, transport permit, and permit amendment requires a separate application and payment of the associated fee. Application forms will be provided by the District and furnished to the applicant upon request.

The application for a permit shall be in writing and sworn to, and shall include the following:

a) the name and mailing address of the applicant and the owner of the land on which the well will be located;

b) if the applicant is other than the owner of the property, documentation establishing the applicable authority to construct and/or operate a well for the proposed use;

c) a location map of all existing wells within a quarter (1/4) mile radius of the proposed well or the existing well to be modified;

d) a map from the county appraisal District indicating the location of the proposed well or the existing well to be modified, the subject property, and adjacent owners' physical addresses and mailing addresses;

e) notice of any application to the Texas Commission on Environmental Quality to obtain or modify a Certificate of Convenience and Necessity to provide water or wastewater service with water obtained pursuant to the requested permit;

f) a statement of the nature and purpose of the proposed use and the amount of water to be used for each purpose.

g) a declaration that the applicant will comply with the District's Rules and all groundwater use permits and plans promulgated pursuant to the District's Rules.

h) a water conservation plan or a declaration that the applicant will comply with the Management Plan.

i) the location of each well latitude and longitude and the estimated rate at which water will be withdrawn;

j) a water well closure plan or a declaration that the applicant will comply with all District well plugging and capping guidelines and report closure to the Commission.

k) a hydrogeological report addressing the area of influence, draw down, recovery time, and other pertinent information required by the District shall be required for the following:

   (1) Requests to drill a well with a daily maximum capacity of more than 2 million gallons; or,

   (2) Requests to modify to increase production or production capacity of a Public Water Supply, Municipal, Commercial, Industrial, Agricultural or Irrigation well with an outside casing diameter greater than 10 inches.

The well must be equipped (or tested at a rate equal to or greater

than the rate necessary) for its ultimate planned use and the hydrogeologic report must address the impacts of that use. The report must include hydrogeologic information addressing and specifically related to the proposed water pumpage levels at the proposed pumpage site intended for the proposed well or for the proposed transporting of water outside the District. Applicants may not rely solely on reports previously filed with or prepared by the District.

5.5 Transfer Permit Requirement: The well owner, well operator, or any other person acting on behalf of the well owner, must obtain a transfer permit to transfer groundwater produced from within the District outside the District's boundaries as provided in Rule 14.

5.6 Notice of Permit Hearing: Once the District has received a completed original application for a water well drilling permit, operating permit, a transport permit, or a permit amendment and associated fees the General Manager will issue written notice indicating a date and time for a hearing on the application in accordance with these Rules. The District may schedule as many applications at one hearing as deemed necessary. Notice will be mailed to any person who either owns land withn a quarter (1/4) mile or holds a Permit from the District for a well located within a quarter (1/4) mile of the proposed well.

5.7 Drilling Permits: Unless specified otherwise by the Board or these Rules, drilling permits are effective for a term ending 120 calendar days after the date the permit application was received.

5.8 Transfer Permits: Unless specified otherwise by the Board or these Rules, transport permits are effective for five (5) years. Notwithstanding the period specified above, the District may periodically review the amount of water that may be transferred under the permit and may limit the amount.

5.9 Effect of Acceptance of Permit: Acceptance of the permit by the person to whom it is issued constitutes acknowledgment of and agreement to comply with all of the terms, provisions, conditions, limitations, and restrictions.

5.10 Reworking and Replacing a Well:

a) An existing well may be reworked or re-equipped in a manner that will not change the permitted well status. A change in the permitted well status will require an operating permit amendment.

b) A permit must be applied for if a party wishes to replace an existing well with a replacement well.

c) A replacement well, in order to be considered such, must be drilled within fifteen feet of the existing well.

d) The location of the old well (the well being replaced) shall be protected in accordance with the spacing Rules of the District until the replacement well is drilled and tested. The landowner or his/her agent must within 120 days of the issuance of the permit declare in writing to the District which one of these two wells he desires to produce. If the landowner does not notify the District of his/her choice within this 120 days, then it will be conclusively presumed that the new well is the well he/she desires to retain. Immediately after determining which well is retained for production, the other well shall be:

(1) Properly equipped in such a manner that it cannot produce more than 25,000 gallons of water a day; or

(2) Closed in accordance with applicable state law and regulation Section 756.002, Texas Health and Safety Code.

A permit to rework, re-equip, re-drill or replace an existing well may be granted by the Board without notice or hearing so long as the production capacity of the new well does not exceed the capacity of the existing well.

5.11 Emergency Authorization

An existing retail water utility, as defined in Texas Water Code Chapter 13, or the owner of a well used for Agriculture, who has a Permit or Certificate of Registration from the District to operate the well, may apply to the District for emergency authorization to drill and operate a well as set forth below. The authorization does not constitute a Permit as required above and does not relieve the utility or Agricultural User from applying for and obtaining one. The emergency authorization can be made by any two of the following: the General Manager and any Board officer. Before granting the authorization, the following conditions must be met:

a) An Application on the form prescribed by the Board and all Fees must be submitted to the District;

b) Persons owning property adjoining the proposed well site must be given written notice of the proposed well;

c) The Applicant must have received authorization from the Commission to drill and operate the well, if applicable;

d) The "emergency," which must present an imminent threat to the public health and safety or to an Agricultural activity, must be explained to the satisfaction of the District and any requested documentation submitted;

e) The Application must not have been previously denied; and,

f) Such other information as may be requested has been received by the District.

After the emergency authorization is granted, the Board shall hold a hearing on the application at which it may issue or deny the requested Permit. If the Permit is denied, the applicant shall immediately cease drilling or production operations.

5.12 All Permits are issued on the condition that the well is drilled in strict compliance with these Rules and the rules and regulations of the Commission and the Texas Department of Licensing and Regulation.

RULE 6 – REQUIREMENT OF DRILLERS LOG, CASING AND PUMP DATA

(a) Complete records shall be kept and reports thereof made to the District concerning the drilling, maximum production potential, equipping and completion of all wells drilled. Such records shall include an accurate driller's log, any electric log which shall have been made, and such additional data concerning the description of the well, its potential, hereinafter referred to as "maximum rate of production" and its actual equipment and rate of production permitted by said equipment as may be required by the Board. Such records shall be filed with the District Board within 60 days after completion of the well.

(b) The well driller shall deliver either in person, by fax, email, or send by first-class mail, a photocopy of the State Well Report to the District within 60 days from the completion or cessation of drilling, deepening, or otherwise altering a well.

(c) No person shall produce water from any well hereafter drilled and equipped within the District, except that necessary to the drilling and testing of such well and equipment, unless or until the District has been furnished an accurate driller's log, any electric log which shall have been made, and a registration of the well correctly furnishing all available information required on the forms furnished by the District. In the case the well has been drilled after Emergency Authorization has been given under Rule 5.11, the foregoing information must be submitted within ten (10) days from the date the well is completed.

RULE 7 – MINIMUM SPACING OF WELLS

(a) Distance Requirements:

(1) No non exempt well to be drilled subsequent to the date of enactment of this rule shall be drilled such that said well shall be located nearer than fifty (50') feet from the nearest property line; provided that the Board, may grant exceptions to allow drilling within shorter distances in accordance with Rule 8.

(2) In the interest of protecting life and for the purpose of preventing waste, preventing overlapping cones of depression resulting from production rates, and preventing confiscation of property, the Board reserves the right to limit the number of wells on a tract of land or require a minimum distance between wells.

(3) Subdivision of property:

(i) In applying this rule and applying every special rule with relation to spacing in all of the subterranean water zones and/or reservoirs underlying the confines of this District, no subdivision of property made subsequent to the adoption of the original spacing rule will be considered in determining whether or not any property is being confiscated within the terms of such spacing rule, and no subdivision of property will be regarded in applying such spacing rule or in determining the matter of confiscation if such subdivision took place subsequent to the promulgation and adoption of the original spacing rule.

(ii) Any subdivision of property creating a tract of such size and shape that it is necessary to obtain an exception to the spacing rule before a well can be drilled thereon is a voluntary subdivision and not entitled to a permit to prevent confiscation of property if it were either, (a) segregated from a larger tract in contemplation of water resource development, or (b) segregated by fee title conveyance from a larger tract after the spacing rule became effective and the voluntary subdivision rule attached.

(b) Change in Use of Well:

Any well existing at the date of enactment of this Rule must comply with the provisions of this rule if after the date of enactment of this rule the ultimate use of the water produced from the well is changed in whole or in part such that the water produced from the well annually is increased. Ultimate use of the water shall be defined as domestic, municipal, industrial, agricultural, or irrigation use.

RULE 8 – EXCEPTION TO SPACING RULE

(a) In order to protect vested property rights, to prevent waste, to prevent confiscation of property, or to protect correlative rights, the Board may grant exception to the above spacing regulations. This rule shall not be construed

so as to limit the power of the Board, and the powers stated are cumulative only of all other powers possessed by the Board. The Board may consider whether a well located on adjoining property is draining the Applicant's property.

(b) If an exception to such spacing regulations is desired, application therefore shall be submitted by the applicant in writing to the Board at its District office on forms furnished by the District. The application shall be accompanied by a plat or sketch, drawn to scale of one (1) inch equaling one thousand (1000) feet. The plat or sketch shall show thereon the property lines in the immediate area and shall show accurately to scale all wells within a quarter mile of the proposed well site. The application shall also contain the names of all property owners adjoining the tract on which the well is to be located and the ownership of the wells within a quarter mile of the proposed location. Such application and plat shall be certified by some person actually acquainted with the facts who shall state that all the facts therein are true and correct.

(c) Such exception may be granted ten (10) days after written notice has been given to the applicant and all adjoining owners and all well owners within a quarter mile of the proposed location, and after a public hearing at which all interested parties may appear and be heard, and after the Board has decided that an exception should be granted. Provided, however, that if all such owners execute a waiver in writing stating that they do not object to the granting of such exception, the Board may thereupon proceed to decide upon the granting or refusing of such application without notice of hearing except to the applicant. The applicant may also waive notice or hearing or both.

RULE 9 – PLACE OF DRILLING WELL

After an application for a well permit has been granted, the well, if drilled, must be drilled within fifty feet of the location specified in the permit so long as that location does not violate any spacing requirements in these rules. If the well should be commenced or drilled at a different location, the drilling or operation of such well may be enjoined by the Board pursuant to Chapter 36, Texas Water Code, as amended. The District shall have the right to confirm reported distances and inspect the wells or well locations.

RULE 10 – RIGHT TO INSPECT AND TEST WELLS

(a) The directors, engineers, attorneys, agents, operators and employees of a district or water supply corporation may go on any land to inspect, make surveys, or perform tests to determine the condition, value, and usability of the property, with reference to the proposed location of works,

improvements, plants, facilities, equipment, or appliances. The cost of restoration shall be borne by the district or the water supply corporation.

(b) District employees and agents are entitled to enter any public or private property within the boundaries of the district or adjacent to any reservoir or other property owned by the district at any reasonable time for the purpose of inspecting and investigating conditions relating to the quality of water in the state or the compliance with any rule, regulations, permit, or other order of the district. District employees or agents acting under this authority who enters private property shall observe the establishment's rules and regulations concerning safety, internal security, and fire protection and shall notify any occupant or management of their presence and shall exhibit proper credentials.

RULE 11 – OPEN WELLS TO BE CAPPED

Every owner or operator of any land within the District upon which is located any open or uncovered well is, and shall be, required to close or cap the same permanently with a covering capable of sustaining weight of not less then four hundred (400) pounds, except when said well is in actual use by the owner or operator thereof; and no such owner or operator shall permit or allow any open or uncovered well to exist in violation of this requirement. Officers, agents and employees of the District are authorized to serve or cause to be served written notice upon any owner or operator of a well in violation of this rule, thereby requesting such owner and/or operator to close or cap such well permanently with a covering in compliance herewith. In the event any owner or operator fails to comply with this rule, the District may go on the land and close the well safely and securely. Closure may be by the District or an entity under contract with the District, all expenditures thereby incurred shall constitute a lien upon the land where such well is located, provided, however, no such lien shall exceed the actual cost for any single closing. Any officer, agent, or employee of the District, is authorized to perfect said lien by the filing of the affidavit authorized by Section 36.118 of the Texas Water Code. All of the powers and authority granted in such section are hereby adopted by the District, and its officers, agents, and employees are hereby bestowed with all of such powers and authority.

RULE 12 – GENERAL RULES OF PROCEDURE FOR HEARING

All hearings whether conducted by the Board or before a Hearings Examiner shall be conducted in accordance with the Hearing Rules and Procedures as adopted by the Board and as they may be amended from time to time.

RULE 13 – WELL REGISTRATION

In order to provide for the "grandfathering" of existing Exempt or non exempt water wells, a Certification of Registration for a well can be issued only after the location of the well and the wellhead equipment of the well has been determined by field survey by District personnel, and/or designated agents acting for the District. A well owner or agent shall apply to the District for validation. The costs to the well owner or the well owner's agent shall be set by the Board. The Board on its own initiative may cause to be issued a Certificate of Registration for wells drilled and equipped within the District for which the landowner or his agent has not applied for a Permit or for wells not otherwise properly permitted, provided that such wells were not drilled, equipped and operated (pumped) in such a manner as to violate any other Rules and regulations of the District. To the extent available, the well owner shall provide all of the information required in Rules 6 and 5.4 and as may otherwise be requested by the District. Well sites already owned by a retail public utility may be registered with the District.

RULE 14 – TRANSFER OF GROUNDWATER OUT OF THE DISTRICT

(a) Purpose. In recognition of the fact that the transfer of groundwater resources from the District for use outside of the District impacts residents and property owners of the District differently than use within the District, and in order to manage and conserve groundwater resources within the District, and provide reasonable protection of the public health and welfare of residents and property owners of the District, a ground water transfer permit is required to produce groundwater from within the District's boundaries and to transfer such groundwater for use outside the District.

(b) Scope. A groundwater transfer permit is required for production of any water from a well within the District, all or part of which is regularly transported for use outside the District. A groundwater transfer permit shall be obtained prior to commencing construction of wells or other facilities utilized to transfer groundwater from the District. Water wells to be used for the transfer of water outside of the District shall be subject to all other requirements of the District.

(c) Exceptions. A groundwater transfer permit is not required for transfers of groundwater from the District in the following cases:

(1) Transfers of groundwater from the District that were occurring on or before June 11, 2003 to the extent the production or transportation capacity of facilities used to produce or transfer groundwater from the District are not increased over the capacity of such facilities that were existing or permitted by the District on or before June 11, 2003.

(2) Transfers of groundwater from the District which are incidental to beneficial use within the District. A groundwater transfer permit is not required for transferring groundwater that is part of a product manufactured in the District, or if the groundwater is to be used on property that straddles the District boundary line. Water that is bottled is not considered to be a product manufactured for this exclusion.

(d) Application. An application for groundwater transfer permit shall be filed in the District office by the owner of the groundwater rights or owner or operator of the production facilities. The following information shall be provided:

(1) The name and mailing address of the applicant and the owner of the land on which the well is or will be located;

(2) If the applicant is other than the owner of the property, documentation establishing the applicable authority to construct and operate a well for the proposed use;

(3) A statement of the nature and purpose of the proposed use and the amount of water to be used for each purpose;

(4) A water conservation plan;

(5) A declaration that the applicant will comply with the District's management plan;

(6) The location of each well and the estimated rate at which water will be withdrawn;

(7) A water well closure plan or a declaration that the applicant will comply with well plugging guidelines and report closure to the Board.

(8) A drought contingency plan;

(9) Data showing the availability of water in the District and in the proposed receiving area during the period for which water supply is requested;

(10) Alternate sources of supply that might be utilized by the applicant, and the feasibility and the practicability of utilizing such supplies;

(11) The amount and purposes of use in the proposed receiving area for which water is intended;

(12) The projected effect of the proposed transfer on aquifer conditions, depletion, subsidence, or existing permit holders or other groundwater users within the District;

(13) The indirect costs and economic and social impacts associated with the proposed transfer of water from the District.

(14) Proposed plan of the applicant to mitigate adverse hydrogeologic, social or economic impacts of the proposed transfer of water from the District;

(15) How the proposed transfer is addressed in the approved regional water plan and certified District management plan;

(16) The names and addresses of the property owners within one-half (1/2) mile of the location of the well(s) from which water to be transported is to be produced, and the location of any wells on those properties.

(17) The time schedule for construction and/or operation of the well.

(18) Construction and operation plans for the proposed facility, including, but not limited to:

I. A technical description of the proposed well(s) and production facility, including depth of the well, the casing diameter, type and setting, the perforated interval, and the size of pump.

II. A technical description of the facilities to be used for transportation of water.

(19) If the water is to be used by someone other than the applicant, a signed contract between the applicant and the user or users.

(20) Additional information that may be required by the District.

(e) Application Processing Fee. An application processing fee, sufficient to cover all reasonable and necessary costs to the District of processing the application, will be charged. The application must be accompanied by the Fee. If the fee is determined by the General Manager or the Board to be insufficient to cover anticipated costs of processing the application, the applicant may be required to post a deposit in an amount determined by the General Manager or the Boards representative to be sufficient to cover anticipated processing cost. As costs are incurred by the District in processing the application, those costs may be reimbursed from funds deposited by the applicant. The applicant shall be provided a monthly accounting of billings against the application processing deposit. Any funds remaining on deposit after the conclusion of application processing shall be returned to the applicant. If initially deposited funds are determined by the General Manager to be insufficient to cover costs

incurred by the District in processing the application, an additional deposit may be required. If the applicant fails to deposit funds as required by the District, the application may be dismissed.

(f) Notice. Within 30 days following a determination by the District that the application is complete, notice of the application shall be mailed by the applicant to all property owners within one-half mile of the property upon which the well(s) is to be located and published in a newspaper of general circulation within the District. The District will provide the notice to the applicant for mailing and publication. Notice shall include at least the following information:

(1) the name and address of the applicant;

(2) the date the application was filed;

(3) the time and place of the hearing;

(4) the location of the proposed well(s) from which water to be transported is to be produced;

(5) A description of the production facility; and

(6) A brief summary of the information in the application.

(g) Hearing. If requested by the applicant, any affected person opposed to the application having a justifiable interest, or the General Manager, a contested case public hearing shall be conducted in accordance with provisions of the Texas Administrative Procedure Act, Gov't Code- 2000.01, et seq. If not requested by any party, the public hearing on the application may be conducted by the Board at a regular or special meeting.

(h) Permit

(1) The permit to transfer groundwater out of the District may be issued as a consolidated permit authorizing drilling, production, and transfer of water from the District. Whether issued as a consolidated permit or separately, the requirements for a permit to transfer groundwater out of the District are cumulative with all other permits or other requirements of the District.

(2) In determining whether to issue a permit to transfer groundwater out of the District, Board shall consider, in addition to all other factors applicable to issuance of a permit from the District:

I. The availability of water in the District and in the proposed receiving area during the period for which the water supply is requested;

II. The availability of feasible and practicable alternative supplies to the applicant;

III. The amount and purposes of use for which water is needed in the proposed receiving area;

IV. The projected effect of the proposed transfer on aquifer conditions, depletion, subsidence, or effects on existing permit holders or other groundwater users within the District;

V. The indirect cost and economic and social impacts associated with the proposed receiving area;

VI. The approved regional water plan and certified District management plan; and,

VII. Other facts and considerations necessary by the Board for protection of the public health and welfare and conservation and management of natural resources in the District.

(3) If it determines to issue a permit to transfer groundwater out of the District, the Board may limit the permit as warranted by consideration of those factors identified above. In addition to conditions identified by Texas Water Code – 36.1131, the permit to transfer water out of the District shall specify:

I. The amount of water that may be transferred out of the District;

II. The period for which the water may be transferred

III. Any monitoring or reporting requirements determined to be appropriate; and,

IV. Such other terms and provisions with reference to the drilling, equipping, completion, or alterations of wells or pumps that may be necessary to conserve the groundwater, prevent waste, minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure, lessen interference between wells, or control and prevent subsidence.

V. That it may be cancelled if the required production and transfer fees are not paid when due.

RULE 15 – ENFORCEMENT

In accordance with the Texas Water Code, 36.102, the District may enforce Chapter 36 of the Texas Water Code and its Rules by injunction, mandatory injunction or other appropriate remedy in a court of competent jurisdiction. The Board adopts civil penalties for breach of Chapter 36 of the Texas Water Code and any rule of the District. Civil penalties shall not exceed $10,000 per day per violation, and each day of a continuing violation shall constitute a separate violation of the Rules. The Board must authorize any enforcement action prior to it being filed in a court.

End of District Rules

NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT

Rules for Hearings

Neches and Trinity Valleys Groundwater Conservation District

RULES FOR HEARINGS

The Neches and Trinity Valleys Groundwater Conservation District (the "District"), pursuant to the authority granted to it by Texas Water Code Chapter 36 and by the Acts of the 77th Legislature (2001) Chapter 313 (SB 1821) adopts these rules to govern the hearings and procedures before the District. All rules or parts of rules otherwise in conflict with these rules are repealed. These rules are adopted for the purpose of simplifying procedure, avoiding delays, saving expenses, facilitating the administration of the laws relating to groundwater, and the rules of the District and to protect property rights. Under no circumstances are these rules to be construed as limitation or restriction on exercising any discretion where such exist nor shall they in any event be construed to deprive the Board of Directors of the District of an exercise of power, duty, and jurisdiction conferred by law nor to limit or restrict the amount and character of data or information which may be required by the Board for the proper administration of the law.

The rules are adopted to achieve the goals of the District Act and the District Management Plan. The District has also adopted rules governing the acts and affairs of the District (the "District Rules") and these Rules for Hearing are adopted in order to set forth the procedures for hearings. The definitions contained in the District Rules are incorporated by reference into these Rules for Hearing.

RULE 1. TYPES OF HEARINGS: The District conducts two general types of hearings: hearings involving permit matters, in which the rights, duties, or privileges of a party are determined after an opportunity for an adjudicative hearing, and rulemaking hearings involving matters of general applicability that implement, interpret, or prescribe the law or District policy, or that describes the procedure or practice requirements of the District. Any matter designated for hearing before the Board may be referred by the Board for hearing before a Hearing Examiner. The person presiding at the hearing may be referred to below as the "Presiding Office." For a hearing before the Board, the president, vice-president, or other person presiding at the meeting will be the Presiding Offices.

1.1 **Permit Hearings**:

1.1.1 **Permit Applications, Amendments and Revocations:** The District will hold hearings on water well drilling permits, operating permits, permit renewals or amendments and permit revocations or suspensions. Hearings involving permit matters may be scheduled before a Hearing Examiner.

1.1.2 **Hearings on Motions for Rehearing**: Motions for Rehearing will be heard by the Board pursuant to Rule 8.2.

1.2 **Rule-making Hearings:**

1.2.1 **District Management Plan:** At its discretion, the Board may hold a hearing to consider adoption of a new District Management plan.

1.2.2 **Other Matters**: A public hearing may be held on any matter within the jurisdiction of the Board, if the Board deems a hearing to be in the public interest, or necessary to effectively carry out the duties and responsibilities of the District.

1.2.3 **General Procedures**: The Presiding Officer will conduct the rulemaking hearing in the manner the Presiding Officer deems most appropriate to obtain all relevant information pertaining to the subject of the hearing as conveniently, inexpensively, and expeditiously as possible.

1.2.4 **Submission of Documents**: Any interested person may submit written statements, protests or comments, briefs, affidavits, exhibits, technical reports, or other documents relating to the subject of the hearing. Such documents must be submitted no later than the time of the hearing, as stated in the notice of hearing given in accordance with Rule 2 provided however, that the Presiding Officer may grant additional time for the submission of documents.

RULE 2. NOTICE AND SCHEDULING OF HEARINGS: The Board or General Manager, as instructed by the Board, is responsible for giving notice of all hearings in the following manner:

2.1.1 Notice will be given to each person who requests copies of hearing notices pursuant to the procedures set forth in subsection 2.2, and any other person the Board of Directors deem appropriate. The date of delivery or mailing of notice may not be less than ten (10) calendar days before the date set for the hearing.

2.1.2 Notice of hearing will be published at least once in a newspaper of general circulation in the District. The date of publication may not be less than ten (10) calendar days before the date set for the hearing.

2.1.3 A copy of the notice will be posted at the county courthouse in which the well is or will be located and in the place where notices are usually posted. The date of posting may not be less than ten (10) calendar days before the date of the hearing.

2.1.5 In addition to the notices required above, when a hearing involves an operating permit matter, notice of the date, time, and location of the hearing will be given to the applicant at least ten (10) calendar days before the day of the hearing.

2.2 Any person having an interest in the subject matter of a hearing or hearings may receive written notice of such hearing or hearings by submitting a request, in writing addressed to the District. The request will identify with as much specificity as possible the hearing or hearings of which written notice is requested. The request remains valid for a period of one year from the date of the request, after which time a new request must be submitted. Failure to provide written notice under this section does not invalidate any action taken by the Board.

2.3 Hearings may be scheduled during the District's regular business hours, Monday through Friday of each week, except District holidays. All permit hearings will be held at the District Office. However, the Board may from time to time change or schedule additional dates, times, and places for permit hearings by resolution adopted at a regular Board meeting. The General Manager may be instructed by theBoard to schedule hearings involving permit matters at such dates, times, and places set forth above for permit hearings. Other hearings will be scheduled at the dates, times and locations set at a regular Board meeting.

RULE 3. GENERAL PROCEDURES:

3.1 **Authority of Presiding Officer**: The Presiding Officer may conduct the hearing or other proceeding in the manner the Presiding Officer deems most appropriate for the particular proceeding. The Presiding Officer has the authority to:

a. set hearing dates, other than the initial hearing date for permit matters set in accordance with Rule 2.3;
b. convene the hearing at the time and place specified in the notice for public hearing;
c. establish the jurisdiction of the District concerning the subject matter under consideration;
d. rule on motions and on the admissibility of evidence and amendments to pleadings;
e. designate and align parties and establish the order for presentation of evidence;
f. administer oaths to all persons presenting testimony;
g. examine witnesses;
h. issue subpoenas when required to compel the attendance of witnesses or the production of papers and documents;
i. require the taking of depositions and compel other forms of discovery under these rules;
j. ensure that information and testimony are introduced as conveniently and expeditiously as possible, without prejudicing the rights of any party to the proceeding;
k. conduct public hearings in an orderly manner in accordance with these rules;

l. recess any hearing from time to time and place to place;
m. reopen the record of a hearing for additional evidence when necessary to make the record more complete; and
n. exercise any other appropriate powers necessary or convenient to effectively carry out the responsibilities of Presiding Officer.

3.2 **Appearance Representative Capacity:** Any interested person may appear in person or may be represented by counsel, engineer, or other representative provided the representative is fully authorized to speak and act for the principal. Such person or representative may present evidence, exhibits, or testimony, or make an oral presentation in accordance with the procedures applicable to the particular proceeding. Any partner may appear on behalf of the partnership. A duly authorized officer or agent of a public or private corporation, political subdivision, governmental agency, municipality, association, firm, or other entity may appear for the entity. A fiduciary may appear forward, trust, or estate. A person appearing in a representative capacity may be required to prove proper authority.

3.3. **Appearance by Applicant or Movant:** The applicant, movant or party requesting the hearing or other proceeding or a representative should be present at the hearing or other proceeding. Failure to so appear may be grounds for withholding consideration of a matter and dismissal without prejudice or may require the rescheduling or continuance of the hearing or other proceeding if the presiding officer deems it necessary m order to fully develop the record.

3.4 **Reporting:** Hearings and other proceedings will be recorded on audio cassette tape or, at the discretion of the Presiding Officer, may be recorded by a certified shorthand reporter. The District will not prepare transcripts of hearings or other proceedings recorded on audio cassette tape on District equipment for the public, but the District will arrange access to the recording. Subject to availability of space, any party may, at their own expense, arrange for a reporter to report the hearing or other proceeding or for recording of the hearing or other proceeding. The cost of reporting or transcribing a permit hearing may be assessed in accordance with Rule 5.2. If a proceeding other than a permit hearing is recorded by a reporter, and a copy of the transcript of testimony is ordered by any person, the testimony will be transcribed and the original transcript filed with the papers of the proceeding at the expense of the person requesting the transcript of testimony. Copies of the transcript of testimony of any hearing or other proceeding thus reported may be purchased from the reporter.

3.5 **Continuance:** The Presiding Officer may continue hearings or other proceedings from time to time and from place to place without the necessity of publishing, serving, mailing or otherwise issuing a new notice. If a hearing or other proceeding is continued and a time and place (other than the District Office) for the hearing or other proceeding to reconvene are not publicly announced at the

hearing or other proceeding by the Presiding Officer before it is recessed, a notice of any further setting of the hearing or other proceeding will be delivered at a reasonable time to all parties, persons who have requested notice of the hearing pursuant to Rule 2.2, and any other person the Presiding Officer deems appropriate, but it is not necessary to post at the county courthouses or publish a newspaper notice of the new setting.

3.6 **Filing of Documents Time Limit**: Applications, motions, exceptions, communications, requests, briefs or other papers and documents required to be filed under these rules or by law must be received in hand at the District Office within the time limit, if any, set by these Rules or by the Presiding Officer for filing. Mailing within the time period is insufficient if the submissions are not actually received by the District within the time limit.

3.7 **Computing line**: In computing any period of time specified by these Rules, by a Presiding Officer, by Board orders, or by law, the day of the act, event, or default after which the designated period of time begins to run is not included, but the last day of the period computed is included, unless the last day is a Saturday, Sunday or legal holiday as determined by the Board, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday.

3.8 **Affidavit:** Whenever the making of an affidavit by a party to a hearing or other proceeding is necessary, it may be made by the party or the party's representative or counsel. This rule does not dispense with the necessity of an affidavit being made by a party when expressly required by statute.

3.9 **Broadening the Issues**: No person will be allowed to appear in any hearing or other proceeding that in the opinion of the Presiding Officer is for the sole purpose of unduly broadening the issues to be considered in the hearing or other proceeding.

3.10 **Conduct and Decorum**: Every person, party, representative, witness, and other participant in a proceeding must conform to ethical standards of conduct and must exhibit courtesy and respect for all other participants. No person may engage in any activity during a proceeding that interferes with the orderly conduct of District business. If in the judgment of the Presiding Officer, a person is acting in violation of this provision, the Presiding Officer will first warn the person to refrain from engaging in such conduct. Upon further violation by the same person, the Presiding Officer may exclude that person from the proceeding for such time and under such conditions as the Presiding Officer deems necessary.

RULE 4. UNCONTESTED PERMIT HEARINGS PROCEDURES:

4.1 Written Notice of Intent to Contest: Any person who intends to contest a permit application must provide written notice of that intent to the District office at least

five calendar days prior to the date of the hearing. If no notice of intent to contest is received five calendar days prior to the hearing, the General Manager, as instructed by the Board, will cancel the hearing and the Directors will consider the permit at the next regular board meeting.

4.2 **Informal Hearings**: Permit hearings may be conducted informally when, in the judgment of the Presiding Officer, the conduct of a proceeding under informal procedures will save time or cost to the parties, lead to a negotiated or agreed settlement of facts or issues in controversy, and not prejudice the rights of any party.

4.3 **Agreement of Parties:** If, during an informal proceeding, all parties reach a negotiated or agreed settlement and it is either reduced to writing or stated into the record, which settles the facts or issues in controversy, the proceeding will be considered an uncontested case and an order will be issued accordingly.

4.4 **Decision to Proceed as Uncontested or Contested Case:** If the parties do not reach a negotiated or agreed settlement of the issues in controversy or if any party contests a staff recommendation, the Presiding Officer will declare the case to be contested and convene a prehearing conference as set forth in Rule *5.1.* The Presiding Officer may also recommend issuance of a temporary permit for a period not to exceed four months, with any special provisions deemed necessarily, for the purpose of completing the contested case process.

RULE 5. CONTESTED PERMIT HEARINGS PROCEDURES:

5.1 **Prehearing Conference**: A prehearing conference may be held to consider any matter which may expedite the hearing or otherwise facilitate the hearing process.

5.2 **Assessing Reporting and Transcription Costs**: Upon the timely request of any party, or at the discretion of the Hearing Examiner, the Hearing Examiner may assess reporting and transcription costs to one or more of the parties. The Hearing Examiner must consider the following factors in assessing reporting and transcription costs:

a. the party who requested the transcript;
b. the financial ability of the party to pay the costs;
c. the extent to which the party participated in the hearing;
d. the relative benefits to the various parties of having a transcript;
e. the budgetary constraints of a governmental entity participating in the proceeding;
f. any other factor that is relevant to a just and reasonable assessment of costs.In any proceeding where the assessment of reporting or transcription costs is an issue, a recommendation regarding the assessment of costs must be included in the Hearing Examiner's report to the Board.

5.3 **Rights of Designated Parties**: Subject to the direction and orders of the Hearing Examiner, parties have the right to conduct discovery, present a direct case, cross-examine witnesses, make oral and written arguments, obtain copies of all documents filed in the proceeding, receive copies of all notices issued by the District concerning the proceeding, and otherwise fully participate in the proceeding.

5.4 **Persons Not Designated Parties:** At the discretion of the Hearing Examiner, persons not designated as parties to a proceeding may submit comments or statements, orally or in writing. Comments or statements submitted by non-parties may be included in the record, but may not be considered by the Hearing Examiner as evidence.

5.5. **Furnishing Copies of Pleadings**: After parties have been designated, a copy of every pleading, request, motion, or reply filed in the proceeding must be provided by the author to every other party or the party's representative. A certification of this fact must accompany the original instrument when filed with the District. Failure to provide copies may be grounds for withholding consideration of the pleading or the matters set forth therein.

5.6 **Interpreters for Deaf Parties and Witnesses**: If a party or subpoenaed witness in a contested case is deaf, the District must provide an interpreter whose qualifications are approved by the State Commission for the Deaf and Hearing Impaired to interpret the proceedings for that person. A "Deaf person" means a person who has a hearing impairment, whether or not the person also has a speech impairment, that inhibits the person's comprehension of the proceedings or communication with others.

5.7 **Discovery**: For good cause shown, discovery will be conducted upon such terms and conditions, and at such times and places, as directed by the Hearing Examiner. Unless specifically modified by these rules or by order of the Hearing Examiner, discovery will be governed by, and subject to the limitations set forth in the Texas Rules of Civil Procedure. In addition to the forms of discovery authorized under the Texas Rules of Civil Procedure, the parties may exchange informal requests for information, either by agreement or by order of the Hearing Examiner. If the Hearing Examiner finds a party is abusing the discovery process in seeking, responding to, or resisting discovery, the Hearing Examiner may take such action as may be appropriate including recommending to the Board that the hearings are dismissed with or without prejudice.

5.8 **Ex Parte Communications**: The Hearing Examiner may not communicate, directly or indirectly, in connection with any issue of fact or law with any agency, person, party, or their representatives, except on notice and opportunity for all parties to participate. This provision does not prevent communications with staff

who is not directly involved in the hearing to utilize the special skills and knowledge of the District in evaluating the evidence.

5.9 **Evidence**: The Hearing Examiner is the sole judge of the relevance and materiality of the evidence. Except as modified by these rules, the Texas Rules of Civil Evidence govern the admissibility and introduction of evidence; however, evidence not admissible under the Texas Rules of Civil Evidence may be admitted if it is of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs. In addition, evidence may be stipulated by agreement of all parties.

5.10 **Written Testimony:** When a proceeding will be expedited and the interest of the parties will not be prejudiced substantially, testimony may be received in written form. The written testimony of a witness, either in narrative or question and answer form, may be admitted into evidence upon the witness being sworn and identifying the testimony as a true and accurate record of what the testimony would be if given orally. The witness will be subject to clarifying questions and to cross-examination, and the prepared testimony will be subject to objections.

RULE 6 CONCLUSION OF THE HEARING; REPORT:

6.1 **Closing the Record; Final Report**: At the conclusion of the presentation of evidence and any oral argument, the Hearing Examiner may either close the record or keep it open and allow the submission of additional evidence, exhibits, briefs, or proposed findings and conclusions from one or more of the parties. No additional evidence, exhibits, briefs, or proposed findings and conclusions may be filed unless permitted or requested by the Hearing Examiner. After the record is closed, the Hearing Examiner will prepare a report to the Board. The report must include a summary of the evidence, together with the Hearing Examiner's findings and conclusions and recommendations for action. Upon completion and issuance of the Hearing Examiner's report, a copy must be submitted to the Board and delivered to each party to the proceeding. In a contested case, delivery to the parties must be by certified mail.

6.2 **Exceptions to the Hearing Examiner's Report; Reopening the Record:** Prior to Board action any party in a contested case may file written exceptions to the Hearing Examiner's report, and any party in an uncontested case may request an opportunity to make an oral presentation of exceptions to the Board. Upon review of the report and exceptions, the Hearing Examiner may reopen the record for the purpose of developing additional evidence, or may deny the exceptions and submit the report and exceptions to the Board. The Board may, at any time and in any case, remand the matter to the Hearing Examiner for further proceedings.

6.3 **Time for Board Action on Certain Permit Matters:** In the case of hearings involving new permit applications, original applications for existing wells, or

applications for permit renewals or amendments, the Hearing Examiner's report should be submitted, and the Board should act, within 60 calendar days after the close of the hearing record.

RULE 7 FINAL DECISION; APPEAL:

7.1 **Board Action**: After the record is closed and the matter is submitted to the Board, the Board may then take the matter under advisement, continue it from day to day, reopen or rest the matter, refuse the action sought or grant the same in whole or part, or take any other appropriate action. The Board action takes effect at the time order or other written decision is signed and is not affected by a motion for rehearing.

7.2 **Requests for Rehearing**: Any decision of the Board on a matter may be appealed by requesting a rehearing before the Board within 20 calendar days of the Board's decision. Such a rehearing request must be filed at the District office in writing and must state clear and concise grounds for the request. Such a rehearing request is mandatory with respect to any decision or action of the Board before any appeal may be brought. The Board's decision is final if no request for rehearing is made within the specified time, or upon the Board's denial of the request for rehearing, or upon rendering a decision after a rehearing. If the rehearing request is granted by the Board, the date of the rehearing will be within 45 calendar days thereafter, unless otherwise agreed to by the parties to the proceeding. The failure of the Board to grant or deny the request for rehearing within 60 calendar days of submission will be deemed to be a denial of the request.

Adopted:_____ End of Rules

APPENDIX

3.

Court of Appeal Opinion

NO. 12-19-00172-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT, APPELLANT	§	*APPEAL FROM THE 2ND*
	§	*JUDICIAL DISTRICT COURT*
V.		
MOUNTAIN PURE TX, LLC, APPELLEE	§	*CHEROKEE COUNTY, TEXAS*

MEMORANDUM OPINION

This is an accelerated appeal from the district court's denial of Neches and Trinity Valleys Groundwater Conservation District's plea to the jurisdiction alleging governmental immunity. In three issues, the District challenges the denial of its plea to the jurisdiction and its no evidence motion for partial summary judgment. Because we conclude that Mountain Pure TX, LLC's counterclaim against the District is barred by governmental immunity, we reverse the order of the trial court, render judgment dismissing Mountain Pure's counterclaim, and remand the cause to the trial court for further proceedings consistent with this opinion.

BACKGROUND

The District is a groundwater conservation district charged with the duty to conserve, preserve, and prevent waste of groundwater in Cherokee, Anderson, and Henderson Counties.[1] Its powers also include the authority to make and enforce rules.[2] Its rules require all persons owning a groundwater well to obtain permits to drill and operate the well unless exempt under the

[1] TEX. WATER CODE ANN. § 36.0015(b) (West 2018); TEX. SPEC. DIST. LOCAL LAWS CODE ANN. § 8863.002.

[2] TEX. WATER CODE ANN. §§ 36.101(a), 36.102 (West 2018).

provisions of Chapter 8863 of the Texas Special District Local Laws. Chapter 8863.151 permits the District to assess production fees.[3] Chapter 8863.103 permits the District to require a permit for the transfer of groundwater out of the district.[4]

Mountain Pure owns a spring water bottling plant in Palestine, Texas. Mountain Pure refused to acknowledge that it owns or operates a water well, refused to apply for a permit to operate a water well, refused to apply for the transfer of water out of the district, and failed to file quarterly production reports or pay quarterly production fees. Mountain Pure maintained that the water it bottled and sold did not come from a water well, but from an "underground formation from which water flows naturally to the surface of the earth." It is Mountain Pure's position that the District therefore has no authority to regulate spring water.

The District, claiming that Mountain Pure was drawing water from a well under its authority, filed suit against Mountain Pure and Ice River Springs Palestine, LLC to force their compliance with the Texas Water Code and the District's rules. The District asked the trial court to order Mountain Pure and Ice River to (1) submit to the District within thirty days applications for operating permits for all of their wells; (2) submit to the District within thirty days written reports stating the amount of groundwater produced from their wells for all quarters beginning with the first quarter of 2008; (3) cease from operating nonexempt wells in Anderson County without accurately metering the amount of water produced; (4) accurately report the amount of water produced from all of its wells to the District on a quarterly basis; and (5) pay to the District within thirty days all production fees due as determined by the quarterly reports required. The suit also asked for reasonable costs, attorney fees, and the assessment of civil penalties. Ice River, a tenant of Mountain Pure, was subsequently dismissed from the case.

Mountain Pure generally denied the District's allegations and filed a counterclaim alleging that the District's enforcement attempts constituted tortious interference with their lucrative operating contract with Ice River. In its counterclaim, Mountain Pure stated that prior to the District's filing suit, Ice River contracted to purchase the facility. Ice River was also operating the facility and making substantial payments to Mountain Pure. Mountain Pure alleged that before filing suit, the District informed Ice River "that a $10,000 per day fine was being assessed because

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[3] TEX. SPEC. DIST. LOCAL LAWS CODE ANN. § 8863.151(c).

[4] TEX. SPEC. DIST. LOCAL LAWS CODE ANN. § 8863.103(b).

of an unreported and unmonitored water well that was drilled on the property." Mountain Pure further alleged "[a]s a result of this communication, Ice River Springs Palestine, LLC practically overnight withdrew from the facility and abandoned operation of the plant and quit making payments under the terms of the written agreement." Mountain Pure alleged that the District, by its actions, tortiously interfered with its contract with Ice River which resulted in $10,000,000 in damages to Mountain Pure from lost earnings and/or lost earning capacity, lost profits, and diminished market value.

In its First Amended Counterclaim, in addition to the tortious interference claim, Mountain Pure alleged a general takings claim based on the same facts and same damages as the tortious interference claim. The trial court granted the District's plea to the jurisdiction as to the tortious interference claim but denied its plea to the jurisdiction as to the takings claim.

In its Sixth Amended Counterclaim, Mountain Pure contended that the District's attempted regulation caused Ice River's withdrawal from the contract to operate the facility for Mountain Pure, denied access to the property, and caused a cessation of operations. The nature and amount of the damages are the same as those formerly claimed.

The District, in its Third Plea to the Jurisdiction, maintained that Mountain Pure simply complained about the District enforcing its regulations and failed to allege a takings claim. The trial court denied the District's plea to the jurisdiction. The District appealed the interlocutory order.

No rules or restrictions have as yet been imposed on Mountain Pure or its property and the question of the District's authority over the source of Mountain Pure's water remains pending before the trial court.

PLEA TO THE JURISDICTION

In two issues, the District claims the trial court erred in not granting its plea to the jurisdiction and dismissing Mountain Pure's counterclaim. In a third issue, the District contends the trial court erred in denying its no evidence motion for partial summary judgment.

Standard of Review

Subject matter jurisdiction is essential to the authority of a court to decide a case. ***Tex. Ass'n of Bus. v. Tex. Air Control Bd.***, 852 S.W.2d 440, 443 (Tex. 1993). A challenge to subject matter jurisdiction presents a question of law. ***Tex. Dep't of Parks & Wildlife v. Miranda***, 133

S.W3d 217, 226 (Tex. 2004). Therefore, we review the trial court's ruling on a plea to the jurisdiction de novo. ***Mayhew v. Town of Sunnyvale***, 964 S.W.2d 922, 928 (Tex. 1998). In reviewing a plea to the jurisdiction, we review the pleadings and any evidence relevant to the jurisdictional issue. *See* ***Tex. Dep't of Criminal Justice v. Miller***, 51 S.W.3d 583, 587 (Tex. 2001). We accord the trial court's decision no deference. ***Quick v. City of Austin***, 7 S.W.3d 109, 116 (Tex. 1998). The plaintiff's pleadings are construed liberally in the plaintiff's favor. ***Miranda***, 133 S.W3d at 226. But it is the factual substance of the pleadings (as supported by the jurisdictional evidence) that is controlling when we review the trial court's ruling on a plea to the jurisdiction. ***Nat'l Media Corp. v. City of Austin***, No. 03-16-00839-CV, 2018 WL 1440454 at *5 (Tex. App.—Austin Mar. 23, 2018, no pet.) (mem. op.) (citing ***Andrade v. NAACP of Austin***, 354 S.W.3d 1, 11 (Tex. 2011)).

Applicable Law

Under the doctrine of sovereign immunity, the State of Texas cannot be sued in its own courts without its consent and then only in the manner indicated by that consent. ***Wichita Falls State Hosp. v. Taylor***, 106 S.W.3d 692, 694 (Tex. 2003). Absent the State's consent to suit, a trial court lacks subject matter jurisdiction. ***Tex. Dep't of Transp. v. Jones***, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). "Sovereign immunity does not shield the government from liability for compensation under the takings clause." ***Harris Cty. Flood Control Dist. v. Kerr***, 499 S.W.3d 793, 799 (Tex. 2016). Governments must sometimes impose restrictions on and regulations affecting the use of private property in order to secure the safety, health, and general welfare of its citizens. *See* ***City of Houston v. Carlson***, 451 S.W.3d 828, 831 (Tex. 2014). Although those restrictions and regulations sometimes result in inconvenience to owners, the government is not generally required to compensate for accompanying loss. ***Id.*** But when regulation of private property reaches a certain level there must be an exercise of eminent domain and compensation to sustain that act. ***Id.*** "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." ***Pennsylvania Coal Co. v. Mahon***, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 2d 322 (1922). Where a property owner believes compensation is due, he may seek redress via an inverse condemnation claim. ***Carlson***, 451 S.W.3d at 831; ***State v. Hale***, 136 Tex. 29, 146 S.W.2d 731, 735 (1941).

The Texas Constitution waives sovereign immunity with regard to inverse condemnation claims. ***Carlson***, 451 S.W.3d at 830. Such claims must be predicated upon a viable allegation of

a taking. *Id.* Absent a properly pleaded takings claim, the government retains immunity, and a court must sustain a properly raised plea to the jurisdiction. *Id.*

A taking is the acquisition, damage, or destruction by physical or regulatory means. *Id.* at 831; *Mayhew*, 964 S.W.2d at 933. A physical taking occurs when the government authorizes an unwarranted physical occupation of a person's property. *Mayhew*, 964 S.W.2d at 933.

A compensable regulatory taking may occur in one of two ways. First, a regulatory taking can occur when governmental agencies impose restrictions that deny landowners all economically viable use of their property. *Id.* at 935. A restriction denies the landowner all economically viable use of the property if the restriction renders the property valueless. *Id.* Second, a regulatory taking can occur if the restrictions imposed unreasonably interfere with the landowners' right to use and enjoy the property. *Id.*

In determining whether the government unreasonably interfered with an owner's right to use and enjoy the property, two factors must be considered: the economic impact of the regulation and the extent to which the regulation interferes with distinct investment backed expectations. *Id.* "The first factor, the economic impact of the regulation, merely compares the value that has been taken from the property with the value that remains in the property." *Id.* at 935-36. The loss of anticipated gains or potential future profits is not usually considered in analyzing this factor. *Id.* at 936. The second factor is the reasonable investment-backed expectation of the landowner. *Id.* "The existing and permitted uses of the property constitute the 'primary expectation' of the landowner that is affected by regulation." *Id.*

A civil enforcement procedure alone cannot serve as the basis of a regulatory takings claim. *Carlson*, 451 S.W.3d at 832-33; ***CPM Trust v. City of Plano***, 461 S.W.3d 661, 673 (Tex. App.—Dallas 2015, no pet.).

A denial of access is compensable if the denial of access is substantial and material. *See* ***City of Houston v. Texan Land and Cattle Co.***, 138 S.W.3d 382, 387 (Tex. App.—Houston [14th Dist.] 2004, no pet.). In order to show substantial and material impairment of access, the owner must establish (1) a total temporary restriction of access, (2) a partial permanent restriction of access, or (3) a partial temporary restriction of access due to illegal or negligent activity. ***State v. Schmidt***, 867 S.W.2d 769, 775 (Tex. 1993); ***Texan Land and Cattle Co.***, 138 S.W.3d at 387.

Discussion

Mountain Pure does not contend that the District's rules and regulations it seeks to enforce are unconstitutional or otherwise invalid. But it maintains that the District is wrongfully attempting to apply them to its property. Mountain Pure claims the spring catch basin from which it derives the water to be bottled and sold is not a water well within the purview of the District's rules and the water taken from the basin is not groundwater subject to the District's rules. The dispute as to whether the District's rules apply to Mountain Pure's facility remains unresolved. Therefore, as yet, no rules or restrictions have been imposed on Mountain Pure or its property.

However, in its counterclaim, Mountain Pure claims a permanent taking occurred when the District filed suit against it and its tenant and operator, Ice River, to enforce its regulations applicable to groundwater. The District's rules required the reporting of the amount of groundwater produced and the payment of a production fee in the amount of three cents for every 1000 gallons shipped out of the District. Failure to pay the production fee results in fines, such as the fine of up to $10,000 per day assessed against Mountain Pure. This initial step in the enforcement process, Mountain Pure asserts, caused Ice River to withdraw from a lucrative contract with Mountain Pure to use and operate the spring. The loss of this contract, it argues, resulted in the cessation of operations at the spring, and the loss of a minimum of $10,000,000.

Mountain Pure does not dispute that the District has governmental immunity but contends that under the Fifth Amendment of the United States Constitution and Article I, Section 17 of the Texas Constitution, the District is not shielded against a properly pled takings claim. When a property owner believes the government's conduct amounts to a taking for which he is entitled to compensation, he may file an inverse-condemnation claim. ***Carlson***, 451 S.W3d at 831; ***Hale***, 146 S.W.2d at 735. Takings can be either physical or regulatory takings. ***Mayhew,*** 964 S.W.2d at 933.

Mountain Pure maintains that the District's suit resulted in a permanent regulatory taking by unreasonably interfering with its right to use and enjoy its property. The record shows that Mountain Pure's Palestine plant, after the government action, retains a value of $4,090,000. Mountain Pure cannot contend that the District's action renders its property valueless. Mountain Pure obviously cannot claim a regulatory taking by claiming the District's actions would take "all economically viable use of its property by rendering it valueless.

As previously stated, two factors must be considered in determining whether the government-imposed restrictions constitute a regulatory taking by unreasonably interfering with the landowners' rights to use and enjoy their property. ***Id.*** The economic impact of the regulation on the property is the first factor. This "merely compares the value that has been taken from the property with the value that remains in the property." ***Id.*** at 936. The loss of anticipated gains or future profits is not usually considered in this analysis. ***Id.*** Mountain Pure's spring and related facilities retain a value, according to its appraiser, of $4,090,000. Mountain Pure's pleadings and the jurisdictional evidence indicate that the loss it claims to the value of its property is the result of the loss of future gains from its lost contract with Ice River. The appraiser's report Mountain Pure submitted in its response to the District's plea to the jurisdiction and motion for summary shows a total value loss of $5,780,000 "attributable to the early lease termination by Ice River."

The second factor to be considered is the extent to which the regulation interferes with the "investment-backed expectation of the landowner." ***Id.*** "The existing and permitted uses of the property constitute the 'primary expectation' of the landowner affected by regulation." ***Id.*** (citing ***Penn Cent. Transp. Co. v. City of New York***, 438 U.S. 104, 136, 98 S. Ct. 2646, 2665, 57 L. Ed. 631 (1978)). There is no pleading or evidence that Mountain Pure has pleaded or shown that the application of the groundwater rules, should they be held to apply, will interfere with production and sale of bottled water from the property. If the District is successful, the enforcement of the production reporting rules would represent a restriction on the property's use. There is no pleading that the imposition of a three cent per 1000 gallons fee will be so onerous as to affect the present use of the property or significantly diminish its economic viability. Even if it could be conceded that the application of the District's rules and regulations might affect the potential attractiveness of the property, the United States Supreme Court has observed neither a diminution in property value nor a "substantial reduction of the attractiveness of the property to potential purchasers' will suffice to establish that a taking has occurred." ***Exposito v. S. Carolina Coastal Council***, 939 F.2d 165, 170 (4th Cir. 1991) (quoting ***Kirby Forest Indus. v. United States***, 467 U.S. 1, 15, 104 S. Ct. 2187, 2196, 81 L. Ed. 2d 1 (1984)).

Mountain Pure's primary expectation concerning the use of the property was the bottling of spring water. Neither the District's rules nor its attempt at their enforcement has deprived Mountain Pure of any reasonable investment backed expectation. There is no showing that the enforcement of the reporting rules and the accompanying three cent per thousand-gallon fee will

affect production. Mountain Pure retains the right to occupy the property, to exclude others from it, to continue to operate the spring on the property, or to alienate it should it choose. The current industrial use is permissible and there are no known private or other restrictions limiting the use of the property according to Mountain Pure's appraiser's report. An analysis of the pleadings and jurisdictional evidence under this factor fails to show a regulatory taking.

Mountain Pure's appraiser showed the property is presently worth $4,090,000. Mountain Pure has simply pleaded that because of the District's threat to enforce its rules, Ice River withdrew from its contract to operate the facility. Its appraiser's report shows that this resulted in a $5,780,000 loss attributable to Ice River's decision to withdraw from the lease according to Mountain Pure's appraisers. Its claim that the District is wrongfully attempting to misapply its rules to Mountain Pure's spring demonstrates that the District's suit is a civil enforcement action. A civil enforcement action alone cannot serve as the basis of a regulatory takings claim. *See* ***Carlson***, 451 S.W.3d at 832-33; *see also* ***CPM Trust***, 461 S.W.3d at 673.

There are assertions in Mountain Pure's pleadings that the District denied access to the property and caused a cessation of operations. Mountain Pure's pleadings do not contain facts that allege a compensable denial of access, nor do they show how the District's suit forced a cessation of operation. Ice River's termination of its lease purchase operating agreement may have been influenced by the District's civil enforcement suit. But there are no facts pleaded to show it was required by the District's action. The District's suit neither denied access to the spring nor prevented its operation. No restrictions, rules, or regulations affecting it have so far been applied to the property. Mountain Pure's pleadings and the facts in the record show that the damage claims relate solely to their loss of the "above market" contract with Ice River. They allege the same facts and damages as Mountain Pure's dismissed tortious interference claim with a conclusory takings claim appended. It is impossible to avoid the conclusion that Mountain Pure's inverse condemnation claim is no more that its dismissed tortious interference claim thinly disguised as a taking.

While Mountain Pure's pleadings recite that the District's actions effectuated a total regulatory taking by unreasonably interfering with Mountain Pure's use and enjoyment of the property, it is the facts pleaded and supported by the jurisdictional evidence that is controlling. Natl' Media Corp. 2018 WL 1440454, at *5 (citing ***Andrade***, 345 S.W.3d at 11). The facts pleaded fail to show a taking.

For the above reasons, we conclude the trial court erred by denying the District's plea to the jurisdiction. We sustain issues one and two. Our disposition of the District's first two issues renders it unnecessary that we address the District's third issue. *See* TEX. R. APP. P. 47.1.

DISPOSITION

Because the trial court erred in denying the District's plea to the jurisdiction and motion to dismiss Mountain Pure's counterclaim, we ***reverse*** the trial court's order of denial, ***render*** judgment dismissing Mountain Pure's takings claim against the District, and ***remand*** the cause to the trial court for further proceedings consistent with this opinion.

BILL BASS
Justice

Opinion delivered September 18, 2019.
Panel consisted of Worthen, C.J., Hoyle, J., and Bass, Retired, J., Twelfth Court of Appeals, sitting by assignment.

(PUBLISH)

APPENDIX
4.

Resolution

RESOLUTION OF THE NECHES AND TRINITY VALLEYS
GROUNDWATER CONSERVATION DISTRICT
AUTHORIZING ENFORCEMENT AGAINST
MOUNTAIN PURE TX, LLC; AND
ITS SUCCESSOR OWNERS AND OPERATORS

RESOLUTION 20150416

WHEREAS, the Board of Directors of the Neches and Trinity Valleys Groundwater Conservation District, at this duly noticed and called meeting, and within a quorum of members present, considered the matter of Mountain Pure TX, LLC; and finds the following:

1. Mountain Pure TX, LLC has failed to obtain a permit for non-exempt wells that it owns and operates;
2. Mountain Pure TX, LLC has failed and continues to fail to provide quarterly production reports as required by the Texas Water Code and District Rules;
3. Mountain Pure TX, LLC has failed and continues to fail to pay production fees as authorized by law and required by District Rules;

NOW, THEREFORE, BE IT RESOLVED THAT, the legal counsel for the District, John D. Stover, is authorized to file suit in the District Court of Cherokee, Anderson, or Henderson Counties against Mountain Pure TX, LLC; to enforce the District Rules by seeking an injunction, mandatory injunction, or other appropriate remedy including civil penalties, reasonable attorneys' fees, expert witness fees, and other cost incurred by the District.

Signed this 16th day of April, 2015.

Board President

ND: 4839-5074-1283, v. 1

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Associated Case Party: Mountain Pure TX, LLC

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Associated Case Party: Neches and Trinity Valleys Groundwater Conservation District

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