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Jessie Harbin, CLERK

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STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Jessie Harbin, CLERK

APPLICATION OF ELECTRO	§	BEFORE THE STATE OFFICE OF
PURIFICATION, LLC, FOR WELL	§	
MODIFICATION AUTHORIZATION	§	ADMINISTRATIVE HEARINGS
AND PRODUCTION PERMIT	§	

**PROTESTANTS' JOINT RESPONSE TO ELECTRO PURIFICATION LLC'S
THIRD MONTHLY ABATEMENT STATUS REPORT AND MOTION TO DISMISS**

Notice to parties: This motion requests the judge to decide some or all of the issues in this case without holding an evidentiary hearing on the merits. You have 15 days after the filing of the motion to file a response. If you do not file a response, this case may be decided against you without an evidentiary hearing on the merits. See SOAH's rules at 1 Texas Administrative Code §155.505. These rules are available on SOAH's public website.

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES ("ALJs"):

Come now, the Trinity Edwards Springs Protection Association ("TESPA"), Donald F. Wood, and pro se landowners (collectively, "Protestants"), and file this Joint Response to Electro Purification, LLC's ("EP") 3rd Monthly Abatement Status Report and Motion to Dismiss. Protestants respectfully request that prior to granting EP's one-month abatement extension, the ALJs request from EP information justifying the necessity for a contested case regarding the subject application.

I.

**EP REVERSED ITS POSITION ON WHETHER THE KINDER MORGAN
PIPELINE WOULD IMPACT EP'S WATER PERMIT APPLICATION**

Protestants do not oppose EP's request for a one-month abatement extension. However, Protestants believe further justification of a contested hearing is still warranted. Over the preceding ten months, EP represented to the Protestants and ALJs that the Kinder Morgan Pipeline's proposed route will significantly threaten the viability of EP's water project under the subject application as follows:

- **EP’s Motion to Abate (October 2, 2019):** “On the Bridges Property, [Kinder Morgan’s] proposed easement runs directly through all four of the existing wells EP has drilled on that property.”
- **EP’s Motion to Abate (October 2, 2019):** “On the Odell Property, [Kinder Morgan’s] proposed easement route ... directly impacts one of the three existing EP wells.”
- **EP’s Motion to Abate (October 2, 2019):** “As evidenced by the two maps attached hereto ... at least five of EP’s seven wells are directly at risk of being condemned. For this reason, Applicant believes there is a strong possibility that it will be forced to withdraw its pending Application and start over with the BSEACD application process. This is true even if Applicant is even allowed to continue to enjoy its leases on the Bridges and Odell properties after the [Kinder Morgan] condemnation by drilling new wells at other locations.”
- **EP’s Motion to Extend Abatement (March 31, 2020):** “Specifically, the location of the pipeline easement, as pled by [Kinder Morgan] would *disrupt, destroy or otherwise require the relocation of one or more of the existing seven wells drilled by EP...*” (emphasis added).
- **EP’s Motion to Extend Abatement (March 31, 2020):** “If any of the seven wells contemplated by the proposed Permit would be required to be relocated or modified due to the [Kinder Morgan] Pipeline, such that EP would be required to drill additional or new wells, EP would be required to hit the “**RESTART**” Button and *resubmit its Application...*” (emphasis added).

When EP sought a temporary restraining order enjoining Kinder Morgan from constructing the pipeline, EP maintained to the Hays County District Court that:

- **EP Application for TRO (March 12, 2020):** “The EP Project will be harmed and injured, if not taken and rendered *valueless* based upon [Kinder Morgan’s] actions to acquire the pipeline easements and related rights through the [Bridges and Odell’s] Properties.”¹ (emphasis added).
- **EP Application for TRO (March 12, 2020):** “Allowing [Kinder Morgan’s] actions to secure easements across either, much less both of the two properties, and/or to exercise the associated rights, through and across either of the Properties will damage, destroy, and/or take the EP Project, EP’s investment backed expectations, and EP’s constitutionally protected property rights if the easements as sought by [Kinder Morgan] are allowed to come to fruition.”²
- **EP Application for TRO (March 12, 2020):** “Compliance with [Kinder Morgan’s] desired restrictions on operations under the EP Groundwater Leaseholds within and near the [Kinder Morgan’s] easements will impact and damage EP’s ability to develop

¹ Exhibit 1, EP App. for TRO at ¶ 36 (March 12, 2020) (Attachments omitted).

² *Id.* at ¶ 39.

its property rights in the Groundwater Estate and, in fact, may cause EP's loss of use of one or more, and possibly all of the seven existing wells EP has drilled. Any such loss(es) would cause substantial economic damage and harm to, if not a complete taking of the EP Project and EP's property rights in its Groundwater Leases. Such an impact would require EP to start over with the lengthy, expensive permit application process with the [BSEACD], which could cause additional damages, including at a minimum a requirement for EP to drill and test new groundwater wells, if not causing EP to lose either, or both of EP's two groundwater leases on the Bridges Property and the Odell Property, and/or the Goforth Contract."³

EP now claims in its Third Monthly Abatement Status Report—absent any mention of the pipeline route—that once settlement with Kinder Morgan is fully in place—i.e. EP gets paid—“EP will be in a position to move forward confidently and prosecute its pending Permit Application in this Docket.”⁴ EP failed to identify any changes to the Kinder Morgan Pipeline's route and EP's recent application for TRO against Kinder Morgan dated May 18, 2020 was prompted by Kinder Morgan clearing the Bridges Property along the route so feared by EP.⁵

While EP has been leveraging the abatement against Kinder Morgan for monetary gain, Protestants have endured nine months of uncertainty surrounding the future of their water supply and incurred financial costs associated with same. Before further abatement, Protestants are entitled to EP's explanation of the changed circumstances that no longer require EP to relocate its wells or resubmit the subject application or absent such changed circumstances a justification for why EP could not make that determination earlier.

SOAH Order No. 12 granting EP's Motion to Continue Abatement contemplated this motion to dismiss upon the expiration of abatement on July 17, 2020 based on EP's prior representations about the pipeline's impact.⁶ If EP cannot adequately explain its drastic change in position, the ALJs should dismiss this proceeding and remand the subject application to the Barton

³ *Id.* at ¶ 46.

⁴ EP 3rd Monthly Abatement Status Report at 2.

⁵ Exhibit 2, EP Application for TRO at para. 5-6 (May 18, 2020) (Attachments omitted).

⁶ *See* SOAH Order No. 12.

Springs Edwards Aquifer Conservation District based on EP's ongoing representation in its Motion to Continue Abatement that "the location of the pipeline easement, as pled by [Kinder Morgan] *would disrupt, destroy or otherwise require the relocation of one or more of the existing seven wells drilled by EP.*"⁷ This representation absent evidence of an altered pipeline route sparing EP's seven water wells establishes this proceeding lacks any genuine issue as to any material fact and that there is no need for a contested hearing on the pending application.⁸

II. PRAYER

Protestants respectfully request the ALJs only grant the one-month abatement extension if EP justifies the necessity of a contested case hearing on the subject application and EP provides that information no later than July 17, 2020, or, alternatively, Protestants request the ALJs dismiss this proceeding for lack of any genuine issue as to any material fact based on EP's repeated representations that the pending application cannot proceed without relocation of one or more of EP's seven existing wells which would require EP to restart and resubmit its application.

⁷ EP Motion to Extend Abatement (March 31, 2020) (emphasis added).

⁸ *Texas Alcoholic Beverage Comm'n, Petitioner v. Joe Angel Gomez d/b/a Game on Sports Bar and Grill, Respondent*, 2017 WL 1425654, at *3 (noting the standard for summary disposition).

Respectfully submitted,

By: /s/ Adam M. Friedman

Adam M. Friedman
Texas Bar No. 24059783
MCELROY, SULLIVAN, MILLER & WEBER, L.L.P.
1201 Spyglass, Suite 200
Austin, Texas 78746
afriedman@msmtx.com
Tel: (512) 327-8111

Jeff Mundy
Texas Bar No. 14665575
MUNDY LAW FIRM
jeff@jmundy.com
Tel: (512) 334-4300
ATTORNEYS FOR TESPA

J.D. Head
Texas Bar No. 9322400
FRITZ, BYRNE, HEAD, & GILSTRAP, PLLC
221 W. 6th Street, Suite 960
Austin, Texas 78701
jhead@fbhg.law
Tel: (512) 476-2020
ATTORNEY FOR DONALD F. WOOD

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 2020, a true and correct copy of the foregoing document was served on the individuals listed below by email.

Edmond R. McCarthy, Jr.
McCARTHY & MCCARTHY, LLP
1122 Colorado, Suite 2399
Austin, TX 78701
Tel: (512) 904-2313
Fax: (512) 692-2826

Representing Electro Purification, LLC
ed@ermlawfirm.com

Bill D. Dugat, III
BICKERSTAFF HEATH DELGADO ACOSTA, LLP
3711 S. Mopac Expressway
Building One, Suite 300
Austin, TX 78746
Tel: (512) 472-8021
Fax: (512) 320-5638

Representing Barton Springs Edwards
Aquifer Conservation District
bdugat@bickerstaff.com

Eric Allmon
FREDERICK PERALES ALLMON & ROCKWELL, PC
1206 San Antonio Street
Austin, TX 78701
Tel: (512) 469-6000

Representing Hays County
eallmon@lf-lawfirm.com

/s/ Adam M. Friedman

Adam M. Friedman

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EXHIBIT 1

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CAUSE NO. 19-0896-C

PERMIAN HIGHWAY PIPELINE LLC,
Plaintiff

vs.

BRIDGES BROTHERS FAMILY
LIMITED PARTNERSHIP NO. 1,
Defendants.

and,

ELECTRO PURIFICATION, LLC,
Intervenor

Elaine A. Anderson
COUNTY CLERK
HAYS COUNTY, TEXAS
EMINENT DOMAIN PROCEEDING

IN THE COUNTY COURT AT LAW
OF HAYS COUNTY, TEXAS

COUNTY COURT AT LAW NO. 2

CAUSE NO. 19-0896-C

ELECTRO PURIFICATION, LLC,
Cross-Plaintiff

vs.

PERMIAN HIGHWAY PIPELINE LLC,
and KINDER MORGAN TEXAS
PIPELINE LLC
Cross Defendants.

IN THE COUNTY COURT AT LAW

HAYS COUNTY, TEXAS

COUNTY COURT AT LAW NO. 2

**CROSS-PLAINTIFF'S ORIGINAL PETITION FOR DECLARATORY JUDGMENT,
APPLICATION FOR TEMPORARY RESTRAINING ORDER AND
INJUNCTION AND REQUEST FOR ATTORNEYS FEES AND COSTS**

TO THE HONORABLE JUDGE OF SAID COURT:

Cross-Plaintiff, Electro Purification, LLC ("EP"), files this Cross-Plaintiff's Original Petition for Declaratory Judgment, Application for Temporary Restraining Order and Injunction, and Request for Attorneys Fees and Costs against Cross-Defendants, Permian Highway Pipeline LLC ("PHP") and Kinder Morgan Texas Pipeline LLC ("KM"). EP petitions the Court for a

Temporary Restraining Order and Injunction to maintain the status quo pursuant to Texas Rules of Civil Procedure, Rules 680 *et seq*, and Chapter 65, Tex. Civ. Rem. & Prac. Code.

I. THREAT OF CONTINUING HARM TO CONSTITUTIONAL RIGHTS REQUIRING PROTECTION OF STATUS QUO

1. The Temporary Restraining Order and injunctive relief is necessary to allow EP to obtain relief pursuant to the Uniform Declaratory Judgments Act, Chapter 37 of the Civil Practice and Remedies Code of Texas, for a declaration that Cross-Defendants' actions are illegally taking EP's constitutionally protected property rights without exercising the rights of eminent domain within Cross-Defendants' control, and have thereby violated, and continue to violate, the rights of EP protected *inter alia* by Article 1, Section 17 of the Texas Constitution and Chapter 21 of the Texas Property Code, as well as EP's procedural and substantive due process rights and equal protection rights.

2. Cross-Defendants' continuing violations of EP's protected rights can only be cured by enforcement of a mandatory injunction ordering Cross-Defendants to cease all actions, trespasses upon, takings, and/or injuries to EP's property and the rights under its multiple groundwater leases or, in the alternative, to compel Cross-Defendants to comply with the mandatory steps to exercise lawfully the power of eminent domain to acquire the desired easements, and related rights impacting EP's property, including to pay just compensation to compensate EP fairly for the takings and injuries to EP's property rights, as mandated by Article 1, Section 17 of the Texas Constitution, and Chapter 21 of the Texas Property Code.

3. To date EP has invested approximately Three Million Dollars (\$3,000,000.00) in the groundwater leaseholds Cross-Defendants seek to operate on, over and through without any

compensation to Cross-Plaintiff, EP. In support thereof, Cross-Plaintiff, EP, would show the Court as follows:

II. PARTIES AND SERVICE OF CITATION

4. Cross-Plaintiff, EP, formally known as "Electro Purification LLC" is a Texas limited liability company headquartered at 4605 Post Oak Place, Suite 212, Houston, Harris County, Texas 77027.

5. Cross-Defendant, Permian Highway Pipeline LLC ("PHP") is a Delaware limited liability company authorized to do business in Texas that may be served via its Registered Agent as designated with the Texas Secretary of State, to wit: Capitol Corporate Services, Inc. at 206 E. 9th St., Ste. 1300, Austin, TX 78701-4411.

6. Cross-Defendant Kinder Morgan Texas Pipeline LLC ("KM") is a Delaware limited liability company authorized to do business in Texas that may be served via its Registered Agent as designated with the Texas Secretary of State, to wit: Capitol Corporate Services, Inc., at 206 E. 9th St., Ste. 1300, Austin, TX 78701-4411.

III. VENUE AND JURISDICTION

7. EP holds Groundwater Leases as the Lessee on multiple properties in Hays County, including a Groundwater Lease over the entirety of the approximately 925 acres of land known as the "**Bridges Property**," designated as Tract No. D-HA-738.000 in this Cause No. 19-1060-C, a condemnation action brought by Cross-Defendants in this County Court at Law No. 2, Hays County.

8. Venue is proper in Hays County, Texas as all of the property and the events or omissions giving rise to these claims are located in and/or occurred in Hays County, Texas. 4.

9. Jurisdiction is proper in County Court at Law No. 2 pursuant to Section 21.003, Texas Property Code, and Sections 65.021 and 65.023, Texas Civil Practice and Remedies Code. The original condemnation action brought by the Cross-Defendants to acquire property rights in the form of temporary and permanent easements across the Bridges Property (Tract No. D-HA-738.000) which affects EP's property rights and gives rise to this action, was filed in and is currently pending in this County Court at Law No. 2. It serves both the efficiency and judicial economy of the Court, and all affected Parties, for this matter to be heard by the same Judge, in the same Court, because EP's claims arise out of the same facts and actions of the Cross-Defendants in the pursuit of the easements they seek to condemn in and across the Bridges Property. Jurisdiction is also proper before the Court pursuant to Sections 65.021 and 65.023, Texas Civil Practice and Remedies Code.

IV. DISCOVERY

10. Discovery in this case can be accomplished at Level 2 pursuant to the Texas Rules of Civil Procedure Rule 190.3.

V. FACTS

A. Procedural Background:

11. Cross-Plaintiff, Electro Purification, LLC ("EP") is a Texas limited liability company headquartered in Houston, Harris County, Texas. EP holds Groundwater Leases in Hays County in, on and over two adjacent tracts of land directly impacted by Cross-Defendants' Permian Highway Pipeline route, including (i) Tract No. D-HA-738.000. EP's leased acreage includes the entirety of the approximately 924 acres of land within Tract No. D-HA-738.000, known as the

“Bridges Property,” and (ii) the entirety of the approximately 457 acres of adjacent land across FM 3237, known as the **“Odell Property,”** which has been designated as Tract No. D-HA-734.000 along Cross-Defendants’ pipeline route. The two leases were acquired by EP in 2013 and 2014, as part of a project to develop a wholesale municipal groundwater supply for retail public utilities serving customers in Hays County (the **“EP Project”**).

12. In 2013, a Memorandum of Lease for the Bridges Property designated by Cross-Defendants as Tract No. D-HA-738.000, was recorded in the Official Public Records of Hays County as Document Id. No. 2013-13039248, in Volume 4806 at Pages 820 *et seq* (the **“Bridges Memorandum of Lease.”**) See Appendix “A” to **Exhibit “1”** (Affidavit of Tim Throckmorton). A copy of the recorded Memorandum of Lease is attached hereto as Appendix “A” to **Exhibit “1”** (the **“Bridges Groundwater Lease”**).

13. The second groundwater lease is over the entirety of the Odell Property, which is designated by Cross-Defendants as Tract No. D-HA-734.000. A Memorandum of Lease for the Odell Property was recorded in the Official Public Records of Hays County as Document Id. No. 2015-15000306, in Volume 5109 at Pages 194 *et seq* in 2015 (the **“Odell Memorandum of Lease”**). A copy of the recorded Odell Memorandum of Lease is attached hereto as Appendix “B” to **Exhibit “1”** (Affidavit of Tim Throckmorton) (the **“Odell Groundwater Lease”**).

14. Cross-Defendant PHP, on behalf of itself and Cross-Defendant KM, has filed separate condemnation suits to acquire the easements across both the Bridges Property and the Odell Property necessary to lay a portion of the approximately 425 mile-long 42-inch pipeline from Reeves County in West Texas as it crosses through Hays County en route to Colorado County in Southeast Texas for the alleged purpose of moving natural gas.

15. The two separate causes of action filed by Cross-Defendants are docketed as:

- (i) Cause No. 19-0896-C; *Permian Highway Pipeline LLC v. Bridges Brothers Family Limited Partnership No. 1* in the Hays County Court at Law No 2, ("Bridges Suit").
- (ii) Cause No. 19-1060-C; *Permian Highway Pipeline LLC v. Juanita M. Leinneweber, Eddie Ray Odell, Roy Gene Odell, and Dallas MTA, L.P. d/b/a Verizon Wireless* in the Hays County Court of Law No. 1 ("Odell Suit"), and

16. Despite the fact that Cross-Defendants were as a matter of law aware of Cross-Plaintiff, EP's prior existing groundwater lease over the entirety of the Bridges Property that is affected by Cross-Defendants' plans to acquire temporary and permanent easements to construct and operate a 42-inch pipeline transecting the Bridges Property and Cross-Plaintiff's groundwater lease, based upon the recorded memorandum of lease (*see* Tex. Prop. Code § 13.002), Cross-Defendants failed to take any steps to initiate or pursue acquisition of EP's property rights either by voluntary negotiation or the initiation of condemnation proceedings pursuant to Chapter 21, Texas Property Code. *See* EP's **Exhibit "1"** (Affidavit of Tim Throckmorton, Co-Manager of EP).

17. Upon learning of Cross-Defendants' filing of Cause No. 19-0896-C, EP filed a Motion to Intervene on August 16, 2019, in Cause No. 19-0896-C. No Party, including Cross-Defendants, responded to or protested EP's Intervention, nor requested to strike EP as a Party.

18. While PHP failed to name EP as a party-defendant to the Bridges Suit, the easements Cross-Defendants seek to acquire will transect the entire Bridges Property and, therefore, impact EP's Bridges Lease. The Cross-Defendants' desired easements will not only impact the entirety of EP's protected property right in the groundwater covered by EP's Leaseholds, based upon the data pled by Cross-Defendants in its condemnation petition, as amended, in the Bridges Suit, the desired easements go through EP's existing wellfield. *Compare*

Exhibit "A" to Cross-Defendants' 3rd Amended Petition *with* EP's Exhibit 1 (Affidavit of Tim Throckmorton) and Exhibit 2 (Affidavit of Kaveh Khorzad).

19. To date, Cross-Defendants have taken no action in the Bridges Suit either (i) to respond to Cross-Plaintiff's Intervention, or (ii) to initiate condemnation of the Cross-Plaintiff's property rights in its groundwater lease needed for Cross-Defendants' easements across the Bridges Property.

20. Cross-Defendants have failed to comply with any of the statutory prerequisites to initiating suit in condemnation of property interests mandated by Chapter 21, Texas Property Code, in connection with their efforts to acquire easements across the Bridges Property prior to filing suit in Cause No. 19-0896-C. *See* EP's Exhibit "1" (Affidavit of Tim Throckmorton).

21. Cross-Defendants did, however, name EP as a party-defendant in the Odell Suit docketed as Cause No. 19-1060-C in County Court at Law No. 1. On December 18, 2019, however, the day before the appointed Special Commissioners were scheduled to conduct a hearing on damages to the EP Leasehold across the Odell Property, Cross-Defendants amended the Petition in Cause No. 19-1060-C to remove EP as a named party-Defendant, effectively dismissing EP from the case, and unilaterally cancelled the scheduled December 19, 2019 Special Commissioners' hearing. To the limited extent Cross-Defendants had taken any steps to comply with Chapter 21, Texas Property Code, by initially naming EP as a Defendant in Cause No. 19-1060-C, Cross-Defendants' dismissal of EP as a party-Defendant by dropping EP in its amended Petition, negated all efforts to acquire EP's affected property rights.

B. EP's Groundwater Leases & Goforth Contract:

22. As part of its separate leases of the Groundwater Estates on each of the Bridges Property and the Odell Property, EP expressly was granted the use of the entire surface estates of

the Bridges Property and Odell Property to explore for, drill, develop and produce groundwater from the Trinity Aquifers underlying each of the two properties. EP's leasehold rights also granted EP the right and ability to build pipelines, gathering lines, and other infrastructure in, on and over and across the respective surface estates to move, treat, and store the groundwater it produced from the two leaseholds on the Properties as part of the EP Project.

23. Pursuant to its Groundwater Leases on the two Properties affected by Cross-Defendants' desired pipeline easement and associated rights, EP has (i) entered into a long-term wholesale groundwater contract with the Goforth Special Utility District ("**Goforth**") to supply up to 3 million gallons per day of groundwater produced from EP's two Groundwater Leases to meet the retail water supply demands of the Goforth customers (the "**Goforth Contract**"), (ii) EP has drilled seven wells on the Bridges Property and Odell Property: four groundwater wells on the Bridges Property and three groundwater wells on the Odell Property (the "**EP Wells**") and (iii) EP has applied for a municipal water supply production permit based upon the EP Wells from the Barton Springs Edwards Aquifer Conservation District.

24. After drilling the initial seven EP Wells, EP commissioned Wet Rock Groundwater Services, LLC to conduct extensive pump tests costing hundreds of thousands of dollars to evaluate the aquifer characteristics and perform studies in support of its pending application for a Production Permit by the Barton Springs Edwards Aquifer Conservation District.

25. Based upon the production capability of its seven existing wells, EP applied to the Barton Springs Edwards Aquifer Conservation District for a Production Permit to produce up to 2.5 million gallons per day to meet its obligations under the Goforth Contract. Cross-Defendants' proposed easements across the Bridges Property and the Odell Property threaten to damage, if not

destroy, or take the EP Project. See EP Exhibits Nos. "1" (Affidavit of Tim Throckmorton) and "2" (Affidavit of Kaveh Khorzad).

26. The four wells on the Bridges Property, drilled pursuant to the Bridges Lease, are named and referred to by EP as the "Bridges Well No. 1," "Bridges Well No. 2," "Bridges Well No. 3," and "Bridges Well No. 4." A map showing the location of the EP Bridges Wells on the Bridges Property is attached hereto as Exhibit "3."

27. The maps attached as Appendix "C" to EP's Exhibit "1" (Throckmorton Affidavit), and Appendices "B" and "C" to EP's Exhibit "2" (Khorzad Affidavit) also reflects the location of Cross-Defendants' desired easement vis-à-vis the EP Bridges Wells based on the information pled by Cross-Defendants in the pleadings in the Bridges Suit.

28. EP has drilled three additional wells on the Odell Property drilled pursuant to the Odell Lease, which are named and referred to by EP as the "Odell Well No. 1," "Odell Well No. 2," and "Odell Well No. 3" and may be collectively referred to herein as the "EP Odell Wells." Maps showing the location of the EP Odell Wells on the Odell Property are attached hereto as Appendix "C" to EP's Exhibit "1," (Throckmorton Affidavit) and Appendix "B" to EP's Exhibit "2" (Khorzad Affidavit).

29. The maps attached as Appendix "C" to EP's Exhibit "1" (Throckmorton Affidavit) also reflects the location of Cross-Defendants' desired easement vis-à-vis the EP Odell Wells based on the information from PHP's pleadings in the Odell Suit.

30. Pursuant to the requirements of Texas Law relating to groundwater wells producing water for a municipal use purposes as codified in 30 Texas Administrative Code, Chapter 290, and as authorized by EP's two separate Groundwater Leases, EP has also secured the right to impose "Sanitary Control Easements" around each of its seven existing wells.

31. By law, a sanitary control easement is an area that includes a one hundred fifty foot easement measured from the wellhead to protect the quality of water to be produced and used for municipal water supply purposes, *i.e.*, drilling water.

32. EP has imposed sanitary control easements over each of the four wells on the Bridges Property pursuant to the Bridges Lease. *See* EP's Exhibits "3"-*"6"* (true and correct copies of the Bridges Sanitary Control Easements as recorded in Hays County Official Records); *see generally* 30 TAC §§ 290.38(75), 290.41(c).

33. The Sanitary Control Easements on the Bridges Properties surrounding each of the wells are duly recorded in the Official Public Records of Hays County as follows:

EP's Bridges Well No.	Document Id. No.	Exhibit Designation
1	19020226	Exhibit "3"
2	19020227	Exhibit "4"
3	19020228	Exhibit "5"
4	19020229	Exhibit "6"

34. To date, EP has invested more than Three Million Dollars (\$3,000,000.00) on lease bonuses, delay rentals, easement acquisition, professional consultant and legal fees, surveying and engineering, and infrastructure costs to acquire, develop and permit, as well as test, the existing seven wells on its two separate leaseholds on the Bridges Property and Odell Property, and in the negotiation of the Goforth Contract.

35. EP's Groundwater Leases on the Bridges Property and Odell Property are constitutionally protected real property interests in each of the two separate properties being condemned by PHP. *E.g.*, Tex. Const. Art. I, § 17; Tex. Water Code § 36.002; *EAA v. Day*, 369 S.W.3d 814, 817, 831-32 (Tex. 2012).

36. Based upon EP's property rights in the two Groundwater Leases, which cover the entirety of both the Bridges Property and the Odell Property, as well as, the Goforth Contract and EP's substantial investment backed expectations in the same, EP's property rights will be severely impacted and damaged, if not taken or destroyed in their entirety, without the payment of any compensation, much less just compensation, by Cross-Defendants' acquisition of its desired easements over, across and through EP's Groundwater Leaseholds. The EP Project will be harmed and injured, if not taken and rendered valueless based upon the Cross-Defendants' actions to acquire the pipeline easements and related rights through the two Properties through the separate condemnation proceeding evidenced by the separate Bridges Suit and Odell Suit.

37. To the extent Cross-Defendants' actions evidenced by the Bridges Suit and Odell Suit will affect EP's property rights without the payment of "just compensation" to EP, Cross-Defendants' actions are illegal. Cross-Defendants have failed to comply with any of the constitutional and statutory prerequisite conditions for the lawful exercise of the power of eminent domain that are mandated by Article I § 17 (Tex. Const.) and/or Chapter 21, Texas Property Code.

38. If Cross-Defendants are allowed to pursue acquisition of the desired easements across the Bridges Property and/or the Odell Property, and secure a right of possession based solely upon their actions vis-à-vis the fee owners of the Surface Estate only, and to do so prior to addressing the constitutionally protected property rights of EP in the two separate Groundwater Leases affecting the entirety of the Bridges Property and the Odell Property, the Court would be allowing Cross-Defendants to effect an illegal inverse condemnation of EP's property rights in violation of both Article I, § 17, Texas Constitution and Chapter 21, Texas Property Code.

39. The success and economic viability of the EP Project is dependent upon EP's ability to exercise all of the rights it negotiated and paid for, and have made investments in, in both the

Bridges Lease and the Odell Lease. Allowing Cross-Defendants' actions to secure easements across either, much less both of the two properties, and/or to exercise the associated rights, through and across either of the two Properties will damage, destroy, and/or take the EP Project, EP's investment back expectations, and EP's constitutionally protected property rights if the easements as sought by Cross-Defendants are allowed to come to fruition before Cross-Defendants.

40. As the Groundwater Lessee, EP has a constitutionally protected property interest in, on, over and under the entirety of both the Bridges and Odell Properties. That protected property right is recognized both statutorily and by the Texas Supreme Court with respect to the Groundwater Estate. That property right in EP will be damaged and/or taken by the Cross-Defendants' proposed easements and the resulting pipeline construction and operation by Cross-Defendants, as well as the post-possession exercise of dominion over EP's Leaseholds. *E.g.*, Texas Water Code § 36.002; *EAA v. Day*, 369 S.W.3d 814, 817, 832-833 (Tex. 2012); *see* Tex. Const Art. I, § 17; *see Coyote Lake Ranch LLC v. City of Lubbock*, 498 S.W.3d 53, 63-64 (Tex. 2016). Cross-Defendants have pled that they allegedly have the authority to lawfully take those actions vis-à-vis EP's property rights; however, only through the exercise of Cross-Defendants' eminent domain powers as mandated by Article I, § 17, of the Texas Constitution, and Chapter 21, Texas Property Code. To date, Cross-Defendants have failed to comply vis-à-vis the rights of EP

41. EP's Groundwater Leases and Sanitary Control Easements evidence EP's protected property rights in and control of the dominant groundwater estate over the proposed surface uses in the servient surface estate that the Cross-Defendants to date have sought to condemn from the surface fee owners, the Bridges and Odells, in the condemnation suits. Cross-Defendants, however, have turned their back completely on EP with respect to EP's property rights, pretending that they

do not exist – but they do. *Coyote Lake Ranch LLC v. City of Lubbock*, 498 S.W.3d 53, 60-61 (Tex. 2016); see EP's **Exhibit "1"** (Affidavit of Tim Throckmorton).

42. The Cross-Defendants' Petitions and supporting exhibits in the pending condemnation of the fee owner's interest in the surface estate to obtain the proposed easements across the Bridges Property demonstrate that the Cross-Defendants' desired easements and the pipeline proposed to be constructed and operated (i) will transect the Bridges Property and cut off EP's access to both its groundwater lease on either side of the easements and EP's access to FM 3237, and (ii) as described in Cross-Defendants' Petitions to go through the EP Wellfield on the Bridges Property affecting both EP's existing wells and multiple EP Sanitary Control Easements appurtenant to EP's multiple municipal water supply wells, and appear to go through multiple of EP's Bridges Wells. See EP's **Exhibit "1"** (Affidavit of Tim Throckmorton) and EP's **Exhibit "2"** (Affidavit of Kaveh Khorzad).

43. In addition to the damages and/or taking that will be caused by Cross-Defendants' easement and pipeline if Cross-Defendants are allowed to take possession of either or both the Bridges Property and Odell Property, the additional terms and conditions Cross-Defendants will impose on any use or activity within the proposed easement areas by any third-parties, including EP as the Lessee of the dominant Groundwater Estate, will impose restrictions which will prevent EP, even as the dominant estate holder, from installing new infrastructure and operating existing infrastructure necessary to exercise EP's constitutionally protected property rights in its two Groundwater Leases. The effects of those limitations and restrictions will impact EP's ability to develop and operate the EP Project in a manner that allows EP to perform and supply water to Goforth pursuant to the Goforth Contract necessary to supply water to retail water customers in Hays County, Texas.

44. Due to Cross-Defendants' failure to engage EP in any form of negotiations as contemplated by both Article I, § 17, Texas Constitution and Chapter 21, Texas Property Code, the full extent of the damages to or taking of EP's property rights is not fully known. To a limited degree, Cross-Defendants have described the restrictions Cross-Defendants will impose on the owners of the residual property rights within the easement areas on the Bridges Property in their Pleadings. *See* Cross-Defendants' Third Amended Petition Article VII., Para. Nos. 24 – 60 (Bridges Suit).

45. To a similar limited degree, Cross-Defendants have described the restrictions Cross-Defendants will impose on the owners of the residual property rights with the easement areas on the Odell Property in their Pleadings. *See* Cross-Defendants' 1st Amended Original Petition, Article VII., Para. Nos. 27 – 62.

46. Compliance with the Cross-Defendants' desired restrictions on operations under the EP Groundwater Leaseholds within and near the Cross-Defendants' easements will impact and damage EP's ability to develop its property rights in the Groundwater Estate and, in fact, may cause EP's loss of use of one or more, and possibly all of the seven existing wells EP has drilled. Any such loss(es) would cause substantial economic damage and harm to, if not a complete taking of the EP Project and EP's property rights in its Groundwater Leases. Such an impact would require EP to start over with the lengthy, expensive permit application process with the Barton Springs-Edwards Aquifer Conservation District, which could cause additional damages, including at a minimum a requirement for EP to drill and test new groundwater wells, if not causing EP to lose either, or both of EP's two groundwater leases on the Bridges Property and the Odell Property, and/or the Goforth Contract.

47. Cross-Defendants' proposed easements and appurtenant use limitations on EP and its ability to exercise its rights to develop the groundwater estates it has leased, on their face, would prevent EP's ability to secure its production permit from BSEACD. Additionally, it impairs if not precludes EP's ability to implement the installation and operation of necessary infrastructure for the EP Project, thus destroying the EP Project and EP's constitutionally protected property rights without payment of any just compensation by Cross-Defendants.

48. Loss of use of any of the seven EP wells will cause damage to the EP Project and EP's property rights under its Groundwater Leases, including requiring EP to start over with respect to its permit application with the Barton Springs-Edwards Aquifer Conservation District, and may result in a taking of the entire EP Project. The permitting process is expensive and time consuming, lasting well in excess of one year, requiring aquifer testing even before the application is subjected to a contested case process that can add years and hundreds of thousands of dollars additional delay and costs.

49. EP has been damaged by Cross-Defendants' actions and inactions in the failure to comply with the constitutional and statutory requirements for the exercise of eminent domain authority, which has caused uncertainty as to EP's ability to prosecute its permit application to the BSEACD at SOAH. EP had to request a minimum six month delay in the prosecution of its permit hearing in direct response to Cross-Defendants' non-compliance with the law.

50. In addition to the anticipated direct interference with, if not destruction of, the seven existing EP Wells on the Bridges Property and Odell Property; the location of the Cross-Defendants' easement and proposed 42-inch pipeline near and/or over the EP well sites and the Sanitary Control Easements will, best case scenario, interfere with EP's ability to fully develop

and enjoy EP's constitutionally protected and dominant Groundwater Estate in and under both the Odell Property and Bridges Property.

51. The Cross-Defendants' proposed easements and pipeline locations will have to be crossed by EP at multiple points to facilitate EP's ability to construct, operate, maintain, repair and replace EP's collection and gathering, and transmission pipeline systems to move the groundwater to be produced from EP's groundwater leaseholds using both the three existing EP Odell Wells and four existing EP Bridges Wells and any future wells EP drills to EP's places of storage and treatment on the EP Leases over the Bridges Property and Odell Property and, thereafter, to EP's customer Goforth's intended delivery point reflected on Exhibit "7" (map of EP's pipeline route), for beneficial use within the Goforth retail municipal water supply system in Hays County.

52. The location of the Cross-Defendants' proposed easements and pipeline, which traverses and bisects the entire length of both the Bridges Property and Odell Property, will hamper and negatively impact and damage, if not destroy and take EP's ability to fully enjoy its protected property rights, e.g., to develop the Groundwater Estate underlying each of the Bridges Property and Odell Property through the drilling, testing and completing additional municipal groundwater supply wells on the opposite side of the separate Bridges and Odell Properties because of Cross Defendants' proposed easements and pipeline route, and associated operating restrictions.

**VI. CROSS-DEFENDANTS' VIOLATIONS OF TEXAS CONSTITUTION
ARTICLE 1, SECTION 17 and TEXAS PROPERTY CODE CHAPTER 21**

53. Cross-Defendants' action (or inaction) with respect to EP's property rights associated with both the Bridges Property and the Odell Property demonstrate their failure to comply with any of the mandatory requirements of both (i) Article I, § 17, of the Texas Constitution and (ii) Chapter 21, Texas Property Code, to lawfully exercise the power of eminent domain.

54. Cross-Defendants' actions are evidence of both a damage to, if not destruction of, and/or a taking of, EP's constitutionally protected property rights in the Groundwater Estate beneath the separate Bridges Property and Odell Property which EP acquired pursuant to EP's groundwater leases over the two Properties.

55. Article I, Section 17a of the Texas Constitution states:

"No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made."

TEX. CONST. ART 1, SEC. 17.

56. Subchapter B., Chapter 21, Texas Property Code sets forth the mandatory process and procedures a condemning authority such as the Cross-Defendants must comply with to exercise eminent domain authority lawfully.

57. Cross-Defendants' decision to ignore EP and its constitutionally protected property rights did not make any of those rights go away.

58. As demonstrated by paragraphs 11 through 21, 44, 49 and 53-57, inclusive above, and EP's **Exhibit "1"** (Throckmorton Affidavit), Cross-Defendants have violated EP's procedural and substantive due process rights, as well as EP's equal protection rights by failing to comply with the mandates of either Article I, Section 17, or Chapter 21.

59. In the Bridges Suit, Cross-Defendants (i) failed to comply with any of the mandatory prerequisites of Chapter 21, Texas Property Code, and (ii) failed to even name EP as a defendant, even though they seek temporary and permanent easements through EP's dominant property right in the groundwater estate, which will damage, destroy and/or take EP's protected rights in its Groundwater Leaseholds for PHP's pecuniary benefit, and (iii) failed to offer or pay EP any compensation, much less just compensation.

60. In the Odell Suit, while Cross-Defendant PHP originally named EP as a "Party-Defendant," Cross-Defendants had failed to comply with the mandatory prerequisites to filing suit, unambiguously set out in Chapter 21, Tex. Prop. Code, including to make an initial offer, a final offer, or to provide EP with a copy of the Landowner's Bill of Rights, Cross-Defendants arbitrarily manufactured an appraisal saying EP's property rights have no value to be taken, and then amended their condemnation suit to remove EP entirely. Again, Cross-Defendants failed to comply with Article I, § 17, Texas Constitution.

61. Not only have Cross-Defendants violated the Texas Constitution by damaging and/or taking EP's property rights without payment of any compensation, much less just compensation, Cross-Defendants have completely ignored the mandatory process established by the Texas Legislature in Chapter 21, Texas Property Code, for the lawful exercise of the power of eminent domain.

62. A condemning authority cannot circumvent the mandatory process established by the Legislature in Chapter 21, Texas Property Code, which mandate minimal due process protections for property rights owners. The Cross-Defendants did not comply with any of those prerequisites as they apply to EP with respect to either the Bridges Property, or Odell Property, and, therefore, have violated and continue to violate EP's due process rights.

63. PHP failed to follow any of Chapter 21's conditions precedent to filing suit in either the Bridges Suit or the Odell Suit, including: (i) no initial offer as required by Tex. Prop. Code §21.0111 was sent by PHP to EP; (ii) no appraisal reports prepared in the 10 years preceding this action or currently existing as required by Tex. Prop. Code §21.0111 have been sent by PHP to EP; (iii) no Landowner's Bill of Rights Statement as required by Tex. Prop. Code §21.0112 has

been sent by PHP to EP; (iv) no first or final bona fide offer as required by Tex. Prop. Code §21.0113 has been sent by PHP to EP.

64. Cross-Defendants' wrongful actions have violated and continue to violate EP's constitutional and statutory rights, and rights to procedural and substantive due process and equal protection, as well as to receive payment of just compensation for the rights Cross-Defendants have and continue to damage and take from EP.

65. Instead of at least complying minimally with the Texas Property Code Sections 21.011 *et seq.*, by proceeding before a Special Commissioners Hearing to secure an award of damages and treating EP somewhat fairly with regard to the Odell Suit, PHP elected to amend its Cross-Defendants' petition in Cause No. 19-1060-C to remove EP as a named party-Defendant, pretending as they have all along on the Bridges Suit in which EP was never named as a party-Defendant, that EP and its groundwater lease did not exist, or contrary to the clear holding of the Texas Supreme Court and actions of the Texas Legislature, deciding EP has no constitutionally protected property right pursuant to its Groundwater Leases. *See EAA v. Day*, 369 S.W.3d 814, 817, 831-832 (Tex. 2012); Tex. Water Code § 36.002.

66. By their continuing wrongful actions Cross-Defendants have damaged, destroyed and/or taken EP's property for their own use and purposes with no just compensation paid to or due regard for the rights of EP, forcing EP to bring this declaratory judgment action.

67. Even after EP intervened in August, 2019 in the Bridges Suit due to Cross-Defendants' failure to comply with any of the statutorily mandated prerequisites to filing suit to condemn an easement that will damage, destroy, and/or take EP's constitutionally protected property rights in its Groundwater Leasehold over the entirety of the Bridges Property, Cross-Defendants have failed to comply with either Article I, § 17 of the Constitution, or Chapter 21,

Texas Property Code, as required to exercise its eminent domain powers in a lawful manner over EP's property rights.

68. In violation of EP's constitutionally protected property rights and substantive and procedural due process rights, and equal protection rights, Cross-Defendants are illegally taking EP's property rights in the dominant groundwater estate EP has acquired underlying both the separate Bridges Property and Odell Property upon acquisition of possession of the easement rights across the respective Properties.

69. Cross-Defendants have deposited money into the registry of the court in both the Bridges Suit (Cause No. 19-0896-C) and Odell Suit (Cause No. 19-1060-C), and stand poised to seek writs of possession for each of the Properties, including EP's property rights in the same, and to commence construction on, over and across both the Bridges Property and the Odell Property that will damage, if not destroy EP's Groundwater Estate Leasehold and the associated unique property rights therein.

70. Cross-Defendants have also stated to counsel for the fee landowners of the Surface Estates, who are EP's Lessors in the Bridges Property and Odell Property, that Cross-Defendants plan to take possession of the respective Properties and begin construction of the PHP Pipeline along the easements they purportedly have condemned on the Bridges and Odell Properties from the Surface Estate owners without acquiring any of EP's property rights in either of the two Properties. Accordingly, EP's property rights are at risk of immediate harm (damages and takings) from Defendants' actions, in violation of EP's constitutionally protected rights, which cannot be reimbursed by monetary damages alone.

71. Cross-Defendants' illegal actions in violation of the Texas Constitution and Texas's unambiguous condemnation laws represent an existing and ongoing injury to EP for which EP is

entitled to both remedies at law and in equity. Both the Texas Constitution and the Texas Property Code state that no condemnation such as Cross-Defendants are attempting may take place without payment of just compensation following the exercise of the procedural and substantive due process and equal protection rights enacted by the Texas Legislature and codified in Chapter 21, Texas Property Code.

VII. DECLARATORY JUDGMENT

72. Pursuant to Chapter 37, Texas Civil Practice and Remedies Code, EP requests that the Court declare the following:

- a) EP's Groundwater Leases evidence a constitutionally protected property right in the dominant groundwater estate underlying the Bridges and Odell Properties. *See* Texas Water Code § 36.002; *EAA v. Day*, 369 S.W.3d 814, 817, 831-32. (Tex. 2012); *Coyote Lake Ranch LLC v. City of Lubbock*, 498 S.W.3d 53, 60-61, 63-64 (Tex. 2010).
- b) Cross-Defendants have failed to comply with the mandatory conditions precedent to the filing of suit to condemn constitutionally protected property rights under Texas law, *see* Texas Property Code Chapter 21, including:
 - i) submitting an Initial Offer to EP pursuant to **Texas Property Code 21.0111(a)**;
 - ii) submitting the Landowner's Bill of Rights Statement to EP pursuant to **Texas Property Code 21.0112**;
 - iii) submitting a Bona Fide Offer pursuant to **Texas Property Code 21.0113**, including failing to submit an initial offer, bona fide offer, or final offer.

- c) Cross-Defendants have violated EP's constitutionally protected property rights, as well as EP's procedural and substantive due process rights and equal protection rights.
- d) Cross-Defendants have no right of possession to EP's property rights in the Groundwater Estate created pursuant to EP's separate Groundwater Leaseholds in, on, over and under the Bridges Property and/or the Odell Property, particularly to the extent the surface boundaries are coterminous with the easement areas Cross-Defendants may have successfully condemned the interests of the fee owners in the Surface Estate, unless and until all the Constitutional and statutory prerequisites for condemnation have been fulfilled by Cross-Defendants.

VIII. INJUNCTIVE RELIEF

73. In order to obtain injunctive relief a plaintiff must: 1) plead some form of permanent relief, including a permanent injunction if injunctive relief is the only relief sought; 2) show that it has a probably right to relief; and 3) show that it will suffer a probable injury. *See Butnaru v. Ford Motor Co.* 84 S.W.3d 198, 204 (Tex. 2002).

74. For the reasons outlined in paragraphs 1 through 72, inclusive, Cross-Defendants have, and will continue to threaten and/or cause imminent harm to the protected property rights evidenced by EP's separate Groundwater Leases covering the entirety of both the Bridges Property and Odell Property.

75. The ongoing and continuing violations of EP's rights, together with EP's procedural and substantive due process rights and equal protection rights, cannot be compensated by measurable monetary damages. Instead, EP needs and is entitled to the relief afforded by the

equitable remedy of injunctive relief to maintain the status quo and protect what remains of EP's constitutionally and statutorily protected property rights.

76. EP is entitled to a TRO pursuant to Texas Rules of Civil Procedure Nos. 680 *et seq.* and, thereafter, to Temporary and Permanent Injunctive Relief pursuant to said rules and Chapter 65, Texas Civil Practice and Remedies Code, including Sections 65.021 and 65.023.

77. EP is requesting the Court issue a Temporary Restraining Order ("TRO"), Temporary Injunction during the pendency of any hearing, and, upon final hearing, a Permanent Injunction ("PI") preventing Cross-Defendants from acquiring a right of possession on any part or portion of the Bridges and/or Odell Properties, and requiring Cross-Defendants cease any and all activities on the Bridges and Odell Properties unless and until Defendants fully comply with the Texas Constitution and the Texas Property Code to properly condemn EP's property right and fairly compensate EP for the damage and taking of its property right, or otherwise lawfully acquire such rights.

IX. ATTORNEYS' FEES

78. EP is entitled to recover its reasonable and necessary attorneys' fees and costs incurred, pursuant to Section 21.047, Texas Property Code, particularly in light of Cross-Defendants' multiple violations of Chapter 21 and failure to follow and comply with the mandatory conditions precedent to exercise the power of eminent domain and, thereafter, to comply with and follow the applicable process to carry out the eminent domain powers.

79. EP is entitled to recover its reasonable and necessary attorneys' fees and costs incurred pursuant to Section 37.009 of the Texas Civil Practice & Remedies Code as this is a suit brought under the Uniform Declaratory Judgment Act.

80. In the case of the Odell Suit in which Cross-Defendants sought to condemn, albeit illegally, EP's property rights and then abandoned the same, EP is also entitled to recovery of its attorneys fees and other costs incurred related to its response to the condemnation proceedings through December 18, 2019, the date Cross-Defendants filed their amended Petition dropping EP from the list of identified defendants pursuant to § 21.019, Texas Property Code. *See State v. CPS Energy*, 2019 LEXIS 5407, Cause No. 04-18-00063-CV (Tex. App. – San Antonio July 18, 2018, (pet. denied) (copy attached as **Appendix "A"**)

X. PRAYER

81. WHEREFORE, Electro Purification LLC requests that the Cross-Defendants be cited to appear and answer herein and that on final hearing Electro Purification LLC respectfully requests that EP be awarded judgment against Cross-Defendants Permian Highway Pipeline LLC and Kinder Morgan Texas Pipeline LLC for the following:

1. That the Court issue a declaration that Cross-Defendants Permian Highway Pipeline LLC and Kinder Morgan Texas Pipeline LLC have violated the Texas Constitution, including Article I, § 17, and Texas Property Code Chapter 21 by taking, damaging and/or injuring the property rights of Electro Purification LLC without following any of the mandatory prerequisites to the exercise of the powers of eminent domain, as well as without proper payment of just compensation for the taking and damaging of Electro Purification LLC's property rights;
2. Upon hearing of the same grant a Temporary Restraining Order, Temporary Injunction, and upon final hearing Permanent Injunction enjoining and forbidding the Cross-Defendants from taking possession of, trespassing upon, or taking any actions on the Bridges and/or Odell Properties in derogation or impairment of the

constitutionally protected property rights of Electro Purification and/or without first properly condemning Electro Purification LLC's property;

3. Court costs incurred by Electro Purification LLC as authorized both by Section 37.009, Tex. Civ. Prac. & Rem. Code, and Sections 21.019 and 21.047, Texas Prop. Code;
4. Reasonable and necessary attorneys' fees incurred by Electro Purification LLC as authorized both by Section 37.009, Tex. Civ. Prac. & Rem. Code, and Sections 21.019 and 21.047, Texas Prop. Code; and
5. All other relief to which Electro Purification LLC is entitled at law or in equity.

Respectfully submitted,

MCCARTHY & MCCARTHY, LLP
1122 Colorado St., Suite 2399
Austin, Texas 78701

Law Offices of Charles Soechting
3331 Ranch Road 12, Suite 107A
San Marcos, Texas 78666

By: /s/ Edmond R. McCarthy, Jr.
Edmond R. McCarthy, Jr.
State Bar No. 13367200
(512) 904-2313 (Tel)
(512) 692-2826 (Fax)
ed@ermlawfirm.com

By: /s/ Charles Soechting, Sr.
Charles Soechting, Sr.
State Bar No. 18821300
(512) 396-2900 (Tel)
(512) 392-6204 (Fax)

Edmond R. McCarthy, III
State Bar No. 24066795
(512) 904-2310 (Tel)
(512) 692-2826 (Fax)
eddie@ermlawfirm.com

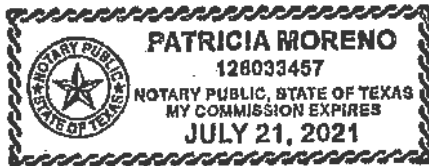
ATTORNEYS FOR ELECTRO PURIFICATION, LLC

VERIFICATION OF TIMOTHY THROCKMORTON

BEFORE ME, the undersigned authority, on this day personally appeared Timothy Throckmorton, acting in his capacity as Co-Manager of Electro Purification LLC, a Texas limited liability company, who, after being by me duly sworn, did upon his oath depose and say that he has read the foregoing pleading, inclusive of the Exhibits attached hereto and incorporated by reference, and that the same are true and correct to the best of his personal knowledge and belief.

Timothy Throckmorton
TIMOTHY THROCKMORTON
Co-Manager, Electro Purification LLC

SWORN TO AND SUBSCRIBED BEFORE ME by Timothy Throckmorton, acting in his capacity as Co-Manager of Electro Purification LLC, a Texas limited liability company, on this the 11th day of March, 2020, to certify which witness my hand and seal of office.



Pat Moreno
Notary Public, State of Texas

Notary ID: 128033457
My Commission Expires: 7/21/2021

CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that a true and correct copy of the foregoing Original Petition for Declaratory Judgment, Application for Temporary Restraining Order and Injunction and Request for Attorneys' Fees was filed with the Court, and forwarded via regular first class mail and/or e-mail, where available, on this the 12th day of March, 2020, to the Parties or their legal counsel at the locations shown on the attached service list.

/s/ Edmond R. McCarthy, Jr.

Edmond R. McCarthy, Jr.

SERVICE LIST

Brian Comarda
Gordon Rees Scully Mansukhani, LLP
1900 West Loop South, Suite 1000
Houston, TX 77027
Tel.: (713) 961-3366
Fax: (713) 961-3938
E-mail: bcomarda@grsm.com

Representing the Permian Highway Pipeline LLC

James L. Messenger
Gordon Rees Scully Mansukhani, LLP
21 Custom House Street, 5th Floor
Boston, MA 02110
Tel.: (617) 902-0098
Fax: (857) 264-2836
E-mail: jmessenger@grsm.com

Gregory D. Burnton
Gordon Rees Scully Mansukhani, LLP
41 South High Street, Suite 2495
Columbus, OH 43215
Tel.: (614) 917-1950
Fax: (614) 360-2130
E-mail: gbrunton@grsm.com

John McClish
Brady, Hamilton, Womack, McClish
1801 Lavaca St., Suite 120
Austin, TX 78701
Tel: (512) 474-9875
Fax: (512) 474-9894
E-mail: john@bhlawgroup.com

Representing Bridges Brothers Family Limited
Partnership No. 1

Christopher J. Oddo
Barron, Adler, Clough & Oddo, LLP
808 Nueces St.
Austin TX 78701
Tel: (512) 478-4995
Fax: (512) 478-6022
E-mail: oddod@barronadler.com

Representing Odell Brothers Family Limited
Partnership No. 1

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Jessie Harbin, CLERK

EXHIBIT 2

CAUSE NO. 19-0896-C

PERMIAN HIGHWAY PIPELINE LLC	§	EMINENT DOMAIN PROCEEDING
<i>Plaintiff</i>	§	
	§	
vs.	§	
	§	
BRIDGES BROTHERS FAMILY	§	IN THE COUNTY COURT AT LAW
LIMITED PARTNERSHIP NO. 1,	§	
<i>Defendants.</i>	§	
and,	§	
ELECTRO PURIFICATION, LLC	§	
<i>Intervenor</i>	§	COUNTY COURT AT LAW NO. 2

CAUSE NO. 19-0896-C

ELECTRO PURIFICATION, LLC,	§	EMINENT DOMAIN PROCEEDING
<i>Cross-Plaintiff</i>	§	
	§	
vs.	§	IN THE COUNTY COURT AT LAW
	§	
PERMIAN HIGHWAY PIPELINE, LLC	§	
and KINDER MORGAN TEXAS	§	
PIPELINE, LLC,	§	
<i>Cross-Defendants.</i>	§	COUNTY COURT AT LAW NO. 2

CAUSE NO. 19-0896-C

PERMIAN HIGHWAY PIPELINE LLC	§	EMINENT DOMAIN PROCEEDING
<i>Counter-Plaintiff</i>	§	
	§	
vs.	§	IN THE COUNTY COURT AT LAW
	§	
ELECTRO PURIFICATION, LLC	§	
<i>Counter-Defendant.</i>	§	COUNTY COURT AT LAW NO. 2

**ELECTRO PURIFICATION LLC'S APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

Counter-Defendant, Electro Purification, LLC ("EP"), files this Application for Temporary Restraining Order and Injunction against Counter-Plaintiffs, Permian Highway Pipeline LLC

(“PHP”) and Kinder Morgan Texas Pipeline LLC (“KM”) (together “Pipelines”). EP petitions the Court for a Temporary Restraining Order and Injunction to maintain the status quo pursuant to Texas Rules of Civil Procedure, Rules 680 *et seq*, and Chapter 65, Tex. Civ. Rem. & Prac. Code.

I. APPLICATION FOR TEMPORARY RESTRAINING ORDER

1. As the Court knows, EP originally filed for a TRO in March against Pipelines as the Pipelines had condemned the surface interest of two tracts in Hays County including 925 acres of land known as the “**Bridges Property**,” designated as Tract No. D-HA-738.000 in this Cause No. 19-1060-C, but had NOT condemned EP’s dominant, constitutionally protected property rights in the groundwater estate EP holds over the entire Bridges Property, which property rights were threatened by the proposed actions of the Pipelines.

2. The Court granted that TRO, and a hearing to convert the TRO to a temporary injunction was commenced remotely via zoom on April 21, 2020, but was adjourned on April 22, 2020 when the Pipelines announced to EP and the Court that they planned to finally follow the law and go through the procedure to condemn EP’s property as opposed to the unlawful taking in which the Pipelines had been engaging.

3. Upon this representation to the Court, the Parties and the Court agreed that the hearing on converting EP’s original TRO to a temporary injunction would no longer be needed, as the condemnation process would keep the Pipelines from taking or injuring any portion of EP’s protected property rights on the Bridges Property until a hearing was held to determine damages either by Special Commissioners appointed by the Court, or by the Court to determine the amount of security in lieu of damages to be awarded to EP, and which amount the Pipelines would deposit into the Registry of the Court.

4. However, on information and belief, on the May 15, 2020, EP learned that without any notice to or consent from EP, order or other authorization from the Court, or other legal right, the Pipelines moved heavy equipment onto the Bridges Property, and begun clearing and grubbing of trees and brush, including Oak Trees subject to “oak wilt” in preparation for construction work on the property.

5. Based upon such information and belief, the undersigned counsel Charles Soechting drove by the Bridges Property and personally witnessed the presence of the Pipelines’ heavy equipment on the Bridges Property as well as cleared and grubbed trees and shrubs piled high, and the scared, disturbed and exposed earth on the Bridges Property and over EP’s groundwater lease. Mr. Soechting took two photographs documenting the Pipelines unauthorized physical possession of and activity on the Bridges Property that he observed. True and correct copies of those three photographs are attached as Exhibit “A.”

6. This unauthorized action by the Pipelines is not only a physical trespass and immediate taking of or injury to, and further threat to EP’s constitutionally protected rights in the dominant groundwater estate over the entirety of the Bridges Property, but the action is in direct violation of representations made by Pipelines to both EP and the Court. When the Pipelines filed their counterclaim to condemn the property, they did so with both the understanding, and statements of counsel, that the Pipelines would be following statutorily mandated condemnation procedures properly.

7. Pipelines’ counsel, Steve Benesh, even acknowledged that the Pipelines at this time would only enter the Bridges Property (and the Odell Property) for the limited purpose of conducting surveying, staking the pipeline route and, as needed, gapping and gating fences the Pipelines need to cut along the pipeline easement route. The Pipelines would not move equipment

onto the Bridges Property according to Mr. Benesh, as evidenced by the April 24, 2020, e-mail correspondence between counsel, a true and correct copy of which is attached hereto as Exhibit “B,” when the Parties agreed to allow the Pipelines survey crew onto the Bridges Property.

8. To date, there has been no hearing before either Special Commissioners duly appointed by the Court, or the Court itself, to set a damages or security amount necessary to protect the property rights and interests in the Bridges Property of EP under its Groundwater Lease.

9. Had an amount of damages been set by the Court, and the Pipelines deposited said amount in the registry of the Court, EP fully admits that at that point, pursuant to Section 21.064, Texas Property Code, the Pipelines would have the right to access the Bridges Property. No such hearing has taken place and no security amount set, nor paid into the Court Registry; yet the Pipelines have commenced construction and threaten to harm EP’s rights and interests in the dominant groundwater estate, as well as its installed infrastructure, including EP’s existing four wells on the Bridges Property, which EP has invested over Three Million Dollars (\$3,000,000.00) to date to install between the Bridges and the Odell Properties.

10. A Temporary Restraining Order and injunctive relief is necessary to protect EP’s dominant property right in its groundwater lease and prevent an illegal taking of, or damage or injury to, EP’s constitutionally protected property rights resulting from the Pipelines’ (i) continued strategy to act first and ask for forgiveness (not permission) after the fact, and (ii) complete failure to first properly and fully exercise its right of eminent domain. The Pipelines have violated, and continue to violate, the property rights of EP protected *inter alia* by Article 1, Section 17 of the Texas Constitution and Chapter 21 of the Texas Property Code, as well as EP’s procedural and substantive due process rights and equal protection rights.

11. Much like when Pipelines polluted countless wells and threatened the environmental stability of the Blanco River on its first day of boring under the Blanco River, or the many issues U.S. District Court Judge Robert Pittman raised with Pipelines actions in a recent decision in a parallel proceeding brought in federal court, the Pipelines are acting too fast with no consideration of the law, the rights of affected landowners, or proper way of executing its business. While the Pipelines on April 23, 2020, filed a counterclaim for condemnation in place pursuant to alternative condemnation procedures authorized by Section 21.017, Texas Water Code, there has been no hearing on the amount of financial security the Pipelines must post, nor have the Pipelines deposited into the Registry of the Court any security amount designated for the benefit of EP. Accordingly, the Pipelines have no right to either the physical possession or use of the Bridges Property subject to EP's Groundwater Leases.

12. While there have been monetary deposits made by the Pipelines related to the Bridges Property in this Cause No. 19-0896-C, those deposits were solely for the benefit of the surface owner, the Bridges Brothers Family LP No. 1. Those deposits were all made prior to the Pipelines even considering condemning EP's property rights.

13. EP's rights and property has been harmed by the trespass on May 15, 2020, and will continue to be under the threat of eminent, if not actual harm and injury unless Pipelines are enjoined from all further activity on the Bridges Property. Having acted in bad faith, without notice to EP, and in contravention of their Counsel's representations to Counsel of the other Parties, including EP (see Exhibit "B"), there is no telling when Pipelines will next decide to move equipment and continue construction activities on the Bridges' Property in derogation of EP's constitutionally protected property rights in its dominant estate Groundwater Leasehold.

14. Given the massive losses the Pipelines claim to have suffered due to delays caused to their project due to their own mistakes, ineptitude, and/or reliance upon the strategy to ask for forgiveness after the fact (rather than permission), as well as many legal decisions against their interest, including the latest decision from the US District Court in Montana which ordered that the United States Army Corps of Engineers Nationwide Permit No. 12 (“NWP 12”) has been vacated with respect to construction of new oil and gas pipelines. This is the same Nationwide Permit the Pipelines have relied upon to authorize its construction activities.¹ EP is concerned that if not enjoined, the Pipelines are so desperate to complete construction of the pipeline that they will begin trenching for the pipeline through the Bridges Property very soon, constituting an even greater trespass upon and taking of, and/or damage and injury to, EP’s property rights than resulted from the trespass on May 15, 2020, including a possible complete taking by the Pipelines’ construction activities that damage any of the EP existing wells or pollute the groundwater itself.

15. The Pipelines’ continuing violations of EP’s protected property rights, and the unambiguous mandates of Chapter 21, Texas Property Code, can only be cured by granting the requested temporary restraining order and, thereafter, by the granting and enforcement of a mandatory injunction ordering Pipelines to cease all actions, trespasses upon, takings of, and/or damages or injuries to EP’s property rights in the entirety of the Bridges Property pursuant to its rights under its Groundwater Lease, or, in the alternative, to compel the Pipelines to comply fully

¹ CV 19-44-GF-BMM Order Amending Summary Judgment Order (Doc. 130) and Order Regarding Defendant’s Motions for Stay Pending Appeal in *Northern Plains Resource Council v. U.S. Army Corps Of Engineers*, pending in the United States District Court for the District of Montana, Great Falls Division. A true and correct copy of the Order is attached hereto as Exhibit “C.” The Court held: “NWP 12 is vacated as it relates to the construction of new oil and gas pipelines pending completion of the consultation process and compliance with all environmental statutes and regulations.” *Id.* at 37.

with the mandatory steps to exercise lawfully the power of eminent domain to acquire the desired easements, and related rights impacting EP's property.

II. PRAYER

For the foregoing reasons, Electro Purification LLC respectfully requests the Court:

1. Issue a temporary restraining order with notice to Pipelines, prohibiting Pipelines from taking possession of, trespassing upon, or taking any actions on the Bridges Property in derogation or impairment of the constitutionally protected property rights of Electro Purification LLC, and/or without first properly condemning Electro Purification LLC's property;
2. Set a bond in a reasonable amount to be paid into the Registry of the Court by Electro Purification LLC;
3. The Court set a time and date for a hearing to convert the temporary restraining order to a temporary injunction prohibiting Pipelines from taking possession of, trespassing upon, or taking any actions on the Bridges Property in derogation or impairment of the constitutionally protected property rights of Electro Purification and/or without first properly condemning Electro Purification LLC's property pending the final hearing on the merits;
4. In due course the Court set a time and date for a final hearing on the merits of this petition and, at the conclusion of the hearing, the temporary injunction mentioned in paragraph 3. of this Prayer be made permanent.
5. Award Court costs incurred by Electro Purification LLC; and
6. All other relief to which Electro Purification LLC is entitled at law or in equity.

Respectfully submitted,

MCCARTHY & MCCARTHY, LLP
1122 Colorado St., Suite 2399
Austin, Texas 78701

Law Offices of Charles Soechting
3331 Ranch Road 12, Suite 107A
San Marcos, Texas 78666

By: /s/ Edmond R. McCarthy, Jr.
Edmond R. McCarthy, Jr.
State Bar No. 13367200
(512) 904-2313 (Tel)
(512) 692-2826 (Fax)
ed@ermlawfirm.com

By: /s/ Charles Soechting, Sr.
Charles Soechting, Sr.
State Bar No. 18821300
(512) 396-2900 (Tel)
(512) 392-6204 (Fax)
charles@soechtinglawfirm.com

Edmond R. McCarthy, III
State Bar No. 24066795
(512) 904-2310 (Tel)
(512) 692-2826 (Fax)
eddie@ermlawfirm.com

ATTORNEYS FOR ELECTRO PURIFICATION, LLC

VERIFICATION OF ROBERT "BART" FLETCHER

BEFORE ME, the undersigned authority, on this day personally appeared Robert "Bart" Fletcher, acting in his capacity as Co-Manager of Electro Purification LLC, a Texas limited liability company, who, after being by me duly sworn, did upon his oath depose and say that he has read the foregoing pleading, inclusive of the Exhibits attached hereto and incorporated by reference, and that the same are true and correct to the best of his personal knowledge and belief.

Robert Bart Fletcher

ROBERT "BART" FLETCHER
Co-Manager, Electro Purification LLC

SWORN TO AND SUBSCRIBED BEFORE ME by Robert "Bart" Fletcher, acting in his capacity as Co-Manager of Electro Purification LLC, a Texas limited liability company, on this the 15th day of May, 2020, to certify which witness my hand and seal of office.



Conni Jones O'Brien
Notary Public, State of Texas

Notary ID: 125899590
My Commission Expires: November 3, 2020

CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that a true and correct copy of the foregoing Original Petition for Declaratory Judgment, Application for Temporary Restraining Order and Injunction was filed with the Court, and forwarded via regular first class mail and/or e-mail, where available, on this the 17th day of May, 2020, to the Parties or their legal counsel at the locations shown on the attached service list.

/s/ Edmond R. McCarthy, Jr.
Edmond R. McCarthy, Jr.

SERVICE LIST

W. Stephen Benesh
BRACEWELL LLP
111 Congress Avenue, Suite 2300
Austin, Texas 78701
Telephone: (512) 494-3680
Fax: (800) 404-3970
steve.benesh@bracewell.com

Representing the Permian Highway Pipeline LLC

Steven R. Brown
12414 Triple Creek Drive
Dripping Springs, Texas 78620
Tel.: (512) 217-0257
Fax.: Unknown
E-mail: steve@stevebrownlaw.com

Representing the Permian Highway Pipeline LLC

Gregory D. Burnton
Gordon Rees Scully Mansukhani, LLP
41 South High Street, Suite 2495
Columbus, OH 43215
Tel: (614) 917-1950
Fax: (614) 360-2130
E-mail: gbrunton@grsm.com

Representing the Permian Highway Pipeline LLC

John McClish
Brady, Hamilton, Womack, McClish
1801 Lavaca St., Suite 120
Austin, TX 78701
Tel: (512) 474-9875
Fax: (512) 474-9894
E-mail: john@bhlawgroup.com

Representing Bridges Brothers Family Limited Partnership No. 1

Christopher J. Oddo
Barron, Adler, Clough & Oddo, LLP
808 Nueces St.
Austin TX 78701
Tel: (512) 478-4995
Fax: (512) 478-6022
E-mail: oddo@barronadler.com

Representing Odell Family