



## AlaFile E-Notice

01-CV-2021-900732.00

To: SARAH MCCARRON STOKES  
sstokes@selcal.org

---

# NOTICE OF ELECTRONIC FILING

---

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

CAHABA RIVERKEEPER, INC. ET AL V. THE WATER WORKS BOARD OF THE CITY OF  
01-CV-2021-900732.00

The following complaint was FILED on 3/8/2021 11:12:11 AM

Notice Date: 3/8/2021 11:12:11 AM

JACQUELINE ANDERSON SMITH  
CIRCUIT COURT CLERK  
JEFFERSON COUNTY, ALABAMA  
JEFFERSON COUNTY, ALABAMA  
716 N. RICHARD ARRINGTON BLVD.  
BIRMINGHAM, AL, 35203

205-325-5355  
jackie.smith@alacourt.gov



State of Alabama  
Unified Judicial System  
Form ARCiv-93 Rev. 9/18

**COVER SHEET**  
**CIRCUIT COURT - CIVIL CASE**  
(Not For Domestic Relations Cases)

**GENERAL INFORMATION**

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA**  
**CAHABA RIVERKEEPER, INC. ET AL v. THE WATER WORKS BOARD OF THE CITY OF BIRMINGHAM**

**First Plaintiff:**  Business  Individual  Government  Other  
**First Defendant:**  Business  Individual  Government  Other

**NATURE OF SUIT:** Select primary cause of action, by checking box (check only one) that best characterizes your action:

**TORTS: PERSONAL INJURY**

- WDEA - Wrongful Death
- TONG - Negligence: General
- TOMV - Negligence: Motor Vehicle
- TOWA - Wantonness
- TOPL - Product Liability/AEMLD
- TOMM - Malpractice-Medical
- TOLM - Malpractice-Legal
- TOOM - Malpractice-Other
- TBFM - Fraud/Bad Faith/Misrepresentation
- TOXX - Other: \_\_\_\_\_

**TORTS: PERSONAL INJURY**

- TOPE - Personal Property
- TORE - Real Property

**OTHER CIVIL FILINGS**

- ABAN - Abandoned Automobile
- ACCT - Account & Nonmortgage
- APAA - Administrative Agency Appeal
- ADPA - Administrative Procedure Act
- ANPS - Adults in Need of Protective Service

**OTHER CIVIL FILINGS (cont'd)**

- MSXX - Birth/Death Certificate Modification/Bond Forfeiture Appeal/ Enforcement of Agency Subpoena/Petition to Preserve
- CVRT - Civil Rights
- COND - Condemnation/Eminent Domain/Right-of-Way
- CTMP - Contempt of Court
- CONT - Contract/Ejection/Writ of Seizure
- TOCN - Conversion
- EQND - Equity Non-Damages Actions/Declaratory Judgment/ Injunction Election Contest/Quiet Title/Sale For Division
- CVUD - Eviction Appeal/Unlawful Detainer
- FORJ - Foreign Judgment
- FORF - Fruits of Crime Forfeiture
- MSHC - Habeas Corpus/Extraordinary Writ/Mandamus/Prohibition
- PFAB - Protection From Abuse
- EPFA - Elder Protection From Abuse
- QTLB - Quiet Title Land Bank
- FELA - Railroad/Seaman (FELA)
- RPRO - Real Property
- WTEG - Will/Trust/Estate/Guardianship/Conservatorship
- COMP - Workers' Compensation
- CVXX - Miscellaneous Circuit Civil Case

**ORIGIN:** F  **INITIAL FILING**      A  **APPEAL FROM DISTRICT COURT**      O  **OTHER**  
R  **REMANDED**      T  **TRANSFERRED FROM OTHER CIRCUIT COURT**

**HAS JURY TRIAL BEEN DEMANDED?**  YES  NO      **Note:** Checking "Yes" does not constitute a demand for a jury trial. (See Rules 38 and 39, Ala.R.Civ.P, for procedure)

**RELIEF REQUESTED:**  **MONETARY AWARD REQUESTED**  **NO MONETARY AWARD REQUESTED**

**ATTORNEY CODE:**

STO083

3/8/2021 11:11:48 AM

/s/ SARAH MCCARRON STOKES

Date

Signature of Attorney/Party filing this form

**MEDIATION REQUESTED:**  YES  NO  **UNDECIDED**

**Election to Proceed under the Alabama Rules for Expedited Civil Actions:**  YES  NO

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA  
 BIRMINGHAM DIVISION**

**CAHABA RIVERKEEPER, INC.;** )  
**CAHABA RIVER SOCIETY;** )  
**DAVID BUTLER; BRADFORD MCLANE;** )  
 )  
**Plaintiffs,** )  
 )  
 v. )  
 )  
**THE WATER WORKS BOARD OF THE** )  
**CITY OF BIRMINGHAM** )  
 )  
**Defendant.** )

**Civil Case No.** \_\_\_\_\_

**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

1. Cahaba Riverkeeper, Inc., Cahaba River Society, David Butler, and Bradford McLane bring this action seeking a declaration of contractual rights and for specific performance by The Water Works Board of the City of Birmingham, otherwise known as the Birmingham Water Works Board, (Board) of a 2001 settlement agreement. This agreement signed by the Board and the Attorney General of the State of Alabama expressly grants all ratepayers the right to enforce its provisions.
2. In this settlement agreement, the Board agreed to place its land that surrounds the Little Cahaba River, Cahaba River, and Lake Purdy into a conservation easement to ensure that this asset was “permanently protected from any and all land development activities.” Settlement ¶ 7.
3. In 2017, the Board purportedly created a “Conservation Easement Agreement,” but the instrument that was created and recorded was not a legally valid conservation easement nor does it permanently protect the land from all harmful development activities.

Conservation Easement Agreement, AL040 Inst. No. 2017104066, Judge Alan King, Oct. 6, 2017. Therefore, the Board is violating its contractual obligations under the settlement agreement to the detriment of ratepayers.

#### **NATURE OF THE CASE**

4. The Board is responsible for providing drinking water for the greater-Birmingham metropolitan area. A major source of this water supply is Lake Purdy and the Cahaba River. Lake Purdy, a drinking water reservoir that lies southeast of Birmingham's city center, flows into the Little Cahaba and then into the Cahaba River where the drinking water intake is located. Thousands of acres of undeveloped land surrounding the lake, the Little Cahaba, and the Cahaba River have been set aside in order to provide an important natural buffer that filters stormwater runoff, recharges water supply, and keeps the drinking water supply clean, which in turn reduces treatment costs and keeps rates low for ratepayers. This land cleans the water for free and is crucial to keeping rates low for all residents.
5. As some of the last undeveloped land in a rapidly urbanizing area, the natural areas in the Cahaba and Lake Purdy watershed have been under intense development pressure.
6. Twenty-two years ago, the Board and the Birmingham City Council (Council) attempted to privatize the water utility and sell all of the Board's assets, including certain reservoirs, filtration plants, water distribution systems, and this undeveloped land in order to retire some the City's debts; however, the citizens of Birmingham overwhelmingly voted against this sale. After the referendum, the Board and Council wanted the Board to regain possession of the System's assets and become an independent board; however,

Birmingham's then-Mayor, Bernard Kincaid sought to keep the Board and the System's assets under the City's control.

7. Mayor Kincaid filed a lawsuit in the Jefferson County Circuit Court to keep the Board from regaining control of the System's assets. (*Kincaid, et al., v. Council of City of Birmingham, et al.*, Case No. CV-00-4779). The Alabama Attorney General, Bill Pryor, intervened on behalf of ratepayers, and, in 2001, the Board and the Attorney General entered into a settlement agreement. Pursuant to the settlement agreement, in exchange for independence, the Board agreed to place a conservation easement on certain land surrounding Lake Purdy, the Little Cahaba and the Cahaba River to "permanently" protect the land from harmful development.
8. In 2017, the Board finally recorded what it calls a "Conservation Easement Agreement," which purportedly created a conservation easement on the land. However, this instrument did not create a conservation easement. Under Alabama law, a "conservation easement" must be held by a third-party, and the third-party must be a charitable or a governmental body. Under the 2017 agreement, the Board held the interest to the "conservation easement" on its own land. Further, the Board is a public corporation, not a charitable or government body, and accordingly it cannot hold a conservation easement.
9. Additionally, the 2017 agreement did not create permanent protection of the land. Any protection ends in thirty years (2051), and the Board retains authority under the recorded document to sell the property at any time. And, in fact, according to past Board meeting minutes, the Board has both seriously considered selling part of this land multiple times, and has actually sold some of it.

10. The 2017 agreement thus violates the settlement and fails to protect the water that flows into the drinking water intake in the manner expressly required by the settlement agreement.

### **JURISDICTION AND VENUE**

11. This case is brought under Alabama Rule of Civil Procedure 57 and Ala. Code § 6-6-221 – 24. “Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment is requested.” Ala. Code § 6-6-222.

12. This is a civil cause of action in which the amount in controversy exceeds \$20,000, exclusive of interest and costs. This Court has jurisdiction over the action pursuant to Ala. Code § 12-11-30.

13. Among the terms of the settlement agreement is a provision designating the ratepayers of the Board as third-party beneficiaries, with “full power and authority to enforce the provisions of the Agreement.” Settlement ¶ 6.

14. Bradford McLane and David Butler are ratepayers that live in Jefferson County. As ratepayers, Mr. McLane and Mr. Butler have standing to sue to enforce the settlement agreement. Further, they are “real part(ies) in interest” under Alabama Rule of Civil Procedure 17(a).

15. Cahaba River Society and Cahaba Riverkeeper, Inc. are membership organizations located in Jefferson County, Alabama. They have associational standing through their members to bring this action. *Bama Budweiser of Montgomery, Inc. v. Anheuser-Busch, Inc.*, 783

- So.2d 792, 795 (Ala. 2000) (quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Both organizations have members who are ratepayers to the Board.
16. Further, under the one-plaintiff rule, standing for one plaintiff is sufficient standing for all: “if any of the [plaintiffs] had standing . . . then we need not consider whether the others also had standing, for if the injunction was proper as to one of the [plaintiffs] then it will clearly benefit all.” *DeKalb Cty. LP Gas Co., Inc. v. Suburban Gas, Inc.*, 729 So.2d 270 (Ala. 1998); see also, *City of Tuscaloosa v. Ala. Retail Ass'n*, 466 So.2d 103 (Ala. 1985).
17. The Board is a public corporation with its principal office in Jefferson County, Alabama. Venue in this judicial district is proper under Ala. Code § 6-3-7.

### **PARTIES**

18. Cahaba Riverkeeper, Inc. (Riverkeeper) is an Alabama non-profit corporation that is located at 4650 Old Looney Mill Road, Birmingham, AL 35243. Riverkeeper seeks to improve the ecological integrity of the Cahaba watershed and to protect its use as an important drinking water supply. Presently, Riverkeeper has hundreds of members in Alabama who are ratepayers. The organization brings this action on behalf of its ratepaying members.
19. Cahaba River Society is an Alabama non-profit corporation that is located at 2717 7th Avenue South, Suite 205, Birmingham, AL 35233. Cahaba River Society seeks to restore and protect the Cahaba River watershed and its rich diversity of life, and to safeguard the supply and quality of the drinking water drawn from it. Presently, Cahaba River Society has hundreds of members in Alabama who are ratepayers. Cahaba River Society brings this action on behalf of its ratepaying members.

20. Bradford McLane is a ratepayer who lives in Jefferson County. He has been a Birmingham Water Works ratepayer for over four years at his current residence and for several years before at a prior residence in Birmingham. He is a member of the board of the Cahaba River Society.
21. David Butler is a ratepayer who lives in Jefferson County. He has been a Birmingham Water Works ratepayer for over eighteen years. He is employed by Cahaba Riverkeeper, Inc., and his job title is Cahaba Riverkeeper and staff attorney.
22. The Water Works Board of the City of Birmingham, otherwise known as the Birmingham Water Works Board, is an Alabama public corporation that has its principal office and residence in Jefferson County. The Board's purpose is to "operat[e] a water works plant and system." Birmingham Water Works Certification of Incorporation, 1951.

### **FACTS**

23. In 1998, the City Council and then-Mayor Richard Arrington began the process of selling off all the Board's assets including the land, reservoirs, and filtration systems to a private investor in order to retire debts and to establish an education trust fund. To begin this process, the Board transferred all its property to the City on September 2, 1998. Acquisition Agreement, 1.
24. The proposed arrangement generated opposition and was overwhelmingly rejected by a public vote that same year.
25. In 2000, a newly-elected mayor, Bernard Kincaid, set out to establish a new arrangement in which the Birmingham Water Works would operate as a City Department under the guidance of an advisory Board.

26. Opponents of Mayor Kincaid's proposal on the Council pushed to create an independent Board and for the Board to reassess the Water Works' assets from the City.
27. On July 10, 2000, the Board adopted Resolution Number 3995, which authorized the Board's Chairman and General Manager to make an offer to reacquire certain water and sewer system property from the City of Birmingham. Settlement, 1.
28. On July 18, 2000, the Council voted to accept the Board's offer and adopted an ordinance to convey the water and sewer systems to the Board. Then-mayor Kincaid vetoed the ordinance, and his veto was overridden. Settlement, 1.
29. On August 10, 2000, Mayor Kincaid filed an action against the Board and the City Council in Jefferson County Circuit Court to keep the Board from reacquiring the assets; Mayor Kincaid argued that the Board was not a valid entity. (*Bernard Kincaid, et al. v. The Council of the City of Birmingham, et al*, CV-0004669.) Settlement, 2.
30. On September 8, 2000, the Attorney General, Bill Pryor, intervened in said action "on behalf of the using and consuming public to protect their interests," and asserted a counterclaim against Mayor Kincaid and a crossclaim against the Council. Settlement, 2.
31. On January 29, 2001, the Attorney General and the Board agreed to settle the Attorney General's claims, and the settlement agreement was signed by Bill Pryor, Attorney General and Anthony Barnes, Chairman-President of Birmingham Water Works and Sewer Board of the City of Birmingham. Settlement, 7.
32. The settlement agreement included a provision designating the ratepayers of the Board as third-party beneficiaries, with "full power and authority to enforce the provisions of the Agreement." Settlement ¶ 6.

33. The Board agreed to place a conservation easement on “the System’s real estate described in paragraph 7 of the Acquisition Agreement that will be entered into by the Water Works Board and the City . . . .” Settlement ¶ 7.
34. On February 23, 2001, the City’s claims against the Board were dismissed without prejudice by the Jefferson County Circuit Court; the court affirmed that the Board was a valid entity.
35. On this same day, the Acquisition Agreement, wherein the City agreed to turn the System’s assets back over to the Board, was entered into by the City and the Board. Acquisition Agreement, signed by William Bell, City Council President, and Anthony Barnes, Chairman-President of the BWWB, Feb. 23, 2001.
36. In the Acquisition Agreement, the Board agreed that in order “to ensure that the assets of the System are permanently protected from any and all land development activities which could be harmful to the System, the Board agreed (A) To enter into an agreement similar to that attached hereto as Exhibit J, with a land preservation trust such as the Alabama Forever Wild Land Trust or the Nature Conservancy of Alabama . . . [where certain land] shall be permanently protected from any and all land development activities which could be harmful to the System . . . .” Acquisition Agreement ¶ 7.
37. The Acquisition Agreement provided an example conservation easement agreement with blanks for the land preservation trust that would be chosen. Acquisition Agreement, Exhibit J.
38. The land that shall be permanently protected was described in the Acquisition Agreement as: all real estate contiguous to Lake Purdy and located in the “Sections 35 and 36-Township 17 South- Range 1 West; Section 6–Township 18 South- Range 1 East; and

Sections 1, 2, 3, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 28, and 29-Township 18 South; Range 1 West; and the System real estate generally described as all real estate located along the Cahaba River and north of U.S. Highway 280 and located in Sections 23, 24, 25, and 26; Township 18 South; Range 2 West. Less and except the property in the Northwest  $\frac{1}{4}$  of the Southeast  $\frac{1}{4}$  of Section 23; Township 18 South; Range 2 West where the existing Cahaba Pumping Station is located and the Southwest  $\frac{1}{4}$  of Section 26; Township 18 South; Range 2 West where the existing Cahaba River Diversion Dam is located.” Acquisition Agreement ¶ 7.

39. Fifteen years later, in 2016, the Board, contrary to the limits imposed in the settlement agreement, discussed selling part of this land located on Sicard Hollow Road for possible subdivisions. The Board called this land “excess” property. The Board surveyed the land, assessed the land, and even hired a realty company for three years to try and sell the land. Finance Committee Minutes, April 20, 2016; Board Minutes, April 27, 2016; Finance Committee Minutes, July 12, 2016; Board Minutes, August 25, 2016.
40. A different parcel subject to the settlement agreement was sold for a gas station after unanimous approval by the Board on April 27, 2016.
41. The Board did not record a conservation easement or take any other action that would restrict harmful development for sixteen years, nor did the Attorney General enforce this critical limitation contained in the settlement agreement.
42. Finally, on October 4, 2017, after pressure from affected local communities and the Birmingham City Council, the Board established and recorded a “Conservation Easement Agreement.” Conservation Easement Agreement, AL040 Inst. No. 2017104066, Judge Alan King, Oct. 6, 2017.

43. With this Conservation Easement Agreement, the Board purported to grant to itself a conservation easement on its own property. Conservation Easement Agreement, 1.
44. The Conservation Easement Agreement provides that the Board and the Attorney General may amend the Conservation Easement Agreement by mutual consent, whether or not the amendment is consistent with the Settlement's stated goal of "permanent protection." Conservation Easement Agreement ¶ 10.
45. The Conservation Easement Agreement provides that it shall terminate on the earlier of February 1, 2051, or such time as the Board ceases to use Lake Purdy and the Cahaba River as a source of water supply. Conservation Easement Agreement ¶ 8.
46. The Conservation Easement Agreement carves out parts of the land by stating that it does not apply to any land where stormwater naturally drains or is engineered to drain outside the watershed. Conservation Easement Agreement ¶ 2(b).
47. Additionally, the Conservation Easement Agreement gives the Board the authority, with respect to the covered land, to carry out "any other activities which may be necessary or appropriate to carry out the purposes of the Water Works Board." Conservation Easement Agreement ¶ 2(a).
48. On May 16, 2019, the Economic Development Committee of the Board again discussed developing land around Highway 280 that was "subject to the conservation easement." The Director of the Board asked a property manager for U.S. Steele to investigate whether this "property would be good for development." The property manager thought it was certainly developable. At this meeting, a board member asked the General Manager to talk to the Board's realtor and relay this information. A different board member also asked the Assistant General Manager to tell the Daniel Corporation, a company that was interested

in buying the land in the past, that the Board would be interested in a lease. Economic Development Committee Minutes, May 16, 2019.

49. In January 2020, certain land protected under the settlement agreement was cleared for a fence, roads, and timber removal.
50. For over three years (during which the Board had three different chairs), Cahaba Riverkeeper and Cahaba River Society patiently sought to find a mutual and cooperative solution to protecting these lands. In June of 2018 and then again in May of 2019, the conservation groups met with leadership of the Board and staff because they are concerned that the Water Works' undeveloped lands that surround Lake Purdy, the Little Cahaba, and Cahaba River are not sufficiently protected. This land provides a natural filter and recharge location for the drinking water. The groups are concerned that without sufficient protection, these lands could become developed and the protection that is afforded by the land would be lost. Thus, drinking water rates would have to be increased because the cost of cleaning the water would increase. During this time, the groups also informed the entire Board about the issue by letter and repeatedly requested to be allowed to meet with the full Board to discuss the matter and find a cooperative solution.
51. The conservation groups gave a detailed presentation to the entire Board on October 14, 2020. At that meeting, the Board voted to discuss the groups' concerns at a separate, non-public Executive Committee meeting. But the Board did not respond further. On January 21, 2021, the conservation groups sent a letter to the Board notifying it that they would be filing suit if this meeting was not scheduled. The Board never scheduled any meeting.

### **COUNT I**

52. Paragraphs 1 through 51 are incorporated herein by reference.

53. The settlement agreement is a valid and enforceable contract, and it is binding on the Board.
54. The Board has a binding, contractual obligation to create a conservation easement on the property that will “ensure that said real estate is permanently protected from any and all land development activities which could be harmful to the System.” Settlement ¶ 7; Acquisition Agreement ¶ 7.
55. The Board has breached this contractual duty by attempting to grant to itself an easement on property it owns, which means that it has failed to create and record a valid conservation easement. The “easement” purportedly created by the Conservation Easement Agreement was automatically extinguished by merger; the rights created by the easement merged with the rights of ownership of the land. “[A] person cannot have an easement to his or her own property.” *Gonzalez v. Naman*, 678 So. 2d 1152, 1154 (Ala. Civ. App. 1996); *see also, Roberts v. Monroe*, 261 Ala. 569, 574, 75 So. 2d 492, 496 (1954) (“It is a familiar principle that if the title in fee to dominant and servient estates is vested in one individual owner, all rights are merged in the title in fee, terminating subordinate easements or rights of use.”)
56. Because a valid conservation easement was not created, the Board has breached its duty under the settlement agreement.

## COUNT II

57. Paragraphs 1 through 56 are incorporated herein by reference.
58. Per the settlement agreement, the Board has an obligation to create a “conservation easement” on the property that will “ensure that said real estate is permanently protected

from any and all land development activities which could be harmful to the System.”

Acquisition Agreement ¶ 7; Settlement ¶ 7.

59. Conservation easements may be held only by: a governmental body empowered to hold an interest in real property; or a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, silvicultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, paleontological, or cultural aspects of real property. Ala. Code § 35-18-1.
60. The Board is not a governmental body empowered to hold an interest in real property. It is clearly established law that a water works board is a public corporation “separate and independent from the city it serves.” Settlement Agreement ¶ 2; *Water Works Bd. v. Huffstutler*, 299 So. 2d 268, 275–276 (Ala. 1974) (“water boards are independent corporations which do not derive their powers from the cities they serve”).
61. The Board is not a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, silvicultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, paleontological, or cultural aspects of real property.
62. The Board’s purpose is to “operat[e] a water works plant and system.” Birmingham Water Works Certification of Incorporation, 1951.

63. Because the Board is not a qualified holder of a conservation easement, the “conservation easement” that the Board purports to have created and to currently hold cannot be valid.

*See Ala. Code § 35-18-1.*

### **COUNT III**

64. Paragraphs 1 through 63 are incorporated herein by reference.

65. Per the settlement agreement, the Board has an obligation to create a conservation easement on the property that will “ensure that said real estate is *permanently* protected from any and all land development activities which could be harmful to the System.”

Acquisition Agreement ¶ 7 (emphasis added); Settlement ¶ 7.

66. Even if this Court finds that the easement created by the Conservation Easement Agreement is valid, the Board has still breached its contractual duties.

67. The Conservation Easement Agreement provides that “[t]he Conservation Easement, rights, and privileges granted [t]herein shall terminate on February 1, 2051 or at such time as the Water Works Board ceases to use Lake Purdy and/or Cahaba River as a source of water supply for its water system, whichever period shall occur first.” Conservation Easement Agreement ¶ 8.

68. Any restrictions created by the Conservation Easement Agreement are not permanent, but rather sunset in thirty years. The Board has therefore not satisfied its obligation to create a conservation easement that “permanently protects” the property.

### **COUNT IV**

69. Paragraphs 1 through 68 are incorporated herein by reference.

70. The Board has an obligation to create a conservation easement on the property that will “ensure that said real estate is permanently protected from any and all land development activities which could be harmful to the System.” Acquisition Agreement ¶ 7; Settlement ¶ 7.
71. The Conservation Easement Agreement allows the Board and the Attorney General to amend the agreement by mutual consent, whether or not the amendment is consistent with the Settlement’s stated goal of permanent protection. Conservation Easement Agreement ¶ 10.
72. The ability of the Board to amend the “conservation easement” without reference to the conservation goal of permanent protection from all harmful land development activities empowers the Board to allow activity inconsistent with the purpose of the settlement agreement, so long as the Attorney General consents.
73. This violates the Board’s obligation to create a conservation easement on the property that will “ensure that said real estate is permanently protected from any and all land development activities which could be harmful to the System.” Acquisition Agreement ¶ 7; Settlement ¶ 7.

#### **COUNT V**

74. Paragraphs 1 through 73 are incorporated herein by reference.
75. The Board has an obligation to create a conservation easement on the property that will “ensure that said real estate is permanently protected from any and all land development activities which could be harmful to the System.” Acquisition Agreement ¶ 7; Settlement ¶ 7.

76. The Conservation Easement Agreement does not apply to any land where stormwater naturally drains or is engineered to drain outside the watershed. Conservation Easement Agreement at ¶ 2(b).
77. The Acquisition Agreement clearly describes the land to which the conservation easement must be applied. Acquisition Agreement ¶ 7. The settlement agreement which refers to this Acquisition Agreement does not give the Board the right to exclude any land.
78. This carve-out does not permanently protect the real estate described from all harmful development.

### **COUNT VI**

79. Paragraphs 1 through 78 are incorporated herein by reference.
80. The Board has an obligation to protect the land from “any and all land development activities which could be harmful to the System.” Settlement ¶ 7.
81. The Conservation Easement Agreement gives the Board the authority to carry out “any other activities which may be necessary or appropriate to carry out the purposes of the Water Works Board,” including the construction of roads. Conservation Easement Agreement ¶ 2(a).
82. Activities that “are appropriate” to carry out the purposes of the Water Works Board is such a broad provision that the Board could argue that it includes selling land for subdivisions to generate revenue, building roads that are unnecessary for maintaining the easement, or undertaking other types of development or revenue-generating activity, in complete disregard for the requirements of the settlement agreement.
83. The Conservation Agreement does not ensure that the real estate is permanently protected from all harmful development.

84. As a result of the Board's breach of its contractual obligations from Counts 1-6, Plaintiffs have been injured in that they have been denied the full benefit of the binding provisions of the settlement agreement including the protection of the land at issue and their drinking water source.

### **PRAYER FOR RELIEF**

On Counts I-II, Plaintiffs respectfully request that this Court enter a declaratory judgment declaring the Board's obligations under the settlement agreement, and its ongoing breach of those obligations, and requiring the Board to immediately create and record a conservation easement that complies with the requirements of Ala. Code §§ 35-18-1 – 35-18-6 and is held by a third party, such as "a land preservation trust such as the Alabama Forever Wild Land Trust or the Nature Conservancy of Alabama," as was contemplated in the settlement agreement.

On Counts III-IV, Plaintiffs request that this Court enter a declaratory judgment declaring the Board's obligations under the settlement agreement, and its ongoing breach of those obligations, and requiring the Board to immediately create and record a conservation easement that explicitly states that it protects the land in perpetuity or at least until the Board ceases to use Lake Purdy and the Cahaba River as a source of water supply and that may only be amended to the extent that such amendments are consistent with the conservation purposes of the easement.

On Counts V-VI, Plaintiffs request that this Court enter a declaratory judgment declaring the Board's obligations under the settlement agreement, and its ongoing breach of those obligations, and requiring the Board to immediately create and record a conservation easement on all the land stated in the Acquisition Agreement and only allow activities that are consistent with the purposes of the easement as contemplated in the settlement agreement.

Respectfully submitted, this 8th day of March, 2021.

**s/ Sarah M. Stokes**

Sarah M. Stokes (STO083)

Barry A. Brock (BRO165)

SOUTHERN ENVIRONMENTAL LAW CENTER

2829 2<sup>nd</sup> Avenue South, Suite 282

Birmingham, AL 35233

Telephone: (205) 745-3060

Facsimile: (205) 745-3064

Email: [sstokes@selcal.org](mailto:ssstokes@selcal.org)

[bbrock@selcal.org](mailto:bbrock@selcal.org)