

September 11, 2024

Paulina Williams  
TEL: 512.322.2543  
FAX: 512.322.3643  
paulina.williams@bakerbotts.com

BVGCD Board of Directors:

Jayson Barfknecht, John Elliott, Mark Carrabba, Stephen Cast,  
Gary Mechler, Jeff Kennedy, Chris Zeig, and Lisa Rolke  
112 West 3rd Street  
Hearne, Texas 77859

Re: Response to The Texas A&M University System's ("A&M's") September 5,  
2024 "Request for a Contested Case Hearing"

Dear BVGCD Board Members:

UW Brazos Valley Farm ("UWBVF") submits this response to A&M's September 5, 2024 "Request for a Contested Case Hearing," in which A&M blatantly disregards the District's rules and asks to unwind longstanding, final board actions. A&M's request has no basis in rule, law, or common sense, and the District should reject A&M's attempt to commandeer its governance over the groundwater resources of Robertson and Brazos counties.

As explained below, the District must deny A&M's untimely collateral attack on final, issued permits because it has no procedural basis in BVGCD Rules or otherwise. Texas law validates all board actions taken even where certain directors were ineligible. BVGCD has full authority to ratify, by rule or action, any past District action at issue, and doing so would satisfy BVGCD's obligation to protect existing water rights<sup>1</sup> through fair and impartial rules<sup>2</sup> that respect the rights of the numerous landowners who properly applied for, obtained, and relied upon BVGCD permits. Resolving this issue would also support the District, which has likewise relied on these final permits in accepting fees and well assistance program funding, expending these funds, and incorporating permit issuance in its regional planning and long-term water management efforts.

A&M's unfounded request, on the other hand, invites the District to disregard its rules, blatantly and unequally disfavor certain private landowners' interests in favor of A&M's, and infringe upon landowners' private-property, statutory, and constitutional rights. A&M's request arises in the context of BVGCD's lack of action to date in ratifying or otherwise affirming the validity of past-

---

<sup>1</sup> Tex. Water Code § 36.0015 ("Groundwater conservation districts ... are the state's preferred method of groundwater management *in order to protect property rights*, balance the conservation and development of groundwater to meet the needs of this state, and use the best available science in the conservation and development of groundwater...") (emphasis added); *id.* § 36.002 (legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property); BVGCD Management Plan (2023) ("Mission Statement: . . . to protect and conserve the groundwater resources of Robertson and Brazos counties" by "preventing waste of water, collecting data, promoting water conservation, *protecting existing water rights* . . .") (emphasis added).

<sup>2</sup> Tex. Water Code § 36.101(a)(2).

issued permits, and additional delay on this point will only invite chaos and lead to further conflict. Just as BVGCD ratified a variety of prior board actions in the August 8, 2024 meeting—including prior board approval of an application to increase production under existing permits and other significant actions such as purchasing a building—the District should, at the upcoming meeting, finish these ratification efforts and close the door on this frivolous attack.

### *A&M's Request*

A&M attempts to turn back time and submit contested case hearing requests for the following permits, all of which complied with the rules and were uncontested when issued:

- BVDO-0254 through BVDO-0256 (final permits issued April 17, 2019)
- BVDO-0292 through BVDO-0304 (final permits issued October 20, 2022)
- BVDO-0315 and -0316 (final permits issued February 9, 2023), BVDO-0108 (final permit issued August 11, 2011; amended permit issued February 9, 2023)
- BVDO-0317 (final permit issued March 9, 2023)
- BVTP-001 (final permit issued March 9, 2023)
- BVDO-0377 through -0389; BVDO-0394 through -0399; BVDO-0401 and -0402; BVDO-0408 through -0414 (final permits issued September 14, 2023)
- BVTP-002 through -008 (permit applications heard on June 18, 2024).

However, A&M submitted a timely<sup>3</sup> contested case hearing request for only one set of permits: BVTP-002 through -008 (*see* June 14, 2024 Notice of Intent to Contest Transport Permit Applications and Request for Contested Hearing). The District should proceed to docket only these matters with the State Office of Administrative Hearings, as previously requested and as the applicants have understood to be in progress through an Interlocal Agreement.

In reaching beyond the pending transport applications, A&M theorizes, without any legal support, that “the BVGCD Board of Directors’ meetings lacked a quorum when the permit and permit amendment applications [listed above] were previously considered, the Board has not yet acted upon them; therefore, this request is timely.” A&M lists a broad swath of permits dating all the way back to 2019 (and one issued in 2011), but then notes that it “would expect to determine and provide notice as to which of these applications it was opposed and continue to contest.” Unsurprisingly, A&M cites no rule or statute for upending final permits that landowners have relied upon, acted upon, and invested in for months and years. A&M’s unsubstantiated theory suffers several glaring errors: (i) the quorum argument cannot survive clear Texas law that upholds actions by ineligible public officers acting under color of law; (ii) A&M attempts to contest permits wholly removed from the alleged quorum issue, without any basis for submitting an after-the-fact hearing request for permits issued years prior; and (iii) A&M’s theory that certain applications are still “pending” would run

---

<sup>3</sup> Despite A&M’s insistence that the majority of BVGCD’s actions in 2023 are invalid—including the September 14, 2023 adoption of the amended Rules of the Brazos Valley Groundwater Conservation District—A&M followed the District’s 2023 rules in submitting its June 14, 2024 contested case hearing request (two days before the scheduled hearing, per 2023 Rule 14.3.5), and A&M likewise cites the newer rule in its September 5, 2024 request (“Under BVGCD Rule 14.3.5(a), a contested case hearing must be requested the day before the permit hearing”).

BVGCD afoul of its procedural and constitutional obligations. The District must deny A&M's baseless request.

***Texas law validates actions taken by public officers acting “under color of a known election or appointment,” even where an ineligible officer could have affected quorum.***

A&M's theory for submitting an untimely contested case hearing request fails in the face of clear Texas law—repeated by multiple courts for decades and reiterated several times over by the Office of the Attorney General—that actions taken by a *de facto* public officer are valid *at the time they are made*, even where circumstances render him ineligible.<sup>4</sup> A *de facto* officer is one who acts “under color of a known election or appointment” that was “void because the officer was not eligible,” and such ineligibility was “unknown to the public.”<sup>5</sup> The three BVGCD directors who held secondary roles during the period at issue<sup>6</sup> constitute *de facto* officers because they were properly appointed to the BVGCD Board and their ineligibility issues were unknown to the public.<sup>7</sup>

Acts performed by a *de facto* officer are valid at the time they are made, despite any eligibility issue or other defect with his election or appointment.<sup>8</sup> Texas courts and the Office of the Attorney General have employed this rule many times over, noting that it is “founded upon sound considerations of necessity and policy and protects the public and individuals whose interests are affected because they rely on the validity of the appointment.”<sup>9</sup> In continuing to uphold the *de facto* officer doctrine, courts have refused invitations like A&M's to invalidate large swaths of government action because it would “invite chaos in the preservation of the peace and the protection of property rights of individuals and the orderly administration of corporate affairs.”<sup>10</sup>

---

<sup>4</sup> *Rivera v. City of Laredo*, 948 S.W.2d 787, 794 (Tex. App.—San Antonio 1997, writ denied) (citing *Forwood v. City of Taylor*, 209 S.W.2d 434, 435 (Tex. App.—Austin), aff'd, 147 Tex. 161, 214 S.W.2d 282 (1948)); Op. Tex. Att'y Gen. No. KP-0287 (2020) (“As such, their actions are binding because the “law validates the acts of de facto officers as to the public and third persons on the ground that, though not officers de jure, they are in fact officers whose acts public policy requires should be considered valid.”); Op. Tex. Att'y Gen. No. JM-874 (1988) (“A de facto officer is one who, by his acts, has the appearance of holding the office he has assumed, but who in fact does not validly hold the office. The designation of ‘de facto officer’ may attach to one who holds office under color of an appointment that is subsequently invalidated on the grounds that the appointee was ineligible. Acts performed by a de facto officer under color of office are considered valid.”).

<sup>5</sup> *Forwood*, 208 S.W.2d at 794.

<sup>6</sup> UWVBF reserves any argument related to whether any director was ineligible in the first instance.

<sup>7</sup> See *Martin v. Grandview Indep. Sch. Dist.*, 266 S.W. 607, 609 (Tex. App.—Waco 1924, writ ref'd) (“It was seen that it would be unreasonable on all occasions to require the public to inquire into the title of an officer, or compel him to show title”). The Directors' statutory ineligibility under section 36.051 of the Texas Water Code is a type of ineligibility contemplated under the *de facto* officer doctrine. See Op. Tex. Att'y Gen. No. LO-88-103 (1988) (holding board member as *de facto* officer where her relation to a trade association violated a statutory prohibition in the Texas Public Accounting Act); *Vick v. City of Waco*, 614 S.W.2d 861, 863 (Tex. App.—Waco 1981, writ ref'd n.r.e.) (holding commissioners as *de facto* members despite their being ineligible under statutory prohibition on prior public officeholding).

<sup>8</sup> Op. Tex. Att'y Gen. No. KP-0217 (2018) (“the law validates the acts of de facto officers as to the public and third persons on the ground that, though not officers de jure, they are in fact officers whose acts public policy requires should be considered valid.”); Op. Tex. Att'y Gen. No. JM-874 (1988) (“Acts performed by a de facto officer under color of office are considered valid”); Op. Tex. Att'y Gen. No. KP-0287 (2020) (actions of de facto officer “are binding because the law validates [their] acts”) (emphasis added).

<sup>9</sup> Op. Tex. Att'y Gen. No. LO-88-103 (1988).

<sup>10</sup> See *Germany v. Pope*, 222 S.W.2d 172, 177 (Tex. App.—Fort Worth 1949, writ ref'd n.r.e.).

The *de facto* officer doctrine squarely applies in this scenario and validates BVGCD actions in the period at issue. *De facto* officers count towards an entity's decision-making quorum.<sup>11</sup> A&M's attempt to invalidate numerous BVGCD decisions flies in the face of established law and sound public policy and adversely affects dozens of landowners in Robertson and Brazos Counties who have relied on, acted on, and invested based upon BVGCD's rules and decisions, as well as the property interests imbued in those decisions. Landowners subject to BVGCD's jurisdiction have expended significant resources on permit fees, engineering and hydrologist reports, drilling expenses, contractual agreements, and a myriad of other costs incurred in reliance on BVGCD's finalized, signed, and issued permits. BVGCD, for its part, has also relied upon these permits in accepting permit fee payments and well assistance funds, expending those funds, and coordinating its regional planning and long-term water management efforts. A&M's baseless theory for challenging prior-issued permits fails.

***Without providing any basis for doing so, A&M also attempts to contest permits wholly removed from the alleged quorum issue.***

Unrelated to the alleged quorum issues, A&M also seeks to submit contested case requests on certain production permits dating back over 5 years, including UWBVF's BVDO-0254 through BVDO-0256 (final permits issued April 17, 2019) and BVDO-0292 through BVDO-0304 (final permits issued October 20, 2022). A&M provides absolutely no basis for contesting these permits years after their issuance and no reason for why it did not submit timely requests under BVGCD Rule 14.3.5 in the first instance. UWBVF has expended significant resources in reliance on these long-final and presumptively-valid permits, including substantial drilling expenses, and the District has accepted large quantities of money for fees and well assistance funding relating to those permits, all contingent upon these permits being final and effective. A&M's unsubstantiated and far-reaching attack demonstrates the importance of ratification to create stability and regulatory certainty in the District.

***A&M's theory that certain applications are still "pending" would run BVGCD afoul of its procedural obligations and create constitutional violations.***

A&M's flawed theory that the prior-issued permits are still "pending" brings additional legal issues upon the District. Procedurally speaking, if the District adopts the theory that it has left over 87 permit applications pending for months and, in some cases, nearly two years, it will have failed in its statutory duty to "promptly consider and act on each administratively complete application," including the obligation to hold a hearing within 35 days of setting the hearing date.<sup>12</sup> Additionally, given that landowners, including UWBVF, have expended significant resources in reliance on the Board's final and effective permits, the Board would be liable for federal and state

---

<sup>11</sup> *Jackson v. Maypearl ISD*, 392 S.W.2d 892, 895 (Tex. App.—Waco 1965, no writ) (holding that tax board members served as *de facto* officers and overruling appellant's argument "no quorum was present" to levy tax); *Vick v. City of Waco*, 614 S.W.2d 861, 864 (Tex. App.—Waco 1981, writ ref'd n.r.e.) (holding that ineligible commissioners acted as "de facto" members and therefore quorum existed to prohibit collateral attack on their prior actions).

<sup>12</sup> Tex. Water Code § 36.114.

takings claims related to the judicially-recognized private property interests in groundwater. And finally, should BVGCD follow requests from A&M, College Station, and Bryan to make or enforce rules that specifically target permits related to UWBVF's transport project, the District would run afoul of its statutory obligation to make, implement, and enforce rules in a fair and impartial manner for all property owners, as well as its constitutional obligations to provide due process and equal protection to persons within its jurisdiction.

### ***Ratification***

Finally, the District can confirm the validity of the permits through ratification by rule or action (even where the *de facto* officer doctrine renders them valid in the first instance), and BVGCD should ratify the prior acts and “give new and undoubted authority” to the actions at issue.<sup>13</sup> Doing so would ensure consistency in BVGCD's decision-making and bring stability to BVGCD and parties relying upon its decisions—conversely, failing to do so would ensure uncertainty and chaos that will only result in more disputes. As one approach, BVGCD has proposed a rule that delegates certain permitting authority to its General Manager, including the issuance of properly noticed, administratively complete, and uncontested permit and permit-amendment applications during the period at issue. This approach is valid because a later-dated rule can serve to ratify a prior action if the means of authority used for ratification would have been authorized in the first instance.<sup>14</sup> Under Texas Water Code section 36.114(c), BVGCD has the authority to delegate permit action and issuance to the General Manager where no hearing is required. Therefore, BVGCD's proposed rulemaking that (1) removes hearing requirements for the permit applications at issue and (2) delegates approval authority to the GM can, even after the fact, serve to ratify the instances where BVGCD conducted hearings and took action on permits. As a second approach, BVGCD can, as it did with certain prior BVGCD actions on August 8, 2024, ratify by action its prior decisions because it holds authority to perform all the actions in the first instance.<sup>15</sup> BVGCD already ratified a long list of prior actions during the last board meeting, including previous board action on an application to increase production under existing permits, which further demonstrates the District's ability to reaffirm the validity of the permits at issue.

BVGCD properly proposed to ratify past actions, and it should immediately proceed with that action, or otherwise affirm the validity of the prior permits, to fulfill its legal obligations,

---

<sup>13</sup> *City of Christine v. Johnson*, 255 S.W. 629, 630 (Tex. App.—San Antonio 1923, no writ) (holding that consideration of city's after-the-fact ratification efforts were “unnecessary” where council member acted as *de facto* officials, “although it would seem that it was entirely lawful for the [later elected] *de jure* council . . . to either ratify the [challenged action] or to give new and undoubted authority”).

<sup>14</sup> *Laird Hill Salt Water Disposal, Ltd. v. E. Tex. Salt Water Disposal, Inc.*, 351 S.W.3d 81, 89 (Tex. App.—Tyler 2011, *pet. denied*) (where condemnation action was initiated by president with “no express or inherent authority to authorize the condemnation,” later-dated resolution by board of directors ratified the unauthorized action); *Bowers Steel, Inc. v. DeBrooke*, 557 S.W.2d 369, 371–72 (Tex. App.—San Antonio 1977, no writ) (“The principle is well established that the directors or stockholders may ratify any act or contract of any other body or agency of the corporations which they might have authorized in the first instance.”); *Thermo Products Co. v. Chilton ISD*, 647 S.W.2d 726, 733 (Tex. App.—Waco 1983, writ *ref'd n.r.e.*) (discussing whether school board impliedly ratified one board member's previous unauthorized acceptance of option notice).

<sup>15</sup> See *supra* note 13; *Norton v. Shelby Cnty.*, 118 U.S. 425, 451 (1886) (“To ratify is to give validity to the act of another, and implies that the person or body ratifying has at the time power to do the act ratified.”)

ensure regulatory certainty and sound governance, and avoid liability. BVGCD must deny A&M's hearing request.

Sincerely,



Paulina Williams  
*Counsel on behalf of*  
*UW Brazos Valley Farm LLC*

cc: David Lynch and Geoff Adamson, UWBVF  
Monique Norman, BVGCD Counsel  
Lynn Sherman, Counsel for Texas A&M  
Ed McCarthy, McCarthy & McCarthy LLP  
Russ Johnson, McGinnis Lochridge  
Doug Caroom, Bickerstaff Heath Delgado Acosta LLP  
Kevin Pennell, Pennell Law Firm PLLC