CAUSE NO. 24-002626-CV-472

TEXAS A&M UNIVERSITY SYSTEM,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT AND ALAN DAY, GENERAL MANAGER OF BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT,	§	**BRAZOS COUNTY, TEXAS**
	§	
Defendants.	§	**472nd JUDICIAL DISTRICT**

UW BRAZOS VALLEY FARM LLC, CULA D'BRAZOS LLC, RH2O LLC, L. WIESE MOORE LLC, CLIFFORD A. SKILES III, AND JAMES C. BRIEN'S PETITION IN INTERVENTION AND RESPONSE TO APPLICATION FOR INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF THIS COURT:

Intervenor UW Brazos Valley Farm LLC ("UW Farm"), together with Intervenors Cula d'Brazos LLC, RH2O LLC, L. Wiese Moore LLC, Clifford A. Skiles III, and James C. Brien ("Landowner Intervenors", together with UW Farm, the "Intervenors"), file this petition for intervention pursuant to Rules 60 and 61 of the Texas Rules of Civil Procedure with respect to the relief sought by Plaintiff Texas A&M University System ("TAMUS" or "Plaintiff") in this case.

I. OVERVIEW

1. TAMUS's lawsuit—which was not filed with the authorization of its Board of Regents—seeks to trample Intervenors' vested property rights in their groundwater, cut off critical drinking water supplies to the region, and stifle billions of dollars of regional economic growth driven by Intervenors' water supply project. The Intervenors join this case to defend their permits and property rights from Plaintiff's unsupported attack and to correct the gross omissions and

mischaracterization of facts and law that Plaintiff presents to this Court and the public in its First Amended Petition for Writ of Mandamus and Application for Temporary and Permanent Injunctive Relief (the "Amended Petition").

2. Plaintiff's threadbare mandamus action demands that the Court turn back time and recognize a non-existent "right" to administratively contest final groundwater permits that the Brazos Valley Groundwater Conservation District ("BVGCD" or the "District") properly noticed and issued to Intervenors months and years prior—all without any complaint or contest by any party, including Plaintiff. Plaintiff's after-the-fact attack relies on a supposed eligibility issue for three BVGCD board members, ignoring firmly-established Texas law that validates the actions of public officials acting under color of appointment. The *de facto* officer doctrine—which squarely applies in this case—protects the public and individuals who rely on public acts from stale collateral attacks like Plaintiff's mandamus action. Plaintiff's desired outcome goes against this established law and policy: overturning long-standing permits would devalue property rights throughout the District, instill chaos and uncertainty in the District's permitting system, break chains of reliance, incite disputes, and hinder critical infrastructure needed to provide drinking water to the citizens of Texas.

3. Plaintiff's demand for injunctive relief to address an "immediate threat" to the "status quo" defies logic where the permits it seeks to challenge have been signed, final, utilized, and relied upon since as early as April 2019. Plaintiff seeks court intervention on the false premise that it will be "denied the opportunity for contested case hearings" otherwise. In doing so, Plaintiff intentionally fails to mention to the Court, the local community, and the public at large that it had proper notice and opportunity to contest the permits in April 2019, October 2022, and in February, March, and September of 2023, and chose not to do so.

4. Plaintiff suffers no harm where it has no right to the procedure it belatedly seeks. On the other hand, by filing the lawsuit, creating a false cloud on Intervenors' permits, and taking other actions including interfering with Intervenors' contracts, Plaintiff is harming Intervenors and exposing itself to substantial liability for tortious interference and other claims for its wrongful conduct. Plaintiff asks the court to ignore years of reliance on the District's public acts, including tens of millions of dollars already expended by Intervenors, as well as Intervenors' partners and customers, on drilling wells, designing infrastructure, and coordinating engineers, hydrologists, and other professionals, all in reasonable reliance on final, signed groundwater permits from the District.

5. The District followed all relevant rules and regulations in issuing the permits, and Plaintiff does not, and cannot, allege otherwise. In fact, UW Farm went above and beyond what the rules require in acquiring its permits, agreeing to advance funding of a mitigation program to benefit neighboring groundwater users in Robertson and Brazos Counties, including Plaintiff. Defendant Alan Day, the District's General Manager, recognized these efforts in public testimony before the Texas State Senate Committee on Water, Agriculture and Rural Affairs, noting that: "We were blessed to have a permit applicant, now a permit holder [UW Farm], who said, 'We want to be a good neighbor.'" The chair of the committee, Senator Charles Perry, agreed and remarked that UW Farm is a "responsible applicant."

6. Plaintiff's blatant omission of these and other relevant facts is an affront to this tribunal and to its charge as a public institution to act in good faith for the local community and the entirety of the State of Texas. Intervenors ask that the Court deny Plaintiff's application for injunctive relief, affirm the validity of the prior-issued permits through declaratory judgment, and dismiss Plaintiff's Amended Petition.

II. RIGHT TO INTERVENTION

7. UW Farm and the Landowner Intervenors have a right to intervene in this action under Rule 60 of the Texas Rules of Civil Procedure. "A party has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation." *Jabri v. Alsayyed*, 145 S.W.3d 660, 672 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Law Offices of Windle Turley v. Ghiasinejad*, 109 S.W.3d 68, 71 (Tex. App.—Fort Worth 2003, no pet.)).

8. UW Farm and the Landowner Intervenors have a direct and substantial interest in the final, signed groundwater permits that Plaintiff seeks now to belatedly challenge. UW Farm holds existing production and transport permits in its own name and has contractual interests in others. The Landowner Intervenors likewise hold final, signed permits in their own names. UW Farm and the Landowner Intervenors are also co-applicants on certain pending transport permit applications for which an administrative process was timely requested and is not in dispute in this case.

9. Intervenors file this intervention to preserve their right to be parties to legal proceedings in which they have an interest in the subject matter of the litigation. Intervenors do so without agreeing or stipulating that this Court has subject matter jurisdiction, that this is the proper forum to challenge actions of the District, or that the actions of the District are subject to judicial review.

III. PARTIES

10. Plaintiff TAMUS is a legislatively created system of member universities that maintains its principal place of business in College Station, Texas.

11. Defendant BVGCD is a conservation and reclamation district created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59 of the Texas Constitution, and Chapter 8835 of the Special District Local Laws Code.

12. Defendant Alan Day is the General Manager of BVGCD and a resident of Brazos County.

13. Intervenor UW Farm is a Delaware limited liability company with its principal place of business located at 7670 Woodway Drive, Suite 200, Houston, Texas 77063, and a property owner in Robertson County.

14. Intervenor Cula d'Brazos LLC is a Texas limited liability company with its principal place of business located at 1108 Kinney Avenue, Austin, Texas 78704, and a property owner in Robertson County.

15. Intervenor RH2O LLC is a Texas limited liability company with its principal place of business located at 8529 Edinburgh Court, Montgomery, Texas 77316, and a property owner in Robertson County.

16. Intervenor L. Wiese Moore LLC is a Texas limited liability company with its principal place of business located at 2208 Churchill Loop, Grapevine, Texas 76051, and a property owner in Robertson County.

17. Intervenor Clifford A. Skiles III is a property owner in Robertson County.

18. Intervenor James C. Brien is a property owner in Robertson County.

IV. BACKGROUND

19. The District—following basic tenets of administrative law—sets a window of time in which a person can request a contested case hearing on a pending groundwater permit application. BVGCD R. 14.3.5. When the District does not receive a timely contested case hearing

request, it processes the application as uncontested. BVGCD R. 14.3. Even when processing uncontested applications, BVGCD must consider an extensive list of factors in deciding whether to grant or deny an application, including whether the application is complete, complies with all rules and law, is consistent with the District's water management plan, protects groundwater quality, and aligns with the public welfare. BVGCD R. 8.3.

20. The District's deadline for challenging permit applications accomplishes the "basic policies" of any type of limitation period: "repose, elimination of stale claims, and certainty." *See Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013). Administrative deadlines, like statutes of limitations, are "vital to the welfare of society" because they give "security and stability to human affairs." *See Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (cited in *Ferrer v. Almanza*, 667 S.W.3d 735, 737 (Tex. 2023)). For administrative actions taken after a deadline passes, courts "should support the finality of administrative orders in keeping with the public policy favoring an end to litigation, whether it be in the administrative or judicial process." *See Westheimer Indep. Sch. Dist. v. Brockette*, 567 S.W.2d 780, 787 (Tex. 1978).

21. When the District's Board of Directors approves a permit application, the applicant receives a final permit signed and issued by the General Manager. Final drilling and operating permits (*i.e.*, production permits) authorize the applicant to drill and operate a well, produce groundwater, and beneficially use that groundwater (*see* Exhibits A–I). Final transport permits authorize the applicant to arrange for beneficial use of the groundwater outside the District's boundaries (*see* Exhibit J). BVGCD R. 10.1.

22. The District complied with its rules and the Texas Water Code in approving the applications and issuing the permits that are the subject of Plaintiff's Amended Petition (*see* Exhibit K – Permit Issuance Chart).

23. UW Farm—like all other permit recipients in the District—has relied on the final permits' validity in paying permit fees, obtaining engineering and hydrologist reports, entering contracts, drilling wells, and expending a myriad of other costs. The Landowner Intervenors have similarly relied on the validity of the final permits. The District has also relied on final permits in accepting fees and well assistance funds, expending those funds, and coordinating its regional planning and long-term water management efforts.

24. Additionally, several layers of third parties have expended resources in reliance on these final permits: EPCOR, a water utility company, contracted with UW Farm to secure the groundwater for infrastructure projects to transport to end-users. Two municipal end-users (the City of Georgetown and the City of Hutto) contracted with EPCOR to reserve water authorized from the final permits. Collectively, tens of millions of dollars have been spent in reliance of the final permits at issue in this lawsuit, which were finalized and issued years prior.

25. Plaintiff's narrative omits all of these facts in asking the Court to unwind months and years of reliance on these final permits. Plaintiff now asks for a contested case hearing years after the District followed its administrative procedures and granted the permits. Re-opening this administrative process decimates any ability to rely on the District's permitting process generally and these permits specifically, which interferes with contracts and plans to build out long-term water supply projects to meet critical regional water needs.

26. This lawsuit has caused, and will continue to cause until it is resolved, uncertainty around the contracts entered into in reliance on the permits. The lawsuit has stalled performance of contracts. The longer this uncertainty remains, the higher the probability that there will be additional legal disputes concerning the contracts as the chain of reliance breaks down, causing additional and substantial damage to multiple parties, including the Intervenors.

27. Below, Intervenors fill in the substantial gaps of Plaintiff's Amended Petition, demonstrating that the facts of the case—and controlling law—conclusively defeat Plaintiff's request that the Court turn back time, un-drill wells, and ignore the reality of contracts and dollars exchanged, all so that Plaintiff may have a second chance at an administrative hearing that it failed to request in the first place.

28. For convenience, a timeline of the relevant events is attached as Exhibit L.

A. Regional water supply project to meet critical water shortages

29. UW Farm owns over 9,000 acres of land in Robertson County near Hearne, Texas, adjacent to the Brazos River. This land supports a variety of agricultural operations and serves as the center for a regional water supply project (the "Project") that has been under development for many years. The Project will meet critical municipal water needs in receiving areas outside of BVGCD's jurisdiction in Milam, Williamson, Bell, and/or Travis counties, where cities are experiencing unprecedented population growth and economic investment and are scrambling to find sufficient water supply to meet projected needs.[1]

30. The Project is a collaborative effort with other Robertson County landowners, including the Landowner Intervenors, to bring together a collection of private property interests in groundwater to solve a public need and support economic growth in Texas. Over the next several decades, the Project will provide a stable drinking water supply for communities, households, and businesses, support the region as it continues to grow, and drive billions of dollars of economic impact within the region.

[1] *See, e.g.*, Stephanie Becerra, *Report: Georgetown Must Find New Water Source by 2030 to Avoid Running Out*, CBS Austin (Feb. 26, 2024), https://cbsaustin.com/news/local/report-georgetown-must-find-new-water-source-by-2030-to-avoid-running-out.

31. UW Farm has worked closely with the District while developing the Project and obtaining all necessary authorizations. UW Farm has described the Project in various public filings, and its efforts in developing the project have been transparent and collaborative. In issuing the permits, the District complied with all state laws and its own rules.

32. The Project draws from the Simsboro Formation of the Carrizo-Wilcox Aquifer. State water planning groups describe the Carrizo-Wilcox Aquifer as "prodigious" and "prolific," meaning there is a high availability of groundwater in this aquifer.

33. In conceptualizing and acquiring authorizations for the Project, UW Farm implemented a variety of protective measures, including an agreement to provide $7.5 million of voluntary well mitigation funding to the District in advance of the Project's operation to address effects on existing wells from changes in Simsboro Aquifer conditions related to the Project. UW Farm also agreed to a cap export at a volume less than the authorized production to balance the Project with groundwater needs and long-term, reliable management within the District's jurisdiction.

B. BVGCD issues final permits for the Project in 2019, 2022, and throughout 2023

34. BVGCD regulates the production and management of groundwater in Robertson and Brazos counties against the backdrop of Texas water law, which recognizes the private property interest of landowners in groundwater. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012). BVGCD is governed by an eight-member Board of Directors that serve staggered four-year terms. The Board of Directors, along with the General Manager, make and implement rules for groundwater production and aquifer management within BVGCD's two-county jurisdiction, overlaying a major aquifer that crosses 66 Texas counties. The Board of Directors, and the General Manager in certain circumstances, take action on various matters before BVGCD.

35. BVGCD's general process for issuing production and transport permits is as follows: (1) BVGCD receives a completed application, reviews it for compliance with BVGCD rules and Chapter 36 of the Texas Water Code, and deems it administratively complete (or, if not administratively complete, requests additional information from the applicant); (2) BVGCD schedules a public hearing on the administratively complete application and provides notice of the hearing; (3) BVGCD accepts public comment on the application prior to and during the public hearing, and affected parties may submit a request for a contested case hearing five days prior to the hearing;[2] and (4) BVGCD considers the application at the public hearing and, if the application is uncontested, may grant or deny the application at the board meeting following the hearing or up to sixty days after the hearing.

36. UW Farm complied with the process outlined above to obtain BVGCD-issued production permits and one transport permit related to that authorized production (the "UW Farm Permits"). Together, these final, issued permits authorize UW Farm to produce and transport up to 49,999 acre-feet per year of groundwater from the Simsboro:

Permit Nos.	Permittee	Permit Type	Noticed Hearing Date	Final Permit Issuance Date
BVDO-0254 to BVDO-0256 (3 permits)	UW Farm	Production	April 17, 2019	April 17, 2019; renewed April 23, 2024[3] (Ex. A)
BVDO-0292 to BVDO-0304 (13 permits)	UW Farm	Production	October 20, 2022	October 20, 2022 (Ex. B)
BVTP-001	UW Farm	Transport	March 9, 2023	March 9, 2023 (Ex. J)

[2] BVGCD R. 14.3.5(a) (2020). The applicable rules for the permits at issue in this lawsuit were adopted on September 10, 2020.
[3] These three permits were amended on April 14, 2022, to add Public Water Supply as an authorized beneficial use.

37. Certain Robertson County landowners (the "Project Participants") individually applied for production permits throughout 2023 (the "Project Participant Permits") (the Project Participant Permits and the UW Farm Permits, collectively, the "Permits"). With their final production permits in hand, these Project Participants, which include the Landowner Intervenors,[4] then collaborated with UW Farm to further develop the Project to meet growing regional water needs. In accordance with BVGCD's procedural and substantive rules, the Board approved and the General Manager issued the Project Participant Permits in February, March, and September 2023:

Permit Nos.	Permittee	Permit Type	Noticed Hearing Date	Final Permit Issuance Date
BVDO-0315 and BVDO-0316 (2 permits)	Dr. James Cooper Brien	Production	February 9, 2023	February 9, 2023 (Ex. C)
BVDO-0317 and BVDO-0108 (2 permits)	Clifford A. Skiles III	Production	March 9, 2023	March 9, 2023[5] (Ex. D)
BVDO-0377 to BVDO-0384 (8 permits)	Ely Family Partnership LP	Production	September 14, 2023	September 14, 2023 (Ex. E)
BVDO-0385 to BVDO-0389 (5 permits)	RH2O LLC	Production	September 14, 2023	September 14, 2023 (Ex. F)
BVDO-0394 to BVDO-0399 (6 permits)	Fazzino Investments LP	Production	September 14, 2023	September 14, 2023 (Ex. G)
BVDO-0401 and BVDO-0402 (2 permits)	L. Wiese Moore LLC	Production	September 14, 2023	September 14, 2023 (Ex. H)
BVDO-0408 to BVDO-0414 (7 permits)	Cula d'Brazos LLC	Production	September 14, 2023	September 14, 2023 (Ex. I)

[4] The two Project Participants who are not Landowner Intervenors are represented by separate counsel.
[5] BVDO-0108 was originally issued on August 11, 2011, and was amended on March 9, 2023, to increase production limits.

38. Following the Board's approval and the General Manager's issuance of the Project Participant Permits, UW Farm entered into option agreements with the Project Participants to lease groundwater on a long-term basis, integrating these permits into the Project. The Project Participant Permits, collectively, authorize the production of 57,718 acre-feet of water per year out of the Simsboro, which allows the Project to disperse production of water in a manner favorable to local hydrology while meeting growing regional water needs.

39. Every Permit complied with BVGCD's rules, and the District determined that every Permit application was administratively complete. The Board properly scheduled and noticed hearings to consider the applications.

40. None of the Permits received a written notice of intent to contest the applications, as is required to participate in a contested case hearing on any given permit application. *See* BVGCD R. 14.3.5(a) (Sept. 10, 2020) ("Any person who intends to protest a permit application and request a contested case hearing must provide written notice of the request to the District office at least five (5) calendar days prior to the date of the hearing."). Plaintiff did not file a written notice of intent to contest the applications before any hearing date on the Permits. Plaintiff did not provide comment on the applications at the relevant public hearings or board meetings. Plaintiff did not show interest or concern about the Permits in any way during the relevant time periods between 2019 and June 2024 and should be estopped from doing so now.

41. The Board considered and approved each Permit in the Board meeting immediately following the scheduled permit hearings. The General Manager then signed, issued, and mailed the final Permits to UW Farm and the Project Participants (*see* Exhibits A–J).

42. Having received the signed and finalized Permits, UW Farm and the Project Participants have operated in reliance on their validity for years. For example:

- UW Farm drilled wells for the three operating permits issued April 17, 2019, and has produced groundwater from these wells (BVDO-0254, BVDO-0255, and BVDO-0256).
- Similarly, a well belonging to a Project Participant has been drilled and has produced water from the Simsboro under the District's final permit (BVDO-0108).
- In further reliance of the Permits, UW Farm entered into contracts that commit the water through groundwater marketing agreements and reservation agreements with receiving entities to provide critically needed municipal water supply (*see* Exhibits M and N – Reservation Agreements). Substantial engineering work is underway with respect to the pipeline, treatment facilities, and related infrastructure for these agreements. The cities of Georgetown and Hutto have paid millions of dollars under their reservation agreements to secure long-term water supply in reliance on the final Permits.
- UW Farm invested tens of millions of dollars to initiate and advance the Project. UW Farm and the Project Participants then also expended significant resources in reliance of the Permits. For example, starting in 2022, UW Farm spent over $3.5 million in capital expenditures related to the physical development of the Permits alone, including drilling costs, engineering and hydrology costs, and costs related to monitoring, fencing, and improving the wells. Additionally, UW Farm and the Landowner Intervenors paid the District thousands of dollars in application fees. And, UW Farm made an initial $200,000 payment to the District under the well assistance program agreement.

C. 2024 contested case hearing requests

43. To receive authorization to transport water associated with the Project Participant Permits, the Project Participants applied in January 2024 for separate transport permits for each Project Participant (the "Pending Transport Applications"). At the request of the District, those applications were revised to include UW Farm as co-applicant. The Pending Transport Applications are in addition to UW Farm's transport permit that the Board approved and the General Manager issued on March 9, 2023. UW Farm and the Project Participants worked with the District throughout this process and agreed to certain concessions, such as an aggregate transport cap of 100,000 acre-feet per year for all permits related to the Project.

44. The District deemed the Pending Transport Applications administratively complete and set the applications for hearing on June 18, 2024. The General Manager recommended that BVGCD issue the permits.

45. Whereas the Permits issued between 2019 and 2023 did not receive any contested case hearing request, the District received several written contested case hearing requests on the Pending Transport Applications, including a June 14, 2024 request[6] from Plaintiff.

46. Plaintiff timely requested a contested case hearing on the Pending Transport Applications and that contest is not in dispute in this case. Intervenors take no issue with Plaintiff's administrative right to seek party status in a contested case hearing on the Pending Transport Applications, where Plaintiff submitted a timely contested case hearing request under BVGCD's rules. The District held a preliminary hearing on the Pending Transport Permit Applications on October 10, 2024, and by order referred the contested case to the State Office of Administrative Hearings on the same day.

[6] The District amended its rules on September 14, 2023, to set the deadline for a hearing request as "5:00 p.m. the day before the permit hearing." BVGCD R. 14.3.5.

47. However, Plaintiff's Amended Petition does not request any relief on the Pending Transport Applications. Instead, it attempts to reach back in time and retroactively challenge the longstanding final Permits that Plaintiff did not contest before their issuance. Plaintiff expressed no interest in the Permits when the District properly noticed and heard those applications, but now seeks to protest the Permits years later.

D. Change of circumstance – Plaintiff enters agreements with semiconductor manufacturing company

48. While Plaintiff has not provided the Court a reason for requesting an after-the-fact contested case hearing request on the Permits, publicly-filed tax abatement documents suggest that Plaintiff's newfound interest in groundwater comes from its dealings with a company aiming to build a semiconductor manufacturing plant on unused land in Plaintiff's RELLIS campus in Bryan, Texas. Semiconductor manufacturing is a notoriously water-intensive industry and usually requires daily water use equivalent to that of a small city.

49. Even if Plaintiff's commercial manufacturing partnership created a sudden focus on water because of demand beyond Plaintiff's normal needs as an institution of higher education, it changes nothing as to two key realities: (1) the Simsboro is a sound water supply for the Project and Plaintiff's manufacturing endeavors, in addition to its educational functions, which can co-exist or even benefit each other through shared infrastructure; and (2) the Intervenors properly permitted their private property groundwater rights and could readily be approached for an in-District purchase of water.

E. BVGCD raises board member eligibility issues

50. Following Plaintiff's first contested case hearing request on the Pending Transport Applications, UW Farm learned that BVGCD's counsel, Monique Norman, had inquired into the eligibility of certain members of BVGCD's Board of Directors. It is UW Farm's understanding

that Ms. Norman conferred with the Robertson County Attorney's office and raised concerns that three of the eight current Directors—John Elliott, Jeff Kennedy, and Chris Zeig—held secondary governmental roles that potentially rendered them ineligible to serve as BVGCD Directors under section 36.051 of the Texas Water Code: "A member of a governing body of another political subdivision is ineligible for appointment or election as a director. A director is disqualified and vacates the office of director if the director is appointed or elected as a member of the governing body of another political subdivision." *See* Tex. Water Code § 36.051.

51. According to the District, John Elliott accepted a role as a Board Member of the Robertson Central Appraisal District on or around January 2023, the same month when he began his role as BVGCD Director. Jeff Kennedy accepted a role as a Board Member of the Appraisal Review Board of Robertson Central Appraisal District on or around January 2023, the same month when he began his role as BVGCD Director. Chris Zeig began a role of Councilman for the City of Franklin on or around January 2023, two years into his four-year term as a BVGCD Director.

52. On July 16, 2024, BVGCD published on its website a list of BVGCD meetings and hearings that it determined were potentially impacted by the alleged ineligibility issues. The list included notices and minutes for nine board meetings throughout 2023 and 2024: February 9, 2023, March 9, 2023, June 8, 2023, August 10, 2023, September 14, 2023, October 12, 2023, November 16, 2023, May 16, 2024, and June 3, 2024. Six of those nine meetings involved hearings on permit or permit amendment applications from at least sixteen different landowners across Robertson and Brazos Counties—a problem stretching far beyond the interests of UW Farm and the Project Participants. At least eighty-seven administratively complete, properly noticed, and uncontested permits were voted on and issued in these meetings, including UW Farm's transport permit and the Project Participant Permits (*see* Exhibit O).

53. The nine board meetings that BVGCD flagged as being potentially impacted by board member ineligibility cover a huge number of significant Board actions in addition to the at least eighty-seven permit approvals, including large funding actions under BVGCD's annual budget, changes to the Board's spacing and production rules, the purchase of a commercial building, changes to personnel policies, large equipment purchases, and various month-to-month actions like adopting minutes and financial reports (*see* Exhibit O).

54. Notably, the sixteen UW Farm production permits were issued April 17, 2019, and October 20, 2022, well before any purported eligibility issues. Plaintiff, in keeping with its strategic decision to omit key facts, provides no explanation to the Court why these permits would be included in Plaintiff's already groundless request for an after-the-fact contested case hearing.

F. BVGCD proposes a secondary means regarding the ineligibility issues

55. As detailed below, Texas law validates the actions of public officials who perform their duties under color of appointment, even when circumstances render them ineligible to serve. Under the *de facto* officer doctrine, the BVGCD Board's votes to approve the Permits are valid, even if certain directors were ineligible to sit on the Board.

56. However, given the far-reaching actions during the ineligibility issue, BVGCD published a set of proposed rule revisions on July 16, 2024, including Proposed Rule 8.3(j) (the "Ratification Rule"), which proposed to ratify all permits issued between January 1, 2021[7] and July 1, 2024, that (1) BVGCD had deemed administratively complete; (2) were properly noticed; and (3) were uncontested (*see* Exhibit P).

[7] BVGCD has indicated that the rule stretches back to January 1, 2021, as a precautionary measure for Zeig's membership, not because the purported quorum issue can be traced back to this date. The ineligibility issues potentially impacting quorum began in January 2023.

57. According to the District, Directors Elliott, Kennedy, and Zeig stepped down from their secondary governmental roles on or around July 2024 to regain eligibility as BVGCD Directors.[8]

58. On August 8, 2024, Plaintiff sent a letter to BVGCD requesting that the District "postpone any action" on the ratification efforts so it could "negotiate with the applicants whose permit application are the ultimate subject of [the ratification efforts]." In this letter, Plaintiff stated that it "hereby formally contests each of the permit applications that is ultimate [sic] subject to the [ratification efforts]." (Exhibit Q).

59. On August 8, 2024, BVGCD held a public hearing on the proposed rule revisions. At the meeting, BVGCD's General Manager explained BVGCD's position that, for the nine allegedly impacted BVGCD meetings, the Board of Directors lacked a quorum to conduct any business when three of its Directors lacked eligibility and other members were absent.[9] The General Manager noted that the Ratification Rule aimed to correct the eligibility issue "in one fell swoop."

60. Following a lengthy executive session, and without any public explanation or basis, the BVGCD Board ultimately voted four to three *against* the proposed rule revisions, including the Ratification Rule that aimed to solve the perceived quorum issues and restore certainty to prior Board actions. The Board did, however, vote to ratify many administrative actions at the allegedly impacted meetings, such as prior approval of BVGCD meeting minutes and financial reports, as well as a ratification of a prior approval of a permit amendment application (*see* Exhibit R). These

[8] Records from the Robertson County Commissioners Court indicate that Elliot and Kennedy were re-appointed to the BVGCD Board and sworn in on July 23, 2024. Zeig was re-appointed on August 6, 2024, and sworn in on August 22, 2024.

[9] A "majority of the membership" of the BVGCD Board is required to have a quorum for a BVGCD meeting or hearing. *See* Tex. Water Code § 36.053(a). In the nine allegedly impacted meetings, at least two Directors were absent, and at least two of the present six Directors were allegedly ineligible, leaving only four allegedly eligible Directors, which is not a majority of eight total Directors.

item-by-item ratifications did not address any of the at least eighty-seven allegedly impacted permits.

61. On September 5, 2024, several weeks after BVGCD's board meeting, Plaintiff sent another letter to the District re-iterating and expanding its prior contested case hearing request, this time requesting a hearing on all the final UW Farm Permits (including the production permits issued well before the eligibility issue), the final Project Participant Permits, and the Pending Transport Applications (*see* Exhibit S).

62. Plaintiff did not challenge any of the other approximately fifty-seven permits issued or actions taken during the purported quorum issues, including seven permits issued to the City of Bryan and the City of College Station that are closer to Plaintiff and will have greater impact on Plaintiff's wells. Plaintiff, in an effort to treat all the Robertson County landowners associated with the Project as second-class citizens, challenges only the final permits and actions related to the Project. However, in casting a cloud of uncertainty over the final Project Permits, Plaintiff devalues *all* property rights in the District by insisting that final, signed permits cannot be relied upon.

63. UW Farm responded to Plaintiff's September 5, 2024 letter in a filing to the District on September 11, 2024. UW Farm explained how Texas law protects the validity of the final Permits from subsequent collateral attack, even if certain BVGCD directors may have been ineligible to serve when acting as board members throughout 2023. UW Farm's letter indicated support for the District's ratification efforts as an *additional* means of clearing the eligibility issue, but it noted that such efforts were not necessary because the final Permits are valid as issued under Texas law (*see* Exhibit T).

64. A few hours after UW Farm sent the September 11, 2024 letter, Plaintiff sent a follow-up letter to BVGCD threatening to "initiate litigation" if the District "considered" any of the Permits or the Pending Transport Applications, including through adoption of the Ratification Rule (*see* Exhibit U).

G. BVGCD adopts the Ratification Rule on September 13, 2024

65. BVGCD again took up its proposed rulemaking package, including the Ratification Rule, in its September 13, 2024 board meeting. This time, following UW Farm's letter, the Board voted to approve the Ratification Rule, with minor changes.

66. The Ratification Rule, as adopted, "ratifies the General Manager's ***prior issuance of*** . . . permit or permit amendments that: (a) the District deemed that the permit or permit amendment application(s) were administratively complete under the District's Rules; (b) the District provided notice(s) to the public of the permit or permit amendment application(s) under Rules 14.1 and 14.2 during the time period from January 1, 2021, to July 1, 2024; AND (c) the District did not receive any written notices of intent to contest the permit or permit amendment application(s) under rule 14.3.5(a)." (Exhibit P (emphasis added)).

67. The Ratification Rule, by its own terms, ratifies the General Manager's "prior issuance" of the purportedly affected permits, including the UW Farm Permits and the Project Participant Permits, which (a) were deemed administratively complete under the District's rules; (b) were properly noticed under the District rules between January 1, 2021, to July 1, 2024; and (c) did not receive written notices of intent to contest the permit under rule 14.3.5(a) (requiring requests "at least five (5) calendar days prior to the date of the hearing").

H. Plaintiff files this lawsuit

68. Apparently in frustration that the District demonstrated the integrity to stand behind final decisions it made years prior, Plaintiff filed the Amended Petition on September 13, 2024, requesting that (1) the Court issue a writ of mandamus directing the BVGCD and General Manager to refer all prior-issued final Permits to the State Office of Administrative Hearings ("SOAH") and (2) the Court restrain BVGCD and the General Manager from "issuing" the (already issued) Permits "until such [SOAH] proceedings are concluded." Plaintiff's arguments fail in light of the facts above and the law below.

V. RESPONSE TO PLAINTIFF'S APPLICATION FOR TEMPORARY AND INJUNCTIVE RELIEF

69. Plaintiff's mandamus claim hinges on its theory that, because of the ineligibility issue, "there have been no permit or board hearings on the [applications for the Permits]." Amended Petition ¶ 21. In other words, Plaintiff urges the Court to pretend that the April 2019, October 2022, and February, March, and September 2023 permit hearings and board meetings never happened—and that all the subsequent actions, contracts, and good-faith reliance on the Board's decisions also never happened. Established Texas law prevents this outcome, and Plaintiff's claims fail because it did not timely submit contested case hearings on the Permits.

A. Under the *de facto* officer doctrine, the final Permits are valid even without the District's ratification efforts and are protected from this subsequent collateral attack

70. Plaintiff'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. *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)); *see also* 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.").

71. 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." *Forwood*, 208 S.W.2d at 794.

72. The three BVGCD directors who held secondary roles during the period at issue constitute *de facto* officers because they were properly appointed to the BVGCD Board and their ineligibility issues were unknown to the public. *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.").

73. The Directors' purported statutory ineligibility under section 36.051 of the Texas Water Code is a type of ineligibility contemplated under the *de facto* officer doctrine. *See, e.g.*, 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).

74. 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. 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)).

75. 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." Op. Tex. Att'y Gen. No. LO-88-103 (1988); *see also Nalle v. City of Austin*, 93 S.W. 141, 145 (Tex. App—Austin 1906, writ ref'd) (*de facto* doctrine prevents "collateral and subsequent inquiry into the regularity of the appointment" that "jeopardize[s]" public acts).

76. In continuing to uphold the *de facto* officer doctrine, courts have refused invitations like Plaintiff'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." *See Germany v. Pope*, 222 S.W.2d 172, 177 (Tex. App.—Fort Worth 1949, writ ref'd n.r.e.) (rejecting as "contrary to a sound public policy" appellant's argument the city council ineligibility invalidated all city action "during a period of about 2 1/2 months").

77. *De facto* officers count towards an entity's decision-making quorum. *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*, 614 S.W.2d at 864 (holding that ineligible commissioners acted as "*de facto*" members and therefore quorum existed to prohibit collateral attack on their prior actions).

78. The *de facto* officer doctrine squarely applies in this scenario and thereby validates BVGCD actions in the period at issue, even without the District's Ratification Rule or other ratification efforts. *See 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").

79. Plaintiff's attempt to invalidate numerous BVGCD decisions flies in the face of established Texas law and sound public policy in Texas and would adversely affect dozens of landowners in Robertson and Brazos Counties—as well as Project customers in the receiving areas—who have relied on, acted on, and invested based upon BVGCD's rules, decisions, and authorizations. The eligibility issue extends far beyond the Permits and reaches community members who accepted payments from the District, cities who obtained permit authorizations for municipal water supplies, and countless individuals who dealt with the District over the affected period of nearly a year and a half. Texas courts reject claims from those who wish to "invite chaos" in sound government actions, which is exactly what Plaintiff is attempting to do here. The longer Plaintiff's challenge drags out, the more likely it is to negatively affect and devalue the property of *all* property owners in the District, as well as disrupt the Project and the communities relying upon it.

80. The *de facto* officer doctrine validates the prior-issued Permits and conclusively defeats the outcome that Plaintiff seeks.

B. Plaintiff's mandamus action fails.

81. In light of the *de facto* officer doctrine, Plaintiff's mandamus action cannot stand. Plaintiff argues that section 36.4051 of the Texas Water Code imposes a non-discretionary duty on the District to "schedule a preliminary hearing to hear a request for a contested case hearing." Plaintiff conveniently omits the full text of the rule: "The board shall schedule a preliminary hearing to hear a request for a contested case hearing ***filed in accordance with rules adopted under Section 36.415***." *See* Tex. Water Code § 36.4051. Section 36.415, in turn, requires the District to "establish the deadline" for filing a contested case hearing request. *Id.* § 36.415. The District has done so in BVGCD Rule 14.3.5: "Any person who intends to protest a permit application and request a contested case hearing must provide written notice of the request to the District office at least five (5) calendar days prior to the date of the hearing."[10]

82. Plaintiff did not file timely contested case hearing requests on the applications for the Permits before the dates of their respective hearings in April 2019, October 2022, and February, March, and September of 2023. There is no "clear legal duty" for BVGCD to implement Plaintiff's after-the-fact requests—indeed, there is no duty at all. *See Phillips v. McNeill*, 635 S.W.3d 620, 628 (Tex. 2021) (mandamus actions "compel the performance of a clear legal duty"); *Wortham v. Walker*, 128 S.W.2d 1138, 1151 (1939) ("Mandamus will not lie to establish as well as enforce a claim of uncertain merit.").

83. Even if Plaintiff's absurd assertion that the "there have been no permit or board hearings on the [applications for the Permits]" is accepted as true (in essence, ignoring the fact that the April 2019, October 2022, and February, March, and September 2023 hearings were noticed

[10] Since issuing the Permits, the District has changed its rule for requesting a contested case hearing to: "A request for contested case hearing shall be in writing and must be received by the District by 5:00 p.m. the day before the permit hearing."

and happened), Plaintiff *still* cannot succeed in arguing that it submitted a timely request, where BVGCD's rules requires a written request "at least five (5) calendar days ***prior to the date of the hearing***." See BVGCD R 14.3.5 (Sept. 10, 2020) (emphasis added). Even assuming the hearings themselves never happened, the date of the hearing is set by the General Manager by letter to the applicant, not by action of the Board. Pretending that the hearings did not occur does not solve the issue that the *date of the hearing* was set and passed by without a written protest by Plaintiff. Even when stretching the imagination to its limit, Plaintiff's September 5, 2024 contested case request cannot be considered timely under the plain language of BVGCD's rules.

84. The illogical end of Plaintiff's theory would be that hearing requests could be filed today or two years from now on, for example, the City of Bryan or the City of College Station's permits for which a hearing date was set in August 2023 and final permits were issued after the hearing and board meeting that same day. Those municipalities would have no ability to rely on those final permits now or in the future.[11]

C. Plaintiff's request for injunctive relief cannot succeed.

85. Plaintiff's request that the Court preserve the "status quo" by "restraining the District and the General Manager from issuing permits on the applications for the [UW Farm permits] and [the Project Participant Permits], until such time as the court may determine, through trial or dispositive motion, the issuance of a writ of mandamus applied for in this petition" also fails because (1) the District has already issued the final Permits, and Plaintiff's request is thereby

[11] Attempts to isolate the Project Permits from all other permittees because Plaintiff or others have not yet challenged other permits, like those of the Cities, only exposes the absurdity of Plaintiff's position: Under the Ratification Rule, the General Manager is authorized to grant and issue the affected permits and the Board "hereby ratifies" the *prior* issuance but only if "(c) the District did not receive [*past tense*] any written notice of intent to contest the permit or permit amendment application(s) under rule 14.3.5(a) [*i.e.*, filed five days prior to the hearing date.]." Plaintiff's position is that no effect is given to the past tense, the noticed hearing dates, nor the fully implemented hearings on such dates. Therefore, according to Plaintiff's illogic, no application can ever satisfy prong (c) because no deadline can have passed without a new hearing, rendering Section 8.3(j)(2) of the duly adopted Ratification Rule a nullity.

moot; and (2) Plaintiff has no claim upon which to base its request for injunctive relief because the mandamus claim fails under the *de facto* officer doctrine. Furthermore, Plaintiff's assertion of an "immediate threat" of being "denied the opportunity for contested case hearing" is unsubstantiated, as Plaintiff had multiple opportunities to timely contest the permits in April 2019, October 2022, and February, March, and September of 2023, but chose not to do so. The status quo is, and has been, that BVGCD issued final Permits, those final Permits have been relied on for years, and the relevant rules and law prohibit *post hoc* challenges of long-issued permits.

VI. CAUSES OF ACTION

Count I. Declaratory Judgment

86. Intervenors incorporate the foregoing paragraphs by reference as if fully set forth herein.

87. There is an actual controversy between Intervenors, Plaintiff, and BVGCD regarding the validity of the Permits, which is to be determined according to Texas law.

88. Therefore, pursuant to Texas Civil Practice & Remedies Code Section 37.001, Intervenors seek the following declaration of its rights:

a. that the Permits were and remain legally valid and effective as of their dates of issuance;

b. that the Permits authorize production and/or transport of groundwater as described on the permit faces;

c. that any alleged ineligibility of certain members of the BVGCD Board does not otherwise invalidate the Permits; and,

d. that Plaintiff's requests for contested case hearing on the Permits were untimely and improper.

VII. ATTORNEY'S FEES

89. Intervenors incorporate the foregoing paragraphs by reference as if fully set forth herein.

90. The Texas Declaratory Judgment Act authorizes this Court to "award costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code § 37.009. Intervenors have been forced to expend significant resources defending permits that BVGCD granted years ago in compliance with BVGCD rules and have been relied upon ever since. As such, Intervenors are entitled to reasonable attorney's fees and costs.

VIII. PRAYER

91. Intervenors respectfully request that the Court enter an appearance for UW Brazos Valley Farm LLC, Cula d'Brazos LLC, RH2O LLC, L. Wiese Moore LLC, Clifford A. Skiles III, and James C. Brien as Intervenors in this cause, to allow Intervenors the opportunity to defend the validity of the Permits before the Court.

92. Intervenors also request that, that upon final hearing, the Court: (1) render judgment for Intervenors as described above; and (2) grant Intervenors any relief to which it may be justly entitled.

Dated: November 5, 2024

Respectfully submitted,

BAKER BOTTS L.L.P.

By: */s/ Kevin T. Jacobs*

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CERTIFICATE OF SERVICE

I hereby certify that, on November 5, 2024, a true and correct copy of the above and foregoing was served on all known counsel of record via the Court's electronic filing system and/or email as follows:

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