CAUSE NO. 24-002626-CV-472

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<tr><td>TEXAS A&M UNIVERSITY SYSTEM,

Plaintiff,

vs.

BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT AND ALAN DAY, GENERAL MANAGER OF BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT,

Defendants.</td><td>§
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§</td><td>IN THE DISTRICT COURT OF

BRAZOS COUNTY, TEXAS

472nd JUDICIAL DISTRICT</td></tr>
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INTERVENORS' TRADITIONAL MOTION FOR SUMMARY JUDGMENT

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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 (collectively, the "Landowner Intervenors"), file this Traditional Motion for Summary Judgment. UW Farm and the Landowner Intervenors (together, the "Intervenors") filed a petition in intervention on November 5, 2024. Intervenors now move for summary judgment on Plaintiff Texas A&M University System's ("TAMUS" or "Plaintiff") mandamus action, which fails as a matter of law, and in favor of Intervenors' declaratory judgment claim.

I. INTRODUCTION

No genuine issue of fact exists in this dispute:

- The Brazos Valley Groundwater Conservation District ("BVGCD" or the "District") issued Intervenors groundwater permits in April 2019, October 2022, and February, March, and September of 2023;
- The District did so after conducting properly noticed public hearings;
- The Intervenors and various third parties have invested and relied upon those permits in good faith; and
- For each hearing before the District, Plaintiff did not submit a contested case request or otherwise show any indication of interest in the permits.

The question before the Court is purely legal—Can Plaintiff challenge final, signed groundwater permits years after issuance by questioning the eligibility of three of the board members who approved them? Centuries-old law and policy provides a clear answer: No.

In this lawsuit, Plaintiff asks the Court to strongarm the District into accepting as timely and acting upon a contested case hearing request that Plaintiff submitted on September 5, 2024—years after the administrative deadlines for doing so had passed.

Plaintiff brings an after-the-fact claim for mandamus relief against the District—an "extraordinary remedy" appropriate "only in situations involving manifest and urgent necessity." *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). This action cannot succeed where Plaintiff received proper notice and opportunity to contest the permits years ago but chose not to do so. The District considered and issued the permits in full compliance with the Texas Water Code and all relevant regulations, and Plaintiff does not, and cannot, claim otherwise.

Instead, Plaintiff asks to upend years of reliance on final permits because of a supposed eligibility issue for three BVGCD board members that allegedly began in January 2023 and resolved in approximately July 2024. Without any explanation, Plaintiff asserts that this eligibility issue allows an "administrative re-do" on final permits issued *even before the period of supposed ineligibility*. For permits that the District issued to the Intervenors during the supposed ineligibility period, Plaintiff invents the legal fiction that "there have been no permit or board hearings" during that time.

Plaintiff's stratagem fails as a matter of law under centuries-old Texas precedent. Under the *de facto* officer doctrine, mere technicalities cannot undo the acts of public officials acting under the color of authority. *Aulanier v. Governor*, 1 Tex. 653 (Tex. 1846) ("A person acting as an officer, under color of a commission, is *de facto* such officer . . . and his authority cannot be questioned in a collateral way. His official acts, until ejected, are valid."). This doctrine includes the scenario where the public officer's appointment or continued officeholding was arguably invalid due to eligibility issues. *Rivera v. City of Laredo*, 948 S.W.2d 787, 794 (Tex. App.—San Antonio 1997, writ denied). The *de facto* officer doctrine is rooted in sound public policy—without it, public acts would be subject to subsequent collateral attack years later, which would "invite chaos in the preservation of the peace and the protection of property rights of individuals

and the orderly administration of corporate affairs." *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 that city council ineligibility invalidated all city action "during a period of about 2 1/2 months").

In direct contravention of Texas law, Plaintiff asks the Court to force the District to erase years of reliance on final, signed groundwater permits issued by BVGCD board members acting under full color of authority and revoke Intervenors' ability to exercise their private property rights in the groundwater under their land. After receiving final permits from the District, Intervenors, as well as their partners and customers, have spent tens of millions of dollars on drilling wells, designing infrastructure, and expending a myriad of other costs on hydrology, engineering, and project development. Plaintiff's desired outcome damages not only Intervenors' property rights and the chain of reliance that flows from those rights, but also the property rights of all landowners who rely on District actions and governmental actions in general. This outcome is the exact scenario that the *de facto* officer doctrine prevents.

Intervenors move the Court to grant summary judgment in Intervenors' favor, deny Plaintiff's request for a writ of mandamus, issue declaratory judgment confirming the validity of Intervenors' permits, and dismiss Plaintiff's action with prejudice. Promptly removing the illegitimate cloud created by Plaintiff's lawsuit is critical to stopping the ongoing harm to property rights, returning confidence in substantial investments, and continuing work on a crucial water supply.

II. Background

A. Intervenors are developing a water supply project to meet critical drinking water shortages in the region

UW Farm owns approximately 9,000 acres of land in Robertson County near Hearne, Texas. Ex. 1, ¶ 3 (Decl. of David L. Lynch). 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. *Id.* 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 need to find sufficient water supply to meet projected needs. *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.

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. Ex. 1, ¶ 5. Over the next several decades, the Project will provide a stable drinking water supply for communities, households, and businesses and will drive billions of dollars of economic growth within the region. *Id.* ¶ 6.

The Project draws from the Simsboro Formation of the Carrizo-Wilcox Aquifer, a major aquifer that crosses 66 Texas counties. *Id.* ¶ 7. State water planning groups describe the Carrizo-Wilcox Aquifer as "prodigious" and "prolific," meaning there is a remarkably abundant availability of groundwater in this aquifer. Ex. 2 (Brazos G Water Planning Group, *2021 Brazos G Regional Water Plan* (Oct. 2020) at ES-4, ES-11).

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

BVGCD regulates the production and management of groundwater in Robertson and Brazos counties under 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. Tex. Spec. Dist. Code § 8835.051 (BVGCD's enabling legislation). 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. The Board of Directors, and the General Manager in certain circumstances, act on various matters before BVGCD, including permit applications. *See generally* Ex. 3 (Rules of the Brazos Valley Groundwater Conservation District (Sept. 10, 2020)).[1]

BVGCD's process for issuing groundwater 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. If the application is uncontested, BVGCD may

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[1] The applicable rules for the permits at issue in this lawsuit were adopted on September 10, 2020; the District amended these rules on September 14, 2023, and September 12, 2024.

[2] The applicable BVGCD rules for the permits Plaintiff challenges required a contested case hearing request in writing 5 days before the date of the permit hearing. The District has since amended that rule to allow for submission of a contested case hearing up until 5:00 p.m. the day before a permit hearing. Plaintiff attempts to submit a contested case hearing request ***years*** after the hearings and meetings where the District issued Intervenors final, signed permits.

grant or deny the application at the board meeting following the hearing or up to sixty days after the hearing. Ex. 3 at 48–50 (BVGCD R. 14.2, 14.3). If the District receives a timely contested case hearing request, it must schedule a preliminary hearing to determine standing and, if a requestor has standing to raise a justiciable issue, the District will coordinate a hearing on the merits of the permit application. *Id.*; Tex. Water Code § 36.4051.

UW Farm fully complied with this process to obtain BVGCD-issued production permits and one transport permit related to that authorized production (the "UW Farm Permits").[3] 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, Ex. 1, ¶ 16:

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[4] (Ex. 1-A)
BVDO-0292 to BVDO-0304 (13 permits)	UW Farm	Production	October 20, 2022	October 20, 2022 (Ex. 1-B)
BVTP-001	UW Farm	Transport	March 9, 2023	March 9, 2023 (Ex. 1-J)

Certain Robertson County landowners (the "Project Participants") individually applied for production permits throughout 2023 (the "Project Participant Permits") (the Project Participant

[3] 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. Final transport permits authorize the applicant to arrange for beneficial use of the groundwater outside the District's boundaries.

[4] These three permits were amended on April 14, 2022, to add Public Water Supply as an authorized beneficial use. These permits were renewed on April 23, 2024, without board action at a hearing or meeting, as required under BVGCD Rule 8.5 and Texas Water Code section 36.1145.

Permits and the UW Farm Permits, collectively, the "Permits"). 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. 1-C)
BVDO-0317 and BVDO-0108 (2 permits)	Clifford A. Skiles III	Production	March 9, 2023	March 9, 2023[5] (Ex. 1-D)
BVDO-0377 to BVDO-0384 (8 permits)	Ely Family Partnership LP	Production	September 14, 2023	September 14, 2023 (Ex. 1-E)
BVDO-0385 to BVDO-0389 (5 permits)	RH2O LLC	Production	September 14, 2023	September 14, 2023 (Ex. 1-F)
BVDO-0394 to BVDO-0399 (6 permits)	Fazzino Investments LP	Production	September 14, 2023	September 14, 2023 (Ex. 1-G)
BVDO-0401 and BVDO-0402 (2 permits)	L. Wiese Moore LLC	Production	September 14, 2023	September 14, 2023 (Ex. 1-H)
BVDO-0408 to BVDO-0414 (7 permits)	Cula d'Brazos LLC	Production	September 14, 2023	September 14, 2023 (Ex. 1-I)

Every Permit complied with BVGCD's rules, and the District determined that every Permit application was administratively complete. Ex. 1, ¶ 12; Ex. 1-K. The General Manager properly scheduled a date for hearings on the applications and provided notice of the hearings. Ex. 1, ¶ 13; Ex. 1-L.

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. Ex. 1, ¶ 14;

[5] BVDO-0108 was originally issued on August 11, 2011, and was amended on March 9, 2023, to increase production limits.

Ex. 1-M; *see* Ex. 3 at 50 (BVGCD R. 14.3.5(a)) ("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. Ex. 1, ¶ 14; Ex. 1-M. Plaintiff did not provide comment on the applications at the relevant public hearings or board meetings. Ex. 1-M.

The Board considered and approved each Permit in the Board meeting immediately following the scheduled permit hearings. Ex. 1-N. The General Manager then signed, issued, and mailed the final Permits to UW Farm and the Project Participants. Exs. 1-A–1-J.

Having received the signed and finalized Permits, UW Farm and the Project Participants then operated and continue to operate in reliance on the Permits' 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). Ex. 1, ¶ 19.
- 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. Ex. 1, ¶ 20; Exs. 1-O–1-P (Reservation Agreements). Substantial engineering and field work is underway with respect to the well field systems, pipelines, treatment facilities, and related infrastructure for these agreements. Ex. 1, ¶ 20(d). 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. *Id.* ¶ 20(c).

- UW Farm invested tens of millions of dollars to initiate and advance the Project. *Id.* ¶ 21. 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 wells. *Id.* And, UW Farm made an initial $200,000 payment to the District under the well assistance program agreement. *Id.* ¶ 22.

C. BVGCD raises board member eligibility issues

When BVGCD issued the Permits between April 2019 and September 2023, no one had questioned, nor did anyone have reason to question, the eligibility of any of the eight acting BVGCD directors. *See* Ex. 1, ¶ 24–26, 29; Exs. 1-Q–1-R. In July of 2024, UW Farm learned that BVGCD's counsel, Monique Norman, had inquired into the eligibility of certain members of BVGCD's Board of Directors. Ex. 1, ¶ 23. 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." *Id.*; *see* Tex. Water Code § 36.051.

John Elliot began his role as BVGCD Director in January 2023. Ex. 1, ¶ 24; Ex. 1-Q. According to the District, 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 began his role as BVGCD Director in January 2023. Ex. 1, ¶ 25; Ex. 1-Q. According to the District, 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 his role as BVGCD Director in January 2021. Ex. 1, ¶ 26; Ex. 1-R. According to the District, Zeig accepted a role as Councilman for the City of Franklin on or around January 2023, two years into his four-year term as a BVGCD Director.

On July 16, 2024, BVGCD published on its website a list of BVGCD meetings and hearings that it determined were potentially impacted by these alleged ineligibility issues. Ex. 1, ¶ 27; Ex. 1-S. 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. *Id.* 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. *Id.* 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, as well as permits for the City of Bryan and the City of College Station. *Id.*

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 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. Ex. 1, ¶ 28; Ex. 1-S.

According to Plaintiff, because three board members were purportedly ineligible to serve as BVGCD directors for a period between January 2023 to approximately July 2024,[6] most hearings and board meetings during this time did not involve enough eligible BVGCD directors to constitute a quorum,[7] and therefore every BVGCD action taken during those hearings and meetings simply never happened. Under Plaintiff's logic, because all Board actions, permit approvals, and rulemakings taken at these meetings were invalid, the applications underlying the Permits and all other applicants' permits are still "pending," and Plaintiff may therefore still submit a timely contested case hearing request on those Permits.

Plaintiff's argument fails because it defies law, logic, and sound public policy. The Court should render summary judgment in Intervenors' favor and dismiss Plaintiff's mandamus action with prejudice. For reference, the Permits are described in Exhibit 4, and a timeline of relevant events is shown in Exhibit 5.

III. LEGAL STANDARDS

Under Texas Rule of Civil Procedure 166a(c), traditional summary judgment is proper where the movant establishes that there is no genuine issue of material fact on at least one essential

[6] 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.

[7] 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. *See also* Tex. Spec. Dist. Code § 8835.055 ("A majority vote of a quorum of the board is required for board action").

element of the cause of action asserted against it and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *see Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017). If the movant meets this burden, the burden then shifts to the non-movant to raise a fact issue precluding summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

"A writ of mandamus will issue to compel a public official to perform a ministerial act." *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991) (citation omitted). Ministerial acts are those "where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015). A writ of mandamus is appropriate only to "compel the performance of a clear legal duty." *Phillips v. McNeill*, 635 S.W.3d 620, 628 (Tex. 2021); *Wortham v. Walker*, 128 S.W.2d 1138, 1151 (Tex. 1939) ("Mandamus will not lie to establish as well as enforce a claim of uncertain merit"). Mandamus "is intended to be an extraordinary remedy, available only in limited circumstances," and will issue "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies." *Walker*, 827 S.W.2d at 840.

IV. ARGUMENTS AND AUTHORITIES

Plaintiff's entire case hinges on this Court embracing fiction. Plaintiff is correct that, following the receipt of a timely written request for a contested-case hearing, the District "*shall* schedule" a preliminary hearing, and if requested "*shall* contract with [SOAH]" to conduct that hearing. Tex. Water Code §§ 36.4051, 36.416 (emphases added). And if Plaintiff had submitted a timely request, the District would have conducted its ministerial duty and set hearings on those requests years ago. The problem is that Plaintiff never did: In April 2019, October 2022, and

February, March, and September 2023, while the District was holding permit hearings and board meetings, Plaintiff was nowhere to be found. Now, years later, there is no ministerial act left for the District to perform.

The fiction Plaintiff endorses is that the relevant permit hearings and board meetings and all the investment and reliance taken upon them simply never happened. Amended Petition ¶ 21 ("Because the board has yet to consider the applications on the [Permits] at a duly noticed meeting attended by a quorum of the board, there have been no permit or board hearings on these permit applications."). Under Plaintiff's theory, the District did not act *at all* during the hearings and meetings impacted by alleged ineligibility—all such board actions (including the purchase of a commercial building, changes to personnel policies, large equipment purchases, and month-to-month actions like adopting minutes and financial reports) were invalid. Under this logic, Plaintiff asks the Court to ignore Intervenors' final, signed, in-hand permits and pretend that their underlying applications are still pending before the District.

There is, of course, settled law dating all the way back to Texas's founding era that closes the book on Plaintiff's fiction. Under the *de facto* officer doctrine, a governing body's actions are not retroactively invalid because they are taken by an officer whose appointment was arguably invalid. "For the good order and peace of society," the actions and authority of *de facto* officers are "to be respected and obeyed." *Norton v. Shelby County*, 118 U.S. 425, 441 (1886). This doctrine takes root in public necessity—without it, "chaos [] would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question." *Ryder v. United States*, 515 U.S. 177, 180–81 (1995).

The District and its directors followed state law and District rules in scheduling hearings on the Permits, properly noticing those hearings, and evaluating and granting the Permits in board

meetings following those hearings. Plaintiff's September 5, 2024 contested case hearing request is *years* too late. No "clear legal duty" exists for the Court to compel the District to act through the extraordinary remedy of a writ of mandamus—no duty exists at all. Plaintiff's mandamus action fails as a matter of law, and the Court should grant summary judgment in Intervenors' favor.

A. Plaintiff's legal fiction contradicts long-settled precedent

Plaintiff has conjured a theory to upset the orderly administration of the District's permitting process. According to Plaintiff, in the year-and-a-half-long period where three members of the District's Board held two governmental positions (and any potential problem was unknown to the public and the BVGCD), certain meetings and hearings lacked a quorum, and every action taken in those meetings were invalid. Because the *de facto* officer doctrine insulates the Board's decision-making during this time, third parties (like Plaintiff) cannot collaterally attack those decisions. Additionally, underlying Plaintiff's mandamus claim is the implicit request that the Court determine the ineligibility of the three BVGCD board members, which is a challenge that can be brought only by the attorney general, or the appropriate county or district attorney, in a quo warranto proceeding. There is no genuine dispute of material fact and Plaintiff's mandamus claim fails as a matter of law.

1. The *de facto* officer doctrine insulates an officer's actions from third-party collateral attack despite any supposed irregularity with the officer's eligibility to serve.

"For over five hundred years, courts have used the *de facto* officer doctrine to immunize from attack by private parties the validity of certain acts of public officers who exercise the duties of an office under color of an appointment or election to that office but whose lawful and legal title or authority is defective." *The* De Facto *Officer Doctrine*, 63 Colum. L. Rev. 909, 909 (1963). This doctrine predates American law and has been adopted and applied in Texas courts since its founding era. *See, e.g.*, *Cox v. Houston & T.C. Ry. Co.*, 4 S.W. 455, 457 (Tex. 1887).

Under the *de facto* officer doctrine, an officer's actions are not retroactively invalid merely because they are taken by an officer whose appointment is later deemed erroneous by an intervening circumstance. *Rivera*, 948 S.W.2d at 794 (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)). Rather, those actions are valid at the time they are made, and they cannot be retroactively invalidated by collateral attack. *See* Op. Tex. Att'y Gen. No. KP-0287 (2020) ("[T]heir 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.'").

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. "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." Op. Tex. Att'y Gen. No. JM-874 (1988).

A public official becomes an officer *de facto* under several circumstances, including when he acts:

> Under color of a known election or appointment, void ***because the officer was not eligible***, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, ***such ineligibility, want of power, or defect being unknown to the public***.

Rivera, 948 S.W.2d at 794 (formatting revised) (emphasis added); *see also* Op. Tex. Att'y Gen. No. JM-874 ("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.") (emphasis added).

This principle derives from the conclusion that "it would be unreasonable on all occasions to require the public to inquire into the title of an officer." *Forwood*, 209 S.W.2d at 434–35. "For the good order and peace of society," *de facto* officers' "authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined." *Norton*, 118 U.S. 425, 441 (1886).

2. A quo warranto proceeding is the only means for challenging a public officer's authority to act.

Underlying Plaintiff's lawsuit is the notion that the three BVGCD directors were ineligible to hold office, which is a determination that can be made only through a writ of quo warranto. A writ of quo warranto is "an extraordinary remedy available to determine disputed questions about the proper person entitled to hold a public office and exercise its functions." *State ex rel. Angelini v. Hardberger*, 932 S.W.2d 489, 490 (citing *State ex rel. R.C. Jennett v. Owens*, 63 Tex. 261, 270 (1885)); *see also Banton v. Wilson*, 4 Tex. 400, 406 (1849) (Hemphill, C.J.) (discussing the *quo warranto* remedy and its adoption in Texas). Quo warranto is the *exclusive* remedy for challenging an officer's title. *See Alexander Oil Co. v. City of Seguin*, 825 S.W.2d 434, 438 (Tex. 1991); *Lewis v. Drake*, 641 S.W.2d 392, 395 (Tex. App.—Dallas 1982, no writ).[8] Only the Texas attorney general, or a proper county or district attorney, may petition for a writ of quo warranto. Tex. Civ. Prac. & Rem. Code § 66.002.

Plaintiff's mandamus action requires the Court to determine that the three officers were ineligible—an issue that can only be determined through a writ of quo warranto, not through Plaintiff's private challenge. Moreover, "while quo warranto may be used to challenge the right

[8] This is consistent with historical applications of the *de facto* officer doctrine. *See* Albert Constantineau, *A Treatise on the De Facto Officer Doctrine* § 451, at 635 (1910) (quo warranto is the exclusive method of determining disputed questions of title to office).

of an officer or official to hold office, it may not be used to challenge the legality of their ***action*** when in office." *In re Miears*, No. 04-09-00700-CR, 2009 WL 3856192, at *1 (Tex. App.—San Antonio Nov. 18, 2009) (orig. proceeding) (emphasis added) (citing *Newsom v. State*, 922 S.W.2d 274, 278 (Tex. App.—Austin 1996, writ denied). Thus, questions about an officer's *title* may be challenged in quo warranto proceedings, but that officer's *actions* cannot be challenged because of the *de facto* officer doctrine.

3. The District's issuance of the final Permits was valid because all of the directors were at least *de facto* officers at the time the Permits were finalized.

According to Plaintiff, three of the District's directors held secondary public offices during the period at issue here, thereby rendering them ineligible to serve on the BVGCD Board. Because of this alleged ineligibility issue, Plaintiff surmises that the BVGCD Board did not have a quorum for many of its hearing and meetings between January 2023 and approximately July 2024. Plaintiff thus contends that "there have been no permit or board hearings on the [applications for the Permits]." Amended Petition ¶ 21.

This contention fails under the *de facto* officer doctrine. The three directors in question were duly appointed by the Robertson County Commissioners' Court, attended the relevant meeting and hearings as BVGCD directors, and acted under color of authority when hearing and issuing the Permits. Ex. 1, ¶¶ 24–26, 29; Exs. 1-Q–1-R (three directors duly sworn as BVGCD directors); Ex. 1-T (BVGCD profile pages for each director). In each relevant hearing and meeting for the Permits, BVGCD announced that a quorum was present, and all three officers acted under color of authority in sitting and acting as BVGCD directors. Ex. 1-N. The District publicly listed, and continues to list, Elliot, Kennedy, and Zeig as acting BVGCD directors. Ex. 1-T. If there was any discrepancy in those Directors' appointments or continued service on the BVGCD Board (and such discrepancy would need to be adjudicated in a quo warranto proceeding, not

through Plaintiff's private challenge), each still served "under color of a known election or appointment" and any ineligibility was "unknown to the public." *Forwood*, 208 S.W.2d at 794.

The Directors' purported statutory ineligibility under Section 36.051 of the Texas Water Code is precisely the type of ineligibility that has traditionally fallen within the *de facto* officer doctrine. *See, e.g.*, Op. Tex. Att'y Gen. No. LO-88-103 (1988) (concluding board member was *de facto* officer where her family tie to 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). And, Plaintiff's lawsuit is precisely the type of second-guessing of public actions that the *de facto* officer doctrine prohibits. *Orix Capital Markets, LLC v. Am. Realty Tr., Inc.*, 356 S.W.3d 748, 754 (Tex. App.—Dallas 2011, pet. denied) (the doctrine "protects the public and individuals who have dealings with the official by ensuring that the official's acts will subsequently be recognized," and prevents challenge to those actions "incidentally in litigation between other parties").

Plaintiff may respond that it is not necessarily the Directors' actions at issue, but instead that their invalid appointments prevented a quorum, therefore rendering all of the Board's actions void. Again, Texas law squarely forecloses this argument, recognizing no difference between the action itself and the quorum sufficient to take certain actions. *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). And this remains true regardless of the District's ratification efforts, which do not bear at all on whether the Directors originally acted as *de facto* officers. *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). Plaintiff's collateral attack fails.

B. The Court should grant summary judgment on Intervenors' claim for declaratory relief because the District properly issued the permits and Plaintiff failed to timely request a hearing on those permits.

Because the *de facto* officer doctrine precludes Plaintiff's sole argument for why it could bring an after-the-fact contested case hearing request, no genuine dispute of material fact exists. The District properly issued the Permits, and Plaintiff's September 5, 2024 request, or any other request made after BVGCD issued the Permits, is untimely. Plaintiff's mandamus claim fails as a matter of law and Intervenors are entitled to summary disposition on their declaratory judgment claim to affirm the Permits' validity. *See* Tex. Civ. Prac. & Rem. Code § 37.003 ("A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.").

1. The District properly issued the Permits.

The Texas Water Code vests primary authority for groundwater management in groundwater conservation districts "in order to protect property rights." Tex. Water Code § 36.0015. To that end, the Water Code gives districts the power to make rules regarding the application process for obtaining a groundwater permit and for contesting that application. *Id.* § 36.415. If a "request for a contested case hearing [is] filed in accordance with rules adopted under Section 36.415," the district must "schedule a preliminary hearing" to address that request. *Id.* § 36.4051.

The District here has adopted such rules. Under Rule 14.3.5(a), "[a]ny 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."

Ex. 3 at 50 (BVGCD R. 14.3.5(a)); *see* BVGCD R. 14.3.5 (2024) (recently amending the rule to make the deadline 5 p.m. of the day before the hearing). Therefore, to challenge the issuance of a permit application, a party must provide notice and request a contested case hearing before the date of the hearing on the permit application. *See id.* When the District does not receive a timely contested case hearing request, it processes the application as uncontested. *Id.* R. 14.3.

In April 2019, October 2022, and February, March, and September 2023, UW Farm and the Project Participants followed all District processes to receive production and transport permits. In each instance, the applications were filed, hearings were properly scheduled, and no person "provide[d] written notice of [a] request" to protest the permit application or request a contested case hearing. *See id.* R. 14.3.5(a); Ex. 1, ¶ 14, Exs. 1-L–1-M. Thus, the applications proceeded as uncontested. Ex. 1-N. The Board then set those applications for hearings and considered an extensive list of factors, including whether the applications were complete, whether they were legally sufficient, and whether they were protective of groundwater quality and consistent with the public welfare. Ex. 3 at R. 8.3; Ex. 1-N. The Board ultimately approved each permit in each meeting immediately following the scheduled hearing, and the General Manager signed, issued, and mailed the final, signed Permits to UW Farm and the Project Participants. *See* Exs. 1-A–1-J.

The District complied with its rules and the Texas Water Code in approving the applications and issuing the Permits. As a result, the Permits are legally valid and effective as of their dates of issuance, authorizing the production and transport of groundwater consistent with their facial terms and conditions. Accordingly, the Court should grant summary judgment on UW Farm's declaratory relief claim consistent with this conclusion.

2. Plaintiff's September 5, 2024 contested case hearing request is untimely.

The Court should further declare that Plaintiff's request for a contested case hearing is untimely as a matter of law, and that the District has no legal duty to set a preliminary hearing to hear that request. Under the Texas Water Code, the District has a duty to set a preliminary hearing only for requests "***filed in accordance with rules adopted under Section 36.415***." Tex. Water Code § 36.4051 (emphasis added). Section 36.415, in turn, requires the District to "establish the deadline" for filing a contested case hearing request. Under BVGCD Rule 14.3.5(a), the window for providing notice and formally contesting the permit applications closed "five (5) calendar days prior to the date of the hearing[s]." Plaintiff never filed any notice within those timeframes. Ex. 1, ¶ 14. In fact, even when suspending reality and accepting Plaintiff's legal fiction that no hearings occurred, the plain language of BVGCD 14.3.5(a) requires a written hearing request before the ***date*** of a hearing, which is set by the General Manager by letter to the applicant, not by action of the Board. Ex. 3 at 50; Ex. 1-L (General Manager setting dates and signing notices for hearing dates on the Permits). Pretending that the hearings did not occur does not solve the issue that the *date of the hearing* was set and passed without a written protest by Plaintiff.

Plaintiff "formally contest[ed] each of the permit applications" at issue here in its September 5, 2024 contested case hearing request. Ex. 1, ¶ 30; Ex. 1-U. Because this request arrived long after the dates of the hearings on and issuance of those permit applications—and indeed, years after Intervenors, as well as Intervenors' partners and customers, began operating and investing in reliance on those final Permits—Plaintiff's request was untimely. Therefore, Plaintiff's request was not "filed in accordance with rules adopted under Section 36.415," *i.e.*, BVGCD Rule 14.3.5, and thus the District has no obligation to set a preliminary hearing. The Court should grant summary judgment on UW Farm's declaratory relief claim on this as well.

***

There is no genuine dispute of material fact that the Directors were *de facto* officers acting under color of law. The *de facto* officer doctrine validates the prior-issued Permits and conclusively defeats the outcome that Plaintiff seeks, both to excuse its own untimeliness and to invalidate the long-final Permits. The Court should therefore grant summary judgment in Intervenors' favor, deny Plaintiffs' mandamus claim, and declare that (a) the Permits were and remain legally valid and effective as their dates of issuance; (b) the Permits authorize production and/or transport of groundwater as described on the permit faces; (c) any alleged ineligibility of certain members of the BVGCD Board does not otherwise invalidate the Permits; and (d) Plaintiff's request for contested case hearing on the Permits was untimely and improper.

V. ATTORNEYS' FEES

Intervenors are entitled to recover from Plaintiff reasonable and necessary attorneys' fees on their declaratory judgment claim.[9] Tex. Civ. Prac. & Rem. Code § 37.009 ("In any proceeding under [the Declaratory Judgment Act], the court may award costs and reasonable and necessary attorney's fees as are equitable and just."). Here, awarding Intervenors attorneys' fees is equitable and just where Plaintiff brought a stale mandamus action, in clear violation of long-established Texas law, that challenges Permits the District had issued to Intervenors years prior. The principles of equity further tip in Intervenors favor on attorneys' fees where Plaintiff, in filing this lawsuit and interfering with Intervenors' customers, has already threatened the performance of contracts relying on the Permits, causing Intervenors to expend additional costs, fees, and resources to defend the Permits from Plaintiff's baseless mandamus claim. Intervenors request that the Court's judgment authorize Intervenors to recover attorneys' fees from Plaintiff. *See Tex. Educ. Agency*

[9] Intervenors will support the quantum of such attorneys' fees in a later submission.

v. Leeper, 893 S.W.2d 432, 446 (Tex. 1994) (Declaratory Judgment Act "waives governmental immunity" for "awards of attorney fees"); *Tex. Tel. Ass'n v. Pub. Util. Comm'n of Tex.*, 653 S.W.3d 227, 258 (Tex. App.—Austin 2022, no pet.) (no government immunity for attorneys' fees "ancillary to the award of prospective relief" under Declaratory Judgment Act); *City of Arlington v. Randall*, 301 S.W.3d 896, 908 n.7 (Tex. App.—Fort Worth 2009, pet. denied) ("request for attorney's fees under the Declaratory Judgment Act is not barred by governmental immunity").

VI. CONCLUSION

Intervenors respectfully request that the Court summarily dispose of Plaintiff's claim for mandamus relief, grant declaratory relief to Intervenors as described above, and dismiss Plaintiff's action with prejudice.

Dated: November 8, 2024

Respectfully submitted,

BAKER BOTTS L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 8, 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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