



publicly stated the exact basis for its determination). To address this issue, the BVGCD Board ratified those prior actions that did not require that BVGCD hold a public hearing and on September 12, 2024, adopted a rule, BVGCD Rule 8.3(j), that delegated to the BVGCD General Manager the authority to administratively approve, without a public hearing, pending permit applications if certain qualifications were met, including a requirement that no written notices of intent to contest the applications pursuant to BVGCD Rule 14.3.5 had been received by BVGCD. Prior to the adoption of this rule and prior to any action on the UW Intervenors' disputed permit applications by the General Manager, TAMUS filed a written notice of intent to contest the disputed permit applications (TAMUS' request for contested case hearing).

3. TAMUS now seeks a writ of mandamus from the Court directing the Brazos Valley Groundwater Conservation District ("BVGCD") to perform its mandatory duty (under Texas Water Code § 36.4051, and BVGCD Rules 14.2, 14.3, 14.35, 14.4, and 14.5) to schedule a preliminary hearing to hear TAMUS' requests for contested case hearing and determine whether TAMUS has standing to make its requests and whether justiciable issues related to the applications have been raised. BVGCD Rule 14.3(c). Additionally, TAMUS seeks an injunction preventing the BVGCD General Manager from administratively issuing permits based on the disputed permit applications. TAMUS' suit is based on BVGCD's rules and Chapter 36 of the Texas Water Code, and the indication in BVGCD's adoption of BVGCD Rule 8.3(j) that the BVGCD Board had concluded that the disputed applications had not previously been lawfully ruled upon. TAMUS' lawsuit does not collaterally attack any decision of the BVGCD Board.

4. On November 5, 2024, the UW Intervenors filed a response to TAMUS' suit. Included in response are causes of actions seeking declaratory judgments that the disputed permit applications were validly issued by BVGCD when they were originally considered because the

alleged ineligibility of certain members of the BVGCD Board does not invalidate the prior actions on the applications and that TAMUS' requests for contested case hearing on the disputed applications were untimely and improper. UW Intervenors argue that the "de facto officer" doctrine excuses the actions of potentially ineligible Board members regardless of the basis for their ineligibility.

5. The "de facto officer" doctrine is a common-law doctrine to judicially validate actions taken by those acting as public officers under some appearance or color of title, when in fact, the officer is not eligible to serve. *Germany v. Pope*, 222 S.W.2d 172, 176 (Tex. Civ. App. - Fort Worth 1949, writ ref'd n.r.e.). The de facto officer doctrine, importantly, does not apply if the basis for ineligibility arises from provisions of the Texas Constitution, such as Article 16, Section 40 (prohibition of dual office holding). *Pruitt v. Glen Rose Indep. Sch. Dist. No. 1*, 126 Tex. 45, 50, 84 S.W.2d 1004, 1007 (Comm'n App. 1935); *Odem v. Sinton Indep. Sch. Dist.*, 234 S.W. 1090, 1092 (Tex. Comm'n App. 1921); Tex. Att'y Gen. Op. JM-423 (1986). The test for whether an officer is a de facto officer may also require an examination of the strength of the appearance or color of title and of the motives of the officer to continue serving while ineligible. *Odem v. Sinton Indep. Sch. Dist.*, 234 S.W. at 1092\_ ("a person cannot be a de facto officer unless the color of title under which he holds office is fair. . ."). UW Intervenors have neither alleged nor established facts supporting a determination that BVGCD's ineligible board members qualify as "de facto officers".

### **Plea to the Jurisdiction**

6. This Court lacks subject matter jurisdiction to hear UW Intervenors' causes of action for declaratory judgment because UW Intervenors' causes of action are not ripe. The

BVGCD Board has not affirmatively concluded that the UW Intervenors' applications were not validly approved.

7. This Court further lacks subject matter jurisdiction to hear UW Intervenors' causes of action because UW Intervenors failed to exhaust administrative remedies set out in BVGCD rules.

8. This Court further lacks subject matter jurisdiction to hear UW Intervenors' causes of action because the requested relief (the validity of the BVGCD Board's prior actions and the validity of TAMUS' request for contested case hearing) falls within the original and/or exclusive jurisdiction of the BVGCD Board.

9. The BVGCD Board has not conclusively stated that its prior permit actions are invalid and, even if it had, the Board has not clearly stated a basis for the ineligibility of the Board members. This will happen when the BVGCD Board has had a chance to rule on TAMUS' contested case hearing request, which pursuant to BVGCD Rules 14.3(c), will occur "following a preliminary hearing." Any challenges to the BVGCD Board's order on the validity of TAMUS' request for contested case hearing and the validity of its prior actions (an order which does not yet exist) would be subject to judicial review under Texas Water Code §§ 36.251-.253. Because UW Intervenors have not exhausted their administrative remedies in that they have not given the BVGCD Board the opportunity to finally determine whether the Board's prior actions were invalid and to determine whether TAMUS' requests for contested case hearing are valid, UW Intervenors' cause of actions are barred. *Tex. Water Code § 36.251(c)*; *Tex. Court Reporters Certification Bd. v. Esquire Deposition Services, L.L.C.*, 240 S.W.3d 79, 92 (Tex. App.—Austin 2007, no pet.); *Real-Edwards Conservation and Reclamation Dist. v. Save the Frio Foundation, Inc.*, No. 04-09-00502-CV, 2010 WL 547045, at \*6 (Tex. App.—San Antonio Feb. 17, 2010, no pet.).

WHEREFORE, PREMISES CONSIDERED, Brazos County Entities respectfully request that this Court dismiss UW Intervenors' claims for want of jurisdiction, and that Brazos County Entities have all other relief, at law or in equity, to which they are entitled.

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Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the following attorneys via the Court's electronic service system on this the 21<sup>st</sup> day of November 2024:

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