CAUSE NO. 24-002626-CV-472

TEXAS A&M UNIVERSITY SYSTEM, Plaintiff and Brazos County, City of Bryan, and City of College Station, Intervenor-Plaintiffs v. BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT AND ITS GENERAL MANAGER ALAN DAY, Defendants and UW BRAZOS VALLEY FARM LLC, CULA D'BRAZOS LLC, RH2O LLC, L. WIESE MOORE LLC, CLIFFORD A. SKILES III, and JAMES C. BRIEN, Intervenor-Defendants	§ § § § § § § § § § § § § § § § §	IN THE DISTRICT COURT BRAZOS COUNTY, TEXAS 472nd JUDICIAL DISTRICT

DEFENDANTS BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT AND ITS GENERAL MANAGER'S JOINT RESPONSE TO INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants Brazos Valley Groundwater Conservation District and its General Manager (collectively, the "District") jointly file this response to the motion for summary judgment filed by Intervenor-Defendants UW Brazos Valley Farm LLC, Cula d'Brazos LLC, RH2O LLC, L. Wiese Moore LLC, Clifford A. Skiles III, and James C. Brien (collectively, "UW Landowners"), and respectfully show as follows:

I. SUMMARY OF THE RELEVANT ISSUES AND THE DISTRICT'S POSITION

1. The UW Landowners' motion requests the Court to apply a common-law remedy to validate groundwater-permitting decisions made by the District at

public hearings during which certain District Directors were not eligible to serve. The relevant facts about (i) the basis for the Directors' ineligibility and (ii) when that ineligibility compromised decisions of the District's Board of Directors are undisputed. However, the UW Landowners dispute is whether the Texas A&M University System ("Texas A&M") *timely* filed its written notices of intent to contest 33 (thirty-three) of the UW Landowners' groundwater permit applications. Factually, there is no dispute that Texas A&M did file notices in Summer 2024, after the District's 2023 decisions on the 33 permit applications, and before the District attempted to rectify the Board-ineligibility issues by adopting a new rule in September 2024 (the "Ratification Rule" or "Rule 8.3(j)").

2. At the crux of the UW Landowners' pending motion is whether the Ratification Rule was necessary—or even effective—to ratify the decisions on the 33 permit applications at issue. If effective, and if Rule 8.3(j)(2)(c) is interpreted to afford an opportunity to protest, then Texas A&M's protest is timely and the District must set a hearing on the 33 permit applications. If the UW Landowners prevail in this lawsuit and it is held that the *de facto* officer doctrine applies, then the Ratification Rule is ineffective and those 33 permit decisions are valid without further action by the District's Board of Directors.

3. The District's position is evident by the action taken to adopt the Ratification Rule. *First*, the District does not believe that it can *sua sponte* elect to adhere to the *de facto* officer doctrine because of the express, mandatory, and clearly applicable statutory language governing how the District must handle

Director ineligibility and a related inability to meet a minimum quorum of the Board of Directors. *See* Tex. Water Code §§ 36.051 and 36.053; Tex. Spec. Dist. Code § 8835.055; Tex. Gov't Code § 552.001. As a political subdivision of the state and conservation district created under the authority of Article XVI, Section 59 of the Texas Constitution, this Constitutional provision is clear that the District is bound to exercise only those rights conferred by law. The District can exercise no authority that has not been clearly granted by the legislature. *Tri-City Fresh Water Supply Dist. No. 2 v. Mann*, 142 S.W.2d 945, 948 (Tex. 1940). Applying this Constitutional provision and the *Mann* decision when examining the extent of a groundwater district's authority, the Amarillo Court of Appeals held that the power of a groundwater district is limited by the terms of applicable statutes and that a district can exercise no authority that the legislature has not clearly granted. *S. Plains Lamesa R.R., Ltd. v. High Plains Underground Water Conservation Dist.*, 52 S.W.3d 770, 776 (Tex. App.—2001 no pet.) (citing *Mann*, 142 S.W.2d at 948)). Once the dual-office holding issues were discovered, the District observed and strictly followed the statutory mandate of the above-cited statutes by recognizing the ineligibility of three Directors under Section 36.051 of the Texas Water Code, the inability to meet the minimum statutory requirement for a Board quorum under Section 551.001(4) and (6) of the Texas Government Code, and the minimum vote-count required for Board action under Section 8835.055 of the District's enabling act, the Texas Special District Local Laws Code.

4. It is undisputed that the three Directors were ineligible to serve. It is undisputed that the three Directors' presence was necessary to make quorum and/or approve the motions at the public hearings on the 33 applications at issue. *See* UW Landowners' motion at pp. 9-11, which cited many of the same statutes above (Tex. Water Code §§ 36.051 and 36.053 and Tex. Spec. Dist. Code § 8835.055). The UW Intervenors' recitation of the timeline and nature of the disqualification of Director Chris Zeig is accurate: by accepting a seat on City of Franklin's Council, Director Zeig was automatically disqualified and vacated his office as a Director of the District on or about January 2023, before the decisions on the 33 applications. *See id* (relying on statutes cited above). The UW Intervenors are not exactly correct in describing the timeline and basis for Director John Elliott's and Director Jeff Kennedy's ineligibility, although they are correct that both Directors were ineligible to serve at the time of the decisions on the 33 applications. Directors Elliott and Kennedy were already serving on the Robertson Central Appraisal District and Appraisal Review Board of the Robertson Central Appraisal District, respectively, prior to and at the time of their appointment to the District's Board. Consequently, pursuant to Section 36.051(b) and (c) of the Texas Water Code, "[a] member of a governing body of another political subdivision is ineligible for appointment or election as a director."

5. *Second*, the District believes that even if the *de facto* officer doctrine could apply, the District cannot apply it without this Court's action or another court's decision that is on point. To be clear, at the present time, no case law exists

(i) that overrides the above-cited statutes that are expressly applicable to the District and (ii) that, instead, extends the *de facto* officer doctrine to groundwater districts. The District cannot disregard these statutory mandates and is bound to follow statutory law governing Director ineligibility and quorum requirements, which is why the District took action to adopt the Ratification Rule. That rule, Rule 8.3(j), was designed to maintain the status quo by ratifying all the District's decisions made when its Board's quorum and actions were compromised by Director ineligibility.

6. It is Rule 8.3(j)(2)(c) that Texas A&M interpreted to provide an opening to file its protest. Although the Ratification Rule was adopted to ratify, not restart, the permitting process on affected permit applications, the District does recognize the plain-meaning of the rule. As expressly set forth in Rule 8.3(j), the District was authorized to streamline permitting under Section 36.114(b) and (c) of the Texas Water Code by not subjecting certain applications to hearings and by allowing permits to be automatically granted "by rule." On its face, the express language of Rule 8.3(j) sets forth such a process of "permitting by rule" without a hearing for those permit applications hung up by Director ineligibility issues, including the 33 applications as well as dozens of other applications. To qualify, an application requesting more than 150 acre-feet of water, which includes the UW Landowners' applications, had to meet all three (3) requirements:

> *(1)* application was deemed administratively complete by the District (Rule 8.3(j)(2)(a)) → it is *undisputed* that UW Landowners' 33 applications *met this requirement*

(2) District provided public notice(s) of the permit application(s) under Rules 14.1 and 14.2 during the time period from January 1, 2021, to July 1, 2024 (Rule 8.3(j)(2)(b)) → it is *undisputed* that UW Landowners' 33 applications *met this requirement*

(3) "the District did not receive any written notices of intent to contest the permit or permit amendment application(s) under [R]ule 14.3.5(a)" (Rule 8.3(j)(2)(c)) → this is a *disputed mixed question of fact and law*

After adoption of Rule 8.3(j), no hearings were to be held on the types of applications such as the UW Landowners' and, consequently, Texas A&M could not have timely filed a protest "before the permit hearing," in accordance with Rule 14.3.5(a). But *before* Rule 8.3(j) was adopted and took effect, the District believed that it would have had to reschedule hearings on applications affected by Director ineligibility and process those applications in accordance with the District's permitting rules. *See, e.g.,* District Rules 7.2, 8.3-8.9, 10.1-3, 14.1-14.5. With that in mind, Texas A&M does appear to have timely satisfied Rule 14.3.5(a) by filing its request for contested case hearing "before the permit hearing" [that would have been rescheduled and held under the then-existing rules]. Consequently, the UW Landowners' 33 permit applications do not satisfy the requirement in Rule 8.3(j)(2)(c) that "the District did not receive any written notices of intent to contest the permit or permit amendment application(s) under [R]ule 14.3.5(a)."

7. At the time of the rulemaking effort to rectify the Director ineligibility issues, it is undisputed that the UW Landowners had other pending permit applications before the District that had been properly protested and referred to

the State Office of Administrative Hearings. At that time, all of the parties to this lawsuit were engaged in informal settlement discussions. Immediately after Texas A&M initiated this lawsuit, Texas A&M, the District, and the UW Landowners coordinated for Texas A&M and the District to enter Rule 11 agreements to abate further activity in this lawsuit while settlement discussions were underway.

8. The District did not set the UW Landowners' 33 permit applications for hearing and did not take any other formal action *because settlement discussions were underway, the Rule 11 agreements were in effect, and now, as the parties have reached an impasse in settlement discussions, because the UW Landowners, the Cities, and the County have intervened and the hearing on summary judgment set for December 6, 2024.* The District's Board of Directors has not taken formal action and announced its position on summary judgment other than as indicated in this response.

9. If the Court agrees with the UW Landowners' authorities and rules that it is appropriate to apply the *de facto* officer doctrine in this circumstance, the District will adhere to the judgment to observe that the UW Landowners' 33 permits are validated. Alternatively, if the Court agrees with Texas A&M's position and determines that the *de facto* officer doctrine does not apply in this circumstance, the District will not apply this common law remedy and will, instead, process the 33 applications in accordance with the District's permitting rules. *See, e.g., supra,* District Rules 7.2, 8.3-8.9, 10.1-3, 14.1-14.5. Recognizing that there is a disagreement about the interpretation of Rule 8.3(j)(2)(c), the District will also

observe the Court's ruling as to whether Texas A&M has a right to a hearing on the 33 permit applications.

II. PRAYER

WHEREFORE, PREMISES CONSIDERED, the District respectfully requests that the Court direct the District to act in accordance with the applicable statutes in the Texas Government Code, Texas Special District Local Laws Code, and Texas Water Code, and determine whether any common law remedies apply. The District requests any such further relief, whether in law or in equity, whether special or general, to which the District may show itself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2024, a true and correct copy of the foregoing document was served in accordance with the Texas Rules of Civil Procedure on the following counsel of record:

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