CAUSE NO. 24-002626-CV-472

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

**PLAINTIFF'S RESPONSE TO INTERVENOR'S**
**TRADITIONAL MOTION FOR SUMMARY JUDGMENT**

Plaintiff Texas A&M University System ("Texas A&M System" or "Plaintiff") files this Response to Intervenors UW Brazos Valley Farm LLC, Cula d'Brazos LLC, RH2O LLC, L. Wiese Moore LLC, Clifford A. Skiles III, and James C. Brien's (collectively, "UW Intervenors") Traditional Motion for Summary Judgment[1], and respectfully shows as follows:

## SUMMARY

Texas A&M System filed this proceeding asking the Court to issue a writ of mandamus compelling the Brazos Valley Groundwater Conservation District ("District") to refer several contested groundwater permit applications ("UW Intervenors' contested permit applications") to the State Office of Administrative Hearings ("SOAH"). UW Intervenors, a group of applicants intending to siphon over 107,000 acre-feet of water per year out of the Simsboro Aquifer and transport it away from Brazos and Robertson County residents, inserted themselves in the suit to assert a claim for declaratory relief. Three days later, UW Intervenors moved for summary

[1] This response is submitted subject to and without waiving the jurisdictional challenges raised in Texas A&M System's Plea to the Jurisdiction filed on November 21, 2024, and the jurisdictional challenges raised in Intervenors City of Bryan, City of College Station, and Brazos County's Plea to the Jurisdiction filed on November 21, 2024.

judgment on Texas A&M System's claim for mandamus relief and their own claim for declaratory judgment. However, UW Intervenors cannot prove that they are entitled to judgment as a matter of law because the District's duty to refer contested cases to SOAH is ministerial. Further, SOAH must decide several fact issues and determine their impact on UW Intervenors' contested permit applications before this Court can properly review the District's decision, precluding summary judgment on UW Intervenors' request for declaratory relief. The Court should deny UW Intervenors' preemptive and presumptuous motion for summary judgment.

At the outset, UW Intervenors distract the Court from the only legal determination at issue: whether the District is required by law to refer Texas A&M System's challenges to SOAH upon request. UW Intervenors assert that the Court must decide whether Texas A&M System can challenge their permit applications. But that is a decision for SOAH and the District to make, and only for the Court to potentially review after they have done so. Again, the only issue of law pending before the Court is whether the District must refer Texas A&M System's challenges to SOAH upon request. Based on their flawed premise, UW Intervenors make two basic arguments in their motion. First, UW Intervenors argue that the *de facto* officer theory insulates their permit applications from attack. The *de facto* officer theory is irrelevant, however, because it is intended to shield public action from private, collateral attack which is not at issue here. Rather, Texas A&M System contests permit applications that have yet to be officially considered by the District in compliance with its own rules. Second, UW Intervenors argue that Texas A&M System's request for contested case hearings was untimely. This is also immaterial for the Court's consideration – timeliness is a fact issue for the District to decide upon a proposal for decision from SOAH, not for the Court to consider. As such, UW Intervenors' motion should be denied and the Court should defer the adjudication of any merits-based issues to SOAH and the District.

## I. PROCEDURAL BACKGROUND

1.1. On or before August 8, 2024, the District determined that at least three current board members had either been ineligible for appointment to the board at the time of their appointment or had become ineligible since the original appointment date. *See* **Exhibit 1**; **Exhibit 3**. The District further determined that this led to a lack of quorum during at least nine board meetings, invalidating official actions taken by the board at those meetings, including actions pertaining to the UW Intervenors' contested permit applications that are the subject of this proceeding. *See* **Exhibit 1**; **Exhibit 3**.

1.2. Prior to the August 8 meeting, Texas A&M System sent a letter to the District requesting that the UW Intervenors' contested permit applications be referred to SOAH and scheduled for contested case hearings. *See* **Exhibit 4**.

1.3. On September 5, Texas A&M System sent a second written request to the District for the UW Intervenors' contested permit applications to be referred to SOAH. *See* **Exhibit 5**.

1.4. To date, the District has failed or refused to schedule contested case hearings with SOAH as required by statute and the District's rules. Tex. Water Code §§ 36.4051, 36.406(a)(3), 36.416; District Rules 8.3(j)(2)(c), 14.4(c-1)(2).

1.5. Texas A&M System filed this lawsuit against the District seeking a writ of mandamus ordering the District to refer the UW Intervenors' contested permit applications to SOAH and seeking injunctive relief preventing the District's General Manager from unilaterally issuing permits that Texas A&M System had requested be scheduled for contested case hearings.

1.6. Pursuant to a Rule 11 agreement entered between Texas A&M System, the District and its General Manager on September 19, those parties agreed, among other things, to abate the lawsuit and any permit application approval proceedings to allow an opportunity for settlement

discussions to occur among all parties, including the UW Intervenors. The term of that abatement period was subsequently extended by those parties to November 18.

1.7. On November 5, and during the continuation of the abatement period, UW Intervenors filed their Petition in Intervention and inserted themselves into this lawsuit. Three days later, UW Intervenors moved for summary judgment on Texas A&M System's request for a writ of mandamus and UW Intervenors' claim for declaratory judgment, which is now pending before this Court.

## II. SUMMARY JUDGMENT EVIDENCE

2.1. Texas A&M System relies on the following summary judgment evidence:

**Exhibit 1**: BVGCD Board Meeting Agenda - August 8, 2024
**Exhibit 2**: Approved Amended BVGCD Rules - September 12, 2024
**Exhibit 3**: BVGCD Board Meeting Agenda - September 12, 2024
**Exhibit 4**: Letter from TAMUS to BVGCD - August 8, 2024
**Exhibit 5**: Letter from TAMUS to BVGCD - September 5, 2024
**Exhibit 6**: Letter from TAMUS to BVGCD - September 11, 2024

2.2. The above evidence is incorporated herein by reference for all purposes. Pursuant to Texas Rule of Civil Procedure 166a(d), notice is hereby provided of Texas A&M System's intent to use the foregoing exhibits as summary judgment proof. True and correct copies of these exhibits are filed herewith and served upon all parties at least seven (7) days before any hearing on UW Intervenors' motion for summary judgment.

## III. STANDARD OF REVIEW

3.1. A trial court may only grant a motion for summary judgment if the moving party establishes that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). Once the movant establishes that it is entitled to summary judgment, the burden shifts to the non-movant to expressly present those issues that would defeat summary judgment and to

present competent summary judgment proof to establish a genuine issue of fact. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993).

## IV. FACTUAL BACKGROUND

4.1. This past summer, and sometime prior to August 8, 2024, it was determined by the District that "several board meetings had been held and business conducted without quorum present. This was due to eligibility of board members serving at the time." *See* **Exhibit 1**, Agenda Item 5 and related information. Currently, the entire period of the board members' ineligibility is not definitively known to Texas A&M System. While the District has expressly acknowledged that the lack of a quorum extends to at least nine board meetings dating back to February 9, 2023, it may affect board meetings dating back to January 1, 2021. *See* **Exhibit 1**, Agenda Item 5 and related information; **Exhibit 2**, District Rule 8.3(j).

4.2. The business conducted at these meetings includes permit hearings and rulemaking, and the District has acknowledged that the lack of a quorum has invalidated action previously taken by the board. *See* **Exhibit 3**, Agenda Item 10 and related information.

4.3. During this period affected by the lack of a quorum, the board purportedly held permit application hearings for permit applications that make up what is referred to as the Upwell project. In total, the Upwell project includes forty-eight production permit applications and eight transportation permit applications that seek to produce and transport over 100,000 acre-feet of groundwater per year out of the District.[2]

[2] A production permit authorizes the production of a certain quantity of groundwater at a specified rate, and a transport permit authorizes the transport of produced water outside of the District.

4.4. UW Brazos Valley Farm LLC ("Upwell"), a foreign entity that owns land in the District, has itself applied for sixteen production permits[3] and one transport permit[4]—for the transfer of up to 49,999 acre-feet of water per year out of the District. Upwell has also entered into agreements with seven local landowners, who in the aggregate have applied for thirty-two production permits[5] and seven transport permits[6]—for an aggregated transfer of up to 57,718 acre-feet of water per year out of the District. Upwell is a co-applicant to each of the landowners' transport permit applications. The UW Intervenors are a combination of Upwell and several landowner co-applicants on these transport permit applications. The combined amount of all eight transfer permits would exceed 107,000 acre-feet of water per year, and the size and scope of the Upwell project alone has necessitated the need for the District to expand its own offices.

4.5. Pursuant to the Water Code and District Rules, Texas A&M System has the right to request contested case hearings on the permit applications pertaining to the Upwell project. District Rules provide that "[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." District Rule 14.3.5(a); *see also* District Rule 8.3(j)(2)(c). Following receipt of such request, Section 36.4051 of the Water Code[7] mandates that

[3] Upwell production permits, which are: BVDO-0254; BVDO-0255; BVDO-0256; BVDO-0292; BVDO-0293; BVDO-0294; BVDO-0295; BVDO-0296; BVDO-0297; BVDO-0298; BVDO-0299; BVDO-0300; BVDO-0301; BVDO-0302; BVDO-0303; and BVDO-0304.
[4] Upwell transport permit: BVTP-001.
[5] Landowner/Upwell production permits, which are: BVDO-0108; BVDO-0315; BVDO-0316; BVDO-0317; BVDO-0377; BVDO-0378; BVDO-0379; BVDO-0380; BVDO-0381; BVDO-0382; BVDO-0383; BVDO-0384; BVDO-0385; BVDO-0386; BVDO-0387; BVDO-0388; BVDO-0389; BVDO-0394; BVDO-0395; BVDO-0396; BVDO-0397; BVDO-0398; BVDO-0399; BVDO-0401; BVDO-0402; BVDO-0408; BVDO-0409; BVDO-0410; BVDO-0411; BVDO-0412; BVDO-0413; and BVDO-0414.
[6] Landowner/Upwell transport permits, which are: BVTP-002; BVTP-003; BVTP-004; BVTP-005; BVTP-006; BVTP-007; and BVTP-008.
[7] This was the language of District Rule 14.3.5(a) when the Texas A&M System requested a contested case hearing in the present matter. The rule was subsequently amended on September 12, 2024, to allow such requests up to "5:00 p.m. the day before the permit hearing." Notably, the Texas A&M System's request would have been timely under either version.

"[t]he board ***shall*** schedule a preliminary hearing to hear a request for a contested case hearing filed in accordance with rules adopted [by the district]" (emphasis added). The hearing shall be conducted by: (1) a quorum of the board; (2) an individual to whom the board has delegated in writing the responsibility to preside as a hearing examiner over the hearing or matters related to the hearing; or (3) the State Office of Administrative Hearings. District Rule 14.4. Section 36.416 of the Water Code further provides "[i]f requested by the applicant or other party to a contested case, a district ***shall*** contract with the State Office of Administrative Hearings to conduct the hearing" (emphasis added).

4.6. On September 5, 2024, Texas A&M System submitted a written request for contested case hearings to be conducted by SOAH on UW Intervenors' contested permit applications.[8] Because the board has yet to consider the UW Intervenors' contested permit applications at a duly noticed meeting attended by a quorum of the board, there have been no permit or board hearings on these permit applications. As a result, Texas A&M System's written request for contested case hearings is timely. District Rule 14.3.5.

4.7. Nevertheless, the District has failed or refused to act on Texas A&M System's requests. It has not contracted with SOAH to conduct the contested case hearings sought by Texas A&M System, as it is obligated to do pursuant to Section 36.4051(b) and (c) and Section 36.416(b) of the Water Code. The District has not provided a reason for its lack of action on Texas A&M System's requests, nor has the District indicated that it will do so.

4.8. The District did, however, post notice of a regularly scheduled board meeting to be held on September 12 for the purpose of, among other things, potentially taking action on permit

[8] On June 14, 2024, Texas A&M System submitted a written request for contested case hearings to be conducted by SOAH on the Landowner/Upwell transport permits that were identified in the District's agenda for a Public Permit Hearing to be held on June 18, 2024. At the board meeting conducted on September 12, 2024, the District confirmed that it had contracted with SOAH to conduct a contested case hearing on the Landowner/Upwell transport permits.

applications for the Upwell project and on newly proposed amendments to the District Rules that would delegate authority to the District's General Manager to "grant and issue" permits, including permits relating to the Upwell project. By letter dated September 11, Texas A&M System demanded that the District immediately implement Texas A&M System's pending requests for contested case hearings on the UW Intervenors' contested permit applications prior to any action by the board or the General Manager on those permit applications. *See* **Exhibit 6**.

4.9. At its scheduled meeting conducted on September 12, the Board approved the proposed amendments to the District Rules. The District's General Manager, when queried by the board, acknowledged that the District had received timely requests for contested case hearings on the permit applications pertaining to the Upwell project, without specificity. Despite that acknowledgement, however, neither the District nor the General Manager has confirmed or otherwise indicated that Texas A&M System's requests will be implemented by contracting with SOAH for preliminary hearing and further contested case proceedings.

## V. ARGUMENT AND AUTHORITIES

### A. This Court should enforce the District's ministerial duty, not adjudicate the merits of groundwater permit applications.

5.1. In their motion, UW Intervenors ask the Court to deny Texas A&M System's request for mandamus relief and instead litigate the merits of an administrative proceeding. However, the only question of law before this Court is whether the Water Code's express requirement for the District to refer a contested case to SOAH upon request is a ministerial duty. The Texas Supreme Court has held that a writ of mandamus is properly issued under Texas law to compel a public official to perform a ministerial act. *See Phillips v. McNeill*, 635 S.W.3d 620, 628 (Tex. 2021). To succeed on their challenge to the relief sought by Texas A&M System, UW

Intervenors must prove that the Water Code allows the District to employ discretion in determining whether requests for contested case hearings are referred to SOAH, which it does not.

5.2. An act is ministerial when the duty to be performed by the official is set forth with sufficient certainty that nothing is left to the exercise of discretion. *Id*. Stated differently, while the district court's jurisdiction is not used to substitute its discretion for that of a public official, the performance of a clear duty that is ministerial should be mandated by the district court. *Harris County v. Walsweer*, 930 S.W.2d 659, 668 (Tex. App.—Houston [1st Dist.] 1996, writ denied). Conversely, an act is not ministerial if it involves the exercise of discretion or judgment in determining whether the duty exists. *State Bar of Tex. v. Heard*, 603 S.W.2d 829, 832 (Tex. 1980). A writ of mandamus will not issue to compel a public official to perform an act which purely involves the exercise of discretion or judgment. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991).

5.3. The Water Code makes clear that following receipt of a written request for contested case hearing, the District "***shall*** schedule" a preliminary hearing and, if requested, the District "***shall*** contract with [SOAH]" to conduct the preliminary hearing and further proceedings on the contested permit application. Tex. Water Code §§ 36.4051, 36.416 (emphasis added). The statute imposes a clear duty on the District to implement Texas A&M System's requests and provides no room for the exercise of discretion. *See Phillips v. McNeill*, 635 S.W.3d 620 (Tex. 2021) (mandamus issued directing state agency to implement request for administrative hearing before SOAH); *Hawkins v. Cmty. Health Choice*, 127 S.W.3d 322 (Tex. App.—Austin 2004, no pet.) (affirming trial court's issuance of writ of mandamus directing state entity to refer dispute to SOAH where statute provided that the entity "shall refer the claim" to SOAH following receipt of a contested case hearing request).

5.4. In this instance, the District's obligation to refer the permit and permit amendment applications to SOAH for contested case hearings is a clear, non-discretionary duty that the District cannot disregard. The statutory language makes clear that the District shall implement contested case hearing requests by contracting with SOAH to conduct the contemplated preliminary hearing and further proceedings. Despite multiple written requests, however, the District has failed or refused to implement Texas A&M System's pending hearing requests. Accordingly, Texas A&M System is entitled to a writ of mandamus compelling the District to refer the permit and permit amendment applications for the Upwell project to SOAH for preliminary hearing and further contested case proceedings.

5.5. To the extent UW Intervenors complain that the District's duty is not clear because of timeliness issues with Texas A&M System's written request for contested case hearings, UW Intervenors ignore that SOAH provides procedures for dealing with such timeliness disputes. *See* Tex. Admin. Code §§ 155.503, 155.505. Once a contested permit application reaches SOAH, UW Intervenors can argue that the proceeding should be dismissed due to an untimely request. But Texas A&M System's claim for mandamus relief does not put timeliness at issue before this Court, and UW Intervenors' motion for summary judgment on Texas A&M System's claim based on a procedural argument prior to a contested case hearing inherently asks the Court to overstep its role in the judicial review of the administrative process.

5.6. Texas courts have consistently held that "a referral to SOAH [is] non-discretionary." *Hawkins v. Cmty. Health Choice, Inc.*, 127 S.W.3d 322, 326 (Tex. App.—Austin 2004, no pet.). For example, the Austin Court of Appeals affirmed the trial court's issuance of a writ of mandamus ordering the Texas Department of Human Services to refer a contract dispute to SOAH. *Id.* The Department had previously refused to refer the case on grounds that the claimant did not comply with statutory notice provisions for timely requesting the referral. *Id.* In

that case, the Department appealed and argued that "the trial court erred in issuing the writ of mandamus because the agency did not have a clear legal duty to refer the case to SOAH since [the claimant] failed to provide timely notice." *Id.* However, the court properly restrained itself from wading into the merits of the dispute and instead punted the timeliness issue to SOAH: "Again, we do not know whether appellee failed to give timely notice and deciding that issue depends on the resolution of a fact issue. SOAH has the power to find facts and make conclusions of law." *Id.* at 327 (citing Tex. Gov't Code Ann. § 2001.141). The court simply held that "[t]he condition precedent to [the Department's] clear legal duty to perform was receipt of [claimant's] request" and "[o]nce the request was made, [the Department was] compelled to act in compliance with the statute" that required referral to SOAH. *Id.* The same is true here.

5.7. In a last-ditch effort to convince the Court that Texas A&M System's request for mandamus relief should only be granted in extreme circumstances, UW Intervenors cite *Walker v. Packer* to support the proposition that mandamus relief is an "extraordinary remedy". 827 S.W.2d 833, 840 (Tex. 1992). However, that mandamus proceeding considered the standard for appellate courts to compel trial judges who rule with an abuse of discretion, which is entirely different than a writ of mandamus compelling a public official to perform a ministerial act. *Id*. In fact, Texas courts commonly issue the type of writ of mandamus requested by Texas A&M System. *See Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991) (requiring mayor to hold election on question of abolishing city's corporate existence); *Bichsel v. Carver*, 321 S.W.2d 284, 285 (Tex. 1959) (proceeding brought to direct chief of police to reinstate member of police force).

5.8. For this claim to be dismissed on summary judgment, the Court must determine that UW Intervenors are entitled to judgment as a matter of law by fully adjudicating the merits of their groundwater permit applications and the timeliness of Texas A&M System's request for contested case hearings. However, the District's obligation to refer applications to SOAH after

receipt of a request for a contested case hearing under Chapter 36 of the Water Code is a purely ministerial duty. Thus, UW Intervenors are not entitled to judgment as a matter of law on Texas A&M System's claim for mandamus relief.

**B. Issues of material fact surrounding board member eligibility preclude summary judgment on UW Intervenors' claim for declaratory judgment.**

5.9. In their motion, UW Intervenors also seek affirmative relief on their claim for declaratory judgment. UW Intervenors ask the Court to determine the validity of their groundwater permits, the actions authorized by such permits, the impact of the District's determination that some of its board members were ineligible to serve on the board when the permits were originally considered, and the timeliness and propriety of Texas A&M System's request for contested case hearings. The Court should not make such overreaching decisions. To support their claim, UW Intervenors assert that no genuine issues of fact exist in this dispute but only list four allegedly indisputable facts:

1. The District previously issued UW Intervenors' groundwater permits;
2. The District did so after conducting properly noticed public hearings;
3. UW Intervenors and third-parties relied on those permits in good faith; and
4. Texas A&M System did not submit contested case requests prior to the original hearings.

5.10. At the outset, Texas A&M System contests the first fact. Due to the District's own determination that permit hearings were held without a quorum of board members, whether previous groundwater permits were effectively issued by the District is a genuine issue of material fact.

5.11. Second, UW Intervenors conveniently exclude additional facts that are not controverted:

5. The District has already determined that three of its board members were ineligible to serve from at least January 2023 through June 2024;[9]

6. The District has already determined that the board has held at least nine board meetings without a quorum present;[10]

7. The District has already determined that a lack of quorum invalidates official actions taken by the board at meetings without a quorum present;[11]

8. At least some of UW Intervenors' contested permit applications were previously approved at board meetings without a quorum present;[12]

9. Texas A&M System requested the District to contract with SOAH to conduct contested case hearings for UW Intervenors' contested permit applications;[13] and

10. The District has failed or refused to contract with SOAH to conduct the requested contested case hearings.

The District has already determined that its prior actions are marred by quorum-less board meetings, and SOAH is the proper authority to resolve the implications of these facts, not this Court. And to the extent that UW Intervenors' challenge any of the facts listed above, additional genuine issues of material fact exist that preclude summary judgment.

5.12. Lastly, a key fact at issue is the context of the District's board member eligibility issues. Specifically, UW Intervenors acknowledge that according to the District, John Elliott and Jeff Kennedy both accepted conflicting board member roles in the same month that they joined the District. Intervenors' Mot. for Summ. J., pp. 9–10. And according to the District, Chris Zeig began his role as city councilmember two years into his four-year term on the District's board. *Id.*

[9] **Exhibit 3**, p. 3 ("It was later determined by District staff that three (3) of the current board members had either been ineligible for appointment to the board at the time of their appointment or had become ineligible since the original appointment date.").
[10] **Exhibit 1**, p. 5 ("The time period and meetings affected by the lack of a quorum are: February 9, 2023; March 9, 2023; June 8, 2023; August 10, 2023; September 14, 2023; October 12, 2023; November 16, 2023; May 16, 2024; June 3, 2024").
[11] **Exhibit 3**, p. 3 ("This led to a lack of quorum during the September 14, 2023 board meeting invalidating the action taken by the Board related to the rules.").
[12] Intervenors' Mot. for Summ. J., pp. 6–7.
[13] *See* **Exhibit 4**; **Exhibit 5**.

The Waco Court of Appeals has emphasized that "[o]ur courts uniformly hold that, where a party holding an office in good faith accepts another with the intention of abandoning his first office, his first office thereby becomes vacant as a matter of law." *Shriber v. Culberson*, 31 S.W.2d 659, 661 (Tex. Civ. App.—Waco 1930, no writ). Thus, depending on the sequence of the board members' actions and their intent in accepting conflicting positions, the extent of their ineligibility and the impact on official District action is yet to be fully understood. This ambiguity as to the extent of the eligibility issues for the District's board members is the primary reason Texas A&M System has contested UW Intervenor's permit applications dating back several years.

5.13. Ultimately, this Court cannot interpret the UW Intervenors' contested permit applications before SOAH, and UW Intervenors' requested declaratory judgment ignores the genuine issues of material fact that SOAH must parse through before adjudicating the merits of the case. UW Intervenors' motion for summary judgment on their claim for declaratory judgment is premature as several outstanding fact issues could impact the validity and applicability of the UW Intervenors' contested permit applications.

**C. The *de facto* officer theory does not entitle UW Intervenors to declaratory judgment as a matter of law.**

5.14. In addition to the existence of genuine issues of material fact, UW Intervenors' motion for summary judgment on its claim for declaratory relief fails because the de facto officer theory does not protect UW Intervenors' contested permit applications from a direct challenge through the administrative process, and Texas A&M System's request for contested case hearings was timely.

i. <u>The *De Facto* Officer Theory Does Not Apply.</u>

5.15. UW Intervenors' entire motion is predicated on the applicability of the *de facto* officer theory. In fact, UW Intervenors go so far as to declare that this is the exact scenario that

the *de facto* officer theory was intended to prevent. Intervenors' Mot. for Summ. J., p. 3. However, UW Intervenors overlook an undeniable characteristic of the *de facto* officer theory: it is and always has been a shield to prevent private, collateral attacks on public actions. *See The* De Facto *Officer Doctrine*, 63 Colum. L. Rev. 909, 909 (1963) ("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.") (emphasis added). But that has no application here.

5.16. To be clear, Texas A&M System is not attacking the District's approval of UW Intervenors' previous permit applications at hearings in which a quorum of Board members was not present. Instead, the District itself has already determined that at least nine specific hearings resulted in official action stained by the ineligibility of at least three Board members that depleted any quorum. Texas A&M System's request for contested case hearings regarding UW Intervenors' contested permit applications is not a collateral attack on the District's actions; instead, Texas A&M System directly contests the permit applications that have yet to be officially considered by the District in compliance with its own rules and governing statutes. The District made the determination that ineligible board members and quorum-less meetings effectively invalidated its prior actions which opened the door for Texas A&M System to directly contest the permit applications pursuant to applicable administrative law. The *de facto* officer theory's shield to private, collateral attacks is irrelevant and has no application in this circumstance.

5.17. As applicants, UW Intervenors are innately subject to the determinations of the governing groundwater authority, regardless of the unintended consequences. Texas A&M System should not be penalized for abiding by the administrative rules and procedures in the wake of the District's decisions. The District opened that door, and Texas A&M System stepped through

it in accordance with the law. The *de facto* officer theory does not consider this circumstance. The theory is a shield for government entities to guard against private attacks, not a weapon for private parties to use against others.

ii. Texas A&M System's Request for Contested Case Hearings was Timely.

5.18. As of the date of this filing, the District has not considered UW Intervenors' contested permit applications at a proper permit hearing. This is not a legal fiction, but a legal fact pursuant to the District's own definition of a hearing: "(a) A hearing ***must*** be conducted by: (1) a quorum of the board; or (2) an individual to whom the board has delegated in writing the responsibility to preside as a hearings examiner over the hearing or matters related to the hearing." District Rule 14.4 (emphasis added). Thus, no official board action can be taken at a hearing in which a quorum of board members is not present. Tex. Water Code §§ 36.053, 36.065, 49.053, 49.064; Tex. Govt. Code § 551.001, et seq.; *see also Thomas v. Abernathy Cty. Line Indep. Sch. Dist.*, 290 S.W. 152, 153 (Tex. 1927) (absence of quorum of eligible directors rendered board action invalid). Although hearings might have literally taken place, they had no more effect than any other unofficial gathering of a small group of board members.

5.19. On August 8, 2024, Texas A&M System first became aware of the District's determination that several board meetings had been held and business conducted without a quorum present. *See* **Exhibit 1**. On that same day, Texas A&M System informed the District that it intended to contest UW Intervenors' permit applications that were considered at the improper hearings that were held by ineligible board members. *See* **Exhibit 4**.

5.20. The next month, Texas A&M System became aware that the District intended to consider the UW Intervenors' contested permit applications at a September 12 board meeting. *See* **Exhibit 3**. Out of an abundance of caution, Texas A&M System again sent the District a letter on September 5 requesting that the District schedule contested case hearings for the UW Intervenors'

contested permit applications with SOAH. *See* **Exhibit 5**. Pursuant to any recent version of District Rule 14.3.5, Texas A&M System's request was timely.[14] And at the September 12 meeting, the District's General Manager Alan Day admitted he had received timely written requests. *See* "BVGCD Public Permit Hearing and Regular Board Meeting – September 12, 2024," https://www.youtube.com/watch?v=wzTAqSd5QFk at 1:09:38 ("Before we take a vote, Alan, have you received any written notices to contest a permit that have been timely?" "Yes, I have.").

5.21. In their motion, UW Intervenors attempt to argue that a board meeting in which formal action is taken on a permit application is not a "permit hearing" pursuant to District Rule 14.3.5. However, a literal reading of the rule under this interpretation would create an absurd result. If a permit hearing never occurred because an uncontested permit application was approved at a board meeting, the deadline for contesting the permit application would never trigger. In narrowly construing a hearing to be distinct from a board meeting in this context, UW Intervenors effectively argue that the deadline to contest their permit applications has yet to lapse. Instead, if the Court ventures to decide the merits of this dispute—which it should not—the commonsense approach that a request for a contested case hearing given more than five days before any formal action is taken on a permit application is timely pursuant to the District's rules should guide that decision.

**D. UW Intervenors are attempting to short-circuit the administrative process.**

5.22. The District is the governing authority managing groundwater resources in Brazos and Robertson counties, including directing all groundwater permitting. The District determined

[14] Depending on the impact of the eligibility/quorum issues on previous District rulemaking, the effective rule governing timely requests for contested case hearings could have required written notice to be submitted one, four or five days before the District takes action on a permit application. Texas A&M System's request is timely considering each alternative deadline.

that three of its own board members were ineligible to serve as board members at times in which they were acting on behalf of the District in an official capacity. Ultimately, the District determined that UW Intervenors' contested permit applications were previously considered at permit hearings in which a quorum of board members was not present, resulting in invalid official action. Thus, the District has identified and self-reported this violation of its own rules.

5.23. Because Texas A&M System has contested permit applications that have not been considered by the District at hearings in which a proper quorum was present, the Water Code expressly requires the District to refer these contested cases to SOAH upon request. The impact of the eligibility and quorum issues on contested permit applications is a determination for SOAH to make pursuant to the Water Code and applicable administrative rules. At SOAH, UW Intervenors can assert the merits-based arguments that they attempt to force into this mandamus proceeding.

5.24. After a contested case hearing, SOAH will make a recommendation to the District's board for final disposition. Then, and only after UW Intervenors have exhausted their administrative remedies through such process, UW Intervenors may seek judicial review of the District's decision. Tex. Water Code §§ 36.251–.253; *see also Tex. Water Comm'n v. Dellana*, 849 S.W.2d 808, 810 (Tex. 1993) ("[O]nly a party that has exhausted all available administrative remedies may seek judicial review of an agency decision."); *City of Hous. v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013) ("The intent is never to deprive a party of legal rights; rather, it aims to ensure an orderly procedure to enforce those rights.").

## CONCLUSION AND PRAYER

Texas A&M System was forced to file this mandamus proceeding in light of the District's failure to advance the administrative process. This attempt by UW Intervenors to hijack the process and have this Court step into the place of the District and SOAH to determine, among other things, the effect and validity of prior actions by the District, the timeliness of Texas A&M System's requests, and interpretations of administrative rules and procedures is a severe obstruction to long-standing administrative law in Texas. Thus, UW Intervenors' motion for summary judgment must be denied.

For the foregoing reasons, the Court should deny Intervenors' Motion for Summary Judgment in full and grant Texas A&M System such other relief to which it may be justly entitled.

Respectfully submitted,

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