

February 4, 2025

**RULE 408 CONFIDENTIAL COMMUNICATION
FOR PURPOSES OF SETTLEMENT DISCUSSIONS**

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VIA EMAIL

Judge Linda Brite
Judge Rachelle Robles
State Office of Administrative Hearings
300 W 15th St Suite 406
Austin, Texas 78701

Re: Applicants' Mediation Statement – SOAH Docket No. 900-25-04017

Dear Judge Brite:

Applicants RH2O LLC, Clifford A. Skiles III, James C. Brien, L. Wiese Moore LLC, Fazzino Investments LP, Ely Family Partnership LP, and Cula d'Brazos, LLC (collectively, the "Landowners"), each with its Co-Applicant UW Brazos Valley Farm LLC ("UWBVF") (Landowners and UWBVF, together, "Applicants") submit this statement in advance of the mediation set for February 10, 2025.

Overview

This contested case hearing involves seven individual applications to transport groundwater from Robertson County in the Brazos Valley Groundwater Conservation District ("BVGCD" or the "District") to Williamson, Travis, Milam, and/or Bell Counties (the "Receiving Area"). The Landowners—a collection of individuals (*e.g.*, Clifford A. Skiles III, a veterinarian in Robertson County) and family entities (*e.g.*, Fazzino Investments LP, representing the interests of the Fazzino family)—own land in Robertson County above the Simsboro formation of the Carrizo-Wilcox Aquifer.

Each Landowner separately and independently began developing groundwater interests in their land in early 2023. Each Landowner separately applied for drilling/operating permits (*i.e.*, production permits) between January and July 2023. The District issued various production permits to the Landowners between February and September 2023 (the "Landowner Production Permits") (see Attachment A). In doing so, the District deemed each application administratively complete, noticed and held public permit hearings on the applications, and determined that each application met every applicable rule in the Texas Water Code and the District's rules. The District specifically considered the following factors in granting each Landowner Production Permit:

- That the authorized production will not unreasonably affect existing groundwater and surface water resources or existing permit holders;¹
- That the authorized production is consistent with the District’s certified Water Management Plan, which includes the District’s relevant water planning goals (such as Modeled Available Groundwater “MAG” and Desired Future Conditions “DFC”);² and
- That the authorized production is not contrary to the public welfare.³

Each Landowner has specified permitted production volumes ranging from 4,115 acre-feet per year (“AFY”) to 13,873 AFY. Across all seven landowners, these authorizations total to 57,718 AFY of production (see Attachment A).

While some other groundwater districts combine production and transport permitting, this District takes a two-step permitting approach to groundwater transport—meaning, it issues production permits separately from transport permits. The District is within its statutory authority to do two-step permitting, but such an approach necessarily requires some differentiation: a transport permit obtained after a production permit must involve an inquiry distinct from, and not duplicative of, the earlier production-only inquiry.

As contemplated by this District’s two-step permitting approach, in January 2024 each Landowner, after having been issued production authorizations, separately applied for a transport permit for his or her respective authorized production (the “Transport Applications”). A transport permit authorizes each Landowner to transfer produced groundwater outside the District. Landowners’ Transport Applications seek authorization to move their produced groundwater to rapidly growing population centers in the Receiving Area along the I-35 corridor that have a well-documented need for additional municipal and other water supplies.

In February and March 2024, the Landowners engaged with the District to revise and update the Transport Applications, including, per the District’s request, to add UWBVF as a co-applicant to each Application. UWBVF owns a large farm and groundwater interests in Robertson County. The District issued production permits to UWBVF in 2019 and 2022, as well as a transport permit in 2023. These permits authorize UWBVF (independently from the Landowners) to produce, from its farm, and transport up to 49,999 AFY of Simsboro groundwater to the Receiving Area. UWBVF is working with a major infrastructure and utility company to reserve water for cities in the Receiving Area that will support critical regional water supply needs. Two cities have signed reservation agreements for this water, and millions of dollars have already been invested to advance this regional water supply project.

Each Landowner separately granted UWBVF an option to lease Landowners’ Simsboro groundwater rights and permits. The leasing supports a project to drill wells at Landowners’ properties and transport groundwater by shared infrastructure to the Receiving Area (the

¹ District Rule 8.3(c)(3); Tex. Water Code § 36.113(d)(2).

² District Rule 8.3(c)(5), 8.3(i); Tex. Water Code § 36.113(d)(4).

³ District Rule 8.3(c)(8).

“Project”). Wells will be drilled at locations specified in the Landowner Production Permits at dispersed locations connected by a gathering network.

While each Landowner is currently associated with the Project through an option to lease agreement with UWBVF, each Landowner individually and privately owns the rights in groundwater under their respective parcels of land. Each Landowner is seeking a transport permit corresponding to previously permitted production. Each Landowner, and co-applicant UWBVF, agreed at the request of the District to accept a condition in each transport permit that would cap the total *export* for all Landowner Transport Permits to which UWBVF is a co-applicant, along with UWBVF’s own transport permit, at 100,000 AFY. This up-front compromise with the District reduces the full potential Project size by approximately 8% (and by approximately 13% of the Landowners Production Permits).

The District deemed the Transport Applications administratively complete on March 21, 2024, and issued notice of a public permit hearing on May 23, 2024. **The District’s General Manager recommended that the BVGCD Board grant the Transport Applications.**

The District held a public hearing on the Transport Applications on June 18, 2024. Prior to the hearing, Texas A&M University System (“TAMU”), Ermine Dieckman, the City of Bryan, the City of College Station, and Brazos County (collectively, “Protestants”) filed contested case hearing requests on the Transport Applications. The District processed Protestants’ requests, entered a contract with SOAH, and named each Protestant as an affected party.

Scope of this SOAH Proceeding

Importantly, SOAH has jurisdiction over only the seven Transport Applications, which the District referred through its Request to Docket.⁴ SOAH does not have jurisdiction over the Landowner Production Permits, UWBVF’s production permit, or UWBVF’s transport permit.

Each Transport Application is associated with one Landowner, encompasses a unique level of authorized production, and has an individual Landowner’s private-property groundwater rights associated with it. Within the Transport Applications, certain information, analyses, and the collective cap are discussed at the Project-level—this does not negate the individuality of each Transport Application and each respective Landowner’s individual rights.

In determining whether to issue a permit to move groundwater out of the District, the BVGCD Board must be “fair, impartial, and nondiscriminatory.”⁵ The District cannot “deny a transport permit based on the fact that the applicant seeks to transport groundwater outside of the District.”⁶ Because this District implemented two-step permitting (authorizing production separate from transport), these principles are firm guardrails against using this proceeding on the

⁴ 1 Tex. Admin. Code § 155.51(a) (“SOAH acquires jurisdiction over a case when a referring agency completes and files a Request to Docket Case form. A separate Request to Docket Case form shall be completed and filed for each case referred to SOAH.”).

⁵ District Rule 10.3(b); Tex. Water Code § 36.122(q).

⁶ District Rule 10.3(c); Tex. Water Code § 36.122(g).

Transport Applications to revisit, reopen, or collaterally attack the already-issued Landowner Production Permits at SOAH.

Issues Beyond the Scope of this SOAH Proceeding

The District issued the Landowner Production Permits in separate hearings throughout 2023. Protestants did not participate in or object to those proceedings. However, after Protestants submitted hearing requests on the Transport Applications in June 2024, they embarked upon a campaign to attack the final Landowner *Production* Permits, as well as the production and transport permits the District issued to UWBVF in 2019, 2022, and 2023. Disputes about Project permits BVGCD has *already issued* are not within SOAH's jurisdiction. However, some details about these outside issues are relevant because mediation provides an opportunity for the parties to discuss Project-level concepts beyond the limited scope of this SOAH proceeding for a comprehensive settlement.

No administrative law mechanism exists to contest final, issued groundwater permits. However, Protestant TAMU has seized upon a technicality raised in July 2024, when the District's counsel pointed out that three of the eight BVGCD Board Members have held secondary governmental positions since around January 2023, potentially rendering them unable to serve as BVGCD Directors under the Texas Water Code.⁷ TAMU argues that this potential ineligibility means that the BVGCD Board lacked a quorum during most meetings and hearings held after January 2023, including every hearing in which the District issued a Landowner Production Permit, as well as UWBVF's transport permit. TAMU theorizes—despite well-established common law to the contrary—that because there was no proper quorum, no hearing or board actions ever occurred, and those final permits are merely pending applications. TAMU's theory is based entirely on this technicality—since the eligibility issue was raised, the three directors have been re-appointed as BVGCD board members without any allegation that their past actions were otherwise improper or biased.

Relying on this theory, TAMU submitted a letter to the District in September 2024 purporting to request a contested case hearing on each Landowner Production Permit, as well as UWBVF's transport permit and UWBVF's production permits. TAMU has repeatedly requested at BVGCD board meetings since September 2024 that the District refer the Landowner *Production* Permits, as well as UWBVF's transport and production permits, to SOAH for a contested case hearing. The BVGCD Board has not acted on TAMU's request, but neither has it affirmed the validity of any permit the Board issued in 2023 or before—including numerous permits unrelated to the Project, and even certain production permits issued to the City of Bryan and City of College Station during the affected timeframe.

In an attempt to address the quorum issue raised in July 2024, the District adopted a rule in September 2024 that intended to treat everyone the same and ratify all permitting actions taken during the period in question (the "Ratification Rule"). Applicants believed this rule was an appropriate belt-and-suspenders approach to confirming BVGCD permitting actions already

⁷ See Tex. Water Code § 36.051(b) ("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.").

deemed valid under common law. That common law, called the “de facto officer doctrine,” protects those who rely on actions of government officials from after-the-fact challenges based on technicalities. TAMU argues that this centuries-old common law doctrine does not apply to the purported District technicality because (1) the District, not TAMU, initially raised the technicality and (2) this common-law remedy has not yet been applied in the context of Texas groundwater conservation districts. TAMU argues that the Ratification Rule creates a loophole allowing TAMU to contest BVGCD permits issued in 2023, as well as in 2019 and 2022, before the eligibility issue arose. Under TAMU’s tortured reading of the Ratification Rule, a contested-case-hearing request filed after the District proposed the Ratification Rule (*e.g.*, TAMU’s August and September 2024 letter requests), allows TAMU, or anyone else, to contest final permits that BVGCD issued years prior.

In September 2024, after the District adopted the Ratification Rule without acting on TAMU’s letter request, TAMU filed a writ of mandamus in Brazos County District Court asking the court to order the District to perform its “non-discretionary duty” to send the Landowner Production *Permits* and other Project-related *permits* to SOAH per TAMU’s September 2024 letter request. The Cities of Bryan and College Station, as well as Brazos County, have intervened to support TAMU’s lawsuit. Through this lawsuit, TAMU, the Cities, and Brazos County are actively working to create a cloud over the Landowner Production Permits and UWBVF’s transport permit, attempting to impede contracts and long-formed chains of reliance. TAMU would like a court to devalue the property rights of Robertson County landowners in favor of TAMU and its political allies who do not want any competition for “their” water, despite well-documented regional water supply needs and longstanding protections for private property.

UWBVF and the Landowners intervened in TAMU’s lawsuit and moved for summary judgment denial of TAMU’s claim, based on common-law protections of prior governmental actions from collateral attack. In December 2024, the court denied Applicants’ motion without any rationale or precedential effect. Demonstrating their commitment to trying to thwart the Project by delay, TAMU has still, after several months, not affirmatively asked for relief on its mandamus action by motion or through a setting request. The District recently moved for a bench trial on TAMU’s requested relief, and a trial is expected to be set for late April, following expedited discovery.

The District’s position in TAMU’s litigation is highly unusual. The District is a defendant who does not seem interested in defending itself against a writ of mandamus. It appears to want to abdicate its responsibility to the court. For context, it is worth noting a glaring juxtaposition: the District receives its directives from its Board, and the Board holds executive sessions *with* the City of Bryan Director of Public Works sitting as Board President and the City of College Station Water Services Director sitting as Vice President. These board members act both as Protestants against the Transport Applications and as the ultimate adjudicators of those same applications. The Cities also chose to intervene in TAMU’s lawsuit to support TAMU. Despite wearing two hats and repeated objections, these two Board members refuse to recuse themselves. And, despite having issued final permits related to the Project and spurring the investment of extraordinary resources in reliance on those permits, the District claims that its decision not to defend itself against TAMU’s lawsuit reflects “the District’s intent is not to pick winners and losers of this.”

Applicants are serving discovery on Protestants in the pending TAMU litigation. The anticipated April 2025 bench trial will address the validity of prior BVGCD permitting actions and the meaning of the Ratification Rule.

TAMU's challenge to the Landowner Production Permits, UWBVF's transport permit, and UWBVF's production permits, is not within SOAH's jurisdiction in this proceeding.⁸ While this mediation provides an opportunity to work through Project-level concerns and potentially address matters holistically, the SOAH proceeding itself is jurisdictionally limited to the seven individual Transport Applications.

Applicable Law

The Transport Applications are evaluated under Section 10 of the District's Rules and Section 36.122 of the Texas Water Code, both of which address transferring groundwater out of the District. This District is coextensive with the jurisdictional boundaries of Brazos and Robertson Counties. Consideration of statutes and rules related to the production of groundwater—specifically, section 36.113 of the Water Code and corresponding District rules—occurred in 2023 when the District issued the Landowner Production Permits. Reevaluating the Transport Applications against the same production-specific statutes and rules would improperly duplicate the production permitting process, effectively requiring a landowner to obtain a production permit *twice* (once when obtaining a production permit, and again when obtaining a transport permit). This would exceed the statutory limits in Texas Water Code Chapter 36.⁹ Importantly, Texas law and the District's Rules prohibit permitting decisions that discriminate against groundwater transport.¹⁰

Evaluation of the Transport Applications

Evaluation of the Transport Applications involves three overarching considerations:

- (1) the availability of water in the district and in the proposed receiving area during the period for which the water supply is requested;
- (2) the projected effect of the proposed transfer on aquifer conditions, depletion, subsidence, or effects on existing permit holders or other groundwater users within the district; and
- (3) the approved regional water plan and approved district management plan.¹¹

The District's hydrologist reviewed the Transport Applications against these three considerations and applicable provisions of the District Rules. Having considered the Transport Applications

⁸ 1 Tex. Admin. Code § 155.51(a) (“SOAH acquires jurisdiction over a case when a referring agency completes and files a Request to Docket Case form. A separate Request to Docket Case form shall be completed and filed for each case referred to SOAH.”).

⁹ See, e.g., Tex. Water Code § 36.113(a) (“a district shall require *a* permit for the drilling, equipping, operating, or completing of wells or for substantially altering the size of wells or well pumps”) (emphasis added).

¹⁰ District Rule 10.3(b); Tex. Water Code § 36.122(q); District Rule 10.3(c); Tex. Water Code § 36.122(g).

¹¹ District Rule 10.4(b); Tex. Water Code § 36.122(f).

and the District hydrologist's report, the General Manager recommended that the BVGCD Board approve the Transport Applications. The General Manager's recommendation is supported by the following factors:

High availability of water in the District during the period for which the water supply is requested.

- The Simsboro formation is part of the Carrizo-Wilcox aquifer, which the Brazos G 2021 Regional Water Plan describes as a “prolific” and “prodigious” water supply.
- The Brazos G 2021 Regional Water Plan remarks that the Carrizo-Wilcox Aquifer “stores enormous amounts of water” and has “significant potential for further development.”
- The Simsboro formation of the Carrizo-Wilcox Aquifer is rechargeable, meaning that groundwater withdrawn from the aquifer is replenished.
- The District considered the availability of water in the District—including a consideration of the District's planning concepts of Modeled Available Groundwater and Desired Future Conditions—in issuing the Landowner Production Permits.

Protestants' overarching objection to the Transport Applications is that they will “siphon” groundwater away from residents in Robertson and Brazos Counties. The City of Bryan, for example, has launched a public-relations campaign to “Keep Water Local,” which attacks “neighboring areas targeting our water supplies” as a purported threat to Bryan's “long-term growth.” But Protestants' zero-sum approach is misplaced: the Simsboro has sufficient supply to support growth and development in the District **AND** support needs in the Receiving Area. The District's issuance of the Landowner Production Permits supports this point, as will expert testimony in this SOAH proceeding. The Transport Applications contained extensive modeling that took into consideration in-District water availability. Extensive support exists for high water availability in both Robertson *and* Brazos Counties.

Low availability of water in the proposed receiving area during the period for which the water supply is requested

Equally extensive support exists for the low availability of water in the Receiving Area:

- The Brazos G Regional Water Plan projects massive population increases for cities in the Receiving Area, along the I-35 corridor: the City of Hutto is projected to experience a 484.1% population increase between 2020 to 2070, with other cities projected to have similarly drastic increases, such as the City of Georgetown (201.5%), the City of Leander (282.7%), and the City of Round Rock (93.8%).
- Water demand will increase in step with population growth, and these areas are currently seeking solutions to meet projected municipal and other water shortages.

- For example, in 2023, the City of Georgetown conducted multi-year water planning and identified a “gap” of as much as 99,000 AFY between its currently available water supplies and its projected 2070 water demands.
- Both the Cities of Georgetown and Hutto have already signed reservation agreements to secure groundwater from Robertson County to supplement their water supply.

Protestants have not objected to the extensive water needs in the Receiving Area. Protestants twist the focus on the first part of this analysis—availability of water in the source area. There is a well-documented need for additional water supply in the Receiving Area and there exists sufficient water supply in the source area to serve both local and regional water supply needs. The high availability of groundwater in the District, when compared with the low availability of water in the Receiving Area, supports permit issuance.

Projected effect of the proposed transfer on aquifer conditions, depletion, subsidence, or effects on existing permit holders or other groundwater users within the District

Importantly, in issuing the Landowner Production Permits, the District already evaluated whether the authorized *production* would have unreasonable effects on existing groundwater resources or existing permit holders. Experts will testify that *transporting* the authorized production to the Receiving Area will not result in additional impacts on aquifer conditions, depletion, subsidence, or cause additional effects on existing permit holders or other groundwater users. The Simsboro recharges in areas outside of the District’s boundaries. Out-of-District transport and use of groundwater, as opposed to solely in-District use of groundwater, does not affect the analyses that the District already conducted when it issued the Landowner Production Permits. Additionally, as a matter of fact supported by numerous studies, subsidence is not a concern within the District for this aquifer.

Protestants commented on the economic impacts they perceive will happen to groundwater users in Robertson and Brazos Counties—namely, the costs they fear will be incurred by lowering or re-drilling wells in the future. However, the record will demonstrate that Robertson and Brazos Counties will continue to have access to an abundant groundwater resource that will supply water to Protestants at reasonable costs. Protestants’ need to lower or re-drill their groundwater wells will occur regardless of the Project due to Protestants’ own pumping, existing regional drawdown, and Protestants’ aging infrastructure.

Additionally, a robust financial framework exists in this District to mitigate impact to existing in-District Simsboro wells, including Protestants’. Prior to obtaining its transport permit, UWBVF entered into a Well Assistance Agreement with the District, agreeing to fund in advance an extensive Well Assistance Program to address local impacts to existing Simsboro wells from projected aquifer conditions associated with the Project. Applicants will pay hundreds of millions of dollars in export and production fees to the District over the coming decades, providing ample

funding for existing Simsboro wells to have pumps lowered or to be re-drilled, as needed. The District adopted this program by rule.¹²

Notably, each Transport Application modeled and evaluated its effects on neighboring wells and local drawdown. Proper consideration of each Transport Application will consider the merits and effects of each application individually. The District conducted a separate analysis of various Project scenarios and pumping permutations to help plan to implement the Well Assistance Program.

The approved regional water plan and approved district management plan

Lastly, the District, in issuing the Landowner Production Permits, took into consideration the regional water plan and the District's management plan. The District's management plan incorporates the planning tool "Modeled Available Groundwater" provided by the Texas Water Development Board based on the Desired Future Conditions chosen by the five-county joint planning group within Groundwater Management Area 12. The District considered both the DFC, and, to the extent appropriate, the MAG before it issued the Landowner Production Permits. As noted above, transport of that already-authorized production does not change the analysis that the District already conducted related to the regional water plan or the District's management plan.

Conclusion

Applicants look forward to continuing previous settlement efforts and bringing resolution to this case. Because this SOAH proceeding is limited in scope to the Transport Applications, mediation provides the best opportunity for project-level discussions. Applicants are available for any pre-mediation meetings and will provide technical information, as requested, beforehand.

Respectfully,



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cc:

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¹² The District has recently taken action to restructure its fee program but it does not change that Applicants prioritized funding for well assistance in advance of Project pumping as a voluntary measure.

**For Brazos County, City of Bryan,
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ATTACHMENT A - LANDOWNER PRODUCTION PERMITS

Production Permit Nos.	Transport Application Permit No.	Permittee	Date of Hearing and Permit Issuance	Combined Authorized Production	Authorized Uses
BVDO-0385 to BVDO-0389 (5 permits)	BVTP-002	RH2O LLC	Sept. 14, 2023	8,130 AFY	Agricultural, industrial, commercial, municipal, and public water supply
BVDO-0317 and BVDO-0108 (2 permits)	BVTP-003	Clifford A. Skiles III	March 9, 2023	4,800 AFY	Agricultural, industrial and public water supply
BVDO-0315 and BVDO-0316 (2 permits)	BVTP-004	Dr. James Cooper Brien	February 9, 2023	4,115 AFY	Agricultural, industrial and public water supply
BVDO-0401 and BVDO-0402 (2 permits)	BVTP-005	L. Wiese Moore LLC	Sept. 14, 2023	4,452 AFY	Agricultural, industrial, commercial, municipal, and public water supply
BVDO-0394 to BVDO-0399 (6 permits)	BVTP-006	Fazzino Investments LP	Sept. 14, 2023	10,348 AFY	Agricultural, industrial, commercial, municipal, and public water supply
BVDO-0377 to BVDO-0384 (8 permits)	BVTP-007	Ely Family Partnership LP	Sept. 14, 2023	13,873 AFY	Agricultural, industrial, commercial, municipal, and public water supply
BVDO-0408 to BVDO-0414 (7 permits)	BVTP-008	Cula d'Brazos LLC	Sept. 14, 2023	12,000 AFY	Agricultural, industrial, commercial, municipal, and public water supply