

CAUSE NO. 24-002626-CV-472

TEXAS A&M UNIVERSITY SYSTEM,

Plaintiff,

vs.

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

Defendants,

UW BRAZOS VALLEY FARM LLC,
CULA D’BRAZOS LLC, RH2O LLC,
L. WIESE MOORE LLC, CLIFFORD
A. SKILES III, JAMES C. BRIEN, ELY
FAMILY PARTNERSHIP, L.P., AND
FAZZINO INVESTMENTS, LP,

Intervenors.

IN THE DISTRICT COURT OF

BRAZOS COUNTY, TEXAS

472nd JUDICIAL DISTRICT

**LANDOWNER INTERVENORS’ FIRST AMENDED PETITION IN INTERVENTION
AND RESPONSE TO APPLICATION FOR INJUNCTIVE RELIEF**

TO THE HONORABLE JUDGE OF THIS COURT:

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, James C. Brien, Ely Family Partnership, L.P., and Fazzino Investments, LP (collectively with UW Farm, the “Landowner Intervenors”), file this first amended petition for intervention pursuant to Rules 60, 61, and 63 of the Texas Rules of Civil Procedure with respect to the relief sought by Plaintiff Texas A&M University System (“TAMUS” or “Plaintiff”) in this case.

I. OVERVIEW

1. TAMUS’s lawsuit—filed without the authorization of its Board of Regents—seeks to trample Landowner Intervenors’ vested property rights in their groundwater, cut off critical drinking water supplies to the region, and stifle billions of dollars of regional economic growth driven by Landowner Intervenors’ water supply project. The Landowner Intervenors join this case to defend their permits and property rights from Plaintiff’s unsupported attack and to correct the gross omissions and mischaracterization of facts and law that Plaintiff presents to this Court and the public in its First Amended Petition for Writ of Mandamus and Application for Temporary and Permanent Injunctive Relief (the “Amended Petition”).

2. Plaintiff’s threadbare mandamus action demands that the Court turn back time and recognize a non-existent “right” to administratively contest final groundwater permits that the Brazos Valley Groundwater Conservation District (“BVGCD” or the “District”) properly noticed and issued to Landowner Intervenors years ago—all without any complaint or contest by any party, including Plaintiff. Plaintiff insists that the District has a “clear, non-discretionary duty” to unwind final permits issued as far back as 2019, glossing over countless factual and legal hurdles that prevent such an outcome.

3. First, Plaintiff lacks a factual basis to support its position. Its after-the-fact attack on the District’s properly-issued permits relies entirely on a supposed eligibility issue for three BVGCD board members. But despite arguing that this purported ineligibility mandates the District’s “clear, non-discretionary duty” to refer final groundwater permits to the State Office of Administrative Hearings (“SOAH”), Plaintiff admits the period of ineligibility “is not definitely known to TAMUS.” Am. Pet. ¶ 16. This factual deficiency is fatal.

4. Second, even if Plaintiff had the facts necessary to establish the alleged BVGCD board member ineligibility, it does not have the statutory authority to challenge board members' qualifications to serve. Such a challenge may be brought only by the attorney general, or the appropriate county or district attorney, in a quo warranto proceeding. That has not occurred.

5. Third, the District explicitly adopted a rule that bars the relief Plaintiff seeks. The District's Rule 8.3(j) (the "Ratification Rule"), adopted in September 2024 to address any purported ineligibility issue, does not "open the door" to Plaintiff's years-late hearing request. The plain text of the Ratification Rule affirms the validity of *all* District permits issued during the time of purported ineligibility. The Ratification Rule's text is supported by the District's own explanation of the rule: it "was designed to maintain the status quo by ratifying all the District's decisions made" during the purported period of ineligibility. BVGCD Response to MSJ ¶ 5. In the District's own words, the rule serves "to ratify, *not restart*, the permitting process." *Id.* ¶ 6 (emphasis added).

6. Fourth, Plaintiff's action also ignores firmly established Texas law that validates the actions of public officials acting under color of appointment, negates any alleged ineligibility issue. The *de facto* officer doctrine—which squarely applies in this case—protects the public and individuals who rely on public acts from stale collateral attacks like Plaintiff's mandamus action. Plaintiff's desired outcome goes against this established law and policy: overturning long-standing permits would devalue property rights throughout the District, instill chaos and uncertainty in the District's permitting system, break chains of reliance, incite disputes, and hinder critical infrastructure needed to provide drinking water to the citizens of Texas.

7. Fifth, Plaintiff cannot obtain mandamus relief because it has acted inequitably with respect to the Landowner Intervenors and the relief it seeks. Mandamus relief is an extraordinary

remedy available only to those with “clean hands.” *City of Houston v. Houston Mun. Employees Pension Sys.*, 549 S.W.3d 566, 573 (Tex. 2018); *Westerman v. Mims*, 227 S.W. 178, 182 (Tex. 1921). But Plaintiff eschews all notions of justice, honesty, and fair dealing in its years-late attack on permits extensively relied upon by Landowner Intervenor, third-party partners, and municipal customers. Plaintiff’s inequitable targeting of the Landowner Intervenor’s permits bars the extraordinary relief it seeks: for example, BVGCD issued permits during the same period of purported ineligibility to entities closer to Plaintiff’s wells, but despite this proximity and their impacts on Plaintiff’s wells, Plaintiff does not challenge those permits. All told, the District issued nearly 100 permit and permit amendments between 2023 and 2024 during the period of alleged ineligibility—including to intervenors City of Bryan and City of College Station—and Plaintiffs only challenge those issued for the Landowner Intervenor in Robertson County. Operating under such a double standard precludes mandamus relief.

8. Plaintiff’s demand for injunctive relief to address an “immediate threat” to the “status quo” defies logic where the permits it seeks to challenge have been signed, final, utilized, and relied upon since as early as April 2019. Plaintiff seeks court intervention on the false premise that it will be “denied the opportunity for contested case hearings” otherwise. In doing so, Plaintiff intentionally fails to mention to the Court, the local community, and the public at large that it had proper notice and opportunity to contest the permits in April 2019, October 2022, and in February, March, and September of 2023, and chose not to do so.

9. Plaintiff suffers no harm where it has no right to the procedure it belatedly seeks. On the other hand, by filing the lawsuit, creating a false cloud on Landowner Intervenor’s permits, and taking other actions including interfering with Landowner Intervenor’s contracts, Plaintiff is harming Landowner Intervenor and exposing itself to substantial liability for tortious interference

and other claims for its wrongful conduct. Plaintiff asks the court to ignore years of reliance on the District's public acts, including tens of millions of dollars already expended by Landowner Intervenor, as well as Landowner Intervenor's partners and customers, on drilling wells, designing infrastructure, and coordinating engineers, hydrologists, and other professionals, all in reasonable reliance on final, signed groundwater permits from the District.

10. The District followed all relevant rules and regulations in issuing the permits, Landowner Intervenor followed all relevant rules and regulations in obtaining the permits, and Plaintiff does not, and cannot, allege otherwise. In fact, UW Farm went above and beyond what the rules require in acquiring its permits, agreeing to advance funding of a mitigation program to benefit neighboring groundwater users in Robertson and Brazos Counties, including Plaintiff. Defendant Alan Day, the District's General Manager, recognized these efforts in public testimony before the Texas State Senate Committee on Water, Agriculture and Rural Affairs, noting that: "We were blessed to have a permit applicant, now a permit holder [UW Farm], who said, 'We want to be a good neighbor.'" The chair of the committee, Senator Charles Perry, agreed and remarked that UW Farm is a "responsible applicant."

11. Plaintiff's blatant omission of these and other relevant facts is an affront to this tribunal and to its charge as a public institution to act in good faith for the local community and the entirety of the State of Texas. Landowner Intervenor ask that the Court deny Plaintiff's petition for writ of mandamus and application for injunctive relief and dismiss Plaintiff's Amended Petition.

II. RIGHT TO INTERVENTION

12. UW Farm and the Landowner Intervenor have a right to intervene in this action under Rule 60 of the Texas Rules of Civil Procedure. "A party has a justiciable interest in a

lawsuit, and thus a right to intervene, when his interests will be affected by the litigation.” *Jabri v. Alsayyed*, 145 S.W.3d 660, 672 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Law Offices of Windle Turley v. Ghiasinejad*, 109 S.W.3d 68, 71 (Tex. App.—Fort Worth 2003, no pet.)).

13. The Landowner Intervenors have a direct and substantial interest in the final, signed groundwater permits that Plaintiff seeks now to belatedly challenge. UW Farm holds existing production and transport permits in its own name and has contractual interests in others. The remaining Landowner Intervenors likewise hold final, signed permits in their own names. UW Farm and the remaining Landowner Intervenors are also co-applicants on certain pending transport permit applications for which an administrative process was timely requested and is not in dispute in this case.

14. Landowner Intervenors file this intervention to preserve their right to be parties to legal proceedings in which they have an interest in the subject matter of the litigation. Landowner Intervenors do so without agreeing or stipulating that this Court has subject matter jurisdiction, that this is the proper forum to challenge actions of the District, or that the actions of the District are subject to judicial review.

III. PARTIES

15. Plaintiff TAMUS is a legislatively created system of member universities that maintains its principal place of business in College Station, Texas.

16. Defendant BVGCD is a conservation and reclamation district created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59 of the Texas Constitution, and Chapter 8835 of the Special District Local Laws Code.

17. Defendant Alan Day is the General Manager of BVGCD and a resident of Brazos County.

18. Intervenor UW Farm is a Delaware limited liability company with its principal place of business located at 7670 Woodway Drive, Suite 200, Houston, Texas 77063, and a property owner in Robertson County.

19. Intervenor Cula d'Brazos LLC is a Texas limited liability company with its principal place of business located at 1108 Kinney Avenue, Austin, Texas 78704, and a property owner in Robertson County.

20. Intervenor RH2O LLC is a Texas limited liability company with its principal place of business located at 8529 Edinburgh Court, Montgomery, Texas 77316, and a property owner in Robertson County.

21. Intervenor L. Wiese Moore LLC is a Texas limited liability company with its principal place of business located at 2208 Churchill Loop, Grapevine, Texas 76051, and a property owner in Robertson County.

22. Intervenor Clifford A. Skiles III is a property owner in Robertson County.

23. Intervenor James C. Brien is a property owner in Robertson County.

24. Intervenor Ely Family Partnership, L.P. is a Texas limited partnership and a property owner in Robertson County, Texas.

25. Intervenor Fazzino Investments, LP is a Texas limited partnership and a property owner in Robertson County, Texas.

26. Intervenor, the City of Bryan, is a home rule municipality organized under Article XI, Section 5 of the Texas Constitution, located in Brazos County, Texas.¹

¹ On November 21, 2024, the Landowner Intervenor moved to strike the City of Bryan, City of College Station, and Brazos County's Original Petition in Intervention. The motion remains pending before the Court.

27. Intervenor, the City of College Station, is a home rule municipality organized under Article XI, Section 5 of the Texas Constitution, located in Brazos County, Texas.

28. Intervenor, Brazos County, is a governmental subdivision of the State of Texas.

IV. BACKGROUND

29. The District—following basic tenets of administrative law—sets a window of time in which a person can request a contested case hearing on a pending groundwater permit application. BVGCD R. 14.3.5. When the District does not receive a timely contested case hearing request, it processes the application as uncontested. BVGCD R. 14.3. Even when processing uncontested applications, BVGCD must consider an extensive list of factors in deciding whether to grant or deny an application, including whether the application is complete, complies with all rules and law, is consistent with the District’s water management plan, protects groundwater quality, and aligns with the public welfare. BVGCD R. 8.3.

30. The District’s deadline for challenging permit applications accomplishes the “basic policies” of any type of limitation period: “repose, elimination of stale claims, and certainty.” *Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013) (quoting *Rotella v. Wood*, 528 U.S. 549, 550, (2000)). Administrative deadlines, like statutes of limitations, are “vital to the welfare of society” because they give “security and stability to human affairs.” *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (cited in *Ferrer v. Almanza*, 667 S.W.3d 735, 737 (Tex. 2023)). For administrative actions taken after a deadline passes, courts “should support the finality of administrative orders in keeping with the public policy favoring an end to litigation, whether it be in the administrative or judicial process.” *Westheimer Indep. Sch. Dist. v. Brockett*, 567 S.W.2d 780, 787 (Tex. 1978).

31. When the District’s Board of Directors approves a permit application, the applicant receives a final permit signed and issued by the District’s General Manager. 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 (*see* Exhibits A–I). Final transport permits authorize the applicant to arrange for beneficial use of the groundwater outside the District’s boundaries (*see* Exhibit J). BVGCD R. 10.1.

32. The District complied with its rules and the Texas Water Code in approving the applications and issuing the permits—48 production permits and 1 transport permit—that are the subject of Plaintiff’s Amended Petition (*see* Exhibit K – Permit Issuance Chart).

33. The Landowner Intervenor—like all other permit recipients in the District—relied on the final permits’ validity in paying permit fees, obtaining engineering and hydrologist reports, entering contracts, drilling wells, and expending a myriad of other costs. The District has also relied on final permits in accepting fees and well assistance funds, expending those funds, and coordinating its regional planning and long-term water management efforts.

34. Additionally, several layers of third parties have expended resources in reliance on these final permits: EPCOR, a water utility company, contracted with UW Farm to secure the groundwater for infrastructure projects to transport to end-users. Two municipal end-users (the City of Georgetown and the City of Hutto) contracted with EPCOR to reserve water authorized from the final permits. Collectively, tens of millions of dollars have been spent in reliance of the final permits at issue in this lawsuit, which were finalized and issued years prior.

35. Plaintiff’s narrative omits all of these facts in asking the Court to unwind months and years of reliance on these final permits. Plaintiff now asks for a contested case hearing years after the District followed its administrative procedures and granted the permits. Re-opening this administrative process decimates any ability to rely on the District’s permitting process generally

and these permits specifically, which interferes with contracts and plans to build out long-term water supply projects to meet critical regional water needs.

36. This lawsuit has caused, and will continue to cause until it is resolved, uncertainty around the contracts entered into in reliance on the permits. The lawsuit has stalled performance of contracts. The longer this uncertainty remains, the higher the probability that there will be additional legal disputes concerning the contracts as the chain of reliance breaks down, causing additional and substantial damage to multiple parties, including the Landowner Intervenors.

37. Below, Landowner Intervenors fill in the substantial gaps of Plaintiff’s Amended Petition, demonstrating that the facts of the case—and controlling law—conclusively defeat Plaintiff’s request that the Court turn back time, un-drill wells, and ignore the reality of contracts and dollars exchanged, all so that Plaintiff may have a second chance at an administrative hearing that it failed to request in the first place.

38. For convenience, a timeline of the relevant events is attached as Exhibit L.

A. UW Farm’s regional water supply project meets critical water shortages

39. UW Farm owns over 9,000 acres of land in Robertson County near Hearne, Texas, adjacent to the Brazos River. 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. 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 are scrambling to find sufficient water supply to meet projected needs.²

² 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>.

40. The Project is a collaborative effort of eight Robertson County landowners to bring together a collection of private property interests in groundwater to solve a public need and support economic growth in Texas. Over the next several decades, the Project will provide a stable drinking water supply for communities, households, and businesses, support the region as it continues to grow, and drive billions of dollars of economic growth in the I-35 Corridor.

41. The I-35 Corridor is among the fastest growing areas of the country. The areas that will be supplied by the Project have exploded in population over the past two decades; for example, the population of Williamson County has more than doubled since 2000.³ That trend is expected to continue, particularly with regard to the population of young adults between the ages of 18 and 34, as young people are flocking to the area in search of economic opportunity.⁴ Already, the I-35 corridor is responsible for \$1.2 trillion—approximately half—of Texas’s GDP.⁵ The I-35 economy is projected to continue growing as investments continue to flow into the area.

42. Much of the growth centers around high-tech manufacturing, specifically semiconductor manufacturing.⁶ Texas is now the #1 U.S. state for semiconductor manufacturing and the passage of the Texas CHIPS Act (House Bill 5174) in June 2023 has reaffirmed the State’s

³ See U.S. Census Bureau, “Texas Joins California as State with 30-Million-Plus Population” (Mar. 30, 2023), available at <https://www.census.gov/library/stories/2023/03/texas-population-passes-the-30-million-mark-in-2022.html> (last visited 3/27/25) (discussing growth of Williamson, Travis, and other Texas counties as being among the largest in the nation).

⁴ See CBRE, “Emerging Industrial Markets: Texas I-35 Corridor” (Mar. 17, 2022), available at <https://www.cbre.com/insights/briefs/emerging-industrial-market-texas-i35-corridor#demographics> (last visited 3/27/25) (noting that “[t]he important 18-34 age group accounts for more than 25% of the total population” in the I-35 Corridor economic area).

⁵ IBC Commerce Bank, “The Long Road: Interstate 35’s Journey from Cattle Trails to Trade Behemoth,” available at <https://www.ibc.com/newsroom/op-ed/the-long-road-interstate-35-s-journey-from-cattle-trails-to-trade-behemoth-> (last visited 3/27/25).

⁶ See, e.g., Samsung, “Building a bright future together at our Taylor, Texas fab,” available at <https://semiconductor.samsung.com/sustainability/corporate-citizenship/community-engagement/building-a-bright-future-together-at-our-taylor-texas-fab/> (last visited 3/27/25) (describing \$18 billion investment driving more than 10,000 jobs).

commitment to leadership and growth in this industry.⁷ All told, the State has committed over \$1.2 billion to semiconductor investment, recognizing the industry not only as an economic driver but also as an urgent national security need in a world where computer chips are essential to critical infrastructure, defense, and technology.

43. All of this growth requires water. The manufacturing itself is water-intensive, but more importantly, the expanding communities growing around these industries cannot thrive without reliable, sufficient, and affordable drinking water for people and families. As Governor Abbott recently stated, “by investing in sustainable long-term water infrastructure, we can ensure the Texas economic miracle continues and improve the livelihood of Texans for generations.”⁸ The Governor’s recent Statewide Economic Development Strategic Plan for 2025-2029 emphasizes that investment in water infrastructure remains a priority to “connect businesses to markets and residents to economic opportunity.”⁹

44. UW Farm has worked closely with the District while developing the Project and obtaining all necessary authorizations. UW Farm has described the Project in various public filings, and its efforts in developing the project have been transparent and collaborative. In issuing the permits, the District complied with all state laws and its own rules.

⁷ Office of the Governor, “Texas CHIPS Act – Snapshot,” available at https://gov.texas.gov/uploads/files/business/Texas_CHIPS_Act_Snapshot.pdf (last visited 3/27/25).

⁸ Office of the Governor, “Press Release – Governor Abbott Announces Texas-Size Investment in Water an Emergency Item” (Feb. 2, 2025) available at <https://gov.texas.gov/news/post/governor-abbott-announces-texas-size-investment-in-water-an-emergency-item> (last visited 3/27/25).

⁹ Office of the Governor – Texas Economic Development & Tourism Office, “Bigger. Better. Texas. Blueprint to Build a Stronger Texas of Tomorrow,” (Jan. 2025) at 56, available at https://www.kxan.com/wp-content/uploads/sites/40/2025/03/Bigger.Better_.Texas_.Economic_Development_Strategic_Plan_.pdf (last visited 3/27/25)

45. The Project draws from the Simsboro Formation of the Carrizo-Wilcox Aquifer. State water planning groups describe the Carrizo-Wilcox Aquifer as “prodigious” and “prolific,” meaning there is a high availability of groundwater in this aquifer.

46. In conceptualizing and acquiring authorizations for the Project, UW Farm implemented a variety of protective measures, including an agreement to provide \$7.5 million of voluntary well mitigation funding to the District in advance of the Project’s operation to address effects on existing wells from changes in Simsboro Aquifer conditions related to the Project. Landowner Intervenors also agreed to cap export at a volume less than their collective permitted production to balance the Project with groundwater needs and long-term, reliable management within the District’s jurisdiction.

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

47. BVGCD regulates the production and management of groundwater in Robertson and Brazos counties against the backdrop of 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. 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, overlaying a major aquifer that crosses 66 Texas counties. The Board of Directors, and the General Manager in certain circumstances, take action on various matters before BVGCD.

48. BVGCD’s general process for issuing production and transport 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;¹⁰ and (4) BVGCD considers the application at the public hearing and, if the application is uncontested, grants or denies the application at the board meeting following the hearing or up to sixty days after the hearing.

49. UW Farm complied with the process outlined above to obtain BVGCD-issued production permits and one transport permit related to that authorized production (the “UW Farm Permits”). 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:

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 ¹¹ (Ex. A)
BVDO-0292 to BVDO-0304 (13 permits)	UW Farm	Production	October 20, 2022	October 20, 2022 (Ex. B)
BVTP-001	UW Farm	Transport	March 9, 2023	March 9, 2023 (Ex. J)

50. The other Landowner Intervenors (the “Project Participants”) individually applied for production permits throughout 2023 (the “Project Participant Permits”) (the Project Participant Permits and the UW Farm Permits, collectively, the “Permits”). With their final production permits in hand, these Project Participants then collaborated with UW Farm to further develop the

¹⁰ BVGCD R. 14.3.5(a) (2020). The applicable rules for the permits at issue in this lawsuit were adopted on September 10, 2020.

¹¹ These three permits were amended on April 14, 2022, to add Public Water Supply as an authorized beneficial use.

Project to meet growing regional water needs. 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. C)
BVDO-0317 and BVDO-0108 (2 permits)	Clifford A. Skiles III	Production	March 9, 2023	March 9, 2023 ¹² (Ex. D)
BVDO-0377 to BVDO-0384 (8 permits)	Ely Family Partnership LP	Production	September 14, 2023	September 14, 2023 (Ex. E)
BVDO-0385 to BVDO-0389 (5 permits)	RH2O LLC	Production	September 14, 2023	September 14, 2023 (Ex. F)
BVDO-0394 to BVDO-0399 (6 permits)	Fazzino Investments LP	Production	September 14, 2023	September 14, 2023 (Ex. G)
BVDO-0401 and BVDO-0402 (2 permits)	L. Wiese Moore LLC	Production	September 14, 2023	September 14, 2023 (Ex. H)
BVDO-0408 to BVDO-0414 (7 permits)	Cula d’Brazos LLC	Production	September 14, 2023	September 14, 2023 (Ex. I)

51. Following the Board’s approval and the General Manager’s issuance of the Project Participant Permits, UW Farm entered into option agreements with the Project Participants to lease groundwater on a long-term basis, integrating these permits into the Project. The Project Participant Permits, collectively, authorize the production of 57,718 acre-feet of water per year out of the Simsboro, which allows the Project to disperse production of water in a manner favorable to local hydrology while meeting growing regional water needs.

¹² BVDO-0108 was originally issued on August 11, 2011, and was amended on March 9, 2023, to increase production limits.

52. Every Permit complied with BVGCD's rules, and the District determined that every Permit application was administratively complete. The Board properly scheduled and noticed hearings to consider the applications.

53. 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. *See* BVGCD R. 14.3.5(a) (Sept. 10, 2020) ("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. Plaintiff did not provide comment on the applications at the relevant public hearings or board meetings. Plaintiff did not show interest or concern about the Permits in any way during the relevant time periods between 2019 and June 2024. It should be estopped from doing so now.

54. The Board considered and approved each Permit in the Board meeting immediately following the scheduled permit hearings. The General Manager then signed, issued, and mailed the final Permits to UW Farm and the Project Participants (*see* Exhibits A–J).

55. Having received the signed and finalized Permits, UW Farm and the Project Participants have operated in reliance on their 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).
- A Project Participant drilled a well and produced water from the Simsboro under the District's final permit (BVDO-0108).

- 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 (*see* Exhibits M and N – Reservation Agreements). Substantial engineering work is underway with respect to the pipeline, treatment facilities, and related infrastructure for these agreements. 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.
- UW Farm invested tens of millions of dollars to initiate and advance the Project. 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 the wells. Additionally, the Landowner Intervenor paid the District thousands of dollars in application fees. And, UW Farm made an initial \$200,000 payment to the District under the well assistance program agreement.

C. Plaintiff requests contested case hearings in 2024

56. To receive authorization to transport water associated with the Project Participant Permits, the Project Participants applied in January 2024 for separate transport permits for each Project Participant (the “Pending Transport Applications”). At the request of the District, those applications were revised to include UW Farm as co-applicant. The Pending Transport Applications are in addition to UW Farm’s transport permit that the Board approved and the General Manager issued on March 9, 2023. UW Farm and the Project Participants worked with

the District throughout this process and agreed to certain concessions, such as an aggregate transport cap of 100,000 acre-feet per year for all permits related to the Project.

57. The District deemed the Pending Transport Applications administratively complete and set the applications for hearing on June 18, 2024. The General Manager recommended that BVGCD issue the permits.

58. Whereas the Permits issued between 2019 and 2023 did not receive any contested case hearing request, the District received several written contested case hearing requests on the Pending Transport Applications, including a June 14, 2024 request from Plaintiff. The City of Bryan, City of College Station, and Brazos County also submitted hearing requests on the Pending Transport Applications.

59. Plaintiff timely requested a contested case hearing on the Pending Transport Applications and that contest is not in dispute in this case. Intervenors take no issue with Plaintiff's administrative right to seek party status in a contested case hearing on the Pending Transport Applications, where Plaintiff submitted a timely contested case hearing request under BVGCD's rules. The District held a preliminary hearing on the Pending Transport Permit Applications on October 10, 2024, and by order referred the contested case to the State Office of Administrative Hearings on the same day.

60. However, Plaintiff's Amended Petition does not request any relief on the Pending Transport Applications. Instead, it attempts to reach back in time and retroactively challenge the longstanding final Permits—issued as far back as 2019—that Plaintiff did not contest before their issuance. Plaintiff expressed no interest in the Permits when the District properly noticed and heard those applications, but now seeks to protest the Permits years later.

D. BVGCD raises board member eligibility issues

61. Following Plaintiff’s first contested case hearing request on the Pending Transport Applications, UW Farm learned that BVGCD’s counsel, Monique Norman, had inquired into the eligibility of certain members of BVGCD’s Board of Directors. 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.” *See* Tex. Water Code § 36.051.

62. According to the District, John Elliott was serving as a Board Member of the Robertson Central Appraisal District prior to his initial appointment as a BVGCD Director in January 2023, and continued to serve in both roles until July 2024. Jeff Kennedy was serving as a Board Member of the Appraisal Review Board of Robertson Central Appraisal District prior to his initial appointment as a BVGCD Director in January 2023, and continued to serve in both roles until July 2024. Chris Zeig began a role of Councilman for the City of Franklin on or around January 2023, two years into his four-year term as a BVGCD Director, and served in both roles until around July 2024.

63. In the summer of 2024, BVGCD began describing this alleged ineligibility as a potential “quorum” issue. Under the Water Code, 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). Theoretically, if at least two Directors are absent, and at least two of the present six

Directors are ineligible, only four allegedly eligible Directors remain, which is not a “majority” of eight total Directors needed to constitute a quorum.

64. On July 16, 2024, BVGCD published on its website a list of BVGCD meetings and hearings that it determined were potentially impacted by the alleged ineligibility issues of District members Elliott, Kennedy, and Zeig. 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. Six of those nine meetings involved hearings on permit or permit amendment applications from at least sixteen different landowners across Robertson and Brazos Counties—stretching far beyond the interests of UW Farm and the Project Participants. 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 (*see* Exhibit O).

65. 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 the 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 (*see* Exhibit O).

66. Notably, the sixteen UW Farm production permits were issued April 17, 2019, and October 20, 2022, well before any purported eligibility issues. Plaintiff, in keeping with its strategic decision to omit key facts, provides no explanation to the Court why these permits are included in Plaintiff’s already groundless request for an after-the-fact contested case hearing.

E. BVGCD proposes the Ratification Rule to resolve alleged ineligibility

67. As detailed below, Texas law validates the actions of public officials who perform their duties under color of appointment, even when circumstances render them ineligible to serve. And under the *de facto* officer doctrine, the BVGCD Board's votes to approve the Permits are valid, even if certain directors were ineligible to sit on the Board.

68. However, given the far-reaching actions taken by the Board during the alleged ineligibility issue time period, BVGCD published a set of proposed rule revisions on July 16, 2024, including the Ratification Rule, which proposed to ratify all permits issued between January 1, 2021¹³ and July 1, 2024, that (1) BVGCD had deemed administratively complete; (2) were properly noticed; and (3) were uncontested (*see* Exhibit P).

69. According to the District, Directors Elliott, Kennedy, and Zeig stepped down from their secondary governmental roles on or around July 2024 to address any potential ineligibility issue as BVGCD Directors.¹⁴

70. On August 8, 2024, Plaintiff sent a letter to BVGCD requesting that the District “postpone any action” on the ratification efforts so it could “negotiate with the applicants whose permit application are the ultimate subject of [the ratification efforts].” In this letter, Plaintiff stated that it “hereby formally contests each of the permit applications that is ultimate [sic] subject to the [ratification efforts].” (Exhibit Q).

71. On August 8, 2024, BVGCD held a public hearing on the proposed rule revisions. At the meeting, BVGCD's General Manager explained BVGCD's position that, for the nine

¹³ BVGCD has indicated that the rule stretches back to January 1, 2021, as a precautionary measure for Zeig's membership, not because the purported quorum issue can be traced back to this date. The alleged ineligibility issues potentially impacting quorum began in January 2023.

¹⁴ 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.

allegedly impacted BVGCD meetings, the Board of Directors lacked a quorum to conduct any business when three of its Directors allegedly lacked eligibility and other members were absent.¹⁵ The District never provided an explanation of the alleged ineligibility issues or details related to the purported conflicting governmental positions. But in the August 8 meeting, the General Manager noted that the Ratification Rule aimed to correct the alleged eligibility issue “in one fell swoop.”

72. Following a lengthy executive session, and without any public explanation or basis, the BVGCD Board ultimately voted four to three *against* the proposed rule revisions, including the Ratification Rule that aimed to solve the perceived quorum issues and restore certainty to prior Board actions. The Board did, however, vote to ratify many administrative actions at the allegedly impacted meetings, such as prior approval of BVGCD meeting minutes and financial reports, as well as a ratification of a prior approval of a permit amendment application (*see* Exhibit R). These item-by-item ratifications did not address any of the at least eighty-seven allegedly impacted permits.

73. On September 5, 2024, several weeks after BVGCD’s board meeting, Plaintiff sent another letter to the District re-iterating and expanding its prior contested case hearing request, this time requesting a hearing on all the final UW Farm Permits (including the production permits issued well before the eligibility issue), the final Project Participant Permits, and the Pending Transport Applications (*see* Exhibit S).

74. Plaintiff did not challenge any of the other approximately fifty-seven permits issued or actions taken during the purported quorum issues, including seven permits issued to the City of

¹⁵ 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.

Bryan and the City of College Station authorizing wells that are closer to Plaintiff and will have greater impact on Plaintiff's wells. Plaintiff, in an effort to treat all the Robertson County landowners associated with the Project as second-class citizens, challenges only the final permits and actions related to the Project. However, in casting a cloud of uncertainty over the final Project Permits, Plaintiff devalues *all* property rights in the District by insisting that final, signed permits cannot be relied upon.

75. UW Farm responded to Plaintiff's September 5, 2024 letter in a filing to the District on September 11, 2024. UW Farm explained how Texas law protects the validity of the final Permits from subsequent collateral attack, even if certain BVGCD directors may have been ineligible to serve when acting as board members throughout 2023, under the *de facto* officer doctrine. UW Farm's letter indicated support for the District's ratification efforts as an *additional* means of clearing the eligibility issue, but it noted that such efforts were not necessary because the final Permits are valid as issued under Texas law (*see* Exhibit T).

76. A few hours after UW Farm sent the September 11, 2024 letter, Plaintiff sent a follow-up letter to BVGCD threatening to "initiate litigation" if the District "considered" any of the Permits or the Pending Transport Applications, including through adoption of the Ratification Rule (*see* Exhibit U).

F. BVGCD adopts the Ratification Rule on September 12, 2024

77. BVGCD again took up its proposed rulemaking package, including the Ratification Rule, in its September 12, 2024 board meeting. This time, following UW Farm's letter, the Board voted to approve the Ratification Rule, with minor changes.

78. The Ratification Rule, as adopted, "ratifies the General Manager's *prior issuance of* . . . permit or permit amendments that: (a) the District deemed that the permit or permit

amendment application(s) were administratively complete under the District’s Rules; (b) the District provided notice(s) to the public of the permit or permit amendment application(s) under Rules 14.1 and 14.2 during the time period from January 1, 2021, to July 1, 2024; AND (c) the District did not receive any written notices of intent to contest the permit or permit amendment application(s) under rule 14.3.5(a).” (Exhibit P (emphasis added)).

79. The Ratification Rule, by its own terms, ratifies the General Manager’s “prior issuance” of the purportedly affected permits, including the UW Farm Permits and the Project Participant Permits, which (a) were deemed administratively complete under the District’s rules; (b) were properly noticed under the District rules between January 1, 2021, to July 1, 2024; and (c) did not receive written notices of intent to contest the permit under rule 14.3.5(a) (requiring requests “at least five (5) calendar days prior to the date of the hearing”).

G. Plaintiff files this lawsuit

80. Wanting a do-over, Plaintiff filed the Amended Petition on September 13, 2024, requesting that (1) the Court issue a writ of mandamus directing the BVGCD and General Manager to refer all prior-issued final Permits to SOAH and (2) the Court restrain BVGCD and the General Manager from “issuing” the (already issued) Permits “until such [SOAH] proceedings are concluded.” Plaintiff’s arguments fail in light of the facts above and the law below.

V. RESPONSE TO PLAINTIFF’S APPLICATION FOR INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDAMUS

81. Plaintiff’s mandamus claim hinges on its theory that, because of the ineligibility issue, “there have been no permit or board hearings on the [applications for the Permits].” Am. Pet. ¶ 21. In other words, Plaintiff urges the Court to pretend that the April 2019, October 2022, and February, March, and September 2023 permit hearings and board meetings never happened—and that all the subsequent actions, contracts, and good-faith reliance on the Board’s decisions also

never happened. Established Texas law and the Ratification Rule prevents this outcome. Plaintiff's claims fail because it did not timely submit contested case hearings on the Permits. It does not get a do-over.

A. Plaintiff seeks extraordinary relief to enforce its legal fiction.

82. Plaintiff seeks extraordinary relief through a writ of mandamus and a permanent mandatory injunction. Am. Pet. ¶¶ 25–29, 30–33. Both request the same outcome: that the Court force BVGCD to act on a years-late hearing request and refer the permits to SOAH as if they were pending applications. But mandamus relief to compel a governmental body to perform a “purely ministerial function,” is an “extraordinary remedy . . . available only in limited circumstances.” *City of Houston v. Houston Mun. Employees Pension Sys.*, 549 S.W.3d 566, 573 (Tex. 2018). 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). “Mandamus will not lie to establish as well as enforce a claim of uncertain merit.” *Wortham v. Walker*, 128 S.W.2d 1138, 1151 (Tex. 1939). Plaintiff cannot establish that BVGCD has failed to perform *any* legal duty, yet alone a *clear* legal duty. The extraordinary remedy Plaintiff seeks is not available for its meritless claims.

83. To obtain a permanent injunction, Plaintiff must prove (1) a wrongful act, (2) imminent harm, (3) an irreparable injury, and (4) the absence of an adequate remedy at law. *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 792 (Tex. 2020). Plaintiff has not, and cannot, allege facts to support any of these elements. Additionally, Plaintiff cannot obtain permanent injunctive relief without a valid underlying cause of action. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993). Plaintiff's request for injunctive relief is redundant and untenable without an independent legal basis.

B. Plaintiff has not and cannot show that any alleged eligibility issue has impacted the final, signed Permits.

84. Plaintiff asks the Court to order BVGCD to undo 49 final, signed Permits by sending their underlying applications to SOAH for contested case hearings years after permit issuance. Am. Pet. ¶¶ 29, 33. Plaintiff's request is baseless.

85. First, for 16 of these 49 permits (the UW Farm production permits issued in 2019 and 2022), Plaintiff provides no legal theory that purportedly obligates BVGCD to invalidate them and send them to SOAH, as they were issued *before* the period of alleged board member ineligibility. Without alleging a legal duty or wrongful act as to *any* of these 16 permits, Plaintiff's claims should be summarily dismissed.

86. Second, for the remaining 33 permits issued during the alleged period of board member ineligibility, Plaintiff cannot make the requisite showing to support mandamus relief. Plaintiff does not have the statutory authority to make the predicate showing that any BVGCD board member was ineligible to serve, as this determination 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). 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.

87. And, for the sake of argument, even if Plaintiff did have the authority to determine whether BVGCD directors properly held public office after January 2023, there is no factual or legal basis to determine that Jeff Kennedy—who allegedly served on the Appraisal Review Board of the Robertson County Central Appraisal District—would be ineligible to serve as a BVGCD board member. The Texas Water Code provides that “a member of the **governing body** of another **political subdivision**” is ineligible to serve as a groundwater conservation district board member. Tex. Water Code § 36.051 (emphasis added). But an *appraisal review board* is not a “political subdivision,” yet alone the “governing body” of a political subdivision—it is a quasi-judicial group of citizens that hears disputes *for* an appraisal district.

88. The Water Code defines “political subdivision” as a “county, municipality, or other body politic or corporate of the state, including a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, a state agency, or a nonprofit water supply corporation created under Chapter 67.” Tex. Water Code § 36.001(15). A political subdivision has three characteristics: (1) jurisdiction over a portion of the State, (2) members of the governing body of a political subdivision are elected in local elections or are appointed by locally elected officials; and (3) the power to assess and collect taxes. *Guar. Petroleum Corp. v. Armstrong*, 609 S.W.2d 529, 531 (Tex. 1980) (construing definition in Texas Water Code). “Cases decided since *Guaranty Petroleum* have looked to those same three elements in determining whether an entity can be considered a political subdivision.” *Veigel v. Tex. Boll Weevil Eradication Found., Inc.*, 549 S.W.3d 193, 199 (Tex. App.—Austin 2018, no pet.). An appraisal review board member does not meet all these criteria.

89. An appraisal review board “is established *for each appraisal district.*” Tex. Tax Code § 6.41(a) (emphasis added); 34 Tex. Admin. Code § 9.4202 (defining “Appraisal District”

as a “political subdivision established in each county,” while an “Appraisal Review Board” is “the board established in a county’s appraisal district”). While the Tax Code specifically defines an Appraisal District as a “political subdivision,” it makes no such designation for an appraisal review board. Tex. Tax Code § 6.01(c).

90. An appraisal review board does not perform at least one of the functions of a “political subdivision”—assessing and collecting taxes. *See Guar. Petroleum*, 609 S.W.2d at 531 (“Political subdivisions have the power to assess and collect taxes.”). Instead, an appraisal review board has specific, limited statutory responsibilities: hearing appraisal protests, determining challenges by taxing units, and correcting certain administrative issues. *See* Tex. Tax Code § 41.01. If not otherwise designated as a political subdivision by statute, a body with no power to assess and collect taxes cannot be a political subdivision. *Ohnesorge v. Winfree Acad. Charter Sch.*, 328 S.W.3d 654, 657 (Tex. App.—Dallas 2010, no pet.).

91. Additionally, the Water Code specifies ineligibility only for “a member of the *governing body* of another political subdivision.” Tex. Water Code § 36.051 (emphasis added). An appraisal review board does not perform any function of a governing body, but is rather governed by the appraisal district that it serves. The appraisal district sets and distributes the budget for both the district and the review board. Tex. Tax Code § 6.06(b). The appraisal district, not the review board, has purchasing and contracting authority. *Id.* § 6.11. Any person aggrieved by action of the appraisal review board must sue either the appraisal district or the Comptroller. *Id.* § 42.21(b). (“A petition for review may not be brought against the appraisal review board”). The Texas Supreme Court has even ruled that there is an “employment relationship” between an appraisal district and the members of its appraisal review board, such that the members of the appraisal review board were eligible for unemployment compensation. *Harris Cnty. Appraisal*

Dist. v. Tex. Workforce Comm’n, 519 S.W.3d 113, 116 (Tex. 2017) (“HCAD is responsible for appraising property in its district for ad valorem tax purposes. The [HCAD Appraisal Review Board] is charged with determining protests and challenges to HCAD’s initial valuations, correcting clerical errors in the appraisal records and appraisal rolls, and determining whether an exemption or a partial exemption is improperly granted. The Board members’ service is therefore merged into the overall success of HCAD.”).

92. Consequently, Kennedy did not serve as a “member of the governing body of another political subdivision” due to his role on the Appraisal Review Board for the Robertson County Appraisal District. Even if Plaintiff can establish ineligibility for the remaining two directors, at a minimum no purported quorum issue exists for the Permits that Plaintiff challenges for the February 9, 2023, and March 9, 2023 board meetings and hearings: BVDO-0315 and BVDO-0316 (Dr. James Brien); BVDO-0108 and BVDO-0317 (Clifford A. Skiles III); and BVTP-001 (UW Farm). To show a “clear legal duty” to warrant mandamus action, Plaintiff would need to, but cannot, demonstrate the purported ineligibility issues that it relies upon to seek extraordinary mandamus relief from this Court. Its mandamus request should be denied.

C. The Ratification Rule bars Plaintiff’s mandamus relief.

93. The plain language of the Ratification Rule—as well as the District’s stated intentions behind that rule—also precludes the relief Plaintiff seeks. The District’s Ratification Rule notes that “the Board hereby ratifies the General Manager’s prior issuance” of permit and permit amendments that:

- a. the District deemed that the permit or permit amendment application(s) were administratively complete under the District’s Rules;
- b. the District provided notice(s) to the public of the permit or permit amendment application(s) under Rules 14.1 and 14.2 during the time period from January 1, 2021, to July 1, 2024; AND

- c. the District did not receive any written notices of intent to contest the permit or permit amendment application(s) under rule 14.3.5(a).

94. The Permits fit each of these criteria. Plaintiff incorrectly asserts that its September 5, 2024 contested case hearing request is a type written notice of intent under subsection (c) of the Ratification Rule that would prevent the rule from applying to the Permits. Plaintiff's interpretation ignores the plain text of the Ratification Rule. Subsection (c) uses past tense—the District “did not receive” any written notices of intent to contest the applications—meaning, written notices received in the original window for doing so. This phrase is also limited by the words “under rule 14.3.5(a),” which requires a request to be submitted “at least five (5) calendar days prior to the date of the hearing” (under the Rules at the time) or “by 5:00 p.m. the day before the permit hearing” (under current Rules). The entire purpose of Rule 8.3(j) is to issue certain permits “without a permit hearing.” Therefore, “under rule 14.3.5(a)” must refer to a hearing request submitted prior to the originally scheduled hearing, because no other relevant “hearing” exists. Reading the Ratification Rule to contemplate requests submitted *after* the only relevant hearing would render “under rule 14.3.5(a)” meaningless.

95. This plain language aligns with the District's stated purpose of Rule 8.3(j)—“to ratify, not restart, the permitting process on affected permit applications.” BVGCD Response to MSJ ¶ 6. The District has stated that the Ratification Rule 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.” *Id.* ¶ 5. Thus, the Ratification Rule forecloses the relief Plaintiff seeks.

D. Under the *de facto* officer doctrine, the final Permits are valid even without eligibility determinations or the District’s ratification efforts

96. Plaintiff’s theory for submitting an untimely contested case hearing request fails in the face of clear Texas law—repeated by multiple courts for decades and reiterated several times over by the Office of the Attorney General—that actions taken by a *de facto* public officer are valid *at the time they are made*, even where circumstances render him ineligible. *Rivera v. City of Laredo*, 948 S.W.2d 787, 794 (Tex. App.—San Antonio 1997, writ denied) (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)); *see also* Op. Tex. Att’y Gen. No. KP-0287 (2020) (“As such, their 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.”); Op. Tex. Att’y Gen. No. JM-874 (1988) (“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. 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.”).

97. 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.

98. The three BVGCD directors who held secondary roles during the period at issue constitute *de facto* officers because they were properly appointed to the BVGCD Board and their ineligibility issues were unknown to the public. *See Martin v. Grandview Indep. Sch. Dist.*, 266 S.W. 607, 609 (Tex. App.—Waco 1924, writ ref’d) (“It was seen that it would be unreasonable on

all occasions to require the public to inquire into the title of an officer, or compel him to show title.”).

99. The Directors’ purported statutory ineligibility under section 36.051 of the Texas Water Code is a type of ineligibility contemplated under the *de facto* officer doctrine. *See, e.g.*, Op. Tex. Att’y Gen. No. LO-88-103 (1988) (holding board member as *de facto* officer where her relation to a 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).

100. Acts performed by a *de facto* officer are valid at the time they are made, despite any eligibility issue or other defect with his election or appointment. Op. Tex. Att’y Gen. No. JM-874 (1988) (“Acts performed by a *de facto* officer under color of office are considered valid”); Op. Tex. Att’y Gen. No. KP-0287 (2020) (actions of *de facto* officer “*are* binding because the law validates [their] acts” (emphasis added)).

101. Texas courts and the Office of the Attorney General have employed this rule many times over, noting that it is “founded upon sound considerations of necessity and policy and protects the public and individuals whose interests are affected because they rely on the validity of the appointment.” Op. Tex. Att’y Gen. No. LO-88-103 (1988); *see also Nalle v. City of Austin*, 93 S.W. 141, 145 (Tex. App—Austin 1906, writ ref’d) (*de facto* doctrine prevents “collateral and subsequent inquiry into the regularity of the appointment” that “jeopardize[s]” public acts).

102. In continuing to uphold the *de facto* officer doctrine, courts have refused invitations like Plaintiff’s to invalidate large swaths of government action because it would “invite

chaos in the preservation of the peace and the protection of property rights of individuals and the orderly administration of corporate affairs.” See *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 the city council ineligibility invalidated all city action “during a period of about 2 1/2 months”).

103. *De facto* officers count towards an entity’s decision-making quorum. *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 to prohibit collateral attack on their prior actions).

104. The *de facto* officer doctrine squarely applies in this scenario and thereby validates BVGCD actions in the period at issue, even without the District’s Ratification Rule or other ratification efforts. 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, “although it would seem that it was entirely lawful for the [later elected] de jure council . . . to either ratify the [challenged action] or to give new and undoubted authority”).

105. Plaintiff’s attempt to invalidate numerous BVGCD decisions flies in the face of established Texas law and sound public policy in Texas and would adversely affect dozens of landowners in Robertson and Brazos Counties—as well as Project customers in the receiving areas—who have relied on, acted on, and invested based upon BVGCD’s rules, decisions, and authorizations. The eligibility issue extends far beyond the Permits and reaches community

members who accepted payments from the District, cities who obtained permit authorizations for municipal water supplies, and countless individuals who dealt with the District over the affected period of nearly a year and a half. Texas courts reject claims from those who wish to “invite chaos” in sound government actions, which is exactly what Plaintiff is attempting to do here. The longer Plaintiff’s challenge drags out, the more likely it is to negatively affect and devalue the property of *all* property owners in the District, as well as disrupt the Project and the communities relying upon it.

106. The *de facto* officer doctrine validates the prior-issued Permits and conclusively defeats the outcome that Plaintiff seeks.

E. The Plaintiff fails to show a “clear, non-discretionary legal duty” for the BVGCD to perform.

107. In light of the factual and legal hurdles above, Plaintiff’s mandamus action cannot stand. Plaintiff argues that section 36.4051 of the Texas Water Code imposes a non-discretionary duty on the District to “schedule a preliminary hearing to hear a request for a contested case hearing.” Plaintiff conveniently omits the full text of the rule: “The board shall schedule a preliminary hearing to hear a request for a contested case hearing *filed in accordance with rules adopted under Section 36.415.*” Tex. Water Code § 36.4051. Section 36.415, in turn, requires the District to “establish the deadline” for filing a contested case hearing request. *Id.* § 36.415. The District has done so in BVGCD Rule 14.3.5: “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.”¹⁶

¹⁶ Since issuing the Permits, the District has changed its rule for requesting a contested case hearing to: “A request for contested case hearing shall be in writing and must be received by the District by 5:00 p.m. the day before the permit hearing.”

108. Plaintiff did not file timely contested case hearing requests on the applications for the Permits before the dates of their respective hearings in April 2019, October 2022, and February, March, and September of 2023. There is no “clear legal duty” for BVGCD to implement Plaintiff’s after-the-fact requests—indeed, there is no duty at all. *See Phillips v. McNeill*, 635 S.W.3d 620, 628 (Tex. 2021) (mandamus actions “compel the performance of a clear legal duty”); *Wortham v. Walker*, 128 S.W.2d 1138, 1151 (1939) (“Mandamus will not lie to establish as well as enforce a claim of uncertain merit.”).

109. Even if Plaintiff’s absurd assertion that the “there have been no permit or board hearings on the [applications for the Permits]” is accepted as true (in essence, ignoring the fact that the April 2019, October 2022, and February, March, and September 2023 hearings were noticed and happened), Plaintiff *still* cannot succeed in arguing that it submitted a timely request, where BVGCD’s rules requires a written request “at least five (5) calendar days *prior to the date of the hearing*.” See BVGCD R 14.3.5 (Sept. 10, 2020) (emphasis added). Even assuming the hearings themselves never happened, the date of the hearing is set by the General Manager by letter to the applicant, not by action of the Board. Pretending that the hearings did not occur does not solve the issue that the *date of the hearing* was set and passed by without a written protest by Plaintiff. Even when stretching the imagination to its limit, Plaintiff’s September 5, 2024 contested case request cannot be considered timely under the plain language of BVGCD’s rules.

110. Aside from failing to adhere to the deadlines prescribed in the Water Code, Plaintiff’s theory that it can contest issued permits belies the Water Code’s requirement that only *applications* may be the subject of a contested case hearing. Section 36.415 “limit[s] participation in a hearing on a contested *application*.” Tex. Water Code § 36.415(b)(2) (emphasis added). Similarly, BVGCD Rule 14.3.5 limits its contested case hearing procedures to *applications*: “Any

person who intends to protest a permit *application* and request a contested case hearing must provide written notice of the request” Plaintiff’s mandamus action seeking audience before SOAH is precluded on its face because the underlying documents at issue are final *permits*, not *applications*.

111. The illogical end of Plaintiff’s theory would be that hearing requests could be filed today or two years from now on, for example, the City of Bryan or the City of College Station’s final permits for which a hearing date was set in August 2023 and final permits were issued after the hearing and board meeting that same day. Those municipalities would have no ability to rely on those final permits now or in the future.

F. Plaintiff’s unclean hands bars its request for mandamus relief.

112. Finally, Plaintiff’s request for mandamus relief fails because Plaintiff has acted inequitably with respect to the relief it seeks. To obtain mandamus relief compelling a governmental body to perform a nondiscretionary duty, “it is a uniform requirement that the relator in seeking this remedy must come into court with clean hands.” *Westerman v. Mims*, 227 S.W. 178, 182 (Tex. 1921) (quoting treatise on “extraordinary relief” and noting that such mandamus relief is “to remedy a wrong, not to promote one”); *see In re D.D.*, 661 S.W.3d 608, 618 (Tex. App.—El Paso 2023, no pet.) (similar); *City of Fredericksburg v. Bopp*, 126 S.W.3d 218, 223 (Tex. App.—San Antonio 2003, no pet.) (similar). Plaintiff’s years-late attack that singles out the Landowner Intervenors rejects all notions of “justice, honesty, and fair dealing,” thereby barring mandamus relief. *See Bopp*, 126 S.W.3d at 223. Issuance of mandamus relief “is largely controlled by equitable principles,” and those principles bar relief when the plaintiff “has engaged in unconscionable, unjust, or inequitable conduct with regard to the issue in dispute.” *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993); *In re Francis*, 186 S.W.3d 534, 551 (Tex.

2006). Plaintiff inequitably targets the Landowner Intervenor. BVGCD issued permits during the same period of purported ineligibility to many persons and entities other than the Landowner Intervenor, including the City of Bryan and City of College Station, whose permitted well locations are closer to Plaintiff's wells than those of Landowner Intervenor. Yet despite this proximity, Plaintiff does not challenge these permits. By instead seeking to treat Robertson County landowners as second-class citizens to those in Brazos County, Plaintiff is precluded from seeking the equitable remedy of mandamus.

113. Plaintiff's request that the Court preserve the "status quo" by "restraining the District and the General Manager from issuing permits on the applications for the [UW Farm permits] and [the Project Participant Permits], until such time as the court may determine, through trial or dispositive motion, the issuance of a writ of mandamus applied for in this petition" also fails because (1) the District has already issued the final Permits, and Plaintiff's request is thereby moot; there are no *applications* to construe; and (2) Plaintiff has no claim upon which to base its request for injunctive relief because the mandamus claim fails under multiple legal doctrines. Furthermore, Plaintiff's assertion of an "immediate threat" of being "denied the opportunity for contested case hearing" is unsubstantiated, as Plaintiff had multiple opportunities to timely contest the permits in April 2019, October 2022, and February, March, and September of 2023, but chose not to do so. The status quo is, and has been, that BVGCD issued final Permits, those final Permits have been relied on for years, and the relevant rules and law prohibit post hoc challenges of long-issued permits.

VI. PRAYER

114. Landowner Intervenor respectfully request that the Court enter an appearance for UW Brazos Valley Farm LLC, Cula d'Brazos LLC, RH2O LLC, L. Wiese Moore

LLC, Clifford A. Skiles III, James C. Brien, Ely Family Partnership, L.P., and Fazzino Investments, LP as intervenors in this cause, to allow Landowner Intervenors the opportunity to defend the validity of the Permits before the Court.

115. Landowner Intervenors also request that, that upon final hearing, the Court: (1) deny Plaintiff's request for relief; and (2) grant Landowner Intervenors any relief to which it may be justly entitled.

Dated: March 27, 2025

Respectfully submitted,

BAKER BOTTS L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that, on March 27, 2025, 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.

/s/ Kevin T. Jacobs
Kevin T. Jacobs