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State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

October 9, 2024

Peter T. Gregg **VIA EFILE TEXAS**

Deborah C. Trejo **VIA EFILE TEXAS**

Lauren Ice **VIA EFILE TEXAS**

RE: Docket Number 955-23-21880.BCRAGD; Bandera County River Authority and Groundwater District No. 1003585; APPLICATION OF VANDERPOOL MANAGEMENT, LP FOR TWO WELL PERMITS FROM BANDERA COUNTY RIVER AUTHORITY AND GROUNDWATER DISTRICT

Dear Parties:

Please find attached a Proposal for Decision in this case.

Exceptions and replies may be filed by any party in accordance with 1 Texas Administrative Code section 155.507(b), a SOAH rule which may be found at www.soah.texas.gov.

CC: Service List

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BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

APPLICATIONS OF VANDERPOOL MANAGEMENT, LP FOR TWO WELL PERMITS FROM BANDERA COUNTY RIVER AUTHORITY AND GROUNDWATER DISTRICT

PROPOSAL FOR DECISION

Vanderpool Management, LP (Applicant) requested a contested case hearing to contest the Board of Directors' (the Board) of the Bandera County River Authority and Groundwater District (the District) decision to grant Applicant's two well applications at lower amounts than sought by Applicant. Applicant seeks a combined total of 200 acre-feet/year (af/yr). The Board granted a combined total of 56 af/yr. Bandera Canyonlands Alliance (BCA) requests that the applications be denied, but in the alternative, that Applicant only be granted a combined 20 af/yr. After reviewing the evidence and considering the arguments of the parties, the Administrative Law Judges (ALJs) recommend the Applications be issued as requested for a combined total of 200 af/yr.

I. BACKGROUND AND PROCEDURAL HISTORY

Applicant submitted two applications to the District for groundwater production well permits for: (1) the Willow Springs-House Well (House Well) for 130 af/yr; and (2) the Willow Springs-Barn Well (Barn Well) for 70 af/yr (the Applications).[1] According to the Applications, the two wells are located on a 317-acre survey tract owned by the Applicant in Bandera County, Texas.[2] The District's General Manager (GM), David Mauk, declared the Applications to be administratively complete and, after review, recommended that the Applications be granted for an annual production limit equal to what an exempt well could produce, 28 af/yr for each well.[3]

The Board considered the Applications at its January 19, 2023, quarterly meeting and voted to approve two permits, each for 28 af/yr.[4] Following a timely request for a contested case hearing submitted by Applicant and a timely motion for rehearing submitted by BCA, the District set the matter for a contested case hearing and referred this matter to the State Office of Administrative Hearings (SOAH).[5]

SOAH ALJ Ross Henderson convened the preliminary hearing on August 15, 2023, and named as parties the GM, the Applicant, and BCA. The

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[1] GM Exs. 4 (Barn Well Application) and 5 (House Well Application).

[2] GM Exs. 4 at 1; 5 at 1.

[3] GM Ex. B (Prefiled Testimony of David Mauk) at 10.

[4] GM Ex. 6.

[5] GM Exs. 6, 7, 8.

hearing on the merits was held April 29-30, 2024, before ALJs Meitra Farhadi and Henderson, at SOAH's hearing facility in Austin, Texas. Applicant appeared and was represented by attorneys Peter T. Gregg, C. Brantly Jones, and Marvin W. Jones. The GM appeared and was represented by attorneys Deborah C. Trejo and Kimberly Buser. BCA appeared and was represented by attorneys Lauren Ice and Vic McWherter. The parties submitted post-hearing briefs and the record closed on September 5, 2024, when the transcript and exhibits were received by SOAH.

II. Applicable Law

Article XVI, Section 59 of the Texas Constitution mandates that the Legislature protect Texas's natural resources.[6] The Constitution provides authority for the Legislature to create conservation districts to accomplish this purpose.[7] Groundwater conservation districts (GCDs) are "the state's preferred method of groundwater management in order to protect property rights, balance the conservation and development of groundwater to meet the needs of this state, and use the best available science[8] in the conservation and development of groundwater through rules developed, adopted, and promulgated by" the districts under Code chapter 36.[9]

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[6] Tex. Const. art. XVI, § 59(a).

[7] Tex. Const. art. XVI, § 59(b).

[8] For purposes of applying Chapter 36, "best available science" means conclusions that are logically and reasonably derived using statistical or quantitative data, techniques, analyses, and studies that are publicly available to reviewing scientists and can be employed to address a specific scientific question. Tex. Water Code (Code) § 36.0015(a).

[9] Code § 36.0015(b).

The District was created by the Texas Legislature by Chapter 629, Acts of the 62nd Legislature, Regular Session, 1971. It was then merged with the newly created Springhills Water Management District by Chapter 654, Acts of the 71st Legislature, Regular Session, 1989, and then renamed the Bandera County River Authority and Groundwater District in 2003.[10] The District was created to, among other things, conserve, preserve, protect, and prevent waste of groundwater in Bandera County as a GCD.[11] The District serves a public use and benefit with respect to the groundwater in Bandera County and has the rights, powers, privileges, authority, functions, and duties provided by the Code for GCDs.[12]

As a political subdivision of the State of Texas,[13] the District has only the powers expressly granted by the Code and those powers necessarily implied so it can carry out its express powers.[14] In carrying out its functions and responsibilities, the District may make and enforce rules limiting groundwater production based on tract size, and to provide for conservation and preservation, and prevent waste, of groundwater.[15]

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[10] GM Ex. 1.

[11] Tex. Spec. Dist. Code §§ 8850.0102-.0104; Code § 36.0015(b).

[12] Tex. Spec. Dist. Code § 8850.0301.

[13] Code § 36.001(15).

[14] *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1,* 209 S.W.3d 172, 179-80 (Tex. App.—El Paso 2006), rev'd on other grounds, 263 S.W.3d 910 (Tex. 2008).

[15] Code §§ 36.101(a), .116(a)(2).

In Texas, a landowner owns the groundwater below the surface of their land as real property and is entitled to drill for and produce that groundwater, subject to a GCD's well-spacing and production restrictions, so long as the drilling and production does not cause waste or malicious drainage of other property, or negligently cause subsidence.[16]

Code chapter 36 outlines the process by which landowners obtain the right to produce their groundwater within GCDs. Under chapter 36, a GCD, such as the District, "shall require a permit for the drilling, equipping, operating, or completing of wells,"[17] except for exempt wells.[18] The Code requires consideration by the District of several factors before granting or denying a permit, including whether:

1. the application conforms to the requirements prescribed by chapter 36 and is accompanied by the prescribed fees;
2. the proposed use of water unreasonably affects existing groundwater resources or existing permit holders;
3. the proposed use of water is dedicated to a beneficial use;
4. the proposed use of water is consistent with the District's management plan;
5. if the well will be located in the Hill Country Priority Groundwater Management Area, the proposed use of water is wholly or partly to provide water to a pond, lake, or reservoir to enhance the landscape appearance;

[16] Code § 36.002(a), (b), (d).

[17] Code § 36.113(a).

[18] Exempt wells are wells used solely for domestic use or for providing water for livestock or poultry and that are located on a tract of land larger than ten acres, and cannot produce more than 25,000 gallons of groundwater a day. Code § 36.117(b)(1).

6. the applicant has agreed to avoid waste and achieve water conservation; and
7. the applicant has agreed that reasonable diligence will be used to protect groundwater quality and to follow well plugging guidelines at the time of well closure.[19]

The District has adopted a management plan as required by the Code, to implement the District's goals and meet its statutory obligation to manage groundwater in Bandera County.[20] The District has also adopted rules for permit applications.[21] Under the District's management plan and rules, all groundwater wells in Bandera County must either be registered with (if exempt) or permitted by (if non-exempt) the District.[22]

As the party seeking the permits, Applicant has the burden of proof by a preponderance of the evidence.[23]

[19] Code § 36.113(d).

[20] GM Ex. B at 6; Ex. 11 (District Management Plan amended July 14, 2022).

[21] GM Ex. 10 (District Rules amended July 14, 2022) (District Rules).

[22] GM Exs. 11; 10 at Rules 3.1, 3.3, 3.4. Pursuant to the Code and the District's rules, groundwater wells are exempt under certain circumstances. *See* Code § 36.117; District Rule 3.2. There is no dispute in this case that the Applications are for non-exempt wells under the District's rules.

[23] 1 Tex. Admin. Code § 155.427; *Granek v. Texas State. Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).

III. Issues

A. Whether the applications conform to the requirements prescribed by Chapter 36 and are accompanied by the prescribed fees (Code § 36.113(d)(1))

Code section 36.113(d)(1) states:

> Before granting or denying a permit . . . the district shall consider whether:
>
> (1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fees[.]

Code section 36.113(c), sets forth items a district may require in a permit application under the district's rules. District Rule 1.1 defines "Administratively Complete Application" as "[a]n application in which all documentation required by District Rules, and payment of all appropriate fees pertaining to the application have been received by the District."[24] District Rule 3.7C lists the permit application contents required by the District.[25] Among other items, the required contents include:

- a statement of the nature and purpose of the proposed use;
- a statement of the anticipated duration of time required for the proposed use of the water;
- information showing what water conservation measures the applicant has adopted, what water conservation goals the applicant has established, and what measures and time frames are necessary to achieve the established water conservation goals;

[24] GM Ex. 10 at 4.

[25] GM Ex. 10 at 24-26.

- information, including a hydro-geological study with test wells, showing water availability and the projected effect of the proposed pumping on aquifer conditions or depletion and on existing permit holders or other groundwater users in the District;
- and water quality testing for multiple parameters.[26]

1. Parties' Evidence and Arguments

a) GM

The GM testified that the process of applying for a non-exempt well permit includes submitting an initial application, paying a permit application fee, and submitting a Water Availability Study (WAS) along with other required documentation.[27] Once the aforementioned is complete, the application is considered administratively complete and set for public hearing and Board consideration.[28] The GM disagrees that the determination that the Applications were administratively complete means that they meet the requirements of the District Rules or Chapter 36.[29]

The GM testified that the District received the Applications in September of 2022. The WAS submitted with the Applications was prepared by Craig Scott Courtney. In reviewing the Applications, the District requested

[26] GM Ex. 10 at 24-26.

[27] GM Ex. B at 6.

[28] GM Ex. B at 6.

[29] General Manager's Response to Applicant Vanderpool Management, LP's Closing Brief (GM Response) (July 16, 2024) at 3.

additional information regarding the WAS;[30] however, Mr. Courtney did not provide the supplemental information requested.[31] The District made the same requests for supplemental information from the Applicant's driller, Chad Hillis. In response, Mr. Hillis requested that the Applications be processed without further supplementation of the WAS. Pursuant to that request, the GM explained, the Applications were scheduled for public hearing and consideration at the January 19, 2023, District quarterly meeting.[32]

The GM stated that the District also requested that Applicant provide modeled aquifer drawdown levels in line with the District's management plan. When Applicant's proposed drawdowns indicated a potential threat to the aquifer and neighboring wells from the proposed pumping, the District sought clarification concerning certain statements in the water availability materials submitted, which the District believed were inconsistent with known geological principles. Applicant did not provide the supplementation sought by the District.[33]

In sum, the GM asserts that his determination of administrative completeness did not amount to a finding that the Applications were entitled to be granted. In fact,

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[30] According to the GM, the WAS lacked the following: (1) a sufficient identification and location (with an aerial map) of infrastructure; (2) sufficient information to justify the large amount of water requested; (3) sufficient information about drawdown levels over 10 and 30 years of use of the wells (including, but not limited to, an illustrated, impossible rectangular cone of depression); (4) sufficient pump test data in a format for confirmation and analysis; and (5) sufficient articulation of the proposed use and need of the amount of water being requested, with a description of beneficial use without waste. GM Ex. B at 7.

[31] GM Ex. B at 7.

[32] GM Ex. B at 8.

[33] GM Ex. B at 7.

he states that the WAS submitted as part of the Applications indicated that there was insufficient water available for the Applications to be granted as requested. Based on the District Rules, its management plan, and the deficiencies in Applicant's WAS, the GM recommended that the Board approve the permits for an annual production limit equal to what an exempt well could produce—28 af/yr for each well.[34]

b) Applicant

Applicant states that the Applications meet the requirements of Code chapter 36 and were deemed administratively complete by the GM.[35] Applicant witness Michael Thornhill, a hydrogeologist, was retained to review the Applications and provide his opinion on the sufficiency of available groundwater to support them.[36] The WAS performed by Mr. Courtney was the technical documentation submitted by the Applicant, and what the District had when it considered the Applications.[37] Because Mr. Courtney refused to provide the raw data from his tests, Mr. Thornhill directed and observed additional pumping tests using the Barn Well and House Well.[38] Mr. Thornhill also explained that he found Mr. Courtney's WAS to be unreliable, particularly in terms of predicting drawdown over the long term.[39] Although Mr. Thornhill did look at the data that was made available from

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[34] GM Ex. B at 10.

[35] Applicant Vanderpool Management, LP's Closing Statement (Applicant Closing) (June 18, 2024) at 3.

[36] App. Ex. 28 (Prefiled Direct Testimony of Michael Thornhill) at 5-6.

[37] Tr. Vol. 1 at 167.

[38] App. Ex. 48 (First Amended Supplemental Direct Testimony of Michael Thornhill) at 3.

[39] Tr. Vol. 1 at 154-55.

Mr. Courtney, he also performed his own pump tests and did not rely on Mr. Courtney's work.[40]

Applicant also hired a hydrogeologist, Michael Keester, to review the data available from both Mr. Courtney's pumping tests and Mr. Thornhill's pumping tests, and to conduct a hydrogeological study as required by District Rule 3.7C(m).[41] Having reviewed the WAS prepared by Mr. Courtney and submitted with the Applications, Mr. Keester testified that Mr. Courtney's work was not reliable and Mr. Keester did not rely on it in forming his opinions.[42] As further discussed in sections III.B and C of this proposal for decision (PFD), Mr. Keester formed the opinions that production of 200 af/yr from the House and Barn Wells: (1) will not unreasonably affect local groundwater conditions or affect surface water resources; and (2) is appropriate for the proposed uses identified in the Applications.[43]

c) BCA

BCA contends the Applications failed to conform to the requirements of Code chapter 36 because there is evidence contradicting the information provided in the Applications concerning the nature and purpose of the proposed use, amount of water to be used for each use, and specific property to be benefitted. BCA asserts that, while Applicant has not sought to amend its Applications in writing, it appears

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[40] Tr. Vol. 1 at 155.

[41] App. Ex. 34 (Prefiled Testimony of Michael R. Keester) at 2; *see* BCA Ex. 8 (March 21, 2024 Keester Hydro-Geological Study for Applications).

[42] Tr. Vol. 1 at 33.

[43] App. Ex. 34 at 3, 7, 8.

Applicant is seeking to amend the WAS and the proposed use of the requested groundwater via this contested case hearing process.[44]

BCA also contends that hydrology information included as part of an application must be accurate and reliable in order for the application to conform to the applicable statutory and regulatory requirements. Specifically, the information must be accurate because GCDs are directed by the Legislature to use best available science to consider whether the proposed use unreasonably affects existing groundwater and surface water resources or existing permit holders.[45] Because the Applications contained defective hydrology information, BCA argues the Applications did not conform to the requirements of Code chapter 36.[46]

BCA notes; however, that the contested case hearing is the opportunity for all parties to engage in discovery, examine the basis of the Applications, and present additional evidence—all of which may inform the ALJs' recommendation and the District Board's final decision.[47]

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[44] BCA notes that the Applications initially requested 200 af/yr of groundwater for the following purposes and uses: 56 af/yr for domestic use, 56 af/yr for livestock use, and 88 af/yr for irrigation use, which was requested based on a 317-acre survey plat. However, Applicant's ranch foreman, Bob Duke, testified that the water is intended for use on that 317 acres as well as a neighboring 310 acre-tract—a total of 627 acres—and suggested his intent is to irrigate 3.8 inches per year using stand-alone sprinklers that water one acre each, across the entirety of the 627 acres, in order to grow grass. Conflictingly, BCA notes that Applicant witness Dr. William Rogers' testimony concerning aggressive rangeland restoration was based on using dripline irrigation. *See* Protestant Bandera Canyonlands Alliance's Written Closing Arguments (BCA Closing) (June 18, 2024) at 10-12; GM Ex. 4 (Courtney Groundwater Availability Report) at 23-24; App. Ex. 145 (Rebuttal Testimony of Bob Duke) at 3-4; Tr. Vol 1 at 94, 236; App. Ex. 144 (Rebuttal Testimony of Dr. William Rogers) at SPLD02391, 2398, 2400-01.

[45] Protestant Bandera Canyonlands Alliance's Response to Written Closing Arguments (BCA Response) (July 17, 2024) at 6; Code §§ 36.0015, .113(d)(2).

[46] BCA Response at 6.

[47] BCA Response at 9.

2. ALJs' Analysis

There is no dispute that the GM declared both Applications administratively complete. However, the ALJs agree with the GM and BCA that declaring an application administratively complete merely means the paperwork has been filled out and the obligatory items submitted—it does not weigh on the substance of the application itself.[48]

The evidence was undisputed that the WAS performed by Mr. Courtney, and submitted with the Applications, was unreliable—so much so that Applicant hired two additional hydrogeologists: Mr. Thornhill to review the WAS and provide his opinion, which included performing additional pump tests and performing his own analyses; as well as Mr. Keester to review both Mr. Courtney and Mr. Thornhill's data and conduct a hydrogeological study. It is also undisputed that the unreliable WAS by Mr. Courtney was the information the Board had in front of it when it considered the Applications in January 2023. However, the ALJs do not believe that the inquiry ends there. Via this contested case hearing process, the Applicant has supplemented the unreliable WAS with additional pumping data by Mr. Thornhill and a hydrogeological study by Mr. Keester. While the GM and BCA disagree with some of the values used by Mr. Keester and Mr. Thornhill, as discussed below in section III.B of this PFD, the ALJs do not find their work unreliable. Therefore, the District may not deny the Applications under Code section 36.113(d)(1).

[48] *See* Tr. Vol. 2 at 258 (cross-examination of David Mauk).

B. WHETHER THE PROPOSED USE OF WATER UNREASONABLY AFFECTS EXISTING GROUNDWATER AND SURFACE WATER RESOURCES OR EXISTING PERMIT HOLDERS (CODE § 36.113(d)(2))

The Code provides that, before granting or denying a permit, the District Board "shall consider whether . . . the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders."[49] District Rule 3.7C(m) requires permit applications to include "[i]nformation, including a hydro-geological study with test wells, showing water availability and the projected effect of the proposed pumping on aquifer conditions or depletion and on existing permit holders or other groundwater users in the District."[50]

1. Parties' Evidence and Arguments

a) BCA

BCA argues that the Applications do not utilize "best available science" as required by Chapter 36.[51] To constitute "best available science," the scientific conclusions relied upon by the Board regarding the adverse impact of a permitting action must be "logically and reasonably derived using statistical or quantitative data, techniques, analyses, and studies that are publicly available to reviewing scientists."[52] Predicted drawdowns are estimates of future water level decline caused by

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[49] Code § 36.113(d)(2).

[50] GM Ex. 10 at 25.

[51] Code § 36.0015(b).

[52] Code § 36.0015(a).

groundwater pumping. The drawdowns are estimated using standard hydrologic techniques, such as the Theis Method, or modifications of the Theis Method such as the Cooper-Jacob Method or the Method of Images.[53] These techniques require the use of values for storativity and transmissivity.

BCA states that Applicant's drawdown predictions all assume a high storativity value that is not supported by scientific literature or the actual pump test data in the record. This error, BCA contends, led to Applicant's witnesses calculating unreliable drawdown predictions and estimated impacts from Applicant's proposed pumping.[54] In addition, BCA argues that Applicant's witnesses improperly calculated transmissivity and ignored the presence of a low permeability boundary.[55]

BCA expert witness George Rice, a hydrologist, explained the concepts of transmissivity and storativity. Transmissivity is a measure of an aquifer's ability to transmit water. It is equal to the hydraulic conductivity (also called permeability) multiplied by the aquifer thickness. The greater the transmissivity, the greater the ability of an aquifer to transmit water. All other things being equal, drawdowns in an aquifer with a high transmissivity will be less than in an aquifer with a low transmissivity.[56] Storativity is a measure of an aquifer's ability to store and release water. In technical terms, it is the volume of water an aquifer releases, per unit surface

[53] BCA Ex. 100 (Prefiled Direct Testimony of George Rice) at 13.

[54] BCA Closing at 14.

[55] Low-permeability boundaries can cause an increase in long-term drawdowns due to pumping. The pump testing of Applicant's wells revealed the presence of a low-permeability boundary. BCA Exs. 100 at 27; 104 at Figure 1.

[56] The units of transmissivity are length squared divided by time (e.g., feet squared per minute, meters squared per second, gallons per day per foot (gpd/ft)). BCA Ex. 100 at 14.

area, per unit decline of hydraulic head. All other things being equal, drawdowns in an aquifer with a high storativity will be less than in an aquifer with a low storativity.[57] Transmissivities and storativities are usually determined by analyzing data from pump tests.[58]

Confined aquifers, also called artesian aquifers, are aquifers that are overlain by low permeability materials (the confining layer). Water levels in wells that are completed in confined aquifers will rise above the top of the aquifer.[59] Unconfined aquifers, also called water table aquifers, are not bounded above by a confining layer but are open to the atmosphere. Water levels in unconfined aquifers are equal to the level of the water table.[60] In confined aquifers, water is released by the very slight compaction of aquifer materials and the very slight expansion of water. That is why the storativity of confined aquifers is so small, ranging from about 0.00005 (5.0×10^{-5}) to 0.005 (5.0×10^{-3}). In unconfined aquifers, on the other hand, water is released by draining the pore spaces of the aquifer materials. That is why the storativities (also known as specific yield) of unconfined aquifers are much larger than for confined aquifers, ranging from about 0.01 (1×10^{-2}) to 0.3 (3×10^{-1}). Storativities of confined aquifers are usually orders of magnitude (factors of ten) less than storativities of unconfined aquifers. This large difference between storativities in confined and unconfined aquifers is widely accepted among hydrologists.[61] The

[57] Storativity is unitless. BCA Ex. 100 at 14.

[58] BCA Ex. 100 at 16.

[59] BCA Ex. 100 at 14.

[60] BCA Ex. 100 at 15.

[61] BCA Ex. 100 at 14-15.

Middle Trinity Aquifer is a confined or semi-confined aquifer such that a small storativity, in the range of 5.0×10^{-5} to 5.0×10^{-3}, would be expected.[62]

Mr. Rice explained that Applicant performed two sets of pump tests—the first in August and September of 2022 and described in Mr. Courtney's WAS.[63] Mr. Courtney used data from these initial tests to calculate transmissivities. He then used the transmissivities, along with assumed values of storativity, to predict long-term drawdowns. Mr. Courtney did not calculate storativity. The Applications are based on Mr. Courtney's analysis of the initial pump tests.[64]

After the Applications were submitted, Mr. Thornhill used the results of the initial pump tests to calculate different values of transmissivity than what Mr. Courtney had calculated. Mr. Thornhill then used his values of transmissivity, along with a different assumed value of storativity than the one Mr. Courtney assumed, to predict long-term drawdowns beyond the Applicant's property.[65]

The second set of pump tests was performed by Mr. Thornhill in November 2023. The second set of tests produced specific types of information that the first set did not—drawdown data for the Barn Well, and drawdown data for the House Well while the Barn Well was pumping.[66] Looking at this data, Mr. Rice

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[62] BCA Ex. 100 at 16.

[63] *See* App. Ex. 4.

[64] BCA Ex. 100 at 16.

[65] BCA Ex. 100 at 17.

[66] BCA Ex. 100 at 17-18.

testified that the drawdown data for the Barn Well indicates the presence of a low-permeability boundary, which manifests itself as an increase in the rate of drawdown.[67] While the Barn Well was pumping, the House Well was acting as an 'observation' well. Mr. Rice explained that this is significant because the drawdown data for the observation (House) well is the only data that can be used to calculate storativity. Storativity cannot be accurately calculated from pumping well data, which means that without observation well data, a storativity value can only be assumed. Mr. Rice testified that it is more reliable to use a calculated storativity value than an assumed storativity value.[68]

Looking at Mr. Courtney's WAS, Mr. Rice testified that Mr. Courtney's 30-year drawdown predictions are not reliable.[69] Mr. Courtney used a transmissivity of 384 gpd/ft for the House Well and 212 gpd/ft for the Barn Well. He assumed a storativity of 10.29 for the House Well, and 12.24 for the Barn well.[70] Mr. Rice explained that the drawdown predictions are unreasonably low because the assumed values of storativity are unreasonably high—they are over 2,000 times higher than the upper values of storativities (for confined aquifers) given in standard groundwater texts (0.005).[71]

[67] BCA Ex. 100 at 18.

[68] BCA Ex. 100 at 18-19.

[69] BCA Ex. 100 at 21.

[70] BCA Ex. 100 at 20.

[71] BCA Ex. 100 at 21.

Mr. Thornhill used a transmissivity of 1150 gpd/ft for the House Well and 700 gpd/ft for the Barn Well. These transmissivities were calculated using data from the first set of pump tests. For his 30-year predictions of drawdown, Mr. Thornhill assumed a storativity of 0.05 for both the House and Barn wells.[72] Mr. Rice testified that he did not agree with the method Mr. Thornhill used to calculate transmissivity—which was a generic equation that may be applied to any aquifer—because a method to calculate transmissivity from specific capacity data has been developed specifically for the Middle Trinity Aquifer, which would provide a more reliable result.[73] Using Dr. Mace's method (for comparison) Dr. Rice calculated the transmissivities of the House and Barn wells to be 596 gpd/ft and 377 gpd/ft, respectively.[74]

Regarding Mr. Thornhill's storativity value, Mr. Rice opined that the assumed storativity value of 0.05 he used is not reliable for three reasons: (1) it is ten times higher than the highest value reported in hydrology texts; (2) it is 25 times higher than the highest measured values of confined storativity for the Middle Trinity Aquifer; and (3) it is about 800 times higher than the value Mr. Rice calculated using data from the Applicant's second pump test. In addition, Mr. Rice noted that Mr. Thornhill's assumed value of 0.05 is within the range of *unconfined* storativity values (0.01 – 0.3), not confined storativity values.[75] Mr. Rice explained that because

[72] BCA Ex. 100 at 21.

[73] BCA Ex. 100 at 22 (citing a method developed by Dr. Robert Mace of the Texas Water Development Board (TWDB); Mace, 2001, *Estimating transmissivity using specific-capacity data*, January 2001).

[74] BCA Ex. 100 at 25.

[75] BCA Ex. 100 at 23-24.

Mr. Thornhill used both transmissivities and storativities that are too high, his predicted drawdowns are too low.[76]

Mr. Rice used the Theis Method and the Cooper-Jacob Method to calculate values of transmissivity and storativity. He calculated an average value of transmissivity of 620 gpd/ft for the House Well, and 580 gpd/ft for the Barn Well. The average value of storativity was 5.7×10^{-5} (0.000057).[77] Mr. Rice also predicted 30-year drawdowns at four locations bordering Applicant's property. One of them was a well used for domestic purposes on the Albritton Family Management property, for which he predicted drawdown to be 176 feet after 30 years of pumping the Applicant's wells.[78] BCA asserts that, at a minimum, the long-term drawdown will cause pumping on the Albritton Family Management property to become more challenging and costly, and their pump may need to be lowered to compensate for the drawdown.[79]

b) Applicant

Applicant argues that the testimony from Mr. Keester and Mr. Thornhill, Applicant's two hydrogeologist witnesses, demonstrates that the proposed pumping

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[76] BCA Ex. 100 at 24.

[77] BCA Ex. 100 at 33.

[78] BCA Ex. 100 at 33. The Albritton well is approximately 8,000 feet from the House and Barn wells. Tr. Vol. 1 at 74; Tr. Vol. 2 at 123; BCA Exs. 6, 7.

[79] BCA Closing at 24; BCA Ex. 100 at 36.

will not unreasonably impact neighboring properties. In addition, Applicant notes that there is no constitutionally protected right to a specific level of water in a well.[80]

Mr. Thornhill testified that the local Middle Trinity Aquifer is under artesian or semi-artesian conditions; and, therefore, the proposed pumping by Applicant will only result in lowered water levels locally.[81] He explained that determining interference drawdown is best accomplished for purposes of the Applications by conducting analytical calculations based on the Theis equation.[82] Mr. Thornhill noted that the Hill Country Trinity Aquifer Groundwater Availability Model (GAM) should not be used for localized assessments of drawdown because, the longer the pumping period and the more distant the assessment, the less the assumptions hold true and the less reliable the drawdown estimates.[83] Mr. Thornhill acknowledged that the Middle Trinity Aquifer (the producing zone tapped by the House and Barn Wells) does not comply with the strict assumptions of the Theis equation, because it is comprised of fractured and karstic limestone, as well as some sand and sandstone. However, he explained, a reasonable drawdown estimate can be derived with a known transmissivity and some modifications of the storage coefficient for longer pumping times.[84]

[80] Applicant Closing at 13 (citing *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904)).

[81] App. Ex. 28 at 10.

[82] App. Ex. 28 at 8.

[83] App. Ex. 28 at 8.

[84] App. Ex. 28 at 8-9.

Mr. Thornhill conducted the same analytical calculations for both the House Well and Barn Well, except he used a lower aquifer transmissivity value for the Barn Well. His equation estimates for the House Well showed that drawdown at the nearest well (about 4,000 feet away) would be 6 feet after 10 years, and 13 feet after 30 years. Interference drawdown at the nearest well from the Barn Well was calculated to be 4 feet after 10 years and 11 feet after 30 years.[85] Mr. Thornhill opined that the analytical calculations using the Theis equation likely overstate the long-term drawdown. In addition, he opined that seasonal water-level fluctuations due to normal wet-dry climatic cycles can be greater in the Middle Trinity Aquifer in the Hill Country than the long-term drawdown calculated, thereby masking the interference drawdown.[86]

Mr. Thornhill criticized Mr. Rice's storativity value, because in his opinion, Mr. Rice did not account for an increase in the effective storativity over time; thereby rendering an unreasonably high estimated drawdown figure.[87] Mr. Thornhill explained that long-term pumping will induce some component of vertical flow within the producing layers and inter-aquifer leakage, which will result in the effective storage coefficient increasing with pumping times—especially over years and decades.[88] For short-term calculations of drawdown, the difference is relatively minor; however, when estimating drawdown over 30 years, assuming that there is no

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[85] Mr. Thornhill notes that the storativity value he used for short-term drawdown was 0.001, which is within the range used by Dr. Mace. App. Ex. 146 at 10.

[86] App. Ex. 28 at 9-10.

[87] App. Ex. 146 at 10.

[88] App. Ex. 146 at 11.

leakage is incorrect and will result in falsely high estimates of drawdown.[89] In his opinion, Mr. Rice's modeling assumption that the storage coefficient will remain the same over 30 years of pumping is significantly flawed.

Mr. Keester testified that, based on the testing data, production of 200 af/yr from the House and Barn wells will not unreasonably affect local groundwater conditions. Though the proposed production will cause water level decline, he explained, the Applicant's wells will be limited by local Middle Trinity Aquifer conditions where effective aquifer hydraulic properties are expected to change with water level decline. He noted that although there is uncertainty regarding the ability of the Middle Trinity Aquifer to support the desired capacity of the House and Barn wells, if conditions in the aquifer do support the well capacity the effects of the production will be primarily on the Applicant (due to a cone of depression starting at the wellbore and extending out some distance), and existing users will continue to be able to access the groundwater from the aquifer beneath their respective properties.[90]

Mr. Keester explained that, once the aquifer level is reduced below the top of the aquifer, the aquifer changes from a confined aquifer to an unconfined aquifer, which reduces storativity and drawdowns.[91] He testified that, in recognition of the likely change in storativity as water levels decline at or near the pumping wells, he increased the storativity over time for the modeling. Mr. Keester agreed that, for the pumping well locations not on Applicant's property, the aquifer will still be

[89] App. Ex. 146 at 12.

[90] App. Ex. 34 at 3-4; Tr. Vol. 2 at 108.

[91] Tr. Vol. 2 at 149-50.

confined.[92] Mr. Keester noted that it is a standard approach of MODFLOW modeling software to convert from a confined storage coefficient to an unconfined storage coefficient when the water levels drop below the top of the aquifer.[93] Recognizing the uncertainty of the local aquifer conditions, Mr. Keester explained that he only applied the lower, unconfined storage coefficient for long-term predictions.[94] He agreed that, had he used storativity values typical of a confined aquifer to calculate long-term drawdown at the off-site well locations, more drawdown would be predicted.[95]

In terms of impacts on surface features such as springs or streams, Mr. Keester explained that he would not expect such impacts because of the depth of the formation from which the water is being produced.[96] Mr. Thornhill testified that springs would only be affected if there was a direct connection between aquifers, which there is not.[97]

c) GM

The GM argues that the WAS provided with the Applications was unreliable and only provided conclusory evidence of the impacts of granting the Applications. Furthermore, the GM notes that Applicant failed to address the impacts on the

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[92] Tr. Vol. 1 at 44.

[93] App. Ex. 34 at 5; BCA Ex. 8 at 7.

[94] App. Ex. 34 at 5; BCA Ex. 8 at 7.

[95] Tr. Vol. 1 at 47-48.

[96] Tr. Vol. 1 at 77; BCA Ex. 8 (Keester Hydro-Geological Study) at 8.

[97] Tr. Vol. 1 at 205.

District's management goals for average drawdown, as well as the impacts to groundwater or surface water resources or other landowners.[98]

Despite its defects, the GM stated that the WAS did show that the projected drawdowns from the proposed pumping in the Applications posed a potential threat to existing Trinity Aquifer groundwater resources and to neighboring wells and permit holders.[99] According to the WAS, within ten years the aquifer at the Barn Well will experience 150 feet of drawdown and the aquifer at the House Well will experience 200 feet of drawdown. These levels of drawdown are larger than the thickness of the production zone at each of the wells.[100]

The GM's expert witness, James Beach, a hydrogeologist, reviewed the WAS submitted with the Applications as well as the subsequent analysis performed by Mr. Thornhill. He noted several flaws in the WAS and pointed out the inconsistencies between the WAS and the subsequent analysis performed by Mr. Thornhill.[101] Noting that Mr. Thornhill used assumed storativity numbers based on his assumption that the Trinity Aquifer is leaky and does not act as a confined aquifer; the GM states that Mr. Thornhill's assumptions are not consistent with the Texas Water Development Board's (TWDB) definition of the Trinity Aquifer as a confined aquifer.[102]

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[98] General Manager's Closing Brief (GM Closing) (June 18, 2024) at 14; GM Ex. B at 9.

[99] GM Ex. B at 9.

[100] GM Ex. B at 10.

[101] GM Ex. A (Direct Testimony of James Beach) at 6-7.

[102] GM Closing at 15; Tr. Vol. 2 at 229.

The GM contends that even with the additional analyses of Mr. Keester and Mr. Thornhill, the Applicant has not met its burden of proof that the requested permits will not unreasonably affect groundwater and surface water resources or other landowners holding permits to withdraw groundwater in the District.[103]

2. ALJs' Analysis

Applicant has now supplied two hydro-geological studies and two pump tests in support of its Applications. The first WAS, by Mr. Courtney, was unanimously adjudged unreliable, and he refused to provide the pump data; therefore, the ALJs give it no weight. The data from the second pump test, commissioned by Mr. Thornhill in November 2023, was available. While disagreed with by the GM and BCA, the ALJs do not find unreliable the second hydro-geological study issued by Mr. Keester on March 21, 2024, or the opinions of Messrs. Keester and Thornhill on the long-term affects of the proposed pumping on existing groundwater and surface water resources or existing permit holders.

The experts all agree that whenever a new well begins pumping, there will be drawdown. While the experts differ on the appropriate storativity and transmissivity values to use in determining the long-term drawdown, the ALJs ultimately must use that information to determine if the proposed use of water will unreasonably affect existing groundwater and surface water resources or existing permit holders. Having considered the arguments and evidence presented, the ALJs agree that the methods,

[103] GM Closing at 17-18.

and resulting values, used by Messrs. Keester and Thornhill to determine storativity were reasonable and appropriate to use in predicting drawdown at wells not located on Applicant's property. The experts agree that the Middle Trinity Aquifer is a confined or semi-confined aquifer; and the storage coefficients for confined aquifers differ by an order of magnitude from the storage coefficients in unconfined aquifers—unconfined values being significantly higher. The experts also agree that the aquifer will become unconfined at the well bore, although no evidence was presented as to how far out that will extend.[104] However; the evidence demonstrated that at some point, Applicant's pumping will cause the aquifer level to drop below the top of the aquifer at the well bore; once this happens, the aquifer changes from a confined aquifer to an unconfined aquifer, which reduces storativity and drawdowns. Treating the aquifer like a confined aquifer at that stage will produce larger drawdown estimates.

Still, an unreasonableness determination is necessarily fact-specific. Looking at Mr. Keester's modeled drawdown for wells with a state identification number within two miles of the House and Barn wells, the highest drawdown after 30 years of pumping would be 69 feet at a well located 3,552 feet away; and it would be 171 feet at the nearest property line.[105] Acknowledging, that it is likely that the actual 30-year drawdown will be somewhere between that modeled by Mr. Keester and Mr. Rice; the ALJs cannot agree that the predicted drawdown after 30 years of pumping the Applicant's wells will be 176 feet at the Albritton Family Management property well.

[104] Tr. Vol. 1 at 46-47.

[105] App. Ex. 34 at 6.

In addition, the evidence offered concerning the reasonableness of a 176-foot drawdown, is that the pump may need to be lowered to compensate for the drawdown and it may become more challenging and costly to pump. The ALJs do not find that this scenario establishes an unreasonable affect on existing groundwater users.

The ALJs find that Applicant's production of 200 af/yr from the Barn and House wells will not unreasonably affect existing permit holders or groundwater and surface water resources.

C. Whether the Proposed Use of Water is Dedicated to Any Beneficial Use (Code § 36.113(d)(3))

Prior to granting or denying a permit, the Code requires the District to consider whether "the proposed use of water is dedicated to any beneficial use," and whether "the applicant has agreed to avoid waste and achieve water conservation."[106] In accordance with the Code, the District's rules require an Applicant for any permit to provide "a statement of the nature and purpose of the proposed use."[107] Additionally, a permit issued by a district may include a requirement that water withdrawn under the permit be put to beneficial use at all times and may include the location of the use of the water.[108] Both the District's Rule and the Code include definitions for "beneficial purposes" and "waste."[109] The District's definition of

[106] Code § 36.113(d)(3), (6). The parties identified these separately as two issues in the proposed briefing schedule and then addressed them together during briefing. The ALJs will address the issue of waste as it relates to "beneficial use" in this section, and address waste as it was argued relates to water conservation in a later section.

[107] GM Ex. 10 at Rule 3.7(C)(f); *see also* Code § 36.113(c)(3), (8).

[108] Code § 36.1131(b)(5), (6).

[109] Code § 36.001(8), (9); GM Ex. 10 at Rule 1.

"Beneficial Use or Purposes" is consistent with the Code and includes the use of groundwater for:

8. domestic, municipal, stock raising, agricultural, industrial, commercial, mining, manufacturing, irrigation, gardening, or pleasure/recreational purposes;
9. exploring, producing, handling, or treating oil, gas, sulphur, or other minerals; or
10. any other purpose that is useful and beneficial to the user *except when such use or purpose falls under the definition of "Waste" as defined in these rules or Chapter 36 of the Texas Water Code*.[110]

And in the Texas Water Code, "waste" is defined as any one or more of the following:

(A) withdrawal of groundwater from a groundwater reservoir at a rate and in an amount that causes or threatens to cause intrusion into the reservoir of water unsuitable for agricultural, gardening, domestic, or stock raising purposes;

(B) the flowing or producing of wells from a groundwater reservoir if the water produced is not used for a beneficial purpose;

(C) escape of groundwater from a groundwater reservoir to any other reservoir or geologic strata that does not contain groundwater;

(D) pollution or harmful alteration of groundwater in a groundwater reservoir by saltwater or by other deleterious matter admitted from another stratum or from the surface of the ground;

(E) willfully or negligently causing, suffering, or allowing groundwater to escape into any river, creek, natural watercourse, depression, lake, reservoir, drain, sewer, street, highway, road, or road ditch, or onto any land other than that of the owner of the

[110] GM Ex. 10 at Rule 1 (emphasis added to highlight language in District Rule 1 that is not included in the definition of "Beneficial Purpose" under Code § 36.001(9)).

well unless such discharge is authorized by permit, rule, or order issued by the commission under Chapter 26;

(F) groundwater pumped for irrigation that escapes as irrigation tailwater onto land other than that of the owner of the well unless permission has been granted by the occupant of the land receiving the discharge; or

(G) for water produced from an artesian well, "waste" also has the meaning assigned by [Code] Section 11.205.[111]

District Rule 1's definition of "waste" mirrors the Code definition but also includes:

(H) water from a well without a required permit or water from a well in excess of the rate approved for the well.

(I) groundwater pumped into ponds, lakes, tanks, reservoirs, water courses, or other surface impoundments for holding water, except as provided in the District's Rules or unless such discharge is authorized by permit, rule, or order issued by the TCEQ under Texas Water Code, Chapter 26; or

(J) groundwater pumped for industrial use in excess of the quantity, if any, recognized by the industry according to its Standard Industrial Code classification to be the maximum amount of water necessary to efficiently meet the demands of the particular use or application in question.[112]

Applicant seeks two groundwater well permits from the District in this proceeding: (1) the House Well, for 130 af/yr at 80 gpm; and (2) the Barn Well, for 70 af/yr at 55 gpm.[113] Applicant seeks to use the combined 200 af/yr of water for a

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[111] Code § 36.001(8).

[112] GM Ex. 10 at Rule 1.

[113] App. Exs. 2; 3.

combination of domestic, livestock, and irrigation purposes across 627 acres the Applicant owns, including the 317-acre tract where the wells will reside and adjacent acreage.[114] Neither Application specified the amount of water to be used for each purpose.[115] Therefore, Applicant would have the ability to use the authorized water for any of the listed beneficial uses, or any combination of the uses, up to the authorized amount. The District granted Applicant 28 af/yr for each of the Applications, for a combined total of 56 af/yr.

Regarding the use, Applicant provided additional evidence that, after removing all cedar trees from its contiguous acreage, it plans to use the groundwater to grow native and improved grasses across both tracts, to feed Applicant's livestock (cattle and goats), and to sell any additional grass it does not need.[116]

1. Parties' Evidence and Arguments

The GM argues that Applicant has failed to prove "it needs the requested amount of water for a beneficial use without waste."[117] The GM argues that Applicant is required to identify the amounts of water it will use for each of the beneficial purposes (domestic, livestock, and irrigation) and to provide more specificity to justify the need for the amounts of water sought. The GM contends

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[114] App. Ex. 145 (Duke Rebuttal) at 3.

[115] App. Exs. 2; 3.

[116] App. Ex. 145 at 3.

[117] GM Closing at 9.

that Applicant's evidence for irrigation was too general and lacked any meaningful plan.

The GM cites three cases to support its argument that need for the water must be established.[118] The first case is *Guitar Holding*—a case about historic use permitting, which the GM argues supports its argument that a groundwater permit must specify the amount of water to be used for each beneficial use.[119] The second case is *Gatehouse Water, LLC v. Lost Pines Groundwater Conservation District*, a surface water right case, which the GM contends requires an Applicant to demonstrate a non-speculative need for the water.[120] Finally, the GM cites a magistrate's recommendation in *Texas Rivers Protection Association v. Texas Natural Resource Conservation Commission*, to support its arguments regarding showing need for a permit.[121]

The GM and BCA both contend that Applicant's evidence for irrigation was too general, was conflicting, and lacked any meaningful plan. They also say that Applicant's proposal to use the water for irrigation and livestock is not reasonable because the property is largely not irrigable. BCA's expert witness, Stephan A. Nelle, examined the slope and soil of the 317-acre tract to determine how much of the tract

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[118] GM Closing at 10.

[119] *Guitar Holding Co.*, 263 S.W.3d 910.

[120] *Gatehouse Water, LLC v. Lost Pines Groundwater Conservation Dist.*, 910 S.W.2d 147 (Tex. App—Austin 1995, writ denied).

[121] *Texas Rivers Protection Ass'n v. Texas Nat. Res. Conservation Comm'n*, Dist., No., 2023 WL 1424000 (W.D. Tex. 2023) (magistrate report adopted by district court in 2023 WL 2923142 (Apr. 12, 2023)).

could be suitable for irrigation and livestock grazing.[122] Mr. Nelle opined that Applicant's property is not well suited for the production of annual grazing crops (such as forage sorghum or small grain) or irrigated hay production (such as coastal bermudagrass).[123] Mr. Nelle relied on various sources to estimate the total acreage of each soil type on the Applicant's property as follows:

- Krum-Prately association, gently undulating Soils (Clay Loam Ecological Site), 39 acres;
- Ekrant-rock outcrop association, 1 to 10 percent slope, (Low Stony Hill Ecological Site), 76 acres; and
- Ekrant-rock outcrop complex, 15 to 60 percent slope (Steep Rocky Ecological Site), 202 acres.[124]

Based on the number of acres associated with each soil type and the potential plant productivity of each soil type, Mr. Nelle estimated that the grazing and browsing capacity of the approximately 317-acre property could support a maximum of 17 to 20 Animal Units (AU) of livestock.[125] Additionally, Mr. Nelle estimated the amount of water needed to properly sustain these livestock would only be about 110,000 gallons of water per year, which is less than one acre-foot.[126]

Mr. Nelle also assessed the potential for the various soil types to be utilized for grass production. He concluded that the 76 acres of Ekrant-rock outcrop soils of 1 to

[122] BCA Ex. 200 (Prefiled Direct Testimony of Stephan Nelle) generally.

[123] BCA Ex. 200 generally.

[124] BCA Ex. 200 generally.

[125] BCA Ex. 200 generally.

[126] BCA Ex. 200 generally.

10 percent slopes are not well suited for intensive grass production and the 202 acres of Ekrant-rock outcrop soils of 15 to 60 percent slopes are not well suited for forage improvement for grazing animals due to slope, rock, and extreme erosion hazard.[127] Mr. Nelle conceded that some irrigation would be possible on 10 to 15 acres of the Krum-Prately soils with "big gun" irrigation, with 24-36 inches of irrigation being reasonable to achieve "really nice production."[128] He concluded the most water Applicant would use is between 20 and 45 acre-feet per year.[129] He also opined that it was not a beneficial use to use water for enhancement of the landscape.[130]

Applicant counters that it has complied with all requirements in the Code and District rules because it has identified beneficial uses enumerated in those authorities. Applicant contends there is no dispute that growing grass for livestock and hay falls within the definition of "beneficial use," because they are both considered "agricultural." Applicant equates the GM's and BCA's arguments about the feasibility of irrigating its property to the "reasonable use doctrine" that, according to Applicant, has been rejected in Texas.[131] Applicant complains that BCA and the GM's arguments go beyond even "reasonable use" arguments; that they are attempting to impose a new requirement regarding specificity of use; and that neither

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[127] BCA Ex. 200 generally.

[128] Tr. Vol. 2 at 182:8-16.

[129] Applicant Vanderpool Management LP's Response to Closing Statements (Applicant Response) (July 17, 2024) at 11.

[130] Tr. Vol. 2 at 180:11-19.

[131] Applicant Response at 11; citing *South Plains Lamesa R.R., Ltd. v. High Plains Underground Water Conserv. Dist. No. 1.*, 52 S.W.3d 770, 779 (Tex. App.—Amarillo 2001, no pet.).

the term, nor the concept, of speculative use is codified in the Code or the District's rules.[132]

Without conceding that the doctrine should apply, Applicant argues that its proposed use of water "is 'beneficial' even under the lens of the 'reasonable use' regulatory scheme the District and BCA attempt to impose."[133] Applicant states it is undeniable that irrigating grass with water is beneficial. Applicant argues that its juniper (cedar) clearing plan will allow more grass to grow and will be beneficial for grazing; and irrigation will support the effort to clear cedar and restore the land.[134] Applicant states the use of irrigation serves the important role of reducing the uncertainty from rainfall.[135] Without irrigation, it can take up to three years to get a stand of grass and another three years before it is ready for grazing.[136] Planting grass seed and ensuring it sprouts and covers as soon as feasible is beneficial in preventing erosion.[137] The Applicant argues BCA's expert's contention that it is not reasonable to irrigate property with a slope greater than 10 percent was not supported and was rebutted by Applicant's expert Dr. Rogers, who said it was feasible and appropriate.[138]

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[132] Applicant Response at 10.

[133] Applicant Response at 13.

[134] Applicant Response at 14, citing Tr. Vol. 1 at 115 (Rogers).

[135] Applicant Response at 14, citing Tr. Vol. 2 at 187 (Nelle).

[136] Applicant Response at 14, citing Tr. Vol. 1 at 114 (Rogers).

[137] Applicant Response at 14, citing Tr. Vol. 1 at 115 (Rogers).

[138] Applicant Response at 14, citing Tr. Vol. 1 at 120, 123-124 (Rogers).

And Mr. Duke testified for Applicant that irrigation would be effective on such slopes.[139]

2. ALJs' Analysis

The ALJs find that the Application meets the minimum requirements in the Code and the District's rules relating to the specificity of Applicant's requested beneficial uses.[140] Applicant seeks to use the combined 200 af/yr of water for a combination of domestic, livestock, and irrigation purposes across 627 acres the Applicant owns, including the 317-acre tract where the wells will reside and adjacent acreage.[141] These uses are enumerated in the Code and the District's rules as beneficial purposes or uses.[142] Regarding the amount of water to be used for each use, the Applications did not specify the amount of water to be authorized for any of the listed beneficial uses. Although Code section 36.113(c)(3) authorizes districts to include the amount of water to be used for each purpose in a permit, the District omitted to adopt such a requirement in its rules.[143]

Regarding specifying the amount for each use, the ALJs do not find *Guitar Holding* controlling in this case because *Guitar Holding* was specific to the evidence

139 Applicant Response at 15, citing Tr. Vol. 2 at 127, 239 (Duke).

140 GM Ex. 10 at Rule 3.7(C)(f); *see also* Code § 36.113(c)(3), (d)(3).

141 Appl. Ex. 145 (Duke Rebuttal) at 3.

142 Code § 36.001(9); Ex. GM-10 at Rule 1.

143 *See* GM Ex. 10 at Rule 3.7(C)(f).

needed to prove up a historic use permit—which is not at issue in this matter.[144] The ALJs also find that *Texas Rivers* has no bearing on these Applications because that case addressed surface water instead of groundwater.[145]

With respect to a demonstration of need for the permits, the identification of non-speculative uses and proof of need are not addressed specifically in the District's rules or anywhere in the Code. The case law cited by the GM does not clearly indicate the District has the authority to require applicants to show need. And, even assuming the District has that authority, the ALJs decline to recommend applying such a requirement absent a clear provision in the District's rules that is transparent and applicable to all applicants.

Finally, the ALJs find the permits will not cause or contribute to waste.[146] Specifically, the ALJs find no evidence of, and that it is unlikely that, the Applications would result in waste as it is narrowly defined in the Code or the District's Rules.[147] Similarly, the ALJs cannot find in favor of the GM's and BCA's arguments or expert opinions that Applicant's proposed use for irrigation of grass is unreasonable, because even if the use were unreasonable, there is no basis in law to deny the permit on that basis. The ALJs note that the District's rules specifically limit the amount of groundwater pumped for industrial use to "the quantity, if any, recognized by the

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[144] *Guitar Holding*, 263 S.W.3d at 916. The Court held a district exceeded its authority under Code section 36.116(b) to protect historic uses, when it allowed historic users to use the same amount of water for new beneficial uses.

[145] *Texas Rivers*, 910 S.W.2d at 151. The ALJs also find that *Gatehouse* has little applicability here because the special conditions at issue in that case were part of an agreed settlement. *See Gatehouse*, 2023 WL 1424000.

[146] GM Ex. 10 at Rule 1.

[147] GM Ex. 10 at Rule 1; Code § 36.001(8).

industry according to its Standard Industrial Code classification to be the maximum amount of water necessary to efficiently meet the demands of the particular use or application in question," but there is no similar limitation in the District's rules regarding the amount of water that can be applied for irrigation.[148] In sum, the ALJs find that there is not a basis to deny any of the 200 af/yr Applicant seeks based on the issue of beneficial purposes or waste.

D. WHETHER THE PROPOSED USE OF WATER IS CONSISTENT WITH THE DISTRICT'S APPROVED MANAGEMENT PLAN (CODE § 36.113(d)(4))

Using the modeled available groundwater (MAG), the District is required to develop a groundwater management plan (GMP) addressing numerous management goals, including: providing the most efficient use of groundwater; controlling and preventing waste of groundwater; controlling and preventing subsidence; addressing conjunctive surface water management issues; addressing natural resource issues; addressing drought conditions; addressing conservation, recharge enhancement, rainwater harvesting, precipitation enhancement, or brush control, where appropriate and cost-effective; and addressing the desired future conditions (DFC) adopted by the District under Code section 36.108.[149]

In the GMP, the District is required to: include the performance standards and management objectives under which the District will operate to achieve the management goals; include the actions, procedures, performance, and avoidance

[148] GM Ex. 10 at Rule 1.

[149] Code § 36.1071(a), (h).

that are or may be necessary to effect the plan, including specifications and proposed rules; estimate the groundwater availability; and consider the water supply needs and water management strategies included in the adopted state water plan.[150] The District must also adopt rules necessary to implement the GMP.[151]

The District has adopted its GMP as required by the Code, as well as rules, to implement it and meet its statutory obligation to manage groundwater in Bandera County.[152] Under the District's GMP and rules, all groundwater wells in Bandera County must either be registered with (if exempt) or permitted by (if non-exempt) the District.[153] Prior to issuing a permit, the District is required to consider whether the proposed use of water is consistent with its approved management plan.[154] The District's GMP has factors to be considered in deciding whether to deny a permit or limit requested withdrawals of groundwater, including: the purposes of the District; the equitable distribution of groundwater; consequences of economic hardship from granting or denying the permit, and landowners' rights in groundwater beneath their property.[155]

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[150] Code § 36.1071(e).

[151] Code § 36.1071(f).

[152] GM Ex. 10; GM Ex. 11 (GMP).

[153] GM Ex. 10 at Rule 3; GM Ex. 11. Pursuant to the Code and the District's rules, groundwater wells are exempt under certain circumstances. *See* Code § 36.117; District Rule 3.2.

[154] Code § 36.113(d)(4).

[155] GM Ex. 11 at 8.

1. Parties' Evidence and Arguments

The GM argues that the Applications are inconsistent with the GMP for several reasons mostly addressed in other sections of its Brief and Response, including: that Applicant failed to prove the amount of water requested would result in a beneficial use without waste; that the use is not the most efficient, non-wasteful use of groundwater; similarly, that the Applicant provided no plan to meet the efficiency or conservation goals of the District; and that the use would unreasonably impact groundwater resources and would interfere with the District's ability to achieve the DFC for the Trinity Aquifer.

BCA concurs that the permits would frustrate the District's ability to achieve the DFC for the Trinity Aquifer. BCA argues the proposed use is inconsistent with the District's purpose under Code section 36.0015(b), to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater. BCA says that the proposed irrigation use does not meet the management goal of the GMP to provide the "best use of the resource while protecting the rights of the public," because BCA says the proposed use is not beneficial, is infeasible, and would constitute waste.[156] Finally, BCA contends the amount of water Applicant seeks would result in an unequal distribution of water. BCA says Applicant would be given the right to approximately 22 percent of the MAG available in the District for the Nueces River Basin (903 af/yr).[157]

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[156] BCA Response at 39.

[157] *See* GM Ex. 11, Appx. A, Table 2; *See also* GM Ex. 11 at 8.

Applicant argues that the GMP is merely a planning document, and not the equivalent of rules which must be followed. Nevertheless, Applicant says the proposed permit meets all the relevant management goals of the GMP. Regarding the GMP's factor, "equitable distribution of the resource," Applicant argues that this language appears nowhere in the Code, and that the factor can only be read in conjunction with the last factor "the landowner's right to the water beneath his/her property."[158] Applicant responds that BCA's request for the District to enforce vague and inarticulable standards would result in arbitrary and unreasonable agency decisions. Applicant argues that BCA's use of the Nueces River Basin as the MAG allocation is without evidentiary support, and that the only relevant number for the District MAG is the total 7,284 af/yr.[159]

2. ALJs' Analysis

Most of the issues raised by BCA and the GM in this section will not be addressed here because they are addressed in more detail elsewhere in the PFD, the exception being BCA's contention that the amount of water Applicant requests is inconsistent with the "equitable distribution of the resource" factor in the GMP.[160] The ALJs do not find that the Applicant's request for 200 acre-feet of water is inconsistent with the GMP for this or any of the reasons raised by the GM and BCA. The ALJs agree that this factor is difficult to measure or quantify. Neither the GMP nor the District's rules offer any specific guidance or definition as to how to

[158] Applicant Closing at 15.

[159] Applicant Response at 36.

[160] *See* GM Ex. 11 at 8

implement this standard. Nevertheless, the ALJs also agree with Applicant that the only relevant value in the record for the MAG is the total 7,284 af/yr adopted for Bandera County in the State Water Plan. There is no evidentiary basis to delineate the Nueces River Basin MAG numbers from the total. Further, the record does not reflect a circumstance where the District must make a decision about allocating the water amongst competing applicants or users. The usage for Bandera County is projected to increase to 4,629 af/yr by 2070, leaving a substantial amount of the MAG unused well into the future.[161]

E. WHETHER, IF THE WELL WILL BE LOCATED IN THE HILL COUNTRY PRIORITY GROUNDWATER MANAGEMENT AREA, THE PROPOSED USE OF WATER FROM THE WELL IS WHOLLY OR PARTLY TO PROVIDE WATER TO A POND, LAKE, OR RESERVOIR TO ENHANCE THE APPEARANCE OF THE LANDSCAPE (CODE § 36.113(d)(5))

The District is part of the Hill Country Priority Groundwater Management Area (PGMA), which was designated by the Texas Commission on Environmental Quality (TCEQ) as an area that is experiencing or is expected to experience critical groundwater problems within 50 years.[162] Code section 36.113(d)(5) requires the District to consider whether "the proposed uses of water from the well[s] is wholly or partly to provide water to a pond, lake, or reservoir to enhance the appearance of the landscape."

[161] GM Ex. 11 at Appx. C.

[162] *See* Texas Priority Groundwater Management Areas (PGMAs), January 2018; 30 Tex. Admin. Code § 294.41(a); Tr. Vol. 2 at 267.

1. Arguments and Evidence

The GM argues that because it is part of the Hill Country PGMA, the District must discourage the use of water for vanity ponds. One of the Applicant's proposed uses of its property is domestic use, which the GM asserts includes sustaining a pond that is not in use for livestock.[163] In light of the District being within the Hill Country PGMA, and noting that the pond has increased in size in the last several years from three acres to approximately seven acres,[164] the GM contends the use of water for the pond does not support approval of the Applications.

BCA asserts that, despite the fact that the Applications have not stated an intent to use produced water for purposes of any pond or lake, Code section 36.113(d)(5) is a factor that the District must consider, particularly given that the Applications have been less than clear. BCA notes that use of the amount of water requested by Applicant to irrigate Applicant's steep, rocky, property would result in wasteful run-off, including into Applicant's vanity pond.[165]

Applicant contends that it presented its proposed use of the wells in the Applications; and none of the water from the wells is proposed to be used wholly or partly to provide water to a pond, lake or reservoir.[166]

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[163] Tr. Vol. 2 at 179.

[164] Tr. Vol. 2 at 178-79.

[165] Tr. Vol. 2 at 168-69; BCA Closing at 40-41.

[166] App Exs. 2 (House Well Application); 3 (Barn Well Application); Applicant Closing at 17.

2. ALJs' Analysis

The evidence was undisputed that Applicant has not proposed to use water from either well, either wholly or partly, to provide water to the pond. Whether Applicant's proposed irrigation might lead to run-off, some of which could enter the pond, is not enough for the District to consider under Code section 36.113(d)(5). The statute requires that the District consider the "proposed use" of the water. Here, the preponderance of the evidence is that Applicant's proposed use does not include providing water to the pond. Therefore, the District may not deny the Applications under Code section 36.113(d)(5).

F. Whether the Applicant has Agreed to Avoid Waste and Achieve Water Conservation (Code § 36.113(d)(6))

The Code states that a district may require, as applicable under its adopted rules, a water conservation plan or a declaration that the applicant will comply with the district's management plan.[167] District Rule 3.7C(k) requires a permit application to include, unless waived by the General Manager, "information showing what water conservation measures the Permittee has adopted, what water conservation goals the Permittee has established, and what measures and time frames are necessary to achieve the Permittee's established water conservation goals."[168] Before granting or denying a permit, the District must consider whether the Applicant has agreed to avoid waste and achieve water conservation.[169]

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[167] Code § 36.113(c)(4).

[168] GM Ex. 10.

[169] Code § 36.113(d)(6). The issue of "waste" is addressed in section III.C of this PFD, regarding whether Applicant's proposed uses of water are dedicated to beneficial use.

The District's Well Permit Application form requests a "statement of a water conservation goal the permittee has established, water conservation measures the Permittee has adopted, and what time frames are necessary to achieve the established water conservation goals."[170] In both Applications, Applicant responded, "water conservation goals consistent with the reasonable and applicable standards for wildlife, agriculture, and livestock management have been adopted and will be adhered to throughout operations."[171] Where requested on the Well Permit Application form, Applicant also indicated "yes," that Applicant "has reviewed the District's Water Conservation Information."[172]

1. Parties' Evidence and Arguments

Regarding conservation, the GM stated only that Applicant provided no specific plan to meet the efficiency or conservation goals of the District.[173] BCA agrees with the GM that the conservation goals were not specific enough. BCA additionally argues that Applicant's proposed uses of water, including irrigating with "big-gun" sprinklers and irrigating on slopes, are inefficient and cannot amount to reasonable conservation measures. BCA states Applicant failed to establish that it will achieve conservation pursuant to Code Chapter 36 and the District's rules.[174]

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170 App. Exs. 2 and 3.

171 App. Exs. 2 and 3.

172 App. Exs. 2 and 3.

173 GM Closing at 19.

174 BCA Closing at 42.

Applicant responds that it has agreed to comply with all the District's rules regarding waste and achieving water conservation, and reiterates its position that its proposed use does not constitute waste under the Code or District definitions of "waste."

2. ALJ's Analysis

In section III.C of this PFD, the ALJs found that Applicant's proposed use of water does not meet the Code or District definitions of "waste." Applicant's statement that it has agreed to avoid waste was unrebutted.

Regarding conservation, there are no specific requirements or adopted standards for achieving conservation in the Code, nor in the District's Rules or GMP. Similarly, there does not appear to be any enforceability of conservation requirements in any of those sources. The GMP notes that the District has conservation literature and the Application form indicated that Applicant has reviewed the District's water conservation information; but none of those documents appear to have been offered into the record by any party, and it is not clear that they would resolve the issue of what Applicant was required to provide. Although Applicant's response to the Application form does appear minimal, the ALJs have no standard to adjudge its adequacy. The ALJs' only basis to find whether the information was adequate for the District's purposes is that the GM reviewed the four-page Applications and found them administratively complete, and there is no record evidence that the GM requested additional information regarding conservation in his review. Further, the District does not appear to have found the information lacking when it approved both Applications, albeit for reduced amounts of water. The ALJs cannot recommend denial of the permits based on this issue.

G. WHETHER THE APPLICANT HAS AGREED THAT REASONABLE DILIGENCE WILL BE USED TO PROTECT GROUNDWATER QUALITY AND THAT THE APPLICANT WILL FOLLOW WELL PLUGGING GUIDELINES AT THE TIME OF WELL CLOSURE (CODE § 36.113(d)(7))

The District must consider whether the Applicant "has agreed that reasonable diligence will be used to protect groundwater quality and that the applicant will follow well plugging guidelines at the time of well closure."[175] The District's Rule 3.7(q) requires "a well closure plan or a declaration that the applicant will comply with the well plugging guidelines and will report closure to the Commission."[176] On the Applications, Applicant marked "yes" indicating Applicant will comply with "well plugging and capping guidelines set forth in the District's rules and will report well closures as required by [law]."[177]

1. Parties' Evidence and Arguments

The GM does not dispute that Applicant has stated that it will use reasonable diligence to protect groundwater and that it will follow well plugging guidelines at the time of well closure.[178]

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[175] Code § 36.113(d)(7).

[176] GM Ex. 10.

[177] App. Exs. 2, 3. The District's application forms reference reporting "well closures as required by Ch. 36 83." The ALJs assume this refers to some Code provision. However, while Code chapter 36 is the likeliest reference, there is not a Code section 36.83, Code chapter 3683, or Code chapter 83.

[178] GM Closing at 7.

BCA argues that water quality tests on the Barn Well in 2022 and 2023 (required by District Rule 3.7(c)(r)) showed the water quality at the well exceeds drinking water standards and is unsuitable for livestock or irrigation because it exceeds suitable levels of iron, sulfate, and electrical conductivity.[179] However, Mr. Beach also conceded that the 2023 test showed the well water "may be suitable for livestock and irrigation."[180] BCA also argues: "Further water quality testing is needed to ensure that any produced groundwater from the Barn Well is suitable for its intended purpose, and to ensure the well has been sealed and completed properly and is not a conduit for poor-quality water from the Upper Glen Rose."[181]

Applicant argues that it will use reasonable diligence to protect groundwater and that it will follow well plugging guidelines at the time of well closure.

2. ALJs' Analysis

The ALJs find that the Applications meet the requirements of the Code and District Rules regarding the use of reasonable diligence to protect groundwater quality and that the Applicant will follow well plugging guidelines at the time of well closure, because Applicant has stated that it will do so. Nothing more appears to be required. BCA's water quality arguments are irrelevant to this issue.[182] There is no

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[179] BCA Closing at 43-44; *see also* BCA Ex. 100 at 39.

[180] BCA Ex. 100 at 39.

[181] BCA Closing at 44; BCA Ex. 100 at 41.

[182] Code § 36.113(d)(7); GM Ex. 10 at Rule 3.7C(q).

record evidence that the water quality from the Barn Well will have any impact on groundwater quality or Applicant's ability to follow well plugging guidelines at the time of well closure.

H. Whether the Applications are consistent with the District's desired future conditions (Code § 36.1132)

Under the Code, the TWDB, with assistance and cooperation from the TCEQ, designates groundwater management areas covering all major and minor aquifers in the State of Texas. The objective of such designations is to provide the most suitable area for the management of groundwater resources.[183] The District is within Groundwater Management Area (GMA) 9.[184] The District and the other groundwater conservation districts located within the boundaries of GMA 9 must, every five years, consider groundwater availability models and other data and information, and propose the DFC for each of the relevant aquifers within GMA 9.[185] DFC are quantitative descriptions of the desired condition of the groundwater resources in a management area at one or more specified future times.[186] DFC are subject to (a) votes of the representatives of all districts in GMA 9; (b) public comment and hearing; and (c) an appeal process.[187] In voting on the DFC, the districts must consider the hydrological conditions of the aquifers within the GMA

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[183] Code § 35.004(a).

[184] GM Ex. 11.

[185] Code § 36.108(d).

[186] Code § 36.001(30).

[187] Code §§ 36.108, .1083.

and the impact on the interests and rights in private property, among other factors.[188] In setting the DFC, districts are required to provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater.[189] Additionally, the Code requires that:

> In issuing permits, the district shall manage total groundwater production on a long-term basis to achieve an applicable [DFC] and consider:
>
> (1) the [MAG] determined by the [TWDB's] executive administrator;
>
> (2) the executive administrator's estimate of the current and projected amount of groundwater produced under exemptions granted by district rules and Section 36.117;
>
> (3) the amount of groundwater authorized under permits previously issued by the district;
>
> (4) a reasonable estimate of the amount of groundwater that is actually produced under permits issued by the district; and
>
> (5) yearly precipitation and production patterns.[190]

The DFC adopted by the districts in GMA 9 for the Trinity Aquifer allow for an increase in average drawdown of approximately 30 feet through 2060.[191] The District must, "to the extent possible, . . . issue permits up to the point that the total

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[188] Code § 36.108(d).

[189] Code § 36.108(d-2).

[190] Code § 36.1132(b).

[191] GM Ex. 11.

volume of exempt and permitted groundwater production will achieve" the DFC for GMA 9.[192] The TWDB has developed a GAM for each aquifer in Texas, including the Middle Trinity in the Hill Country area, to help estimate groundwater availability and water levels.[193] Based on the DFC adopted for GMA 9, the executive administrator of the TWDB provided the District and GMA 9 with the MAG for each aquifer within the District.[194] The MAG is the amount of water the TWDB executive administrator determines may be produced on an average annual basis to achieve the DFC.[195] The MAG for the Trinity Aquifer for the District for all years through 2060 is 7,284 af/yr.[196]

1. Parties' Evidence and Arguments

The GM and BCA argue that Applicant failed to provide evidence that the Applications will not interfere with the District's achievement of the DFC. They rely on the testimony of their experts to conclude that the Applications are not consistent with the DFC. The GM, Mr. Mauk, testified that Applicant's own revised WAS predicts that, within ten years, drawdown at the Barn Well will be 150 feet and at the House Well will be 200 feet. Mr. Mauk concluded those levels of drawdown are "not consistent with the [DFC] for the Trinity Group of Aquifers in Bandera County, and the drawdowns are larger than the thickness of the production zone at each of the

[192] Code § 36.1132(a).

[193] *See* GM Ex. 11.

[194] Code § 36.1084(b).

[195] Code § 36.001(25).

[196] GM Ex. 11.

wells."[197] Mr. Beach estimated that drawdown would be 370 feet at the Barn Well after 30 years and 400 feet at the House Well after just one year.[198] Mr. Rice's calculations showed drawdown for other nearby landowners would be between an estimated 151 feet and 261 feet, after 30 years of pumping.[199] The GM and BCA argue that those levels are substantially misaligned with the District's DFC.

Applicant counters that the Applications are consistent with the DFC because the 200 af/yr sought by Applicant would constitute only 2.75 percent of the MAG for the aquifer. Applicant argues that the modeling should not look at localized affects to determine consistency with the DFC.[200]Applicant also contends that, per Code section 36.1132(b)(4), consistency with the DFC requires consideration of the amount of water that is actually being pumped. Applicant states that from 2004-2019, only 46 percent of the MAG for Bandera County was produced and annual demand is only projected to increase from 4,007 af/yr in 2020 to 4,629 af/yr in 2070. These are all numbers that are well below the MAG of 7,284 af/yr.

2. ALJs' Analysis

The ALJs find, after considering the factors in Code section 36.1132, that the Applications are consistent with the DFC for GMA 9. The MAG is the amount of water the TWDB executive administrator determines may be produced on an average

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[197] GM Ex. B at 10.

[198] GM Ex. A at 10.

[199] BCA Ex. 111, Table 3 at 2.

[200] Applicant Response at 28-29.

annual basis to achieve the DFC.[201] The MAG for the Trinity Aquifer for the District for all years through 2060 is 7,284 acre-feet per year.[202] Specifically, there is a significant amount more than 200 af/yr in production available and unused under the MAG for the aquifer. Accordingly, the Applications cannot (either standing alone, or in combination with all other production in the aquifer) cause exceedances of the DFC. The GM's and BCA's arguments regarding localized pumping effects are irrelevant to this particular issue.

I. OTHER ISSUES

1. District Rule 3.4Q

The District rules state that the annual production limit for each permitted well can be up to one af/yr, times the total number of acres in the tract of land owned by the permit holder and identified in the permit application as associated with the well.[203] The total annual production for a tract with multiple wells is limited in the aggregate to one af/yr times the number of acres in the tract.[204] A lower production limit may be set in areas where WASs indicate insufficient water is available for permitting.[205] A variance from the production limit rule can be considered by the

[201] Code § 36.001(25).

[202] GM Ex. 11.

[203] GM Ex. 10 at Rule 3.4Q(a).

[204] GM Ex. 10 at Rule 3.4Q(b).

[205] GM Ex. 10 at Rule 3.4Q(d).

Board, and the applicant must produce documentation showing the beneficial use and documented need for the additional production.[206]

d) Parties' Evidence and Arguments

(i) Applicant

Applicant notes that under the District's rules, a lower production limit may only be set in areas where a WAS indicates insufficient water is available for permitting up to one af/yr per acre. Applicant argues that the burden is on the District (or a protestant such as BCA) to provide a WAS showing there is insufficient water to grant the requested amount.[207] Moreover, Applicant contends that because the GM declared the Applications to be administratively complete, the District is now precluded from claiming the Scott Courtney WAS included with the Applications was not sufficient.[208]

Applicant further asserts that "[a]ll of the evidence and testimony at the hearing amounts to *post hoc* rationalizations for the January 19, 2023, action of the Board. As such it is not relevant and cannot properly be considered."[209] Applicant argues that the ALJs must judge the propriety of the Board's action solely on the grounds stated by the District at the January 19, 2023 hearing, and "[i]f those grounds are inadequate or improper, the [ALJ] is powerless to affirm the

[206] GM Ex. 10 at Rule 3.4Q(e).

[207] Applicant Closing at 20.

[208] Applicant Closing at 21.

[209] Applicant Response at 10 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

administrative action by substituting what it considers to be a more adequate or proper basis. . . ."[210]

(ii) GM

The GM disagrees that District Rule 3.4Q shifts the burden of proof from the Applicant to the District or a protestant to show that there is insufficient water available for permitting in order for the District to be able to issue a permit for less than one af/yr per acre owned by Applicant.[211] The GM notes that District Rule 3.4Q's non-exhaustive basis for setting a lower production limit where the District has determined that the available water is limited does not override other applicable provisions of the District Rules or Code chapter 36's requirements.[212]

The GM stresses that the production limit in this rule sets the maximum amount of water that can be permitted, not a minimum.[213] The GM testified that, as the MAG is 7,284 af, the production limits in the District's rules are "absolutely maximums."[214] Thus, the GM argues, the District may authorize a permit to be issued for up to one af/yr per acre owned by Applicant, but the burden of proof is not

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[210] Applicant Response at 8 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *SEC v. Chenery*, 332 U.S. 194, 196-97 (1947)).

[211] GM Response at 2.

[212] GM Response at 3.

[213] GM Closing at 23.

[214] Tr. Vol. 2 at 278-79.

shifted to the GM or anyone else to establish that limited water is available as the sole basis for not approving a permit as requested.[215]

(iii) BCA

BCA joins the GM in arguing that Rule 3.4Q does not limit the District's authority to protect groundwater resources by setting production limits lower than requested. Additionally, BCA points out the absurdness of Applicant's contention that, so long as Applicant submits a document titled "hydro-geological study," no matter the accuracy or reliability of its contents, the District must either grant the requested permit amount, or perform its own WAS.[216] Moreover, BCA asserts that, at most, Mr. Courtney's WAS showed the absence of data showing insufficient water—not the presence of data showing sufficient water.[217]

e) ALJs' Analysis

The ALJs find that the language of District Rule 3.4Q is clear and unambiguous. It does not mandate a production limit of one af/yr per acre owned; in fact, it caps production to *no more than* one af/yr per acre owned, provided the WAS indicates sufficient water is available. Stated another way, where the WAS indicates insufficient water is available for permitting, a lower production limit may be set.[218]

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[215] GM Response at 3.

[216] BCA Response at 29.

[217] BCA Response at 29.

[218] *See* GM Ex. 10 at Rule 3.4Q(d).

The ALJs also do not find that District Rule 3.4Q shifts the burden of proof away from the Applicant. Nor do they find, as discussed in section III.A of this PFD, that a finding of administrative completeness by the GM means that the Applications meet the requirements of the District Rules or Code chapter 36.

To Applicant's benefit, the ALJs do not agree with Applicant that this contested case hearing amounts to judicial review of an agency action.[219] The ALJs issue this PFD, which the Board will consider in making its determination. Thus, the administrative agency has not yet taken final action subject to judicial review. The evidence presented to the ALJs as part of this contested case hearing will be part of the evidentiary record for the Board to consider in making their final determination.[220]

Applicant seeks permits for production of 130 af/yr and 70 af/yr, for a total of 200 af/yr, from two wells on a 317-acre tract of land.[221] This amount is less than the 317 af/yr maximum limit under District Rule 3.4Q. As discussed in the above sections of this PFD, the ALJs do not find that there is insufficient water available for permitting.

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[219] *See* section III.A of this PFD, wherein the ALJs rely on Keester hydro-geological study and Keester and Thornhill testimony for lack of a basis to deny the Applications under Code section 36.113(d)(1).

[220] *See* GM Ex. 10 at Rules 7.5F, G, I.

[221] *See* App. Exs. 1-3.

2. Transcript Costs

District Rule 7.5C(b)(iv) provides that the party requesting the hearing before SOAH "shall pay all costs associated with the contract for hearing." The District's rule matches the language in Code chapter 36: "The party requesting the hearing before [SOAH] shall pay all costs associated with the contract for the hearing and shall deposit with the district an amount sufficient to pay the contract amount before the hearing begins. At the conclusion of the hearing, the district shall refund any excess money to the paying party."[222]

District Rule 7.5E provides that the costs of a court reporter may be assessed against the party requesting it or among the parties to the hearing.[223] District Rule 7.5C(b)(i) states that, for cases referred to SOAH for a contested case hearing, SOAH's rules of procedure govern as supplemented by the District Rules and Code chapter 36. SOAH's rules provide that the cost of the transcript may be assessed to one or more of the parties and that the cost of a copy of a transcript ordered by a party shall be paid by that party, unless otherwise ordered by the ALJ.[224]

a) Parties' Evidence and Arguments

The GM requests that Applicant pay the District's costs incurred for transcripts in connection with the Applications as part of this contested case, as well as other costs associated with this contested case hearing. The GM states he has

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[222] Code § 36.416(c).

[223] *See also* Code § 36.408(a).

[224] 1 Tex. Admin. Code § 155.423(d)(1), (2).

incurred $158,876.19 in costs associated with the contested case, which includes $10,208.71 for transcripts and $148,667.48 in attorney's fees and costs to date. The GM anticipates that he will incur an additional $15,000 in attorney's fees and costs through the PFD.[225]

BCA argues that, for the same reasons the District Rules require Applicant to pay all SOAH costs associated with conducting these proceedings, all transcript costs should also be assessed to Applicant. BCA states that it is a non-profit organization working to protect and preserve the abundance and quality of local water sources; conserve and enhance native plants and wildlife; and promote good land stewardship; whereas the type of activities proposed by Applicant demonstrate its ability to pay.[226] Therefore, BCA asserts, it is just and reasonable to assess all transcript costs to Applicant.

Applicant states that it has submitted the required deposit to pay all costs associated with the contract for hearing. Applicant disputes that there is authority for the party requesting referral to also pay all other costs incurred by a party in prosecuting a matter.[227]

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[225] GM Closing at 24-25.

[226] *See* BCA Ex. 1 (BCA's Certificate of Formation).

[227] Applicant Response at 38.

b) ALJs' Analysis

It is undisputed that Applicant has submitted the required deposit to pay all costs associated with the contract for hearing. While the GM would also like Applicant to pay his attorney's fees and costs, he provides the ALJs with no authority for such an award and the ALJs decline to grant that request.

Concerning transcript costs, the ALJs do believe Applicant should pay for the costs of transcription as well as the costs of transcripts ordered by the GM and BCA in this matter. The ALJs make such a ruling because this hearing process allowed Applicant to support the Applications with pumping data and an additional hydro-geological study and analyses, thereby providing evidence to support a previously unreliable permitting request.

IV. RECOMMENDATION

The ALJs recommend the Applications for groundwater production well permits be issued as requested for a combined total of 200 af/yr. In support of the recommendation, the ALJs propose the following Findings of Fact and Conclusions of Law.

V. FINDINGS OF FACT

Background and Procedural History

1. The Bandera County River Authority and Groundwater District (District) was created to, among other things, conserve, preserve, protect, and prevent waste of groundwater in Bandera County as a groundwater conservation district. The District serves a public use and benefit with respect to the groundwater

in Bandera County; and it has the rights, powers, privileges, authority, functions, and duties provided by the Texas Water Code (Code) for groundwater conservation districts.

2. Vanderpool Management, LP (Applicant) owns a 317-acre survey tract of land and a contiguous 310-acre tract of land in Bandera County, Texas.

3. Applicant submitted two applications (Applications) to the District for groundwater production well permits on the 317-acre tract. Applicant seeks authorization to produce groundwater from the Cow-Creek Formation of the Middle Trinity aquifer for domestic, livestock, and agricultural use as follows: (1) up to 130 acre-feet per year (af/yr) at a rate up to 80 gallons per minute (gpm) from the Willow Springs-House Well (House Well); and (2) up to 70 af/yr at a rate up to 55 gpm from the Willow Springs-Barn Well (Barn Well).

4. The District's General Manager (GM), David Mauk, declared the Applications to be administratively complete and, after review, recommended that the Applications be granted for an annual production limit equal to what an exempt well could produce, 28 af/yr for each well.

5. The District's Board considered the Applications at its January 19, 2023, quarterly meeting and voted to approve two permits, each for 28 af/yr.

6. Following a timely request for a contested case hearing submitted by Applicant and a timely motion for rehearing submitted by Bandera Canyonlands Association (BCA), the District set the matter for a contested case hearing and referred this matter to the State Office of Administrative Hearings (SOAH).

7. SOAH Administrative Law Judge (ALJ) Ross Henderson convened the preliminary hearing on August 15, 2023, and named as parties the GM, the Applicant, and BCA.

8. The hearing on the merits was held April 29-30, 2024, before ALJs Meitra Farhadi and Ross Henderson, at SOAH's hearing facility in Austin, Texas. Applicant appeared and was represented by attorneys Peter T. Gregg, C. Brantly Jones and Marvin W. Jones. The GM appeared and was represented by attorneys Deborah C. Trejo and Kimberly Buser. BCA appeared and was represented by attorneys Lauren Ice and Vic McWherter.

9. At the hearing on the merits, Applicant offered the expert testimony of Michael Thornhill on direct and rebuttal, Michael Keester on rebuttal, Dr. William Rogers on rebuttal, and the lay testimony of Bob Duke. The GM offered the expert testimony of himself and James Beach. BCA offered the expert testimony of George Rice and Stephan Nelle.

10. The parties submitted post-hearing briefs and the record closed on September 5, 2024, when the transcript and exhibits were received by SOAH.

Whether the Applications conform to the requirements prescribed by Code Chapter 36 and are accompanied by the prescribed fees (Code § 36.113(d)(1)).

11. The District received the two Applications in September of 2022.

12. The GM's determination of administrative completeness does not amount to a finding that the Applications were entitled to be granted.

13. The Water Availability Study (WAS) submitted with the Applications was prepared by Craig Scott Courtney.

14. In reviewing the Applications, the District requested additional information regarding the WAS; however, Mr. Courtney did not provide the supplemental information requested.

15. The WAS lacked: (1) a sufficient identification and location (with an aerial map) of infrastructure; (2) sufficient information about drawdown levels over 10 and 30 years of use of the wells; and (3) sufficient pump test data in a format for confirmation and analysis.

16. The District made the same requests for supplemental information from the Applicant's driller, Chad Hillis. In response, Mr. Hillis requested that the Applications be processed without further supplementation of the WAS. Pursuant to that request, the Applications were scheduled for public hearing and consideration at the January 19, 2023, District quarterly meeting.

17. The WAS performed by Mr. Courtney was the technical documentation submitted by the Applicant, and what the District had when it considered the Applications.

18. Mr. Courtney's work was unreliable.

19. Based on the District Rules, its management plan, and the deficiencies in Applicant's WAS, the GM recommended that the Board approve the permits for an annual production limit equal to what an exempt well could produce—28 af/yr for each well.

20. In advance of the contested case hearing at SOAH, Applicant hired two additional hydrogeologists.

21. Michael Thornhill reviewed the Applications and provided his opinion on the sufficiency of available groundwater to support the Applications.

22. Because Mr. Courtney refused to provide the raw data from his tests, Applicant had Mr. Thornhill direct and observe additional pumping tests using the Barn Well and House Well.

23. Michael Keester reviewed the data available from both Mr. Courtney's and Mr. Thornhill's pumping tests, and conducted a hydrogeological study as required by District Rule 3.7C(m).

24. As supplemented with the evidence of Mr. Keester and Mr. Thornhill at the contested case hearing at SOAH, the Applications conform to the requirements prescribed by Code chapter 36.

Whether the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders (Code § 36.113(d)(2)).

25. Transmissivity is a measure of an aquifer's ability to transmit water. It is equal to the hydraulic conductivity (or permeability) multiplied by the aquifer thickness. The greater the transmissivity, the greater the ability of an aquifer to transmit water. All other things being equal, drawdowns in an aquifer with a high transmissivity will be less than in an aquifer with a low transmissivity.

26. Storativity is a measure of an aquifer's ability to store and release water. It is the volume of water an aquifer releases, per unit surface area, per unit decline of hydraulic head. All other things being equal, drawdowns in an aquifer with a high storativity will be less than in an aquifer with a low storativity.

27. Transmissivities and storativities are usually determined by analyzing data from pump tests.

28. Confined aquifers, also called artesian aquifers, are aquifers that are overlain by low permeability materials (the confining layer). Water levels in wells that are completed in confined aquifers will rise above the top of the aquifer.

29. Unconfined aquifers, also called water table aquifers, are not bounded above by a confining layer. Unconfined aquifers are open to the atmosphere. Water levels in unconfined aquifers are equal to the level of the water table.

30. In confined aquifers, water is released by the very slight compaction of aquifer materials and the very slight expansion of water. As a result, the storativity of confined aquifers is small, ranging from about 0.00005 (5.0×10^{-5}) to 0.005 (5.0×10^{-3}).

31. In unconfined aquifers, water is released by draining the pore spaces of the aquifer materials. As a result, the storativity of unconfined aquifers is much larger than that of confined aquifers, ranging from about 0.01 (1×10^{-2}) to 0.3 (3×10^{-1}).

32. The Trinity Aquifer is a confined or semi-confined aquifer; so a small storativity, in the range of 5.0×10^{-5} to 5.0×10^{-3}, would be expected.

33. The aquifer will become unconfined at the well bore, but it is unclear from this record how far out that will extend.

34. It is more reliable to use a calculated storativity value than an assumed storativity value.

35. For his 30-year predictions of drawdown, Mr. Thornhill assumed a storativity of 0.05 for both the House and Barn wells, based on his assumption that the Trinity Aquifer is leaky and does not act as a confined aquifer.

36. Mr. Thornhill's assumed storativity value of 0.05 is within the range of unconfined storativity values (0.01 – 0.3), not confined storativity values.

37. At some point, Applicant's pumping will cause the aquifer level to drop below the top of the aquifer at the well bore; once this happens, the aquifer changes

from a confined aquifer to an unconfined aquifer, which reduces storativity and drawdowns.

38. The values used by Messrs. Keester and Thornhill to determine storativity were reasonable and appropriate to use in predicting drawdown at wells not located on Applicant's property.

39. Using data from the first set of pump tests, Mr. Thornhill used a transmissivity of 1150 gallons per day per foot (gpd/ft) for the House Well and 700 gpd/ft for the Barn Well.

40. Mr. Thornhill's transmissivity values are reasonable.

41. Mr. Rice used the Theis Method and the Cooper-Jacob Method to calculate values of transmissivity and storativity. He calculated an average value of transmissivity of 620 gpd/ft for the House Well, and 580 gpd/ft for the Barn Well. The average value of storativity was 5.7×10^{-5}.

42. Mr. Rice also predicted 30-year drawdowns at four locations bordering Applicant's property. One of these was a well used for domestic purposes on the Albritton Family Management property, for which he predicted drawdown after 30 years of pumping the Applicant's wells to be 176 feet.

43. The long-term drawdown on the Albritton Family Management property will result in it becoming more challenging and costly to pump, and their pump may need to be lowered to compensate for the drawdown.

44. An unreasonableness determination is fact-specific.

45. The evidence does not establish an unreasonable effect on the Albritton Family Management property well, from Applicant's proposed pumping.

46. Impacts from Applicant's proposed pumping are not expected on surface features such as springs or streams, because of the depth of the formation from which the water is being produced.

47. Springs would only be affected by Applicant's proposed pumping if there was a direct connection between the aquifer and surface water, which there is not.

48. Applicant's proposed use of water will not unreasonably affect groundwater or surface water resources or existing permit holders.

Whether the proposed use of water is dedicated to any beneficial use (Code § 36.113(d)(3)).

49. Applicant seeks to use the combined 200 af/yr of water for a combination of domestic, livestock, and irrigation purposes across 627 acres the Applicant owns, including the 317-acre tract where the wells will reside and adjacent acreage. These uses are enumerated in the Code and the District's rules as beneficial purposes or uses.

50. The Applications will not result in waste as it is narrowly defined in the Code or the District's Rules.

Whether the proposed use of water is consistent with the District's approved management plan (Code § 36.113(d)(4)).

51. The District is within Groundwater Management Area (GMA) 9.

52. The Texas Water Development Board (TWDB) has developed a groundwater availability model (GAM) for each aquifer in Texas, including the Middle Trinity in the Hill Country area, to help estimate groundwater availability and water levels.

53. Desired future conditions (DFC) are quantitative descriptions of the desired condition of the groundwater resources in a management area at one or more specified future times.

54. Based on the DFC adopted for GMA 9, the executive administrator of the TWDB provided the District and GMA 9 with the modeled available groundwater (MAG) for each aquifer within the District.

55. The MAG is the amount of water the TWDB executive administrator determines may be produced on an average annual basis to achieve the DFC.

56. The MAG for the Trinity Aquifer for the District for all years through 2060 is 7,284 af/yr.

57. Using the MAG, the District developed a groundwater management plan (GMP), as well as rules, to implement the District's GMP and meet its statutory obligation to manage groundwater in Bandera County.

58. The District's GMP has factors to be considered in deciding whether to deny a permit or limit requested withdrawals of groundwater, including: the purposes of the District; the equitable distribution of groundwater; consequences of economic hardship from granting or denying the permit, and landowners' rights in groundwater beneath their property.

59. There is no basis to delineate 903 af/yr attributable to the Nueces River Basin from the total MAG for Bandera County for purposes of permitting.

60. The usage for Bandera County is projected to increase to 4,629 af/yr by 2070, leaving a substantial amount of the MAG unused until 2070.

Whether, if the well will be located in the Hill Country Priority Groundwater Management Area, the proposed use of water from the well is wholly or partly to provide water to a pond, lake, or reservoir to enhance the appearance of the landscape (Code § 36.113(d)(5)).

61. The District is part of the Hill Country Priority Groundwater Management Area, which was designated by the Texas Commission on Environmental Quality as an area that is experiencing, or is expected to experience, critical groundwater problems within 50 years.

62. None of the water from either the House Well or the Barn Well is proposed to be used wholly or partly to provide water to a pond, lake or reservoir.

Whether the applicant has agreed to avoid waste and achieve water conservation (Code § 36.113(d)(6)).

63. The District's Well Permit Application form requests a statement of a water conservation goal the permittee has established, water conservation measures the Permittee has adopted, and what time frames are necessary to achieve the established water conservation goals.

64. On the Well Permit Application forms, Applicant responded, "water conservation goals consistent with the reasonable and applicable standards for

wildlife, agriculture, and livestock management have been adopted and will be adhered to throughout operations." Applicant also indicated it has reviewed the District's Water Conservation Information.

65. There are no specific requirements or adopted standards for achieving conservation in the Code, nor in the District's Rules or GMP.

66. Applicant agreed to comply with all the District's rules regarding waste and achieving water conservation.

Whether the Applicant has agreed that reasonable diligence will be used to protect groundwater quality and that the Applicant will follow well plugging guidelines at the time of well closure (Code § 36.113(d)(7)).

67. Applicant stated that it will use reasonable diligence to protect groundwater and that it will follow well plugging guidelines at the time of well closure.

68. There is no record evidence that the water quality from the Barn Well will have any impact on groundwater quality or Applicant's ability to follow well plugging guidelines at the time of well closure.

Whether the Applications are consistent with the District's DFC (Code § 36.1132).

69. The District and the other groundwater conservation districts located within the boundaries of GMA 9 meet every five years, consider GAMs and other data and information and propose the DFC for each of the relevant aquifers within GMA 9.

70. The DFC adopted by the districts in GMA 9 for the Trinity Aquifer is to allow for an increase in average drawdown of approximately 30 feet through 2060.

71. Because the MAG is the amount of water the TWDB executive administrator determines may be produced on an average annual basis to achieve the DFC, and there is a significant amount more than 200 af/yr in production available and unused under the MAG for the aquifer, the Applications cannot (either standing alone, or in combination with all other production in the aquifer) cause exceedances of the DFC.

District Rule 3.4Q

72. District Rule 3.4Q does not mandate a specific production limit; it authorizes discretion in the amount permitted, within a range capped by the rule's specified upper production limit.

73. District Rule 3.4Q caps production to no more than one af/yr per acre owned, provided the WAS indicates sufficient water is available.

74. The burden of proof is on the Applicant to demonstrate that sufficient water is available.

75. Applicant seeks permits for production of 130 af/yr and 70 af/yr, for a total of 200 af/yr from two wells on a 317-acre tract of land. This amount is less than the maximum limit under District Rule 3.4Q.

76. Through the evidence offered at the hearing on the merits, Applicant met its burden of proof to demonstrate by a preponderance of the evidence that sufficient water is available for permitting the 200 af/yr sought in the Applications.

Allocation of Transcript Costs

77. Applicant has submitted the required deposit to pay all costs associated with the contract for hearing.

78. Reporting and transcription of the hearing on the merits was warranted because the hearing lasted for two days.

79. Applicant requested the contested case hearing at SOAH.

80. Through the contested case hearing process, Applicant was able to supplement the unreliable WAS submitted with its Applications.

81. BCA is a non-profit organization working to protect and preserve the abundance and quality of local water sources; conserve and enhance native plants and wildlife; and promote good land stewardship.

82. The GM, as the chief executive officer of the District, is responsible for carrying out the business and activities of the District.

83. Applicant should pay the full cost of the reporting and transcription, and reimburse the GM and BCA for transcript costs incurred.

VI. CONCLUSIONS OF LAW

1. The District has jurisdiction to decide the issues raised by the Applications. Code ch. 36.

2. As the party seeking the permits, Applicant has the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427; *Granek v. Texas State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).

3. Notice was accomplished in accordance with Code chapter 36 and District Rules.

4. The Applications, together with the information provided through the contested case hearing process, conform to the requirements prescribed by Code chapter 36 and are accompanied by the prescribed fees. Code § 36.113(d)(1).

5. An administratively complete application is an application in which all documentation required by District Rules, and all appropriate fees pertaining to the application, have been received by the District. District Rule 1.1.

6. District Rule 3.7C lists the permit application contents required by the District. The required contents include:

   - a statement of the nature and purpose of the proposed use;
   - a statement of the anticipated duration of time required for the proposed use of the water;
   - information showing what water conservation measures the applicant has adopted, what water conservation goals the applicant has established, and what measures and time frames are necessary to achieve the established water conservation goals;
   - information, including a hydro geological study with test wells, showing water availability and the projected effect of the proposed

pumping on aquifer conditions or depletion and on existing permit holders or other groundwater users in the District; and

- water quality testing for multiple parameters.

7. The proposed use of water will not unreasonably affect existing groundwater and surface water resources or existing permit holders. Code § 36.113(d)(2).

8. When deciding whether or not to issue a permit, the District must consider whether the permit will result in a beneficial use and not cause or contribute to waste. Code §§ 36.113(d)(3), (6), .1131(b)(5), (6); District Rule 3.7C(f).

9. The Code includes definitions of "use for a beneficial purpose" and "waste." Code § 36.001(8), (9); District Rule 1.

10. The proposed uses of water under the Applications are beneficial uses. Code § 36.001(9); District Rule 1.

11. The Applications will not cause or contribute to waste. Code § 36.001(8); District Rule 1.

12. Prior to issuing a permit, the District is required to consider whether the proposed use of water is consistent with its GMP. Code § 36.113(d)(4).

13. The Applications are not inconsistent with the GMP, and there is currently sufficient groundwater in the aquifer and under the GMA 9 MAG to support the issuance of the permits. Code § 36.113(d)(4).

14. The proposed use of water from the two wells is neither wholly or partly to provide water to a pond, lake, or reservoir to enhance the appearance of the landscape. Code § 36.113(d)(5).

15. A district may require, as applicable under its adopted rules, a water conservation plan or a declaration that the applicant will comply with the district's management plan. Code § 36.113(c)(4).

16. District Rule 3.7C(k) requires a permit application to include, unless waived by the GM, "information showing what water conservation measures the Permittee has adopted, what water conservation goals the Permittee has

established, and what measures and time frames are necessary to achieve the Permittee's established water conservation goals."

17. Before granting or denying a permit, the District must consider whether the Applicant has agreed to avoid waste and achieve water conservation. Code § 36.113(d)(6).

18. Applicant has agreed to avoid waste and achieve water conservation. Code § 36.113(d)(6).

19. Before granting or denying a permit, the District must consider whether the Applicant has agreed that reasonable diligence will be used to protect groundwater quality and that the applicant will follow well plugging guidelines at the time of well closure. Code § 36.113(d)(7); District Rule 3.7C(q).

20. Applicant has agreed that reasonable diligence will be used to protect groundwater quality, and that Applicant will follow well plugging guidelines at the time of well closure. Code § 36.113(d)(7); District's Rule 3.7C(q).

21. In issuing permits, the District shall manage total groundwater production on a long-term basis to achieve an applicable DFC and consider the availability of groundwater using the MAG for GMA 9, as well as other contributing factors. Code § 36.1132(b).

22. The Applications are consistent with the DFC for GMA 9. Code §§ 36.001(25), .1132.

23. The annual production for each permitted well can be limited to one af/yr, times the total number of acres in the tract of land owned by the permit applicant and identified in the permit application as associated with the well. Any existing wells on the tract being utilized for the new well must be taken into account when setting the production limit. The total annual production for a tract with multiple wells is limited in the aggregate to one af/yr times the number of acres in the tract. District Rule 3.4Q(a), (b).

24. A production limit lower than one af/yr per acre owned by the applicant may be set in areas where water availability studies indicate insufficient water is available for permitting. District Rule 3.4Q(d).

25. The party requesting the hearing before SOAH shall pay all costs associated with the contract for the hearing and shall deposit with the District an amount sufficient to pay the contract amount before the hearing begins. At the conclusion of the hearing, the District shall refund any excess money to the paying party. Code § 36.416(c); District Rule 7.5C(b)(iv).

26. The costs of a court reporter may be assessed against the party requesting it or among the parties to the hearing. Code § 36.408(a); District Rule 7.5E. The cost of a copy of a transcript ordered by a party shall be paid by that party, unless otherwise ordered by the ALJ. 1 Tex. Admin. Code § 155.423(d)(2).

27. After weighing the factors under Code section 36.113(d) and the District Rules, the District should approve the Applications.

Signed October 9, 2024

Meitra Farhadi,
Administrative Law Judge

Ross Henderson,
Administrative Law Judge

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Associated Case Party: Bandera County River Authority and Groundwater District

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Associated Case Party: Vanderpool Management, LP

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