

discriminatory and unconstitutionally take landowner's real property rights. Constructive comments received by the District from the Alliance and other concerned landowners were overwhelmingly ignored by the District. The Alliance specifically refers the District's Board to written comments previously delivered to the Board on August 10, 2004, September 1, 2004 and October 21, 2004 in connection with the draft Rules then available for public comment. Copies of these written comments are attached to this Motion and made a part hereof for all purposes. As the District is well aware, the final Rules adopted on December 2, 2004 contain revisions not available for public review until late November 2004. Most importantly, the final rules adopted by the District were substantially different than the draft rules available to the public when the District published notice of its intent to adopt rules and substantial changes were made in the proposed rules prior to their adoption without notice to the public.

Alliance representatives have attended every noticed meeting of the District's board and rules committee. The record establishes that the District's board has had no public discussion, deliberation or vote by the Board or Rules Committee concerning any comments received from the Alliance or other interested parties, nor has the Board ever publicly advised or instructed District staff on changes or revisions to the draft rules despite the numerous versions of the rules and the significant changes and modifications in the various drafts prior to the adoption of the final rules by the Board on December 2, 2004. As the Board is well aware, the rules adopted on December 2, 2004 are substantially different than the draft rules originally promulgated by the District and subject to the notice published by the District upon which initial comments were received. Indeed, numerous changes and revisions were made prior to December 2, 2004. Government Code Section 551.001 et seq requires that all deliberations and decisions of the Board be undertaken after published notice, notice of an open meeting and at an open meeting

before the public. Clearly, the rules adopted by the Board on December 2, 2004 were modified and revised pursuant to instructions received and deliberations which occurred without complying with the notice requirements of Texas Water Code § 36.101 and Government Code § 551.001 et seq.

II. Statutory Authority

The District can only exercise the statutory authority explicitly granted to Texas groundwater conservation districts pursuant to Chapter 36 of the Texas Water Code (hereinafter "Chapter 36"). Chapter 36 of the Texas Water Code does not authorize groundwater conservation districts to establish limits on total permitted withdrawals from within the District or to establish total permit limits. § 36.113 and § 36.116 do not authorize management or restrictions on use or denial of permits based upon caps or limits on total withdrawals and the District's enabling legislation contains no such authorization.

The District's final rules establish an "availability goal" and impose that "availability goal" on all new permit applications and provide that the district will evaluate all new permit applications based upon the District's "availability goal." The District's regulatory powers are limited to those specific powers explicitly and clearly stated in Sections 36.113 and 36.116 and are limited to rules establishing spacing requirements or allocations based upon tract size or acreage owned. See *South Plains Camesa Railroad Ltd. vs. High Plains Underground Water Conservation District No. 1* 52 SW 3rd 770 (Tex Civ App. Amarillo 2001). Chapter 36 does not authorize a groundwater conservation district to establish an availability goal and to deny permits to applicants after the "availability goal" has been reached by permits previously issued. A district may not exercise a new power or power contradictory to Chapter 36. Clearly this is what the District has done in their rules.

III. Availability Goal Exceeds the Statutory Authority of the District and is Arbitrary, Capricious and Discriminatory

Rule 7.1(1) "Availability Goal" of the rules adopted December 2, 2004 exceeds the statutory authority and powers granted to districts by Chapter 36 and the District's established "availability goal" contained in Rule 7.1(1) is not supported by the available scientific information. It is clear from a reading of this section of the rules that the District will apply the "availability goal" as a cap and overall limit on the total authorized permitted withdrawals within the District's boundaries. Rule 7.1(1) therefore exceeds the statutory authority and power of the District. The District is not authorized to adjudicate ownership of groundwater rights shared by all landowners and create in its rules a time priority for permit applicants. The rules implement a prior appropriation system not authorized by Chapter 36. The District rules will therefore adjudicate groundwater ownership based on priority of applications and will create landowner "winners" and landowner "losers." Landowner "losers" will be forever prevented from developing or using groundwater beneath their property. This is contrary to Chapter 36 powers which state that "the board shall consider all groundwater uses and needs and shall develop rules which are fair and impartial." See § 36.101. Under the District's rules, a landowner's rights will depend upon historic use or when the landowner applies for a permit. If a landowner applies for a permit before the availability goal is reached (if any is left after the District has confiscated most of the water from the landowners and appropriated it to historic users in amounts above their historic use), the landowner can produce the maximum amount of water authorized by the District's rules. Under the District's rules, once the availability goal is reached, a landowner applicant will not be authorized to drill or operate a groundwater well (other than exempt wells for domestic purposes) and will therefore be permanently deprived of any benefit from the

groundwater rights owned by the landowner. Chapter 36 does not authorize a district to establish a prior appropriation scheme and thereby deny landowners access to their water right.

IV. Lack of Scientific Support for "Availability Goal"

More importantly, there exists no technical basis, factual support or scientific justification for the inclusion of an "availability goal" limit on production from groundwater resources within the District. The District has taken data from the Region G Water Planning Group and the Texas Water Development Board that was not intended or developed to establish a limit on overall production but rather assessed the aquifer's ability to meet existing and anticipated future demand for regional water planning purposes. The Board has arbitrarily decided this information should equal the limit on total authorized production, regardless of landowner rights, the rights to the groundwater beneath the ground and the benefits to the owners and the community of further development. The record before the District is devoid of any evidence that would justify this decision. Thus the District has established an arbitrary limit on overall production with no scientific basis to establish or even support the view that production greater than this limit will adversely affect the aquifer or interfere with continued production from existing users. Worse, the District has not undertaken a comparison of the benefits of further development of the resource versus the potential impacts of establishing the limit contained in the rules. The effect of the rule is to discriminate in favor of early applicants and existing in-District users and forever deprive all other landowners of any ownership interest in their property rights in the groundwater under their land within the District. Because these existing users are primarily public entities, the District has, in essence, converted a privately owned resource into a government controlled public water reserve without compensation to the water's owners. This far exceeds the statutory authority granted to the District by Chapter 36.

V. Historic Use

The District's rules make passing reference in Rule 8.3(g) to permits for historic use as a different category of operating permit. The rule simply says that the District "shall preserve historic groundwater use" in the District before the effective date of the District rules "to the maximum extent practicable" without defining how, under what circumstances or to what extent historic groundwater users will be granted an operating permit. The District does not define how historic use will be determined, what quantity of historic use will be "preserved," or how the District will determine historic operating permit amounts or what information must be submitted by the historic user in order for the District to evaluate the claim of actual use by the historic user.

The District rules outline the requirements for all original applications for drilling permits, operating permits, transport permits, permit renewals or amendments but does not outline the requirements for historic use applications, nor do the rules describe how and under what circumstance a historic user qualifies for this type of operating permit. For instance, historic users appear to be relieved of the responsibility of filing with the District a water conservation plan or any requirement that the historic user comply with the District's management plan; nor are historic users required to file a well closure plan or a declaration that the historic user will comply with well plugging guidelines and report closure to the applicable authority. Indeed, the District's rules do not even require that historic users prove that their actual use was without waste or that it was a beneficial use. No guidance is provided as to what the District will consider as evidence proving historic use or the amount of such use.

The District's rules are therefore discriminatory and are arbitrary and capricious in granting "historic users" a virtual blank check for "historic use" while insisting that new permit applicants comply with rigorous and onerous permit rules. These rules are intended and do

discriminate in favor of local water users and are specifically intended to prevent new use for transfer outside the District, in direct contradiction to the prohibition against such rules contained in § 36.122. Once again the rules have targeted selected landowners and not met the statutory requirement of fairness and impartial rulemaking required by Texas Water Code § 36.101.

VI. Schedule of Rulemaking and Permitting Process

At its December 2, 2004 meeting, the Board adopted a schedule of rulemaking and permitting process which exceeds the District's authority under Chapter 36 and is arbitrary, capricious and discriminatory and was adopted without posting notice of the District's intention to do so as required by Chapter 36 and the Government Code.

The District's agenda for the December 2, 2004 meeting failed to disclose or give notice to the public that it intended to adopt a schedule that prevented new permit applicants (all landowners not qualifying for "historic use") from filing applications for permits until, at the earliest, October 6, 2005. Adopting a schedule that has such a profound effect on millions of acres of land within the District without any notice to the affected landowners and, in essence, precluding any new users from making any application for water use within the District for nearly a year, given the time that must be spent considering permit applications, is clearly arbitrary, capricious and discriminatory and is intended specifically to benefit historic users within the District to the detriment of all other landowners and potential new water users, in violation of § 36.113 and 36.122.

The permitting schedule adopted by the Board contemplates consideration of applications for historic use prior to consideration of any other applications and then consideration of applications for "applications for future groundwater production of existing wells" under District Rule 8.10 before authorizing even the filing of any permit applications for new operating permits. As discussed above, Rule 8.10 of the District's rules is arbitrary, capricious and

discriminatory and violates Chapter 36 and the due process of all landowners within the District by allowing the general manager, without publication of notice, hearing, or any opportunity to protest, to award historic users a 20 percent increase above historic production prior to consideration of any applications for new permits. Any rule authorizing any amendment of an existing permit without notice, publication or hearing or opportunity to protest exceeds the District's statutory authority and vesting that discretion in the general manager without any criteria for the general manager's consideration of such applications is inherently arbitrary, capricious, discriminatory and a violation of due process. Authorizing a 20% increase in actual use for existing users is intentionally discriminatory in violation of § 36.113

The District has empowered itself, contrary to statute, to confiscate all the groundwater in the District and dole it out preferentially and partially. The end result of the District's schedule and Rule 8.10 is that:

1. The District rules establish a limit on overall production from the aquifer within the District;
2. The District has declared a moratorium on new production in the District. This moratorium has been in existence since the inception of the District and they have preferentially extended this moratorium on new production until at least October of 2005. This is clearly contrary to the authority granted to Districts by Chapter 36;
3. The District rules authorize historic users to make first application for the District's arbitrarily determined limited amount of water available within the District before any other landowner can make an application for use of water;
4. Actual historic users are not given any criteria or limits on what they can 'apply for' as actual historic use, thus they can claim almost any amount as historic use;

5. Historic users can then apply for a 20 percent increase in their "historic use";

6. The general manager can consider these applications for increases up to 20 percent without publication of notice, notice to affected landowner, hearing or any opportunity to protest and grant or deny such applications with no stated criteria;

7. Then and only then can all other landowners within the District even attempt to obtain access to their groundwater resources, most if not all of which have already been confiscated by the District and given to others at the expense of the owners of such water.

Clearly the District intends to ensure that all in-District users have access to an unfettered right to produce groundwater to the maximum extent they have historically, plus a 20 percent increase in that maximum use without notice, hearing or opportunity to protest before any other landowner can make even an application for a permit to use groundwater. These provisions are clearly discriminatory and are intended to discriminate against new users in direct contravention of Section 36.113 and 36.122 of the Texas Water Code. There exists no authority in Chapter 36 to grant existing users a "future needs allowance of 20%" without a hearing process or opportunity to protest before all other applicants seeking to produce groundwater can even apply for a permit. The rules operate as a one-year moratorium on all new user applications, which is clearly unfair and discriminatory.

VII. Beneficial Use

The District's final rules improperly condition granting of a permit application "on evidence of beneficial use" submitted in operating permit applications. The Board has explained, prior to adoption of the rules, that it intends to condition permit applications on proof of an actual contract for, or agreement to purchase or use water, before a permit will be granted.

Chapter 36 authorizes groundwater conservation districts to prohibit production of groundwater if the water is wasted or not put to a beneficial use. Nothing in Chapter 36 allows a groundwater district to condition a permit application on an actual contract or agreement. Permit applicants must agree to put the water to beneficial use and can be required to submit conservation plans and comply with all District rules with regard to prohibitions against waste, but the District cannot condition the grant of a permit on proof of an actual contract. Indeed, such a requirement effectively prevents and prohibits exports of groundwater in direct contravention to § 36.122 Texas Water Code.

VIII. Contiguous Acres

The contiguous acre requirement can and will result in the loss of groundwater rights by all small landowners located within the District. District Rules 1.1(6), 6.1 and 7.1(2) establish a contiguous acre requirement that is arbitrary, capricious and discriminatory in that it is not based upon the available science, does nothing to protect the resource and is intended solely to prevent landowners from pooling their groundwater rights for production purposes. The distance and spacing requirements already limit small landowners in where and how large a well they can drill to the proximity of their boundary with their neighbors. A contiguous acre requirement, by its very application, deprives a 50 or 80-acre landowner of any opportunity to benefit from the landowner's groundwater rights since the landowner cannot obtain a permit to obtain Simsboro groundwater.

Small landowners adjacent to or surrounded by property embraced in the contiguous acre requirement are thereafter precluded from obtaining any benefit from their groundwater rights in the Simsboro Aquifer. Given that they cannot drill a well and cannot include their acreage with any other noncontiguous acreage, they are forever precluded from benefiting from the

groundwater. The contiguous acre requirement therefore operates as a complete taking of the groundwater rights of landowners throughout the District.

Spacing requirements contained in the rules thoroughly address impacts of local production and minimize the impact of draw-down associated with well use. The addition of the contiguous acre requirement adds nothing to the protection afforded by the spacing requirement, is not based on the hydrology of the aquifer or the minimal impact of local production (as evidenced by Bryan and College Station's well fields) and serves only to benefit large landowners. The requirement is therefore arbitrary, capricious and discriminatory.

IX. Permit Terms

The District's draft rules attempt to limit terms for all operating permits (except historic users) to five years and obligate the permit holder to reapply for a permit every five years, with the entire burden and expense that that process entails. Chapter 36 does not authorize the District to establish terms for operating permits. The only mention of permit terms is in § 36.122 which requires a minimum term of 30 years for transport permits. Moreover, historic users are not subject to this five-year term limit. The District's rules are internally inconsistent in allowing a 30-year term for transport permits while requiring an operating permit before a transport permit can be granted. However, under the rules, an operating permit can only be granted for five years. The § 36.122 direction that transport permits be issued for a minimum of 30 years is rendered meaningless if the required operating permit (which must underlie the transport permit) only lasts for five years.

Once again, the District appears to be placing an undue burden on new permit applicants and new operating permits while exempting all historic users from similar regulation, to the detriment of water conservation and the prevention of waste. This approach is discriminatory, is arbitrary and capricious and is not designed to protect the aquifer, minimize waste or provide for

enforcement of conservation goals from historic users. Instead, these provisions are clearly intended to manage and control the end use of water produced from within the District.

X. Use and Transport Fees

Chapter 36 prohibits export fees in excess of 50 percent of the user fee adopted by a District. The transport fees adopted by the District in its final rules clearly are in excess of 50 percent of the user fees adopted for in-District users, in direct contravention of Chapter 36. While the amount of the fees included in the District's rules are within the District's enabling legislation, the District is still required to maintain the statutory balance between user fees and transport fees and has ignored this statutory requirement in adopting the user and transport fees in its final rules. The fees are therefore contrary to Chapter 36 and are discriminatory, intentionally discriminating against use outside District boundaries. Such a clear contradiction between the District's rules and Chapter 36 reveals the intent of the District to discriminate against transporters and new users and the District's poor understanding of Texas water law.

Worse, use and transport fees can only be adopted by the District by rule. Instead, the District has attempted to authorize an annual setting of user and transport fees by Board resolution, thus eliminating the notice and publication requirement made mandatory by Chapter 36. The Legislature requires this notice to give all users within the District notice of the District's intention to adopt or raise user and transport fees and an opportunity to comment on those fees before they are adopted by the Board. Moreover, in order to enforce these fees in court or through permit revocation, fees must be adopted and established by rule and cannot be adjusted or established by Board order or resolution.

XI. Future Restrictions or Limitations

Rule 8.3(d) restates statutory authority granted to Districts. However, the District's rules apparently intend to authorize the District board to take statutorily authorized actions on

individual permit applications, amendment applications or transport permit application, instead of, as required by Chapter 36, adopting new or amended rules after notice and comment, which would then be applicable to new permit applications. Imposing more restrictive permit conditions on new permit applications after the application has been made and then applying such limitations to all subsequent new permit applications and increased use by historic users will result in arbitrary and capricious decisions which will fundamentally change the District's rules without complying with the rulemaking process established by Chapter 36. These changes would then be accomplished without giving proper notice and without consideration of rule changes in an open meeting and would thereafter be imposed on all landowners and water producers without complying with Chapter 36. The District can only change its permit conditions by changes in its rules which are adopted pursuant to statutory requirements. Permit conditions and limitations authorized by rule must then be uniformly applied to all permit applicants so that the applicant has performance standards which, if met, ensure the right to produce a known quantity of water.

The statutory authorizations outlined in the District's rules can only be implemented by amending the District's rules. The District cannot, on an individual application basis, make District-wide judgments that will affect all landowners without undertaking the public process required before the District adopts a rule. Under the District rules, the District could make a decision on an individual permit application that would thereafter limit all other applicants without any notice to those affected or opportunity for them to be heard. This is far in excess of the statutory authority granted to groundwater districts and fundamentally denies all landowners due process.

XII. 3000-Gallon-Per-Minute Production Limitation

Rule 7.1(3) establishing a 3000-gallon-per-minute production limit is without technical justification and is entirely inconsistent with application of a spacing limit. The District has established no basis for, scientific reason for or benefit from the 3000-gallon-per-minute production limit contained in its rule and therefore this limit is arbitrary, capricious and without scientific or technical justification.

XIII. Report by a Registered Professional in Hydrogeology

Rule 8.4(6)(B) requires any applicant for a well capable of producing over 500 gallons per minute to include a report by a registered professional in hydrogeology evaluating the projected effect of the proposed withdrawal on the aquifer or any other aquifer conditions, depletion, subsidence or effects on existing permit holders or other groundwater users in the District. This requirement is far in excess of the statutory authority granted to the District, implies that the District may consider this report as part of its evaluation of the application, even if the applicant meets all the other requirements of the rule, and places an unnecessary, vague uncertain and unconstitutional burden on applicants without stating any objective standard by which these reports will be measured. Most importantly, it is the District's obligation to assess these factors in establishing its rules, its spacing limitations and its production limitations in advance as opposed to doing it on a case-by-case or permit-by-permit basis. By requiring such a report, the District clearly intends to act on a case-by-case basis and judge permit applications on the basis of arbitrary criteria as opposed to compliance with District rules. Such an approach is inherently unconstitutional, vague and discriminatory. Furthermore, it should be noted that the Alliance knows of no professional registration for hydrogeologists in the State of Texas. The only Texas registrations available are for engineers and geologists or certifications from various nationwide associations.

XIV. Feasible and Practicable Alternative Supplies to the Applicant

Rule 8.4(5) requires the applicant to submit information to the District concerning the availability of feasible and practicable alternative supplies to the applicant. This requirement is not within the statutory authority of Chapter 36 and implies that the District will make judgments on permit applications without a defined criteria and will decide without any defining information whether each applicant has "feasible and practicable alternative supplies." Such a determination is inherently subjective and is inherently applied on a case-by-case basis and is inconsistent with and in excess of the statutory authority granted the District under Chapter 36.

XV. Proof of Notification

Rule 8.4(11) requires the applicant to provide proof of notification of the application to all landowners and/or registration/permit holders that are located within the spacing requirement circumference of the applied-for wells, along with a publisher's affidavit showing publication of the notice. However, Rule 8.5(b) provides that the general manager shall be responsible for issuing all written public notices at the applicant's expense to all those entitled to notice and requires the general manager to ensure that the notice is published as required by Chapter 36. It is inherently arbitrary, capricious and unreasonable to require the applicant to make proof of an obligation that is imposed upon the general manager in the District's own rule.

XVI. Amendments to Increase Use

Rule 8.10 of the District rules authorizes the general manager of the District to rule on "the first application for an amendment to an operating permit for an increase in total groundwater production up to, but not exceeding, 20 percent of the initial authorized total production amount without notice, hearing or further action of the Board." This authorization is inconsistent with the requirements of Chapter 36 and appears specifically to benefit only historic users and not new permit applicants. Indeed, it appears to grant the general manager the

authority to grant all historic users a 20 percent increase in their historic use without any notice or hearing or opportunity to protest by any landowner or affected party, even if they will be adversely affected. Worse, no criteria are outlined for determining whether the general manager should or should not grant such a request, meaning the District's general manager could grant some and deny others without any reason or for reasons that are arbitrary, capricious or discriminatory, without appeal. This rule violates fundamental principles of due process and constitutional law and clearly exceeds the statutory authority granted districts by Chapter 36 and is contrary to the requirement in § 36.101 that rulemaking be fair and impartial.

XVII. Transfer Application Consideration

Rule 10.3(b) lists three criteria which the District will consider when evaluating a transport application which are clearly in excess of the statutory authority granted the District and are not authorized by § 36.122. Specifically, the District is not authorized to apply more restrictive permit conditions (or more restrictive permit review conditions) on transport permit applications than on permit applications to produce groundwater for use within the District.

This requirement is therefore in excess of the District's statutory authority, is arbitrary and capricious and is intended to discriminate against applications for transfer permits.

XVIII. Periodic Reviews

Rule 10.4(C) attempts to authorize "periodic review" by the District of the amount of water that may be transferred under a transport permit. This is directly contrary to the requirements and limitations in § 36.122 and is clearly an attempt on the part of the District to impose more restrictive permit conditions on transfer permits and to impose uncertainty and the potential for reduction in the future pursuant to these "periodic reviews" in transfer permits as opposed to operating permits or historic permits within the District. These provisions are inherently discriminatory, arbitrary and capricious, are intended to make transport permits

unreliable and therefore of no value or use and are therefore inherently discriminatory and an obvious attempt by the District to stop the transport of water out of the District even though the owners of such waters expressly wish to do so.

XIX. Production Limitations

Rule 7.1(2) provides a method for determining the amount of acreage required for a new well based on the instantaneous production amount. There are several concerns with this rule as follows:

1. In conjunction with the District "Availability Goal" and the District's rules giving a superior right to historic users, less than one percent of the land within the District will have all the water rights in the District on a permanent basis. In other words, 99 percent of the land in the District and their property owners will have no rights to any groundwater above domestic amounts. This is clearly arbitrary, discriminatory, unfair, and a taking of property in violation of Article I, Section 17 of the Texas Constitution.

2. The production-based acreage methodology in the rule results in a variable scale allocation method. The lower the well yield, the more water per acre you are allowed to develop. This results in preferential treatment of small landowners and unequal rights and differing protection under the rules.

3. The rule is unclear as to what right the applicant is granted under the rule. The rule states how much acreage is required for a specific instantaneous production yield. However, the rule is silent with regard to how that instantaneous production rate is applied to the permitted production volume. Without the rule specifically stating how it will be applied, the District can apply arbitrary production amounts to different applicants. Furthermore, the rule states that a majority of the contiguous acreage assigned to the well shall bear a reasonable reflection of the cone of depression impact near the pumped well. The application of a "reasonableness standard"

in this rule is clearly arbitrary and provides no criteria or guidance to the applicant as to the required property shape or configuration necessary to obtain the required water, offers little to no benefit or protection to the aquifer or adjoining wells and may be applied selectively and arbitrarily by the District in the granting and denial of operating permit applications.

Conclusion

For each of the above-described reasons, the Alliance requests that the District reconsider its Rules and make revisions to conform the rules to the statutory requirements related to groundwater districts in Texas as set out in Chapter 36 of the Texas Water Code and to correct those deficiencies and discriminatory provisions in the rules as outlined in this Motion for Rehearing.

Respectfully submitted,

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