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October 22, 2010

BY HAND DELIVERY

Ms. LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle
Austin, TX 78753

RE: TCEQ Docket # 2010-1611-MIS

Dear Ms. Castañuela:

Please find enclosed an original and eight copies of a Response of Hemphill County Underground Water Conservation District to Request for Inquiry in the above mentioned docket number. Please date stamp the copy and send back with the person delivering.

Thank you for your assistance on this matter.

Sincerely,

KEMP SMITH LLP



By:

Andrew S. "Drew" Miller

CHIEF CLERKS OFFICE

2010 OCT 22 PM 3:30

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Enclosures

cc: Christiaan Siano
Marvin Jones
Monique Norman
Keith Good
Jim Conkwright

14901.00302/DMIL/CORR-3/1097715v.1

EL PASO OFFICE: 221 North Kansas, Suite 1700 | El Paso, Texas 79901 | 915.533.4424 | Fax 915.546.5360

No. 2010-1611-MIS

REQUEST FOR INQUIRY
AND SELECTION OF
REVIEW PANEL
UNDER § 36.108(f),
TEXAS WATER CODE,
FILED BY MESA WATER, L.P.

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BEFORE THE 2010 OCT 22 PM 3:30
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

**RESPONSE OF HEMPHILL COUNTY UNDERGROUND
WATER CONSERVATION DISTRICT TO REQUEST FOR INQUIRY**

Hemphill County Underground Water Conservation District (“HCUWCD”) hereby files this response to *Petitioner’s Request for Inquiry* (and for the selection of a review panel) which was filed with the Texas Commission on Environmental Quality (“TCEQ”) by Mesa Water, L.P. (“Mesa”), on September 17, 2010 (“Mesa Petition”).

Introduction

In this, Mesa’s most recent attack on groundwater conservation districts (“GCDs”) and groundwater management in Texas, Mesa has filed a request for an inquiry and for the selection of a review panel with TCEQ pursuant to TEX. WATER CODE ANN. § 36.108(f) regarding joint planning in Groundwater Management Area No. 1 (“GMA 1”), which is in the Texas Panhandle. Mesa attempts to assert arguments in this proceeding that are substantially the same as arguments that Mesa recently presented to the Texas Water Development Board (“TWDB”) in connection with a petition it filed pursuant to another subsection of § 36.108, Water Code (*i.e.*, TEX. WATER CODE ANN. § 36.108(l)), appealing the reasonableness of the Desired Future Conditions (“DFCs”) adopted by the joint planning committee for GMA 1. Mesa’s arguments were rejected in that proceeding, in which TWDB determined that the GMA 1 DFCs were reasonable.

In addition to its attempt to pursue a redundant challenge to the reasonableness of the DFCs established for GMA 1, Mesa also attacks, in its petition to TCEQ, the rules of each of the

GCDs within GMA 1. However, such attacks are completely premature. The DFC process has just begun. Under the terms of Chapter 36, Water Code, DFCs were not required to be adopted until just a few weeks ago (September 1, 2010). As of the date of this response, TWDB has not issued the final Managed Available Groundwater (“MAG”) values that will result from the GMA 1 DFCs. TCEQ should not agree to be dragged into this ongoing process at this time. Rather, TCEQ should allow TWDB sufficient time to develop and finalize the MAG values and to provide them to the GCDs, and allow the GCDs within GMA 1 sufficient time to incorporate the DFCs into their groundwater management plans, to ensure that the management plans contain goals and objectives consistent with achieving the DFCs, and to adopt rules necessary to implement the management plan (which must, in turn, include and incorporate the DFCs), before such challenges should be considered.

TCEQ should also view Mesa’s Petition in the context of Mesa’s larger strategy, which is to attack the required joint planning process (as added to Chapter 36 in 2005)¹, and the results of that process in GMA 1, on as many fronts as possible. Mesa’s strategy appears to be to paint a picture of failure of that process in order to *promote* its failure at an early stage. Mesa is concurrently attempting to advance a legislative agenda to weaken GCDs so that it can ultimately pump and sell the greatest volume of groundwater, free from the possibility of meaningful regulatory and management-based limits.

Mesa’s requests for relief from TCEQ in this proceeding bring its goals into clear focus. Specifically, Mesa requests that TCEQ issue an order:

¹ Act of May 30, 2005, 79th Leg., R.S., ch. 970 (“HB 1763”), § 8, 2005 Tex. Gen. Laws 3247, 3254.

- (1) requiring the adoption of a single DFC “for each of the subdivisions [of] the Ogallala Aquifer in GMA 1 and to adopt and equitably enforce rules designed to achieve the Desired Future Condition”;²
- (2) dissolving of the boards of directors of the four groundwater conservation districts within GMA 1; or
- (3) dissolving of the four groundwater districts within GMA 1.

Thus, because Mesa does not favor the *results* of joint planning in GMA 1, it is now asking TCEQ to impose its preferred approach by *ordering* the establishment of a uniform DFC and uniform regulation across GCD boundaries, or by taking the draconian measure of dissolving the governing boards of the GMA 1 districts or dissolving the districts themselves. In other words, Mesa asks TCEQ to dismantle the local control of groundwater resources, which is the cornerstone of groundwater management in Texas,³ in the Texas Panhandle where Mesa has invested in rights to groundwater and does not like the result of the joint planning. TCEQ should summarily dismiss Mesa’s latest attack on GCDs and allow the joint planning process and groundwater management, as called for in Chapter 36, to proceed.

The Adoption of DFCs for GMA 1

On July 7, 2009, the district representatives to the joint planning committee for GMA 1, acting pursuant to Chapter 36, Water Code, including, in particular, TEX. WATER CODE ANN. § 36.108(d) and (d-1), unanimously adopted the following DFCs for the portions of the Ogallala and Rita Blanca Aquifers within GMA 1:

² Note that Mesa purposely employs the singular “Desired Future Condition” here because it argues that GCDs are required to adopt a uniform DFC throughout an entire aquifer (or aquifer subdivision). *See infra* at 21.

³ TEX. WATER CODE ANN. § 36.0015 (West 2008) (declaring that groundwater management pursuant to Chapter 36, Water Code is the preferred method of groundwater management); *see also* Martin Hubert and Bob Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas’s Future Water Needs*, 30 TEX. TECH L. REV. 53, 65-66 (1999) (stating that groundwater conservation districts “embody a central premise of [SB 1] – local control – and represent the idea that those closest to the resource are those most capable of managing it”).

- 50% volume in storage remaining in 50 years (50/50) –
 - throughout the jurisdiction of the High Plains Groundwater Conservation District (consisting of parts of Armstrong, Potter and Randall Counties);
 - throughout the jurisdiction of the Panhandle Groundwater Conservation District (consisting of all or part of Armstrong, Carson, Donley, Gray, Hutchinson, Potter, and Roberts Counties);
- 40% volume in storage remaining in 50 years (40/50) in those portions of the North Plains Groundwater Conservation District located in Dallam, Hartley, Moore, and Sherman Counties; and
- 80% volume in storage remaining in 50 years (80/50) in Hemphill County.⁴

Although joint planning in GMA 1 culminated with the adoption of these DFCs in July 2009, joint planning for GMA 1 had begun in early 2006.⁵ The first meeting of the joint planning committee for GMA 1 was held in Hemphill County on January 12, 2006, at which time the committee discussed strategies and procedures for the development of DFCs.⁶ The committee also adopted by-laws to guide its proceedings and determined that it needed to learn more about aquifer conditions and management approaches in each of the member districts.⁷ Thereafter, the committee held meetings within each of the GMA 1 districts to allow each district's representative to learn about the other districts' management plans and philosophies. Four such meetings were held, one in each district.⁸ Technical and other information about groundwater management within each district was presented and discussed.⁹

⁴ *Resolution No. 2009-01 of the Groundwater Management Area 1 Joint Planning Committee Adopting Desired Future Conditions for the Ogallala and Rita Blanca Aquifers*, dated July 7, 2009 (copy attached as Exhibit 1 to Mesa Petition) ("*Resolution No. 2009-01*").

⁵ Transcript of Texas Water Development Board Hearing, November 11, 2009, 10:00 AM, Amarillo, Texas ("TR") at 98 (Testimony of James Haley). A copy of this transcript is included in the Appendix to this Response at Tab A.

⁶ TR at 65 (Testimony of Danny Krienke).

⁷ TR at 98 (Testimony of James Haley).

⁸ TR at 65 (Testimony of Danny Krienke).

⁹ TR at 98 (Testimony of James Haley).

Beginning in 2006, the joint planning committee requested that TWDB provide seven separate Groundwater Availability Modeling (“GAM”) runs and seven GAM runs and two supplemental reports were issued by TWDB for the committee’s use and consideration. After the results of each GAM run were provided, the committee met to discuss the results and their implications for planning throughout the GMA. Considering the amount of water available in the GMA based on current and future projected use, the last GAM run request was filed with TWDB to determine whether the proposed DFCs would work together. TWDB concluded the proposed DFCs were feasible and compatible with each other.¹⁰

Throughout the entire process, the meetings of the joint planning committee for GMA 1 have included discussions and deliberations regarding available science, current and future demands, and stakeholder input. In its efforts to establish DFCs, the committee relied heavily on historical data prepared by the regional planning group and updated that information with input from each member district.¹¹ Prior to setting the DFCs, the joint planning committee for GMA 1 met eighteen times.¹²

Danny Krienke, who served as President of GMA 1 and of the North Plains Groundwater Conservation District during GMA 1’s joint planning process, summarized that process in sworn testimony as follows:

In setting the DFCs, input was sought from all interested parties, including farmers, ranchers, businessmen, professionals, city managers and others. Consideration was given to the desires of each area represented and to the economic impact of different DFCs on those areas. Consideration was given to the State and Regional Water Plan. Guidance and scientific information were provided by the Texas Water Development Board.

¹⁰ TR at 99 (Testimony of James Haley).

¹¹ TR at 99 (Testimony of James Haley).

¹² TR at 65 (Testimony of Danny Krienke).

GMA 1 is divided into Geographic Areas 1, 2 and 3. In setting the goals for Geographic Area 1, the GMA Joint Planning Committee acknowledged that the groundwater stakeholders in Area 1 are heavily invested in irrigated agriculture and related agriculture industries such as dairies and cheese factories.

Our studies indicated that to set a goal for Geographic Area 1 as a whole greater than . . . 40 percent remaining in 50 years would likely force immediate cutbacks on groundwater production and cause economic harm to agriculture enterprises and financial institutions.

Conversely, higher DFCs are justified on the eastern side of [the] GMA, specifically in Geographic [Area] 2, Hemphill County. This is because the topography there is less adapted to irrigation and there is more stakeholder interest in protecting stream flows to enhance the natural beauty and property values of the area and to maintain and improve [the] existing economy of Geographic Area 2.

Further, reasonable water planning and state water planning project - projects that less water will be pumped in Area 2 and 3. Our analysis indicated that even with higher DFCs, collectively the counties in Area 3 will enjoy significant opportunity for expanded groundwater production far beyond any projected groundwater demands identified in the State Water Plan for this region in the next 50 years.

GMA 1 covers over 17,000 square miles. That area is larger than nine of the 50 United States. It is not difficult to perceive considerable geographic and socio-economic differences, and therefore differences in desires for the future of the GMA's groundwater resources.

We believe the DFCs adopted by the Joint Planning Committee are responsive, responsible and reasonable reflections of those desires. All in all, the GMA 1 DFCs, from the perspective of the Joint Planning Committee, are reasonable and on track with the legislative mandate to establish DFCs considering the various uses of groundwater, as well as the different conditions of the aquifer within the GMA.

The science and modeling runs also tell us that these DFCs are physically possible and compatible with one another. Further, these DFCs also adhere to the legislative mandate for groundwater conservation districts comprising GMA 1 to conserve and protect this valuable Texas resource.¹³

¹³ TR at 65-68 (Testimony of Danny Krienke).

Prior Mesa Petition to TWDB and TWDB Hearing

In August 2009, Mesa and G&J Ranch, Inc.,¹⁴ each filed a petition with TWDB pursuant to TEX. WATER CODE ANN. § 36.108(l), appealing the DFCs established for the Ogallala Aquifer within GMA 1 and asserting that those DFCs were not reasonable.¹⁵ TWDB held a three-hour long hearing on those petitions on November 11, 2009, as called for by TEX. WATER CODE ANN. § 36.108(m) and pursuant to the procedures set forth in TWDB's implementing rules (31 TEX. ADMIN. CODE 356.41-.46) to hear testimony and take evidence on Mesa's Petition. In addition, parties submitted written responses and briefs.¹⁶ Pursuant to TWDB rule, the record remained open following the hearing until November 24, 2009, to receive additional evidence from other interested persons. During that time period, seventy-six additional comments from interested parties were submitted in support of the GCDs and/or HCUWCD. Prior to and following the hearing, a total of over 130 comments from interested parties were submitted in support of the GCDs and/or HCUWCD.

Findings of TWDB on the GMA 1 DFCs

On February 10, 2010, TWDB staff issued a report with technical analyses that discussed whether the GMA 1 DFCs are unreasonable based on the evidence in the record before TWDB.¹⁷

¹⁴ G&J Ranch, Inc., has sold one half of the rights to groundwater associated with its property to Mesa. Both Mesa and G&J Ranch were represented in connection with those parties' petitions to TWDB appealing the reasonableness of the GMA 1 DFCs by Marvin W. "Marty" Jones of Sprouse Shrader Smith P.C. in Amarillo, Texas. Marty Jones likewise represents Mesa in this proceeding.

¹⁵ A copy of the petitions of Mesa and G&J Ranch to TWDB (without exhibits) are included in the Appendix to this Response at Tabs B and C, respectively.

¹⁶ A copy of the *Response of Hemphill County Underground Water Conservation District to Petitions of G&J Ranch, Inc., and Mesa Water LP* ("HCUWCD Response") and the *Reply of Hemphill County Underground Water Conservation District to Brief of Mesa Water, LP and G&J Ranch, Inc.* ("HCUWCD Reply") in the proceeding before TWDB are included in the Appendix to this response at Tabs D and E, respectively.

¹⁷ *Report on Appeal of the Reasonableness of the Desired Future Conditions Adopted by the Groundwater Conservation District in Groundwater Management Area 1 for the Ogallala and Rita Blanca Aquifers*, February 10, 2010 ("TWDB Staff Recommendation") A copy of the TWDB Staff Recommendation is included in the Appendix to this response at Tab F.

TWDB staff recommended that the Board of Directors of TWDB find that the DFCs adopted by the GMA 1 GCDs are not unreasonable based on the analysis set out in its report.

Among the conclusions of TWDB staff set forth in its report are the following:

- The GMA 1 districts “engaged in joint planning and exercised the local decision-making process envisioned by the statute.”¹⁸
- No evidence was presented that the GMA 1 DFCs prohibit someone from pumping their groundwater or prohibit a particular beneficial use.¹⁹
- Petitioners’ claim that water rights will be worthless under the DFC for Hemphill County has no basis in fact.²⁰
- Rules based on the GMA 1 DFCs have yet to be adopted.²¹
- The DFC for Hemphill County serves to protect property rights in that it conserves groundwater, protects stream flow, and protects existing users of property and enhances their property values.²²
- The GMA 1 districts have considered the potential impact of their decisions on all users and uses of groundwater in GMA 1 and have achieved a balance for all sectors, including the water marketers.²³
- Chapter 36 allows multiple DFCs in a GMA based on different patterns of use and conditions within an aquifer.²⁴
- Mesa’s own exhibits suggest significant differences from one part of GMA 1 to the other.²⁵
- Mesa’s exhibits do not support its claim that uses are undifferentiated throughout GMA 1 and fail to establish that the different DFCs adopted for GMA 1 are unreasonable based on the statutory criteria.²⁶

¹⁸ TWDB Staff Recommendation at 3.

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 5.

²⁵ *Id.*

²⁶ *Id.*

- Political subdivisions are common demarcations of geographic areas for purposes of describing uses and conditions of those areas.²⁷
- The GMA 1 districts have achieved a reasonable response to issues related to the environmental impacts of groundwater pumping and concerns regarding spring flows.²⁸
- The GMA 1 districts have balanced the various uses, conditions, desires, and needs of all concerned in a manner that is not unreasonable.²⁹
- The models, as run by TWDB staff, demonstrate that the GMA 1 DFCs are physically possible.³⁰
- The DFC for Hemphill County allows for more than a ten-fold increase in pumping over current pumping and that, unless changes occur in the pumping patterns in Hemphill County compared to historic pumping, most of the available groundwater could be marketed, as Mesa wants.³¹
- The GMA 1 districts appear to have carefully considered and reasonably balanced municipal, agricultural, industrial, environmental and recreational interests, uses and potential uses, in the development of the GMA 1 DFCs.³²

In response to Mesa's argument that areas defined by the jurisdictional boundaries of groundwater conservation districts or counties are not valid "geographic areas" that may be used to establish different DFCs within a GMA, the staff report concluded as follows:

Given that uses and conditions can be distinguished in the various areas of GMA 1 and described conveniently by reference to the counties, it is not unreasonable to divide the geographic area along political boundaries. Such a vision is consistent with the statute and useful to the Districts as they seek to fulfill their responsibilities. Staff therefore concludes that, based on the statutory language and the historic patterns of pumping in GMA 1, the delineation along county boundaries for the DFCs is not unreasonable.³³

²⁷ *Id.*

²⁸ *Id.* at 6.

²⁹ *Id.* at 7.

³⁰ *Id.* at 8.

³¹ *Id.* at 8.

³² *Id.* at 8.

³³ *Id.* at 5-6

At its meeting on February 17, 2010, the governing board of TWDB voted to approve TWDB staff's recommendation in its entirety.³⁴ Therefore, among other things, TWDB has determined, in a proceeding in which Mesa fully participated, that: (1) the GMA 1 GCDs engaged and participated in the joint planning process; (2) the process resulted in adequate planning; and (3) that the GMA 1 DFCs are reasonable.

TWDB conducted an exhaustive review and analysis of the GMA 1 DFCs, touching on all of the factors enumerated in the TWDB rule governing the evaluation of DFCs in such appeals.³⁵ TWDB did not limit itself to issues raised by Mesa and G&J Ranch in their petitions. TWDB's findings show that the joint planning process, as conducted in GMA 1 and as reflected in the resulting GMA 1 DFCs, represents *a model* of how joint planning of groundwater management among GCDs should work.

Response to Petition

A. TCEQ should dismiss Mesa's petition (and not select a review panel).

TCEQ should dismiss Mesa's Petition pursuant to TEX. WATER CODE ANN. § 36.108(g) and decline to select a review panel that would review the petition, hold a hearing, take evidence, and issue a report with respect to Mesa's Petition. Pursuant to TEX. WATER CODE ANN.

³⁴ Minutes of the Texas Water Development Board, Special Meeting, February 17, 2010 (copy included in the Appendix to this response at Tab G).

³⁵ See 31 TEX. ADMIN CODE 356.45(c). Under that rule, TWDB "shall consider the following criteria when determining whether a desired future condition is reasonable:

- (1) the adopted desired future conditions are physically possible and the consideration given groundwater use;
- (2) the socio-economic impacts reasonably expected to occur;
- (3) the environmental impacts including, but not limited to, impacts to spring flow or other interaction between groundwater and surface water;
- (4) the state's policy and legislative directives;
- (5) the impact on private property rights;
- (6) the reasonable and prudent development of the state's groundwater resources; and
- (7) any other information relevant to the specific desired future condition."

§ 36.108(g), TCEQ should dismiss Mesa's Petition by no later than December 16, 2010, which is 90 days from the date of its filing.

1. **TEX. WATER CODE ANN. §§ 36.108(f)-(k) does not call for a review of the reasonableness of DFCs with respect to their establishment and approval, which would be redundant with an appeal of DFCs before TWDB under TEX. WATER CODE ANN. § 36.108(l)-(m).**

An inquiry into joint planning involving a review panel selected by TCEQ under TEX. WATER CODE ANN. §§ 36.108(f)-(k) is not a *reasonableness review* of DFCs. Rather, state agency review of the reasonableness of DFCs is called for and allowed by another portion of § 36.108, Water Code, specifically, subsections (l) through (m). Such a review is to be conducted by TWDB (and not TCEQ). Subsection (l) of § 36.108 states that:

A person with a legally defined interest in groundwater . . . may file a petition with *the development board* appealing the approval of the [DFCs] of the groundwater resources established under this section. The petition must provide evidence that the districts did not establish a *reasonable* desired future condition of the groundwater resources in the [GMA].³⁶

Moreover, because the petition process prescribed by TEX. WATER CODE ANN. § 36.108(l) expressly relates to the *approval* of DFCs, it is clear that this petition process is meant to occur at or near the beginning of the joint planning process and involves the establishment of DFCs.

On the other hand, the review of joint planning involving the selection of a review panel by TCEQ under TEX. WATER CODE ANN. §§ of § 36.108(f)-(k) relates to the *failure* of an individual district or districts to act (or act effectively) with respect to joint planning. Review of joint planning under TEX. WATER CODE ANN. § 36.108(f)-(k) may address: (1) whether a district or districts refused to participate in the joint planning process; or (2) whether a district has failed to act (or has failed to act effectively) *following* the joint planning process.³⁷

³⁶ TEX. WATER CODE ANN. § 36.108(l) (West 2008) (emphasis added).

³⁷ See TEX. WATER CODE ANN. § 36.108(f); *id.* § 36.108(f)(1)-(4).

The portion of TEX. WATER CODE ANN. § 36.108(f) that describes the evidence that must be submitted with a petition requesting an inquiry strongly supports the conclusion that the purpose of the petition process before TCEQ is to address district inaction (or ineffective district action) following the joint planning process (in addition to a district's refusal to join in the planning process). Specifically, that statutory language requires that the petition provide evidence that:

- (1) a district in the groundwater management area has failed to adopt rules;
- (2) the rules adopted by a district are not designed to achieve the desired future condition of the groundwater resources in the groundwater management area established during the joint planning process;
- (3) the groundwater in the management area is not adequately protected by the rules adopted by a district; or
- (4) the groundwater in the groundwater management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules.³⁸

Likewise, § 36.3011, Water Code, entitled "Failure of District to Conduct Joint Planning," supports that understanding of § 36.108(f) as well. Section 36.3011 provides an *exclusive* list of conditions that *must* exist in order for TCEQ to take action against a district following a report of a review panel under § 36.108(i)-(k). Under that section:

The commission may take any action against a district it considers necessary in accordance with Section 36.303 if the commission finds that:

- (1) a district has *failed* to submit its plan to the executive administrator;
- (2) a district has *failed* to adopt rules;

³⁸ See TEX. WATER CODE ANN. § 36.108(f)(1)-(4).

(3) the rules adopted by the district are not designed to achieve the desired future condition of the groundwater resources in the groundwater management area; or

(4) the groundwater in the management area is not adequately protected by the rules adopted by the district, or the groundwater in the management area is not adequately protected because of the district's *failure* to enforce substantial compliance with its rules.³⁹

Thus, § 36.3011 contemplates action against a GCD for its failure to act and for its failure to adequately protect groundwater. It does not contemplate TCEQ action against a GCD or a group of GCDs because DFCs are not reasonable on the grounds asserted by Mesa.

That the review of joint planning contemplated by TEX. WATER CODE ANN. § 36.108(f)–(k) does not include a reasonableness review of DFCs as established but rather is meant to involve questions of whether a particular district or districts has failed to participate in joint planning or has failed to act (or has failed to act effectively) *following* joint planning is also in keeping with other provisions of Chapter 36 that provide for TCEQ's performance review of the actions of particular districts.⁴⁰ By way of comparison, TWDB review of DFCs under TEX. WATER CODE ANN. § 36.108(i) is a more technical review of the DFCs asking, for example: Are particular DFCs physically possible?⁴¹ It is a rule of statutory construction that statutes

³⁹ TEX. WATER CODE ANN. § 36.3011 (emphasis added).

⁴⁰ See TEX. WATER CODE ANN. §§ 36.301 (relating to failure to submit a management plan) 36.302(f) (relating to legislative audit review and determination of whether district is operational); 36.303 (related to action by commission); 36.304 (relating to dissolution of district), 36.305 (relating to notice of hearing for dissolution of board of district), 36.306 (relating to investigation), 36.307 (relating to order of dissolution of board), 36.308 (relating to certified copy of order), 36.309 (relating to appeals) 36.310 (relating to assets escheat).

⁴¹ TWDB Staff Recommendation at 8; see also Report on Appeal of the Reasonableness of the Desired Future Condition Adopted by the Groundwater Conservation Districts in Groundwater Management Area 9 for the Edwards-Trinity (Plateau) Aquifer (copy – without attachments - included in the Appendix to this Response at Tab H). TWDB has determined, in a proceeding involving the DFCs issued for GMA 9, that the DFC adopted for the Edwards Group of the Edwards-Trinity (Plateau) Aquifer of “no net increase in average drawdown” was not reasonable because it was not achievable.

should be considered as a whole and that particular language should be construed in a way that is consistent with other provisions of the statute.⁴²

Subsections (f) through (k) of § 36.108, Water Code, allowing a party to request an inquiry regarding joint planning and calling for the selection by TCEQ of a review panel, do not provide a proceeding which is redundant to the proceeding pursuant to TEX. WATER CODE ANN. § 36.108(l) before the TWDB to appeal the reasonableness of DFCs. The Texas Legislature could not have intended that the petition processes of TEX. WATER CODE ANN. § 36.108(l) & (m) (to TWDB) and TEX. WATER CODE ANN. § 36.108(f)–(k) (to TCEQ) to provide two redundant and duplicative avenues for reasonableness review of DFCs before two separate state agencies. A construction of a statute that creates a redundancy should be avoided.⁴³ A construction of a statute that would lead to absurd consequences is to be avoided.⁴⁴

Mesa is now seeking a remedy before TCEQ which is redundant with the remedy that it sought a few months ago before TWDB but failed to obtain. As described above, Mesa has appealed the reasonableness of the GMA 1 DFCs before TWDB and lost. Mesa now attempts to again challenge the reasonableness of the GMA 1 DFCs, this time to TCEQ, and rehash some of the same arguments that it did in its recent unsuccessful proceeding before TWDB. This second bite at the apple should not be allowed.

Moreover, many of the arguments that Mesa attempts to assert in its Petition to TCEQ have also been asserted in a lawsuit that Mesa has filed, and which is currently pending, in

⁴² See, e.g., *Sultan v. Mathew*, 178 S.W.3d 747, 749 (Tex. 2005).

⁴³ See, e.g., *Williams v. Texas State Board of Orthotics and Prosthetics*, 150 S.W.3d 563, 573 (Tex. App.–Austin 2004, no pet.).

⁴⁴ See, e.g., *Mustang Tractor & Equipment Co. v. Hartford Acc. and Indem. Co.*, 263 S.W.3d 437, 440 (Tex. App.–Austin 2008, pet. denied)

Travis County District Court.⁴⁵ This lawsuit is a judicial attack on the determination made by TWDB (in response to Mesa's petition to that agency) that the GMA 1 DFCs were reasonable and includes Mesa's argument that different DFCs may not be established for different geographic areas based on GCD boundaries or counties.

2. TWDB has already conclusively determined that the GMA 1 DFCs are reasonable in a proceeding under TEX. WATER CODE ANN. § 36.108(I) initiated by Mesa.

To the extent that Mesa's petition attempts to have TCEQ examine the reasonableness of the DFCs established for GMA 1,⁴⁶ the reasonableness of those DFCs has already been conclusively determined and established as a result of the Mesa-initiated proceeding before TWDB as described above. In addition, TWDB also conclusively determined, in the Mesa-initiated proceeding, that the GMA 1 GCDs engaged and participated in the joint planning process and that the joint planning process in GMA 1 resulted in adequate planning. These determinations by TWDB are amply supported in the record that was before TWDB.

The question of whether DFCs are reasonable is a matter that has been entrusted to the discretion of TWDB by statute.⁴⁷ Principles of comity between state agencies compel TCEQ to not undertake a duplicative analysis that could lead to conflicting and confusing results on the same or overlapping topics and which would encourage forum shopping.⁴⁸

⁴⁵ See *Mesa Water, LP., et al. v. Texas Water Development Board*, No. D-1-GN-10-000819, in the 201st Dist. Ct., Travis County, Texas. A copy of Mesa's amended petition in that lawsuit is included in the Appendix to this response at Tab I.

⁴⁶ See Mesa Petition at ¶¶ 9, 10; Mesa Affidavit at ¶ 3.b; Harden Affidavit at ¶ 9.a.

⁴⁷ TEX. WATER CODE ANN. § 36.108(I) & (m).

⁴⁸ Cf. *In re John G. and Marie Stella Kenedy Memorial Foundation*, 159 S.W.3d 133, 141 (Tex. App.—Corpus Christi 2004, no pet.) (stating that “[u]nder the principles of comity, a court should not be permitted to interfere with the final judgment of another court of equal jurisdiction. Apart from the unseemliness of such conduct, the rule avoids confusion, judge-shopping and conflicting results”).

3. Mesa's attacks on the rules of the GMA 1 districts are premature.

Mesa also attempts to attack the rules of the GMA 1 GCDs in its petition to TCEQ and request for selection of a review panel.⁴⁹ For example, with respect to the HCUWCD, Mesa hydrogeologist Robert Harden argues that a current HCUWCD rule specifying an acceptable decline rate "is not designed to achieve the [DFC] of the groundwater resources in the [GMA], and the groundwater is not adequately protected by the rules adopted by the district."⁵⁰

Although inquiries into whether rules adopted by individual GCDs are not designed to achieve DFCs established during the joint planning process or whether groundwater in the GMA is adequately protected by the rules adopted by a GCD are appropriate issues in a petition to TCEQ requesting a review panel under § 36.108(f), such inquiries are completely premature in this instance.

Under the express terms of Chapter 36, Water Code, DFCs were not required to be adopted until just a few weeks ago – on September 1, 2010.⁵¹ Rules based on the GMA 1 DFCs have yet to be adopted,⁵² which is appropriate given where the GCDs are in the prescribed process. A final MAG value for Hemphill County that will result from the GMA 1 DFCs has not yet been issued and is currently being developed by TWDB. HCUWCD expects the MAG to be finalized in the spring or summer of 2011.⁵³

⁴⁹ See Mesa Petition at ¶ 11; Mesa Affidavit at 3.e-i; Harden Affidavit at 9.e-i.

⁵⁰ Harden Affidavit at ¶ 9.f.

⁵¹ TEX. WATER CODE ANN. § 36.108(d). The majority of DFCs around the state were not adopted until 2010. The majority of those adopted in 2010 were adopted in August 2010.

⁵² TWDB Staff Report at 4.

⁵³ TWDB and HCUWCD are currently working on developing amounts of groundwater production in Hemphill County that are exempt from permitting requirements under Chapter 36 of the Water Code. Those figures will be accounted for in the final MAG. See Affidavit of Janet Guthrie (included in the Appendix to this response at Tab J); Affidavit of Raymond Brady (included in the Appendix to this response at Tab K).

HCUWCD is working deliberately toward revising its groundwater management plan and rules, as necessary, in order to implement the results of the joint planning process. In August 2010 (prior to the filing of this petition by Mesa), the Chairman of the governing board of HCUWCD appointed a rules committee for HCUWCD that will become effective in November 2010. In September 2010, HCUWCD entered into an Technical Services Contract with Ray Brady, P.G., of RMBJ Geo, Inc., to provide technical support to assist HCUWCD in amending its groundwater management plan and its rules.⁵⁴

HCUWCD currently intends to use the period between now and September 2011 to work with its consultant on technical issues that will allow HCUWCD to determine the adequacy of its current groundwater management plan and rules and to develop a new management plan and discussion drafts of rule amendments, as necessary. HCUWCD currently intends to use the period between October 2011 and September 2012 to discuss with stakeholders and formally propose a new management plan and rule amendments, as necessary. HCUWCD intends to *adopt* a new management plan and rule amendments, as necessary, by September 2012.⁵⁵ (Approval of HCUWCD's current groundwater management plan is set to expire on September 17, 2012.)

Importantly, a petition for inquiry to TCEQ requesting the selection of a review panel under TEX. WATER CODE ANN. § 36.108(f)-(k), regarding an alleged failure by one or more of the GMA 1 GCDs to adopt rules designed to achieve DFCs, may be filed by Mesa or another interested party at a later date. At some point, after final MAG amounts have been issued, and after the GCDs have had an opportunity to review and revise their groundwater management plans and rules in accordance with the results of the joint planning, such an inquiry may be

⁵⁴ See Affidavit of Janet Guthrie; Affidavit of Raymond Brady.

⁵⁵ See Affidavit of Janet Guthrie.

appropriate. There appears to be no time limitation for such a petition, which makes sense in light of the fact that TEX. WATER CODE ANN. § 36.108(f)–(k) is meant to address a GCD’s *failure* to act.

Conversely, an inquiry by a TCEQ-selected review panel into the rules of the GMA 1 GCDs (not to mention possible action by TCEQ following the report of such a panel), *now*, at this stage, as requested by Mesa, would constitute a major interference with the joint planning process, comprehensive groundwater management planning, and regulation by GCDs, as contemplated by Chapter 36. Such an inquiry would present a major obstacle to the GMA 1 GCDs and could hinder those GCDs from pursuing and accomplishing their responsibilities.

Accordingly, to the extent that Mesa’s petition requests an inquiry regarding the rules of the individual GMA 1 DFCs, such an inquiry should be dismissed as entirely premature. TWDB should be allowed sufficient time to develop and finalize MAG values and to provide them to the GCDs. The GMA 1 GCDs should be allowed sufficient time to incorporate the DFCs into their groundwater management plans, to ensure that their management plans contain goals and objectives consistent with achieving the DFCs, and to adopt rules as necessary to implement their management plans (which must include and incorporate the DFCs),⁵⁶ before any challenge should be considered. As noted above, there would be nothing to prevent Mesa from filing a petition at a later date, as the situation develops.

⁵⁶ See TEX. WATER CODE ANN. §§ 36.1071(a)(8), 36.1071(f), 36.108(d-2).

4. Evidence is inadequate to show that the joint planning process failed to result in adequate planning in GMA 1, including the establishment of reasonable DFCs of the aquifers.

The evidence presented is inadequate to show that any of the conditions alleged in the petition that are relevant to this proceeding exist.⁵⁷ Accordingly, and pursuant to TEX. WATER CODE ANN. § 36.108(g), Mesa's petition should be dismissed and a review panel should not be appointed.

In order to avoid a dismissal of Mesa's petition, evidence must be adequate to show that a GCD refused to join in the planning process or the process failed to result in adequate planning, including the establishment of reasonable DFCs.⁵⁸ Mesa has conceded that joint planning was conducted in GMA 1.⁵⁹ It has been conclusively determined by TWDB that adequate planning occurred in GMA 1 and that the GMA 1 DFCs are reasonable.⁶⁰

Moreover, in order to avoid a dismissal of the petition and for TCEQ to select a review panel, evidence must be adequate that:

- (1) a district in the groundwater management area has failed to adopt rules;
- (2) the rules adopted by a district are not designed to achieve the desired future condition of the groundwater resources in the groundwater management area established during the joint planning process;
- (3) the groundwater in the management area is not adequately protected by the rules adopted by a district; or

⁵⁷ Although Mesa purports to attach the Certified Statement of Mesa Water, L.P., and the Certified Statement of Robert D. Harden as "evidence" in support of its Petition to TCEQ, significant portions of these statements are legal argument and not evidence of any sort.

⁵⁸ As discussed above, TEX. WATER CODE ANN. § 36.108(f)-(k) does not contemplate or allow a general reasonableness review of DFCs. *See supra* at 11-14.

⁵⁹ *See* Mesa Petition at ¶ 8.

⁶⁰ *See supra* at 8-9, 15.

(4) the groundwater in the groundwater management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules.⁶¹

Regarding (1), there is no evidence and no suggestion that any GMA 1 GCD has failed to adopt rules. Regarding (2), although Mesa has asserted, with regard to several of the GMA 1 GCDs, including HCUWCD, that their rules are not designed to achieve the DFCs, adequate evidence has not been presented by Mesa to support that assertion. Moreover, and as discussed above, given where the process stands, an inquiry regarding this allegation is premature. Regarding (3), although Mesa has asserted, with regard to several of the GMA 1 GCDs including HCUWCD, that their rules do not adequately protect the groundwater in the GMA, adequate evidence has not been presented by Mesa to support that assertion.⁶² Moreover, and as discussed above, given where the process stands, an inquiry regarding this allegation is premature. Regarding (4), although Mesa's hydrogeologist argues that HCUWCD has recently "extended a delay for requiring groundwater users to obtain and conform to a production permit," which he attempts to relate to "lack of enforcement of rules,"⁶³ Mesa presents no evidence regarding this vague assertion.⁶⁴

⁶¹ TEX. WATER CODE ANN. § 36.108(f).

⁶² The current rules of HCUWCD and its management plan provide for groundwater conservation for future use and include provisions that implement conservation measures should water level measurements indicate that the need for such measures exist. *See* Affidavit of Ray Brady. The current rules of HCUWCD are available on HCUWCD's website at http://www.hemphillwcd.org/pdf/masterRules_081910.pdf and its management plan is available at <http://www.hemphillwcd.org/pdf/mgmtPlan.pdf>

⁶³ Harden Affidavit at ¶ 9.f.

⁶⁴ Mesa is alluding to the fact that earlier this year, HCUWCD adopted an amendment to § 5.113(c) of its rules. Prior to this amendment, § 5.113(c) included a deadline of January 1, 2011, for owners of existing non-exempt wells to file an application for a production permit. The amendment to § 5.113(c) changed that deadline to January 1, 2015. The primary reason for this amendment is that HCUWCD staff has been occupied with several projects over the past few years and has not been able to devote the time and attention which is believed necessary to properly implement a permitting program for existing, non-exempt wells. There has never been a time period in which this deadline had passed and therefore there has never been a time period in which this deadline was not complied with by any well owner. Accordingly, it is false that HCUWCD has ever failed to enforce this rule. *See* Affidavit of Janet Guthrie (Appendix, Tab J).

5. The adoption of different DFCs for different geographical areas over the same aquifer along political boundaries (such as groundwater district boundaries) is clearly authorized.

Mesa's bottom line is its argument that the GMA 1 districts are required to "adopt a single [DFC] for each of the subdivisions [of] the Ogallala aquifer in GMA 1 and to adopt and equitably enforce rules designed to achieve the Desired Future Condition."⁶⁵ Mesa's hydrogeologist argues that the "use of political areas," such as GCD boundaries and counties, to delineate the uses and conditions of an aquifer that differ substantially, is unreasonable and impermissible.⁶⁶ Mesa has advocated for the establishment of a single DFC throughout all of the Ogallala Aquifer and argues that no other approach is permissible.

Whether the adoption of different DFCs for different geographical areas over the same aquifer along political boundaries – such as groundwater district boundaries – is authorized by § 36.108, Water Code, is a legal question. This question was briefed before TWDB in the recent proceeding initiated by Mesa and has also been raised by Mesa in its pending lawsuit in Travis County District Court.⁶⁷

The correct answer is that the adoption of different DFCs for different geographical areas over the same aquifer including along political boundaries (such as groundwater district boundaries) is authorized by TEX. WATER CODE ANN. § 36.108(d). Rather than repeating its arguments on this legal issue, HCUWCD adopts and incorporates its prior briefing before TWDB on this subject.⁶⁸

⁶⁵ Mesa Petition at ¶ 12.a.

⁶⁶ Harden Affidavit at ¶ 9.a.

⁶⁷ Mesa's First Amended Original Petition (Appendix, Tab I).

⁶⁸ See HCUWCD Response at 6-12 (Appendix, Tab D); UCUWCD Reply at 9-10 (Appendix, Tab E).

Conclusion

Having failed in its petition before the TWDB, and perhaps without confidence in its lawsuit against TWDB in Travis County District Court, Mesa now brings this petition to TCEQ, seeking a “third bite of the apple.” However, Mesa’s petition is without merit (and portions of it are premature) and should therefore be dismissed. TCEQ should not select a review panel in this proceeding. Accordingly, HCUWCD requests that:

- (1) TCEQ dismiss Mesa’s Petition pursuant to TEX. WATER CODE ANN. § 36.108(g);
- (2) TCEQ deny all other relief requested by Mesa in its petition; and
- (3) TCEQ grant any further relief to which HCUWCD is entitled.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response of Hemphill County Underground Water Conservation District to Request for Inquiry was served by hand delivery or U.S. mail, as indicated below, to the representatives listed below on October 22nd 2010.

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