

**SOAH DOCKET NO. 582-24-12113  
TCEQ DOCKET NO. 2023-1406-DIS**

<b>PETITION FOR THE CREATION OF BRAHMAN RANCH MUNICIPAL UTILITY DISTRICT OF ELLIS COUNTY AND JOHNSON COUNTY</b>	<b>§ § § § §</b>	<b>BEFORE THE STATE OFFICE  OF  ADMINISTRATIVE HEARINGS</b>
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**PROTESTANT ELLIS COUNTY’S EXCEPTIONS TO PROPOSAL FOR DECISION**

COMES NOW, Ellis County (“Protestant” and/or “the County”) and files this, its Exceptions to the Proposal for Decision (“PFD”), and in support thereof would show the following:

**I. INTRODUCTION**

The County excepts to the Administrative Law Judge’s (“ALJ”) recommended actions, proposed Findings of Fact, and proposed Conclusions of Law. The County disagrees with the ALJ’s recommendation that the proposed Petition for the creation of the Brahman Ranch Municipal Utility District of Ellis County and Johnson County (“the District”) should be granted. Applicants Miskimon Management, III, LLC and Buffalo Hills Development, LLC (collectively “Applicants”) have failed to meet their burden of proving that the proposed District meets all applicable state law requirements.

Applicants have failed to properly prove that the project is feasible, practicable, and necessary and would be a benefit to the land to be included in the District. Specifically, Applicants have failed to show that (1) the projected construction costs, tax rates, and water and sewer rates are reasonable; (2) the proposed District and subsequent development will not have an unreasonable effect on water quality; and (3) the proposed District and subsequent development will not have an unreasonable effect on the groundwater level within the region, natural run-off rates and drainage, and total tax assessments on the land located within the proposed District.

## **II. EXCEPTIONS AND CORRECTIONS**

### **A. Exceptions to the PFD's Analysis and Recommendations Regarding the Reasonableness of Projected Construction Costs, Tax Rates, and Water and Sewer Rates.**

The County excepts to the conclusions of the ALJ that the District's projected construction costs, tax rates, and water and sewer rates are reasonable. The Applicants have failed to meet their burden to establish that the MUD is feasible and practicable and is necessary and would benefit the land because they did not provide reasonable projected costs and a detailed rate analysis based on reasonable unit costs for the proposed construction and infrastructure. The Applicants further did not establish the reasonableness of the proposed tax rates of the proposed District, because the construction costs that the rates are based upon are underestimated. The ALJ erred in relying upon the undervalued and unsubstantiated estimates contained within the Applicants' Preliminary Engineering Report in determining that the Applicants' projected construction costs are reasonable.

First, the projected water and wastewater construction costs presented in the Application are significantly undervalued and unreasonable for the projected capacity needs for the proposed District, and this undervaluation results in unrealistic and inaccurately understated tax and utility rates in the financial models. Although the Applicants estimated that on-site water facilities will cost \$6.2 million, a comparison of other similar construction projects in 2023 demonstrates that this estimate should be approximately \$6.2 million more than the estimate in the Preliminary Engineering Report. (Protestant Ex. 1 – 9:11-14 (Lozano)). Similarly, the offsite water, sanitary sewer, and storm sewer costs in the Application appear to be understated by 41% (offsite water), 30% (sanitary sewer), and 38% (storm sewer). (Protestant Ex. 1 – 9:14-15 (Lozano)). Wastewater treatment plants of the size and type described cost in 2023 approximately \$25-\$30 per gallon of

capacity, but the Applicants only allotted a unit cost of \$6 per gallon of capacity – resulting in an undervaluation of at least \$8.8 million. (Protestant Ex. 1 – 9:22-23; 10:1-4 (Lozano)). The total construction costs for the MUD are understated by over 70%. (Protestant Ex. 1 – 10:13-16 (Lozano)). The Applicants have thus provided a significant undervaluation of costs that are not reasonable.

Second, the Applicants provided no meaningful support for any itemized costs and no supporting documentation for TCEQ to verify that the costs are reasonable. In the Preliminary Engineering Report, the statement is made that the “engineer’s opinion of development cost for the internal water, wastewater, drainage, and road improvements is from Miskimon Management, I, LLC” and references Exhibit 12 to the Preliminary Engineering Report. (MMBHD Ex. 16 – Page 9). Exhibit 12 to the Preliminary Engineering Report is a list of itemized costs with no documentation on how these costs were derived. (See MMBHD Ex. 16 – Exhibit 12). The ALJ noted the testimony of the Applicants’ witness, Melissa Lopez, who stated that she “based costs on previous bids, and in the case of the wastewater treatment plant, and actual bid from the company that would be constructing the plant.” (PFD, p. 17). However, the Applicants did not include any such bids or reference thereto in the Preliminary Engineering Report. The TCEQ, in turn, only reviewed the numbers as they were presented by the Applicant, and in the absence of supporting documentation, relied on the Applicants’ assertion that the costs were reasonable.

Third, the Applicants included a contingency of only 10% in the cost estimate calculations. (MMBHD Ex. 16 – Page 9, Table 3). In standard engineering practice, a contingency of only 10% is typical for a project with a high-confidence cost estimation, usually for a project in the latest phases of design where the plans and specifications are ready for actual construction. (Protestant Ex. 1 – 10:9-12 (Lozano)). It is not typical – or reasonable – for a project in an early preliminary

phase to utilize such an unrealistically low contingency. The combined projected tax rate of the MUD is \$0.9815 per \$100 of assessed valuation. (MMBD Ex. 3 – 9:13-16). The combined tax rate cannot exceed \$1.00. *See* 30 TAC § 293.59(k)(3). Using simple math, a higher contingency for the estimated costs as listed would likely cause the MUD to exceed the statutory tax rate. This will be further exacerbated by the fact that the estimated number of homes that the MUD can support has been reduced from the 1,411 homes anticipated to 1,390 homes due to accommodation of wetlands. (Tr. 27:21-25, 28:1-9).

Finally, because the cost estimates in the Preliminary Engineering Report are understated, neither the projected construction costs nor the corresponding tax rates are reasonable, and, accordingly, the ALJ erred in determining as such.

Therefore, the County excepts to and recommends the amendment of Findings of Fact Nos. 30, 32, and 34 as follows:

“30. Applicants’ projected construction costs are not reasonable.”

“32. Applicants’ proposed tax rates are not reasonable.”

“34. The proposed water and sewer rates are not reasonable.”

The County also excepts to and recommends the amendment of Conclusion of Law Nos. 11 and 14 as follows:

“11. Applicants have not met their burden of proof regarding reasonableness of projected construction costs, tax rates, and water and sewer rates. Tex. Water Code § 54.021(b)(2).”

14. Applicants have not met their burden of proof to show that the project and District are feasible, practicable, and necessary and would be a benefit to the land included in the District. Tex. Water Code § 54.021; 30 Tex. Admin. Code § 293.11(d)(5)(J).”

**B. Exceptions to the PFD’s Analysis and Recommendations Regarding Whether the Proposed District and its Systems and Subsequent Development Will Have an Unreasonable Effect on Groundwater Level Within the Region and Recharge Capability.**

The County excepts to the conclusion of the ALJ that the District, and the systems and subsequent development within the District, will not have an unreasonable effect on groundwater level within the region and recharge capability of groundwater source. The Applicants did not provide enough information to adequately assess this issue or meet their burden of proof on this issue.

In the PFD, the ALJ relied upon the conclusory testimony of the Applicants' witness, Ken Heroy, who stated merely that "there should be no impact on the groundwater levels because the MUD will receive water from Mountain Peak." (PFD, p. 20-21). Similarly, the ALJ relied upon the Applicants' Preliminary Engineering Report, which stated only that the District would have no effect on the recharge capability of groundwater because runoff from the development would "generally follow existing topographical flow patterns." (MMBHD Ex. 16 – Page 14). The Applicants' statements regarding these issues are conclusory and show that the Applicants failed to conduct any real analysis on the District's impact on groundwater levels and recharge. Additionally, because the TCEQ relied only upon the Preliminary Engineering Report, as presented, and conducted no independent analysis of the issue, the TCEQ likewise did not conduct any analysis of the proposed District's impact on groundwater levels and recharge and relied only on the materials provided by the Applicant. (Tr. 48:10-21 (Taack)).

Further, the ALJ erred in concluding that because the County "presented no evidence on groundwater levels or subsidence," and "in the absence of countervailing evidence," the Applicants met their burden of proof (PFD at p. 21). Whether the County did or did not submit evidence of its own is not determinative. The Applicants have the burden of proof to demonstrate that there will be no unreasonable effect; it is not the County's burden to prove the opposite.

Therefore, the County excepts to and recommends the amendment of Findings of Fact Nos. 40 and 42 as follows:

- “40. ~~Runoff from the District will generally follow existing topographical flow patterns, and therefore development of the District will have little to no effect on aquifer recharge.~~”
- “42. There is insufficient evidence in the record to show that tThe District, and the systems and subsequent development within the District, will not have an unreasonable effect on groundwater level within the region and recharge capability of a groundwater source.”

The County also excepts to and recommends the amendment of Conclusion of Law Nos. 12 and 14 as follows:

- “12. Applicants met their burden of proving that the District, its systems, and subsequent development will not have an unreasonable effect on land elevation, subsidence, ~~groundwater levels and recharge capability within the region, natural run-off rates and drainage, water quality, or total tax assessments~~ on all land located within the District. Insufficient evidence was presented to establish that the District, its systems, and subsequent development will not have an unreasonable effect on groundwater levels and recharge capability within the region, natural runoff rates and drainage, water quality, or total tax assessments. Tex. Water Code §54.021(b)(3).
14. Applicants have not met their burden of proof to show that the project and District are feasible, practicable, and necessary and would be a benefit to the land included in the District. Tex. Water Code § 54.021; 30 Tex. Admin. Code § 293.11(d)(5)(J).”
- C. Exceptions to the PFD’s Analysis and Recommendations Regarding Whether the Proposed District and its Systems and Subsequent Development Will Have an Unreasonable Effect on Natural Run-Off Rates and Drainage.**

The County excepts to the conclusion of the ALJ that the District, and the systems and subsequent development within the District, will not have an unreasonable effect on natural run-off rates and drainage. The Applicants did not provide enough information to adequately assess this issue or meet their burden of proof.

The ALJ relies upon the Applicants’ Preliminary Engineering Report, which contains little substantive information about runoff and storm drainage, merely stating that the MUD will

increase the natural runoff rates, but that such will be collected in detention ponds before outfalling into tributaries of Boggy Branch. (MMBHD Ex. 16 – Page 14). The Preliminary Engineering Report does not provide any information about the natural run-off rates before development in order to compare with the post development rates and confirm this assessment. The Report offers little substantive information on how the District will impact natural runoff rates and drainage. The Executive Director’s analysis is similarly conclusory, because it relied entirely on information provided by the Applicants – primarily the Preliminary Engineering Report. (See Tr. 48:10-21 (Taack)). Therefore, the County excepts to and recommends the amendment of Findings of Fact Nos. 44 and 45 as follows:

- “44. ~~The District’s detention ponds will be designed to mitigate any effect on downstream runoff rates.~~”
- “45. There is insufficient evidence in the record to show that ~~t~~The District, and the systems and subsequent development within the District, will not have an unreasonable effect on natural run-off rates and drainage.”

The County also excepts to and recommends the amendment of Conclusion of Law Nos. 12 and 14 as follows:

- “12. Applicants met their burden of proving that the District, its systems, and subsequent development will not have an unreasonable effect on land elevation, subsidence, ~~groundwater levels and recharge capability within the region, natural run-off rates and drainage, water quality, or total tax assessments~~ on all land located within the District. Insufficient evidence was presented to establish that the District, its systems, and subsequent development will not have an unreasonable effect on groundwater levels and recharge capability within the region, natural runoff rates and drainage, water quality, or total tax assessments. Tex. Water Code §54.021(b)(3).
- 14. Applicants have not met their burden of proof to show that the project and District are feasible, practicable, and necessary and would be a benefit to the land included in the District. Tex. Water Code § 54.021; 30 Tex. Admin. Code § 293.11(d)(5)(J).”

**D. Exceptions to the PFD's Analysis and Recommendations Regarding Whether the Proposed District and its Systems and Subsequent Development Will Have an Unreasonable Effect on Water Quality.**

The County excepts to the conclusion of the ALJ that the District, and the systems and subsequent development within the District, will not have an unreasonable effect on water quality. The Applicants did not provide enough information to adequately assess this issue or meet their burden of proof to show that the proposed district will not have an unreasonable effect on water quality.

The County has identified two sources of pollution related to the District that will impact the water quality: (1) the point source discharge from the proposed wastewater treatment plant for the development; and (2) the storm water runoff from the development. The ALJ in error relies upon the conclusory testimony of the Applicants' witness, Ken Heroy, who states that "all wastewater will be collected and treated in a wastewater facility that is permitted and approved by TCEQ." (PFD at p. 23). These conclusory statements do not provide any support that the discharge of wastewater and stormwater from the MUD will not impact water quality. The County is not asking that the wastewater treatment plant or associated permitting matters be regulated as a component of the approval of a MUD. Rather, the County is asking that the impact to water quality from the proposed discharge that will serve the proposed development be adequately evaluated.

With respect to the non-point source runoff from the development, the Applicants have provided no specific information or analysis that addresses post-development storm water quality, other Mr. Heroy's statement that construction in the MUD will have erosion control measures and the Applicants' witness, Melissa Lopez, who stated that "the stormwater discharge would be similar to other single-family residential developments in North Texas[.]". (PFD at p. 23).



Additionally, the TCEQ does not review any stormwater design criteria from any applicable entity to determine whether the stormwater facilities are sufficient to protect water quality from runoff in the proposed MUD. (Tr. 49:3-5 (Taack)).

Therefore, the County excepts to and recommends the amendment of Findings of Fact No. 49 as follows:

- “49. There is insufficient evidence in the record to show that tThe District, and the systems and subsequent development within the District, will not have an unreasonable effect on water quality.”

The County also excepts to and recommends the amendment of Conclusion of Law Nos. 12 and 14 as follows:

- “12. Applicants met their burden of proving that the District, its systems, and subsequent development will not have an unreasonable effect on land elevation, subsidence, ~~groundwater levels and recharge capability within the region, natural run-off rates and drainage, water quality, or total tax assessments~~ on all land located within the District. Insufficient evidence was presented to establish that the District, its systems, and subsequent development will not have an unreasonable effect on groundwater levels and recharge capability within the region, natural runoff rates and drainage, water quality, or total tax assessments. Tex. Water Code §54.021(b)(3).
14. Applicants have not met their burden of proof to show that the project and District are feasible, practicable, and necessary and would be a benefit to the land included in the District. Tex. Water Code § 54.021; 30 Tex. Admin. Code § 293.11(d)(5)(J).”
- E. Exceptions to the PFD’s Analysis and Recommendations Regarding Whether the Proposed District and its Systems and Subsequent Development Will Have an Unreasonable Effect on Total Tax Assessments on All Land Located Within the Proposed District.**

The County excepts to the conclusion of the ALJ that the proposed District, and the systems and subsequent development within the District, will not have an unreasonable effect on total tax assessments on all land located within the proposed district. The Applicants did not provide enough information to adequately assess this issue or meet their burden of proof.

As discussed above, the Applicants have undervalued their construction costs related to water, offsite water, wastewater treatment, sanitary sewer, and storm sewer facilities by a factor of 70%. (Protestant Ex. 1 – 10:13-16 (Lozano)). No additional funding sources for the project have been identified in the Preliminary Engineering Report. (Protestant Ex. 1 – 10:13-16 (Lozano)). With no funding sources identified other than tax rates, these higher costs will certainly have an impact on the financial modeling and could result in an effective tax rate substantially higher than the tax rate proposed by the Applicants.

Because the cost estimates for the Development are drastically underestimated, the Applicants cannot factually represent that the proposed District will not have an unreasonable effect on land within the proposed district, because such a determination would not be based on the reasonable projected costs to serve the development. Therefore, the County excepts to and recommends the amendment of Findings of Fact Nos. 50, 51, and 53 as follows:

- “50. ~~The total overlapping tax rate within the District for Ellis County is projected to be \$2.504131 per \$100 valuation, which is reasonable and comparable to other districts in North Texas.~~”
- “51. ~~The total overlapping tax rate within the District for Johnson County is projected to be \$2.862427 per \$100 valuation, which is reasonable and comparable to other districts in North Texas.~~”
- “53. There is insufficient evidence in the record to show that ~~t~~The District, and the systems and subsequent development within the District, will not have an unreasonable effect on total tax assessments on all land located within the proposed district.”

The County also excepts to and recommends the amendment of Conclusion at Law Nos. 12 and 14 as follows:

- “12. Applicants met their burden of proving that the District, its systems, and subsequent development will not have an unreasonable effect on land elevation, subsidence, ~~groundwater levels and recharge capability within the region, natural run-off rates and drainage, water quality, or total tax assessments~~ on all land located within the District. Insufficient evidence was presented to establish that the District, its

systems, and subsequent development will not have an unreasonable effect on groundwater levels and recharge capability within the region, natural runoff rates and drainage, water quality, or total tax assessments. Tex. Water Code §54.021(b)(3).

14. Applicants have not met their burden of proof to show that the project and District are feasible, practicable, and necessary and would be a benefit to the land included in the District. Tex. Water Code § 54.021; 30 Tex. Admin. Code § 293.11(d)(5)(J).”

**F. Exceptions to the PFD’s Analysis and Recommendations Regarding Whether the Proposed District is Feasible, Practicable, Necessary, and Will Benefit All of the Land to Be Included in the District.**

The County excepts to the conclusion of the ALJ that Applicants have shown that the District is feasible, practicable, necessary, and will benefit all of the land to be included in the District.

The Applicants have not demonstrated that the proposed project is feasible, practicable, and necessary, and would be a benefit to the land to be included in the proposed District. The Applicants’ analysis regarding costs contains gross underestimations of the projected costs, and therefore, an underestimation of the projected tax rate. The Preliminary Engineering Report does not properly address the necessary costs of facilities and infrastructure and provides no information or basis to determine how these costs were derived. The testimony relied upon by the ALJ is similarly conclusory.

Therefore, the Applicants have failed to carry its burden, and the County excepts to and recommends the amendment of Finding of Fact No. 54 as follows:

- “54. Applicants have not shown that the District is feasible, practicable, necessary, and will benefit all of the land to be included in the District.”

The County also excepts to and recommends the amendment of Conclusions at Law Nos. 14 and 15 as follows:

“14. Applicants have not met their burden of proof to show that the project and District are feasible, practicable, and necessary and would be a benefit to the land included in the District. Tex. Water Code § 54.021; 30 Tex. Admin. Code § 293.11(d)(5)(J).

15. Applicants’ Petition should not be granted.”

### III. CONCLUSION AND PRAYER

WHEREFORE, Protestant respectfully requests that the TCEQ grant its exceptions and amend the PFD with the corrections set out above. Protestant respectfully requests any other relief to which it is entitled.

Respectfully submitted,

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BY:   
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## **CERTIFICATE OF SERVICE**

I hereby certify that on April 1, 2025, a copy of the foregoing document was served on all persons listed via electronic mail.

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