State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

August 26, 2024

To the Parties **VIA EFILE TEXAS**

RE: SOAH Docket Numbers 965-23-21218.POSGCD and 965-23-21219.POSGCD; *Application by SLR Property I, LP for a New 9,000 Acre-Foot Per Year Simsboro and Hooper Drilling and Operating Permit and Application by SLR Property I, LP for a New 15,000 Acre-Foot Per Year Simsboro Operating Permit*

Dear Parties:

Please find attached a Proposal for Decision in this case.

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

Enclosure

CC: Service List

SOAH Docket No. 965-23-21218, -21219 **Suffix: POSGCD**

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

APPLICATION OF SLR PROPERTY I, LP FOR A NEW 9,000 ACRE-FOOT PER YEAR SIMSBORO AND HOOPER DRILLING AND OPERATING PERMIT

AND

APPLICATION OF SLR PROPERTY I, LP FOR A NEW 15,000 ACRE-FOOT PER YEAR SIMSBORO OPERATING PERMIT

TABLE OF CONTENTS

I. Introduction 1
II. Background and Procedural History 3
A. The Applications 3
B. Jurisdiction, Notice, and Procedural History 4
C. Permits in the District 6
III. Applicable Law 9
IV. Administrative Completeness 13
V. Issues Regarding Permits 15

A. Whether the Permits will Result in a Beneficial Use and not Cause or Contribute to Waste 16
1. Parties' Evidence and Arguments 20
2. ALJs' Analysis 25
B. Effects and Impacts on Water Resources, Other Landowners, and Other Wells 32
1. What is the proposed use to be considered? 33
a) Parties' Evidence and Arguments 33
b) ALJs' Analysis 33
2. What does "unreasonably affect" mean? 35
a) Parties' Evidence and Arguments 36
b) ALJs' Analysis 39
3. Does the modeling show unreasonable effects? 40
a) Parties' Evidence and Arguments 44
b) ALJs' Analysis 56
C. Management of Total Groundwater Production on a Long-Term Basis to Achieve DFCs 62
1. Parties' Evidence and Arguments 63
2. ALJs' Analysis 65
D. Recommendation 68
1. 9K Application 68
2. 15K Application 69
a) Parties' Evidence and Arguments 70
b) ALJs' Analysis 74
VI. Conclusion 77
VII. Findings of Fact 78
VIII. Conclusions of Law 90

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PROPOSAL FOR DECISION

I. INTRODUCTION

The Post Oak Savannah Groundwater Conservation District (District) has jurisdiction to manage and regulate production from groundwater sources in Milam

and Burleson Counties. The District requires an operating permit or historic use permit (HUP) to produce water within District boundaries.[1]

SLR Property I, LP (Applicant) is a private equity development group that, in 2021, bought the 33,000-acre Alcoa mine and smelting site in Milam and Lee Counties, along with its groundwater rights.[2] On April 8, 2022, Applicant submitted two applications (Applications) to the District seeking authorization to withdraw water from the Carrizo-Wilcox Aquifer for municipal, industrial, manufacturing, and commercial uses within Milam and Burleson Counties. The first Application was to drill and operate up to 60 new wells at 30 well sites, to withdraw 9,000 acre-feet (af) of water per year (af/yr) (altogether, "9K") from the Simsboro and Hooper Formations;[3] and the second Application was to operate its 61 previously authorized and drilled wells, to withdraw 15,000 af/yr (15K) from the Simsboro.[4] The District's General Manager (GM), Gary Westbrook, declared the Applications, along with their later revisions and additional information, administratively complete on November 2, 2022,[5] and now recommends denial of the Applications.

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[1] District Rule 7.1(1).

[2] Transcript (Tr.) 15, 39.

[3] Appl. Ex. APP-108.

[4] Appl. Ex. APP-107. The 15K Application was "to be used in conjunction with SLR's 15,000 af/yr Historic Use Permit No. 0330 [*a cap of 15,000 af/yr on total combined production under both permits*]" (emphasis in original). Appl. Ex. APP-107 at SLR_000089.

[5] Appl. Ex. APP-126.

The Administrative Law Judges (ALJs) recommend issuance of the 9K and 15K permits with special conditions. Alternatively, if the 15K permit were to be denied, the ALJs recommend the 9K permit be issued without special conditions.

II. BACKGROUND AND PROCEDURAL HISTORY

A. THE APPLICATIONS

Applicant already has, from Alcoa, two permits for groundwater: (1) a 25,000 af/yr permit, HUP 0148, that was already fully contractually allocated to be transported out of district when Applicant purchased the property;[6] and (2) a 15K permit for industrial use, HUP 0330, which would be superseded over time by use under the 15K Application.[7] In addition to those resources, Applicant now seeks to develop an additional 9K.[8]

After the Applications were submitted on April 8, 2022, Applicant and the GM engaged in a series of communications and application amendments, wherein Applicant clarified and added further detail to the Applications.[9] On November 2, 2022, the District's GM notified Applicant by letter that its

[6] HUP 0148 contains a special condition requiring mitigation of permitted wells within three quarters of a mile that are impacted, resulting from a settlement agreement with the HUP 0148's prior holder, Alcoa. Appl. Ex. APP-100 (Gardenhire Testimony) at 32:26-35.

[7] Appl. Ex. APP-124 at 15K00015 ("The new permit would impose a cap of 15,000 af/yr on total combined production under both SRL's Historic Use Permit 0330 and the new operating permit.").

[8] Appl. Ex. APP-125.

[9] *See* Appl. Exs. APP-109 through APP-128.

Applications were administratively complete.[10] The GM later notified Applicant that the Applications were set for a public hearing to occur January 10, 2023, and Applicant completed public notice.[11] At the January 10 meeting, the District continued the matter of the Applications to its January 19, 2023 public meeting by consent, at which time the Applications were referred to the State Office of Administrative Hearings (SOAH) for hearing per Applicant's request.[12]

B. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Notice and jurisdiction were undisputed; therefore, those matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

On June 9, 2023, the District referred the Applications to SOAH pursuant to the District's rules. On September 6, 2023, SOAH ALJ Ross Henderson held a prehearing conference via Zoom videoconference. At the prehearing conference, the ALJ admitted the following as parties: Applicant; the District; Blue Water 130 Project, LP (Blue Water); and Brian Harold Limoges, Ronald Crump, and Jeff Howell (collectively, Landowners), all property owners neighboring Applicant's property and represented by a single attorney.[13] In a September 27, 2023 order, the dockets were consolidated for purposes of hearing and a proposal for decision. The

[10] Appl. Ex. APP-126.

[11] Appl. Ex. APP-127.

[12] Appl. Ex. APP-138 at Prelim_00312.

[13] The City of Rockdale filed a Motion to Intervene on August 29, 2023, but withdrew its request on September 5, 2023, prior to the prehearing conference.

Landowners were aligned in an October 13, 2023 order. On January 10, 2024, Blue Water's motion to withdraw from the proceeding was granted, and Blue Water was dismissed from the case.[14]

On March 6, 2024, the GM moved for summary disposition, asking SOAH to remand the Applications to the Board and recommend that the Board deny the Applications. On April 4, 2024, SOAH issued an order denying the GM's motion for summary disposition.

The hearing on the merits was held April 10-12, 2024, before ALJ Henderson and ALJ Heather D. Hunziker, at SOAH's hearing facility in Austin, Texas. Applicant appeared and was represented by attorneys Molly Cagle, Samia Broadaway, Kevin T. Jacobs, and Cole Lempke. The GM appeared and was represented by attorneys Barbara Boulware-Wells and Deborah Trejo. Landowners appeared and were represented by attorney Donald Grissom.

All witnesses prefiled direct testimony and testified at the hearing. The following witnesses testified on behalf of Applicant: (1) Alan Gardenhire, Applicant's Vice President of Operations, corporate representative, and project manager; (2) Bob Harden, P.E., hydrologist who prepared Applicant's permit Applications; (3) Michael Gabrielse, Senior Urban Forester and Certified Arborist with Burditt Land consulting firm; and (4) Carlos Rubinstein, environmental consultant with RSAH2O, LLC. The following witnesses testified on behalf of

[14] Order Granting Blue Water 130's Motion to Withdraw (January 10, 2024).

Landowners: (1) Mr. Limoges, protestant and neighboring well-owner; (2) Mr. Crump, protestant and neighboring well-owner; (3) Mr. Howell, protestant and neighboring well-owner; and (4) Keith Copeland, Principal/Senior Geologist with Ranger Environmental Services, LLC. The following witnesses testified on behalf of the GM: (1) Mr. Westbrook, the District's GM and (2) Dr. Steven C. Young, PhD, P.E., hydrogeology specialist with INTERA consulting firm.

The record closed on June 25, 2024, with the filing of reply briefs.

C. PERMITS IN THE DISTRICT

Applicant's property sits on the Calvert Bluff, Simsboro, and Hooper Formations of the Carrizo-Wilcox aquifer.[15] Overlaying the Simsboro is the Calvert Bluff, and the Hooper Formation underlies the Simsboro Formation.[16] The Calvert Bluff's sand is less thick and less productive compared to the Simsboro, but can produce potable water supplies; and, on Applicant's property, the Calvert Bluff performs like a separate aquifer isolated from the Simsboro, due to the layers of clay that separate its sand layers.[17]

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[15] Appl. Ex. APP-200 (Harden Testimony) at 6.

[16] Appl. Ex. APP-200 (Harden Testimony) at 6 ("recent test drilling conducted in 2021 and 2022 indicates the Calvert Bluff ranges from 300 feet to 460 feet below ground level, the total depth of the Simsboro ranges from approximately 850 feet to 1,000 feet below ground level, and the Hooper formation is present immediately below the Simsboro."). According to Landowners' expert hydrologist, Mr. Copeland, there is "hydrogeologic uncertainty" in the Landowners' properties related to their wells' classifications, due to "hydrogeologic communication between the Calvert Bluff and Simsboro;" and Landowners' wells' aquifer assignments based on geographical well logs differ substantially from the Groundwater Availability Model (GAM). Landowners Ex. D at 5-6.

[17] Appl. Ex. APP-200 (Harden Testimony) at 7.

The Landowners are the closest three property-owners to Applicant and either have wells (both "exempt" and "non-exempt" according to District regulation) or permits to produce water from the area.[18] Mr. Limoges owns 204 acres in Milam County, surrounded on three sides by Applicant's property. He currently uses his property as a family retreat, for hunting, and to keep his ten head of cattle; additionally, he has plans to take up permanent residence there, increase his cattle herd, and possibly farm crops.[19] Mr. Limoges has two wells on his property, one 250-feet deep and one 510-feet deep.[20] His exempt well is in the Calvert Bluff, and is used for watering grass and trees around the residence; his non-exempt well is in the Simsboro, and is used to maintain tanks for cattle and stocked fish; and Mr. Limoges also uses the wells to irrigate hay pastures.[21] Applicant currently has numerous wells within a mile of Mr. Limoges's 510-foot well and, per Mr. Limoges, Applicant's proposed wells include two new wells within a mile and two more new wells within two miles.[22]

Mr. Crump, with 200 acres in Milam County out of his total 500 acres, uses his property for cattle grazing, hay production, and family recreation.[23] Mr. Crump

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[18] Tr. Vol. 2 at 22.

[19] Landowners Ex. A at 1-2.

[20] Landowners Ex. A at 2.

[21] Landowners Ex. A at 2, 5.

[22] Landowners Ex. A at 3-4. Mr. Limoges testified these four new wells would add more than 2,000 gallons per minute (GPM); and he noted that other proposed wells identified in the Application appear to be within a mile of his property, but he could not determine an accurate location from Applicant's maps. He listed 12 Applicant wells within a mile, totaling 4,500 GPM of pumping capacity, and two more Applicant wells within 1.5 miles of his 510-foot well, adding 2,000 GPM capacity.

[23] Landowners Ex. B at 1-2.

has three wells on his property: two shallow, hand-dug wells approximately 35- to 40-feet deep and one in the Calvert Bluff.[24] His wells are primarily used for watering cattle and irrigating pastures.[25] Mr. Crump testified that Applicant currently has 20 wells within two miles of his property, totaling 12,500 gallons per minute (GPM), and Applicant's proposed new wells include 13 within two miles, adding another 13,000 GPM.[26]

Mr. Howell, who owns 27.5 acres in Milam County with his wife, uses the property as his permanent residence and raises some cattle there.[27] Mr. Howell has three wells on his property, all roughly 300-feet deep, of which only two are active.[28] His wells, in the Calvert Bluff, are the sole source of water for his residence and also provide water for cattle and irrigating pastures.[29] Mr. Howell testified that Applicant has a 1,000 GPM well half a mile from his property and Applicant's proposed wells include numerous new wells between 0.2 miles from his property and two miles from his wells [or "one of his wells].[30]

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[24] Landowners Ex. B at 2.

[25] Landowners Ex. B at 2.

[26] Landowners Ex. B at 3.

[27] Landowners Ex. C at 1.

[28] Landowners Ex. C at 2.

[29] Landowners Ex. C at 2.

[30] Landowners Ex. C at 3. Mr. Howell's description of the new wells is unclear as to how many wells, how far away from him, and how much capacity they will add. Mr. Howell also noted that other proposed wells identified in the Application appear to be within a mile of his property, but he could not determine an accurate location from Applicant's maps.

Other large permits in the District belong to Vista Ridge LLC (Vista Ridge), which is authorized to pump 55,835 af/yr for municipal use in Bastrop, Bell, Burnet, Caldwell, Hays, Lee, Travis, Williamson, Comal, Guadalupe, and Bexar Counties;[31] Blue Water, which is authorized to pump 20,000 af/yr for municipal use;[32] and the City of Rockdale, which provides water to its citizens through five groundwater wells in the District within five miles of Applicant's property boundary.[33]

III. APPLICABLE LAW

In Texas, a landowner owns the groundwater below the surface of his or her land as real property and is entitled to drill for and produce that groundwater, subject to a groundwater conservation district's well-spacing and production restrictions, so long as the drilling and production does not cause waste or malicious drainage of other property, or negligently cause subsidence.[34] Groundwater conservation districts, which are described as the state's preferred method of groundwater management, have the following obligations:

> to protect property rights, balance the conservation and development of groundwater to meet the needs of this state, and use the best available science in the conservation and development of groundwater through rules developed, adopted, and promulgated by a district in accordance with the provisions of [chapter 36].[35]

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[31] Appl. Ex. APP-505.

[32] Appl. Ex. APP-507.

[33] City of Rockdale's Motion to Intervene (August 29, 2023) at 2.

[34] Tex. Water Code (Code) § 36.002(a), (b), (d).

[35] Code § 36.0015(b).

Chapter 36 of the Texas Water Code (Code) outlines the process by which landowners obtain the right to produce their groundwater within groundwater conservation districts. Under chapter 36, a groundwater conservation district, such as the District, "shall require a permit for the drilling, equipping, operating, or completing of wells,"[36] except for exempt wells.[37]

Before granting or denying an operating permit, a groundwater conservation district must consider whether:

1. (1) the application conforms to the requirements prescribed by [Code chapter 36] and is accompanied by the prescribed fees;

2. (2) the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders;

3. (3) the proposed use of water is dedicated to any beneficial use;

4. (4) the proposed use of water is consistent with the district's approved management plan;

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

6. (6) the applicant has agreed to avoid waste and achieve water conservation; and

[36] Code § 36.113(a).

[37] Exempt wells are wells used solely for domestic use or for providing water for livestock or poultry and that are located on a tract of land larger than ten acres and cannot produce more than 25,000 gallons of groundwater a day. Code § 36.117(b)(1). Certain wells related to oil rigs and mining are also exempt. Code § 36.117(b)(2), (3).

7. (7) the applicant has agreed that reasonable diligence will be used to protect groundwater quality and that the applicant will follow well plugging guidelines at the time of well closure.[38]

The District has adopted similar rules for permit applications.[39] The version of the District's rules in effect when the Applications were declared administratively complete was the version amended May 10, 2022 (May 2022 Rules), which differs in consequential ways from the current District rules (Current Rules). The May 2022 Rules control in evaluating the Applications, but the Current Rules may be relevant in certain contexts as discussed below. In deciding whether or not to issue a permit, and in setting the terms of the permit, the District's rules require it to consider, in addition to the seven factors set out above, "all other relevant factors" including, but not limited to, the following:

8. (1) the management plan;

9. (2) the quality, quantity, and availability of alternative water supplies;

10. (3) the impact on other landowners and well owners from a grant or denial of the permit, or the terms prescribed by the permit, including whether the well will interfere with the production of water from exempt, existing or previously permitted wells and surface water resources;

11. (4) whether the permit will result in a beneficial use and not cause or contribute to waste; and

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[38] Code § 36.113(d).

[39] The District's rules as amended May 10, 2022, were admitted into evidence as GM Ex. 1. The current District rules, those as amended December 12, 2023, were admitted into evidence as GM Ex. 2, and are also available at https://posgcd.org/wp-content/uploads/2024/02/Approved_Final-Rules-12-12-2023_02.06.2024.pdf (last visited May 20, 2024).

12. (5) if the applicant has existing production permits that are underutilized and fails to document a substantial need for additional permits to increase production. [40]

Additionally, Current Rule 7.6(a) specifies another factor for the District to consider in permitting: "(6) if the simulated drawdowns indicate that the permitted production will cause unreasonable impacts."[41]

Groundwater conservation districts may adopt rules regulating the spacing of wells and the production of groundwater.[42] When promulgating rules that limit

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[40] May 2022 Rule 7.6; Current Rule 7.6(a). GM Ex. 1 at 37; GM Ex. 2 at 38.

[41] GM Ex. 2 at 38. Unreasonable impacts are further defined by Current Rule 16.4.6, which states:

> In order to help achieve a balance between production and conservation of groundwater resources, the District will consider the impacts from an aggregate of wells associated with one or more operating permits to be unreasonable if pumping from the aggregate wells, by themselves and without contribution of pumping from wells not part of the aggregate of permitted wells, cause any of the following:
>
> a. Land subsidence that: threatens the structural integrity of existing pipelines, building, or other infrastructure; (b) causes land from being used for its potential use; or (c) creates a problem associated with flooding or poor drainage;
>
> b. Intrusion of surface water or groundwater from another aquifer into the aquifer, which is pumped by the aggregate wells, that degrades groundwater quality in the pumped aquifer so it would not be suitable for its intended use or its potential use;
>
> c. More than a 30-foot reduction and more than a 25% reduction in the saturated thickness of the aquifer being pumped by the aggregate wells at any well location outside of one or more operating permits' property or along any part of the boundary of the operating permits' property;
>
> d. More than a 100-foot reduction and more than a 40% reduction in the pressure head above the top of the aquifer at any well location outside of one or more operating permits' property or along any part of the boundary of the operating permits' property; and
>
> e. The District has the authority to set the baseline value for a saturated thickness and an artesian pressure on a case by case basis for a baseline year that is not before 2010.

GM Ex. 2 at 107.

[42] Code § 36.116(a).

groundwater production, a groundwater conservation district "may preserve historic or existing use before the effective date of the rules," subject to the district's management plan.[43]

Under Code chapter 36, groundwater conservation districts are not required to adopt rules that provide for correlative rights—in other words, allocating to each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres the landowner owns.[44]

As the party seeking the permits, Applicant has the burden of proof by a preponderance of the evidence.[45]

IV. ADMINISTRATIVE COMPLETENESS

Code chapter 36 provides that an application is administratively complete if it contains the information set forth under sections 36.113 and 36.1131.[46] Under the District's rules, the GM is delegated the authority to determine that an application is administratively complete.[47] May 2022 Rule 7.4.8 states "an application will be considered administratively complete if it complies with all requirements set forth under this Section 7, includes all information required to be included in the

[43] Code § 36.116(b).

[44] Code § 36.002(d)(3).

[45] 1 Tex. Admin. Code § 155.427; *Granek v. Texas St. Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).

[46] Code § 36.114(h).

[47] May 2022 Rule 7.4.9.

application, and is accompanied by the required application fee." There is no dispute that the GM declared both Applications at issue administratively complete on November 2, 2022.[48] However, the parties briefed at length on the significance of an administrative completeness determination.

Applicant argues that an administrative completeness determination entails more than the mere checking of boxes, that the Applications meet the minimum requirement for containing information, and that the GM's review equates to a more rigorous technical review.[49] Landowners interpret Applicant's arguments—or perhaps anticipated Applicant's arguments based on testimony—to mean that the GM's administrative completeness mandates approval of the Applications.[50] Landowners argue convincingly that it does not.[51]

Regardless what its expert witness Mr. Rubinstein testified, in closing briefs Applicant did not explicitly argue that the GM's administrative completeness declaration mandated approval of the Applications; therefore, the ALJs decline to rule specifically on the significance of the GM's administrative completeness determinations. Instead, the ALJs interpret Applicant's arguments as attempts to rebut the GM's and Landowner's arguments that the Applications were deficient. Applicant states:

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[48] Appl. Ex. APP-126 (Westbrook Letter).

[49] Applicant SLR Property I, LP's Closing Brief (Applicant's Closing) (May 31, 2024) at 6; Applicant SLR Property I, LP's Reply to Closing Briefs (Applicant's Reply) (June 25, 2024) at 8.

[50] Jeff Howell, Ronald Crump, and Brian H. Limoges' Closing Brief (Landowners' Closing) (June 3, 2024) at 11.

[51] Landowners' Closing at 10-17.

> . . . critically, during the months of technical review, the GM never asked SLR to propose conjunctive use, to change its proposed well locations to reduce effects on the Landowners, to identify a specific end user, to provide water contracts, to assign a specific percentage of water to each categorical beneficial use listed in the Applications, or to calculate the Applications' effects on [desired future conditions].[52]

The ALJs note Applicant's frustration with the District's administrative process; however, each of the arguments relating to alleged deficiencies in the Applications is addressed in turn below, in their appropriate sections. Therefore, regarding administrative completeness, the ALJs find only that the Applications were declared administratively complete on November 2, 2022.

V. ISSUES REGARDING PERMITS

The GM and Landowners argue that the Applications should be denied and, if issued, should include special conditions. Applicant argues the permits should be issued without any conditions.

In making their arguments, the parties focus on the following factors set out in Code chapter 36 and the District's rules:

- Whether the proposed use of water is dedicated to any beneficial use;
- Whether Applicant has existing production permits that are underutilized and fails to document a substantial need for additional permits to increase production;
- Whether the proposed use of water unreasonably affects existing groundwater water resources or existing permit holders; and

[52] Applicant's Reply at 9.

- Whether granting the application is consistent with the District's duty to manage total groundwater production on a long-term basis to achieve an applicable Desired Future Condition (DFC).

The parties generally do not address the remaining factors, which will be addressed in the findings of fact and conclusions of law, but not discussed further in this Proposal for Decision (PFD).

A. WHETHER THE PERMITS WILL RESULT IN A BENEFICIAL USE AND NOT CAUSE OR CONTRIBUTE TO WASTE

In accordance with the Code, the District's rules require an Applicant for any permit to provide "a statement of the nature and purpose of the proposed use and the amount of groundwater to be used for each purpose" and a statement that any "groundwater withdrawn under the permit will be put to beneficial use at all times."[53] Relatedly, prior to granting or denying a permit, the Code requires the District to consider whether "the proposed use of water is dedicated to any beneficial use," and whether "the applicant has agreed to avoid waste and achieve water conservation."[54] To these ends, the District adopted May 2022 Rule 7.6(4), which says the Board will consider, when deciding whether or not to issue a permit, "whether the permit will result in a beneficial use and not cause or contribute to waste." The Code includes definitions for "beneficial purposes" and "waste." "Beneficial Purposes" include:

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[53] May 2022 Rule 7.4.4(c), (i); *see also* Code § 36.113(c)(3), (8).

[54] Code § 36.113(d)(3), (6).

(A) agricultural, gardening, domestic, stock raising, municipal, mining, manufacturing, industrial, commercial, recreational, or pleasure purposes;

(B) exploring for, producing, handling, or treating oil, gas, sulphur, or other minerals; or

(C) any other purpose that is useful and beneficial to the user.[55]

And "waste" is defined as any one or more of the following:

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

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

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

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

(E) willfully or negligently causing, suffering, or allowing groundwater to escape into any river, creek, natural watercourse, depression, lake, reservoir, drain, sewer, street, highway, road, or road ditch, or onto any land other than that of the owner of the well unless such discharge is authorized by permit, rule, or order issued by the commission under Chapter 26;

(F) groundwater pumped for irrigation that escapes as irrigation tailwater onto land other than that of the owner of the well unless

[55] Code § 36.001(9).

permission has been granted by the occupant of the land receiving the discharge; or

(G) for water produced from an artesian well, "waste" also has the meaning assigned by [Code] Section 11.205.[56]

One other rule is relevant to this issue. Under May 2022 Rule 7.6(5), whether "the applicant has existing production permits that are underutilized and fails to document a substantial need for additional permits to increase production" is a factor to be considered in deciding whether to issue a permit and in setting the terms of that permit.

Applicant seeks two permits in this consolidated proceeding. One Application seeks 15K from the Simsboro Formation using 61 wells authorized in its HUP 0330, with a cap of 15K on total combined production from HUP 0330 and the new operating permit sought, so that the current authorized production of 15K will not be increased. The second Application seeks a new drilling and operating permit to produce an additional 9K (in total) from the Simsboro and Hooper Formations, from 60 new wells and 30 defined well sites.[57] Both Applications specify the water is to be used for municipal, industrial, manufacturing, and commercial uses, anywhere in Milam and Burleson Counties.[58] Neither Application specified the amount of water to be used for each purpose.[59] Therefore, Applicant would have the ability to use the

[56] Code § 36.001(8).

[57] Appl. Ex. APP-124; Appl. Ex. APP-125.

[58] *Id.*

[59] *Id.*

authorized water for any of the listed beneficial uses, or any combination of the uses, up to the authorized amount.

Regarding the use, Applicant is developing, and has plans to further develop its 33,000-acre property it acquired in 2021 in Milam and Lee Counties.[60] Applicant plans to develop the site for commercial, industrial, residential, and retail uses.[61] Its plans are long-term, and mostly only conceptual plans have been made publicly available.[62] Applicant intends to use its authorized water to develop its property. Generally, the plans include various residential, retail, commercial, industrial, hospitality, hamlet, and recreation facilities. However, for phase 1 of its development, Applicant broke ground on a 3,300-acre Advanced Manufacturing and Logistics Center (AMLC) in summer 2023, and the 2023 Texas Legislature also created the Sandow Municipal Utility District No. 1 to support development on the property.[63] The AMLC is currently using up to 3,000 af/yr of groundwater.[64] Applicant has also announced plans for the construction and operation of a new natural gas power plant. Mr. Gardenhire testified that he anticipated the current use to increase after AMLC is complete and tenants are in place, but he did not provide an estimate of the increased use; and Applicant cited no other evidence about the potential increase.[65] The Brazos G Regional Water Planning Group has included

[60] Appl. Ex. APP-100 (Gardenhire Testimony) at 8.

[61] Appl. Ex. APP-100 (Gardenhire Testimony) at 14.

[62] Appl. Ex. APP-100 (Gardenhire Testimony) at 8.

[63] Appl. Ex. APP-100 (Gardenhire Testimony) at 14.

[64] Tr. Day 1 at 37 (Gardenhire Cross).

[65] Tr. Day 1 at 97 (Gardenhire Redirect).

population projection estimates in its draft 2026 regional water plan that indicate the population of Milam County could increase by 140,000 people by 2060, with 120,000 on Applicant's property.[66] Lastly, Applicant plans to use the water to support local community needs in Milam and Burleson Counties, as needed, such as during periods of drought.

1. Parties' Evidence and Arguments

The GM argues that Applicant has failed to prove "it needs the requested amount of water for a beneficial use without waste."[67] The Landowners agree with the GM.

The GM cites three cases to support its argument that need for the water must be established.[68] The first case is *Guitar Holding Company, LP v. Hudspeth County Underground Water Conservation District*—a case about historic use permitting, which the GM argues supports its argument that a groundwater permit must specify the amount of water to be used for each beneficial use.[69] The second case is *Gatehouse Water, LLC v. Lost Pines Groundwater Conservation District*, a surface water right case, which the GM contends requires an Applicant to provide third-party contracts and agreements to demonstrate a non-speculative need for the water.[70] Finally, the

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[66] Appl. Ex. APP-106; Tr. Day 1 at 77 (Gardenhire Cross).

[67] GM Closing at 10.

[68] GM Closing at 10.

[69] *Guitar Holding Co., LP v. Hudspeth Cnty. Underground Water Conservation Dist.*, 263 S.W.3d 910 (Tex. 2008).

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

GM cites a magistrate's recommendation in *Texas Rivers Protection Association v. Texas Natural Resource Conservation Commission*, to support its argument that a permit can have special conditions that condition future withdrawals on the permittee producing a contract for the sale of water before the water may be withdrawn.[71]

The GM also contends that the evidence in the record does not support a need for the water. The GM begins by noting that the 15K authorized in HUP 0330 for industrial use has not been utilized for several years and that this amount is sufficient to meet Applicant's current needs for supplying water to the AMLC. The GM next argues that Applicant's requests are speculative and that Applicant has no developed plans to actually use any of the water sought in the Applications. In particular, the GM asserts that Applicant's plans for future uses are too remote in the future and lack specificity, that Applicant's projections regarding population growth on its property are unsupported by any evidence, and that Applicant has provided no contracts or agreements to provide the water to any other entities. Assuming Applicant's population projections (from the Brazos Region 12 Water Planning Group) are accurate, the GM states that Applicant's evidence would support only a need for 16,000 af/yr, which can be mostly met by the currently authorized 15K in HUP 0330. The GM also notes that Applicant has access to other sources of water, including surface water rights and potable water purchased from Southwest Milam Water Supply Corporation. Landowners assert that the District's Groundwater

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

Management Plan (GMP) should inform decisions relating to whether the water is needed for the beneficial uses sought in the Applications.

Additionally, both Landowners and the GM argue that under May 2022 Rule 7.6(5), Applicant must show a "substantial need for additional permits to increase production" because it is currently underutilizing HUP 0330 by not fully using the entire 15K authorized in that permit.[72] They argue that both the Applications seek to increase production. Specifically, they argue the Application for 9K would authorize completely new production, and the Application for 15K would result in additional production beginning after 2038—when HUP 0330 expires, unless renewed.

Applicant counters that it has complied with all requirements in the Code and District rules because it has identified beneficial uses enumerated in those authorities and has provided a statement committing to using the water for those beneficial uses without waste. Applicant argues that the GM and Landowners are attempting to impose new uncodified requirements regarding specificity of use, identification of end-users, need, and underutilization.[73]

Applicant contends that the specificity of the beneficial uses set out in its Applications is consistent with the specificity of the beneficial uses contained in all the other District permits in the record. Applicant also noted that none of the other

[72] May 2022 Rule 7.6(5).

[73] Applicant Closing at 13.

permits specify an amount dedicated for each use.[74] Applicant intends to maintain the flexibility to use the full authorized amount of water for any of the beneficial uses listed. Applicant also states that the codified law does not require more granularity regarding the identified beneficial uses than the applicable Code definitions provide.[75] Applicant disagrees that *Guitar Holding*, has any relevance to its permit request because *Guitar Holding* was specific to the evidence needed to prove up a HUP.[76] Applicant complains that the GM is conflating the requirement to identify beneficial uses with an uncodified requirement that it prove it needs the water.

Regarding identification of end-users, Applicant contends that it intends to use the water itself to develop its own land in Milam County and that, in doing so, it may allow tenants and contracting parties to use its groundwater.[77] Applicant argues that *Texas Rivers* has no bearing on these Applications because that case addressed surface water instead of groundwater, and because Applicant intends to develop the property itself, whereas the applicant in *Texas Rivers* intended to sell its water to unnamed third-parties.[78] Regarding *Gatehouse*, Applicant argues that case holding is limited to the enforcement of a special condition that was included in a permit during settlement negotiations.[79] Therefore, Applicant believes that it cannot be required to produce third-party contracts to support its own beneficial use of the groundwater

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[74] Applicant Reply at 11.

[75] Applicant Closing at 12; Code §§ 36.001(9), .113(d)(3), (6) (definitions for "beneficial purposes" and "waste").

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

[77] Applicant Reply at 13.

[78] *Texas Rivers*, 910 S.W.2d 147.

[79] *Gatehouse*, 2023 WL 1424000.

sought.[80] Applicant adds that the District's rules do not require information regarding end-users and the District's application forms do not request it.

Applicant contends that there is no law that authorizes the District to deny an operating permit based on a showing of need or underutilization. Applicant analogizes May 2022 Rule 7.6(5) (underutilization) to the "reasonable use doctrine," which, according to Applicant, has been rejected in Texas in favor of the "rule of capture."[81] Even so, Applicant states May 2022 Rule 7.6(5) would not apply to its Applications because its current authorizations in HUP 0148 and HUP 0330 are not underutilized. Finally, the underutilization inquiry would not apply to the 15K Application because, it argues, the permit would not increase annual production—a required element of the rule.

Without conceding its position that the underutilization inquiry should not apply, Applicant argues that there is evidence to support a substantial need for its requested additional 9K of groundwater. Applicant lists its plans to develop and other needs, including: Sandow Municipal Utility District No. 1; the AMLC; residential, retail, commercial, industrial, hospitality, hamlets, and recreation facilities; supporting community needs in Milam and Burleson Counties during periods of drought; and supporting 16,816-18,146 af/yr needed based on the Texas Water Development Board (TWDB) approved, Brazos Region G Regional Water Planning Group-projected population increases on Applicant's property and in

[80] Applicant Reply at 13.

[81] Applicant Closing at 25.

Milam County.[82] Applicant states that it cannot support all of this need with its HUP 0330 alone because that permit currently authorizes only industrial uses and because 15K will not be enough.

2. ALJs' Analysis

The ALJs find that the Applications each meet the minimum requirements in the Code and the District's rules relating to the specificity of its requested beneficial uses.[83] Each Application specifies the water produced will be used for the statutorily identified beneficial purposes of municipal, industrial, manufacturing, and commercial uses, anywhere in Milam and Burleson Counties.[84] Regarding the amount of water to be used for each use, Applicant requested that the entire amount of water be authorized for any of the listed beneficial uses, or any combination of the uses, up to the entire authorized amount. This is consistent with Applicant's HUP 0148 (issued previously by the District), which authorizes Applicant to produce up to 25,000 af/yr for municipal, industrial, manufacturing, and commercial uses.[85] Notably, HUP 0148 does not include more specificity regarding the identified beneficial uses and does not specify an amount of water to be designated to any one of the beneficial uses. HUP 0148, as a water right, is not unusual in this respect. Regarding specifying the amount for each use, the ALJs do

[82] Applicant Reply at 23-24.

[83] May 2022 Rule 7.4(4)(c), (i); *see also* Code § 36.113(c)(3), (8), (d)(3), (6).

[84] Code § 36.001(9).

[85] GM Ex. 7.

not find *Guitar Holding* controlling in this case because *Guitar Holding* was specific to the evidence needed to prove up a HUP—which is not at issue in this matter.[86]

The ALJs also find no basis to require Applicant to provide identification of any third-party end-users for purposes of obtaining the permits. As a practical matter, Applicant intends to use the water itself to develop its own land in Milam County. Additionally, the District's rules do not require information regarding end-users, and the District's application forms do not request it.[87] Finally, the ALJs agree that *Texas Rivers* has no bearing on these Applications because that case addressed surface water instead of groundwater, and because Applicant intends to develop the property itself, whereas the applicant in *Texas Rivers* intended to sell its water to unnamed third-parties.[88]

The ALJs additionally find the permits will not cause or contribute to waste.[89] Specifically, the ALJs find no evidence of, and that it is unlikely that, the Applications would result in waste as it is narrowly defined in the Code.[90]

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

[87] *See* Appl. Ex. APP-503.

[88] *Texas Rivers*, 910 S.W.2d at 151. The ALJs also find that *Gatehouse* has little applicability here, where Applicant plans to use the water itself instead of selling to third parties, and because the special conditions were part of an agreed settlement. *See Gatehouse*, 2023 WL 1424000.

[89] May 2022 Rule 7.6(5).

[90] Code § 36.001(8).

Finally, with respect to a demonstration of need for the permits, except for May 2022 Rule 7.6(5) (underutilization) (which is discussed below), the identification of non-speculative uses and proof of need are not addressed specifically in the District's rules or anywhere in the Code. The case law cited by the GM does not clearly indicate the District has the authority to require applicants to show need. And, even assuming the District has that authority, the ALJs decline to recommend applying such a requirement absent a clear provision in the District's rules that is transparent and applicable to all applicants.

On the other hand, May 2022 Rule 7.6(5) does require an applicant to document a "substantial need for additional permits to increase production" where the "applicant has permits that are underutilized." Unfortunately, the District's rules and the Code provide no definitions or guidance regarding the meaning of the terms "substantial need," "underutilized," or an "increase in production." The meaning and applicability of all these terms are contested in these permit Applications.

The GM and Landowners argue that Applicant has underutilized HUP 0330 because in recent years Applicant has not used all of its authorized 15K. Applicant argues the term underutilized should be forward-looking, and only applied in situations where the water under existing permits is unlikely to be fully utilized. However, proving the likelihood of future use seems to the ALJs to be another way of saying Applicant can prove it needs its existing unutilized permits, plus additional production for future demand. Another reasonable interpretation the ALJs considered is whether a permit has ever been fully utilized in the past, in a similar

manner to adjudication of historic use exemptions. In that case, Applicant would have a better argument since the record evidence shows Applicant was using almost the full authorization as recently as 2010 and almost 10,000 af/yr as recently as 2015.[91] However, absent a definition, guidance, or case law, the ALJs can only apply the plain meaning of the term underutilized. Merriam Webster dictionary defines "underutilized" as "to utilize less than fully or below the potential use."[92] Under that definition, HUP 0330, or any permit that uses any amount less than its full authorization, is underutilized. Moving forward, the District should consider amending its rules to provide more guidance and transparency regarding the application of May 2022 Rule 7.6(5) (Current Rule 7.6(a)(5)); however, considering Applicant is currently not using most of its authorized production under HUP 0330, and it is seeking an additional 9K, it is reasonable to scrutinize whether Applicant should be granted additional production absent a showing of substantial need for it.

However, that does not end the inquiry. May 2022 Rule 7.6(5) requires a demonstration of substantial need, but only if the application seeks an increase in production. The GM and Landowners argue that the new 15K permit increases production after the year 2038, when HUP 0330 expires unless renewed. The ALJs disagree. Even though this case is not about renewal, the GM's and Landowners' interpretation of what constitutes an increase in production under May 2022 Rule 7.6(5) would directly conflict with Code section 36.1145 in the case of a renewal, because section 36.1145 mandates that a district approve an application to renew an

[91] GM Ex. 11 at 8 (model run C-1, showing the historic usage of HUP 0330).

[92] "Underutilized," *Merriam-Webster.com*, https://www.merriam-webster.com (accessed July 30, 2024).

operating permit without a hearing, if the application is timely and meets all requirements. Under this scenario, a permit holder seeking renewal could not be denied for underutilizing its permit, *or even never having used it*. Therefore, the only interpretation that harmonizes Code section 36.1145 with May 2022 Rule 7.6(5) is that renewal of a permit (or in this case trading production under one permit to another) does not constitute an increase in production. Accordingly, an increase in production must refer to an increase in *annual* production, and not in *total* production over time. In this case, because Applicant is essentially trading its 15K in production for production under a new permit, there will not be an increase in annual production now or after 2038 when HUP 0330 is up for renewal. Regarding the 9K permit application, there is no dispute that Applicant is seeking an increase in production.

The final question to be resolved is whether Applicant has shown a substantial need for its requested additional 9K in groundwater production. And although the ALJs found that Applicant is not required to demonstrate a need for the 9K permit in order to obtain it, it is relevant to first assess whether any current excess supply would cover all Applicant's needs, potentially rendering the additional request for 9K unneeded. Further, if the District disagrees with the ALJs and finds that Applicant must demonstrate a need for the 15K permit, then they will have analysis of such need for their consideration.

Regarding need, the ALJs find that the record showed by a preponderance of the evidence that Applicant demonstrated a need for a portion of the 9K sought. Applicant is developing, and has plans to further develop its 33,000-acre property it

acquired in 2021 in Milam in Lee Counties.[93] Its plans are long-term, and mostly only conceptual plans have been made publicly available.[94] However, for phase 1, Applicant broke ground on the 3,300-acre AMLC in summer 2023, and the 2023 Texas Legislature also created the Sandow Municipal Utility District No. 1 to support development on the property.[95] The AMLC is currently using up to 3,000 af/yr of groundwater.[96] Mr. Gardenhire testified that he anticipated the current use to increase after AMLC is complete and tenants are in place, but he did not provide an estimate; and Applicant cited no other evidence about the potential increase.[97] The Brazos G Regional Water Planning Group has included population projection estimates in its draft 2026 regional water plan that indicate the population of Milam County could increase by 140,000 people by 2060, with 120,000 on Applicant's property.[98] Using a conservative estimate of 135 gallons per day (GPD) per capita, Mr. Rubinstein calculated Applicant would need 18,146 af/yr to serve the additional 120,000 people expected on the property, and potentially more to serve the additional 20,000 projected outside the property.[99] Based on the record evidence, the ALJs find Applicant demonstrated a need for 21,146 af/yr (3,000 af/yr current

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[93] Appl. Ex. APP-100 (Gardenhire Testimony) at 8.

[94] Appl. Ex. APP-100 (Gardenhire Testimony) at 8.

[95] Appl. Ex. APP-100 (Gardenhire Testimony) at 14.

[96] Tr. Day 1 at 37 (Gardenhire Cross).

[97] Tr. Day 1 at 97 (Gardenhire Redirect).

[98] Appl. Ex. APP-106; Tr. Day 1 at 77 (Gardenhire Cross).

[99] Tr. Day 3 at 27, 51 (Rubinstein Redirect); Mr. Rubinstein testified that 135 GPD was a conservative estimate of per capita usage based on his knowledge of different areas across the state. The GM's counsel asked Mr. Rubinstein to re-calculate the figures using 125 GPD, asserting that 125 GPD was the approved number for Brazos G RWPG. Mr. Rubinstein calculated the need would be 16,802 af/yr using the lower 125 GPD. However, the GM never substantiated the assertion with record evidence.

use at AMLC plus projected 18,146 af/yr to support 120,000 new residents on the property) as the property is developed. Of which, 15K is available under HUP 0330, leaving Applicant a need for 6,146 af/yr.[100] Although there was evidence that Applicant may need an unspecified amount of water to serve tenants at the AMLC and to provide water to up to 20,000 additional persons off of Applicant's property, that evidence was not proven by a preponderance of evidence.

Finally, the GM also suggested Applicant had additional sources of water it should deplete before obtaining additional groundwater, including Applicant's authorization under its independent surface water right to divert up to 18,000 af/yr of state water from the Brazos River watershed. The Applicant provided unrebutted testimony that the availability of surface water from the Brazos River watershed under Applicant's contractual and surface water rights is limited and inconsistent depending on the time of year and surface water flow, and it is subject to senior priority calls and that surface water from the Brazos River watershed is of lower quality than groundwater from the Carrizo-Wilcox Aquifer, making surface water also more expensive to treat than Carrizo-Wilcox groundwater. The ALJs do not find that the GM showed that Applicant is obligated to use its surface water in lieu of exercising its property right to groundwater. At any rate, the ALJs find water is not available in sufficient quality and quantity from reliable alternative water supplies to support Applicant's development plans.

[100] The 25,000 af/yr of water authorized by Permit 0148 is contractually committed to a third party for transport under POS-T-0005 to Taylor, Texas, and thus is not available for on-site or in-District use.

Therefore, the ALJs recommend that Applicant's request, if granted, be limited to 6,146 af/yr in new production, or to grant the entire 9K but include a special condition allowing immediate production of 6,146 af/yr and requiring Applicant to supplement its showing of need at a specified date in order to produce the remaining 2,854 af/yr.

B. EFFECTS AND IMPACTS ON WATER RESOURCES, OTHER LANDOWNERS, AND OTHER WELLS

In deciding whether to issue an operating permit, the District must consider whether "the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders."[101] Similarly, the District must consider "the impact on other landowners and well owners from a grant or denial of the permit, or the terms prescribed by the permit, including whether the well will interfere with the production of water from exempt, existing or previously permitted wells and surface water resources."[102]

Regarding unreasonable effects, the parties focus on three aspects of the examination. First, the GM and Landowners disagree with Applicant about what is encompassed in "the proposed use" whose effects are to be considered—whether to include Applicant's 15K as "new" or whether that is already permitted. Second,

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[101] Code § 36.113(d)(2).

[102] May 2022 Rule 7.6(3); Current Rule 7.6(a)(3). Landowners argue that the District's protective drawdown limits (PDLs) should also be considered, per Section 6.0 of the District's Management Plan as amended and adopted December 12, 2023 ("The factors that the District may consider in making a determination to grant a drilling and operating or operating permit . . . will include: . . . the District PDLs."). Landowners' Closing at 29, citing GM Ex. 3 at 4-5. However, the Management Plan version in effect at the time of these permit applications was that dated December 5, 2017, Section 6 of which does not include the PDLs as a factor to consider. GM Ex. 4 at 9-10.

the parties disagree about what "unreasonably affects" means. Finally, they disagree about whether Applicant sufficiently modeled local effects and what those effects will be.

1. What is the proposed use to be considered?

Before determining whether "a proposed use" would cause unreasonable impacts, the ALJs must first decide which use is under consideration. Applicant's 9K is certainly a proposed use to consider, but is Applicant's 15K "new" or historic (i.e., continuing), for the purposes of differentiating its impact?

a) Parties' Evidence and Arguments

Applicant contends that in determining the effect of the use, the District must examine the proposed 9K use alone, not the cumulative effects of all permitted use in the District, including their historic 15K.[103] The GM and Landowners disagree.

b) ALJs' Analysis

The ALJs will decide this issue by looking at both precedent and the language of the statute and rule. In earlier proposals for decision (PFDs) for an operating permit (albeit in other groundwater conservation districts), the ALJs concluded that only the applicant's use should be examined when determining whether proposed use would lead to unreasonable effects. Some of those ALJs noted that the district's

[103] Applicant's 15K Application explains that it would not increase Applicant's current 40,000 af/yr total authorized production because it would impose a cap of 15K on total combined production under both HUP 0330 and the new operating permit. Appl. Ex. APP-124 at 15K00015. However, HUP 0330 has a term that extends through December 31, 2038; whereas Applicant is requesting the term of the new operating permit be 40 years from the date of permit issuance (i.e., circa 2064). Appl. Ex. APP-124 at 15K00016.

rule "and [Code] § 36.113(d)(2), on which it is based, focus on the impact of the specific application, not cumulative pumping under the requested permit and other existing users."[104]

While those decisions have no precedential value in this matter, the ALJs agree with this analysis and adopt it in this matter. The language of the statute and the rule requires an examination of "the proposed use of water," which suggests a concern with the use represented by the application. The language of "proposed use" is the same language used in other factors that only refer to an applicant's use, such as whether "the proposed use of water is dedicated to any beneficial use" and, for proposed wells in the Hill Country Priority Groundwater Management Area, whether "the proposed use of water from the well is wholly or partly to provide water to a pond, lake or reservoir to enhance the appearance of the landscape."[105] Similarly, May 2022 Rule 7.4.5(a) and (b) require the inclusion in permit applications of "[p]redictions of pumping *impacts* on water levels over the next 30 years within a radial distance of 5 miles *of the newly permitted well*" to be "based on *the newly permitted well* pumping it's [sic] fully permitted amount."[106]

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[104] *Application of Lower Colorado River Authority for Operating and Transport Permits for Eight Wells in Bastrop County, Texas*, SOAH Docket No. 952-19-0705 (March 31, 2020) (recommending Lost Pines Groundwater Conservation District issue revised draft operating permits and draft transport permits to withdraw 25,000 af/yr from the Simsboro, with changes); *Application of City of Bastrop for an Operating Permit for Well No. 1 in Bastrop County, Texas*, SOAH Docket No. 952-15-3851 (July 26, 2016) (recommending Lost Pines Groundwater Conservation District approve operating permit application to withdraw 2,000 af/yr for municipal use, from the Simsboro). The ALJs take judicial notice of these PFDs.

[105] Code § 36.113(d)(3), (5).

[106] May 2022 Rule 7.4.5(a)-(b) (Application Requirements for Permits, for wells that will have a maximum pumping rate that equals or exceeds 500 GPM) (emphasis added).

When the District intends to look at use *beyond* that proposed in an application, that is made clear. For example, in establishing the maximum allowable production consistent with the District's duty to manage total groundwater production on a long-term basis to achieve an applicable DFC, "[a] new permit for groundwater production will be considered *together with all the currently existing permitted production* within that Management Zone."[107]

Accordingly, the ALJs conclude that the analysis of whether the proposed use unreasonably affects groundwater or existing permits must focus on Applicant's proposed pumping, not cumulative pumping under Applicant's permit and other District-wide permitted pumping at 100% capacity. Likewise, as Applicant is already permitted to withdraw 15K through 2038 under its HUP 0330, the only "proposed use" associated with its new 15K permit application is the use beyond 2038.[108]

2. What does "unreasonably affect" mean?

There is no statutory definition of what "unreasonably affects" water resources or permit holders.

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[107] May 2022 Rule 16.6.2(a) (emphasis added).

[108] Dr. Young calculated that the additional 15K to be authorized between 2038 and 2064 would total 390,000 af/yr; and he noted that the proposed 15K permit would "significantly change how much groundwater will be used as compared to the condition that the 15K permit were not granted" due to expanding the use beyond industrial on site to also municipal, industrial, manufacturing, and commercial uses anywhere in Milam and Burleson Counties. GM Ex. B (Young Testimony) at 23-24.

a) Parties' Evidence and Arguments

Applicant does not define the term in its arguments, but points to the discrepancy between Current Rule 7.6 (Considerations for Granting Permits), which includes reference to guidelines for determining "unreasonable impacts,"[109] and May 2022 Rule 7.6, which does not. Applicant's expert, Mr. Harden, took the position that Rule 16.4 does not apply to Applicant's permit applications but only addresses the District's response to effects of pumping across the District observed through water level monitoring.[110]

The GM acknowledges that his expert, Dr. Young, "evaluated the Application's impacts with reference to the District's now-adopted rule defining unreasonable impacts"[111] (that is, Current Rule 7.6(a)(6), referencing Rule 16.4.6); however, the GM does not suggest that Current Rule 16.4.6 is determinative. In considering the question of unreasonable impacts through the lens of Current Rule 16.4.6's definition, Dr. Young specifically examined whether pumping under a specific Groundwater Availability Model (GAM) run would cause:

- **more than a 30-foot and 25 percent reduction in the saturated thickness** of the aquifer being pumped by the aggregate wells at any well location outside of one or more operating permits' property or along any part of the boundary of the operating permits' property; or

[109] May 2022 Rule 16.4.6 ("Unreasonable Impacts" in Rule 16.4 "Actions Based on Monitoring Results"); Current Rule 16.4.6. Current Rule 7.6(a)(6) references Rule 16.4.6 explicitly, stating: " . . . and (6) if the simulated drawdowns indicate that the permitted production will cause unreasonable impacts as defined by Rule 16.4.6."

[110] Appl. Ex. APP-200 (Harden Testimony) at 20.

[111] GM's Closing at 14.

- **more than a 100-foot and 40 percent reduction in the pressure head** above the top of the aquifer at any well location outside of one or more operating permits' property or along any part of the boundary of the operating permits' property.[112]

Dr. Young noted that this allows the District to account for site specific conditions that cannot be adequately accounted for in well spacing rules, such as proximity to a spring or relative productivity of that area of the aquifer.[113]

Landowners' expert, Mr. Copeland, contends that the District's definition of unreasonable impacts in Current Rule 16.4.6 should be applied to the statutory analysis.[114] Additionally, Landowners contend that the protective drawdown limits (PDLs) should be considered in relation to groundwater impacts and that lowering the water table near the ground surface is an unreasonable impact to surface water resources.[115]

On cross examination, counsel for Landowners asked Dr. Young to agree that drawdown levels causing the District's PDLs to be exceeded would be an

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[112] GM Ex. B at 15-19; GM Ex. 11 at 51-81.

[113] GM Ex. B at 15.

[114] Landowners Ex. D at 8-9. Mr. Copeland would also include the additional factors under Current Rule 16.4.6 not listed by Dr. Young, namely:

a. Land subsidence that: threatens the structural integrity of existing pipelines, buildings, or other infrastructure; (b) causes land from being used for its potential use; or (c) creates a problem associated with flooding or poor drainage; [and]

b. Intrusion of surface water or groundwater from another aquifer into the aquifer, which is pumped by the aggregate wells, that degrades groundwater quality in the pumped aquifer so it would not be suitable for its intended use or its potential use.

[115] Landowners' Closing at 28-29.

unreasonable impact, to which he responded: "I'm not inclined to say that at this time. I haven't thought that through. . . . That's not the definition we think of unreasonable. . . . It may or may not be."[116] May 2022 Rule 1.1 defines PDLs as "conditions of unconfined areas of aquifers in the District as expressed in limits of water level drawdown." May 2022 Rule 16.4 uses PDLs as a data point or standard by which to make decisions about various actions based on monitoring results; and May 2022 Rules Section 7, which governs permits, does not mention PDLs at all. Mr. Copeland described PDLs as "an average drawdown across a management zone measured from January 2011 to December 2070 . . . developed to improve the District's ability to manage and regulate water levels . . . using the same GAM run used by Groundwater Management Area (GMA) 12 to develop the DFCs for each management zone."[117] Mr. Westbrook explained how the District uses PDLs, saying, "the PDL area gives you—offers an opportunity to have quite a bit of data . . . [i]t can also be an indicator of whether or not you're on track to achieve your desired future conditions."[118] Landowners' properties are in the Calvert Bluff and Simsboro Area 1 PDL management zones, with PDLs of 88 feet and 91 feet of average drawdown from January 2010 to December 2070, respectively.[119]

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[116] Tr. Day 2 at 217:24-218:8 (Young).

[117] Landowners Ex. D (Copeland Testimony) at 4.

[118] Tr. Day 2 at 178:10-16 (Westbrook).

[119] Landowners Ex. D (Copeland Testimony) at 4-5.

b) ALJs' Analysis

While Dr. Young and Mr. Copeland would apply Current Rule 16.4.6's definition of unreasonable impacts to the statutory analysis, the ALJs agree with Applicant that the Current Rule 16.4.6's definition is not *controlling* in evaluating permit applications. Nevertheless, it provides a useful reference (supported by expert opinions) as to specific impacts or effects the District could consider unreasonable, albeit in the context of post-permit monitoring. Even for such purpose, the District's rule elaborating such "unreasonable impacts" does not purport to be exhaustive;[120] and the ALJs find Current Rule 16.4.6's definition too narrow for the purpose of determining whether the Application unreasonably affects water resources or permits. While the ALJs agree that the four specified instances of unreasonable impacts would, indeed, unreasonably affect water resources or existing permit holders, they conclude that impacts short of these could also be unreasonable. An unreasonableness determination is necessarily fact-specific.

As to the PDLs, the ALJs understand them to be a forward-looking management tool, or yard stick, by which to measure or assess the groundwater resource in a given area. That said, a projection of PDL exceedance would certainly reflect a potential impact on the groundwater resource. With that, the ALJs turn to the evidence relating to effects of Applicant's proposed pumping.

[120] *See* May 2022 Rule 16.4.6; Current Rule 16.4.6.

3. Does the modeling show unreasonable effects?

One way to assess impacts is to analyze data from the GAM. The current GAM for the central portion of the Carrizo-Wilcox Aquifer was developed by the TWDB primarily to support regional groundwater planning and was approved by the TWDB in 2020.[121]

Applicant's impact predictions were based on GAM run "S-19," which was previously used to establish the modeled available groundwater (MAG) for the aquifer and set out the GMA's DFCs.[122] Applicant performed the modeling to the District's specifications.[123] Dr. Young testified, "[e]valuation of impacts should be considered in light of model limitations;" but, "despite its limitations, the GAM still provides the best science for predicting the impacts to flow directions and water levels caused by [Applicant's] proposed pumping."[124]

The parties and witnesses agree that the GAM has shortcomings and is a regional planning tool with limited use when it comes to looking at local effects.[125]

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[121] GM Ex. B (Young Testimony) at 8, 12; *see* https://www.twdb.texas.gov/groundwater/models/gam/czwx_c/czwx_c.asp.

[122] GM Ex. B (Young Testimony) at 8; Appl. Ex. APP-200 at 14.

[123] Applicant's Closing at 8; Appl. Ex. APP-124 at 15K00029; Appl. Ex. APP-125 at 9K00028; Appl. Ex. APP-215 at 15K00490; Appl. Ex. APP-216 at 9K00107; Appl. Ex. APP-200 (Harden Testimony) at 15:1-7; Tr. Day 2 at 232-34 (Young) (confirming that the District met with Applicant and specified the modeling runs and assumptions to make).

[124] GM Ex. B (Young Testimony) at 6, 12; GM Ex. 11 at 45.

[125] Tr. Day 2 at 59-61 (Copeland), 227-28 (Young); Landowners Ex. D (Copeland Testimony) at 5-6; GM Ex. B (Young Testimony) at 7.

Dr. Young, one of the primary authors of the GAM,[126] recognized Applicant's concerns with it and detailed additional ones of his own—many of which he had previously raised during the process of Alcoa amending now-Applicant's HUP 0148.[127]

Dr. Young noted that the GAM's representations of the top and bottom of the Simsboro at Applicant's property and wells are inconsistent with geophysical logs—with the GAM having incorrectly identified 11 of 32 wells there as being screened within the Calvert Bluff instead of the Simsboro, as previously found by Alcoa.[128] Mr. Copeland agreed the GAM has a large area of "hydrogeologic uncertainty"—erroneously depicting the elevation of the Simsboro by hundreds of feet—which is "most pronounced in Landowners' property locations."[129] Dr. Young said this is important to Applicant's permit Applications, because the proposed pumping associated with the new permits may have a significant impact on some wells located

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[126] Tr. Day 2 at 243.

[127] GM Ex. B (Young Testimony) at 6-7; Tr. Day 2 227-28 (Young), 237 (Young), 252-54 (Young), 260 (Young); GM Ex. 11 at 36-37. The GAM issues identified in Applicant's Application addendum, as summarized by Dr. Young, include: (1) the transmissivity of the Hooper is likely overestimated in the GAM; (2) the lack of well development in the Hooper is limited, thus the aquifer parameters for the Hooper are relatively coarse estimates; (3) the base elevation of the Simsboro and the top elevation of the Hooper cannot always be defined simply; (4) the vertical conductance between the Simsboro and Calvert Bluff is likely overestimated in the vicinity of Applicant's property; (5) the effects of faulting on groundwater flow are challenging to simulate with groundwater models and faulting can only be approximated; and (6) additional test drilling, well drilling, groundwater pumping, and water level measurements will reveal greater heterogeneity of the aquifer characteristics. GM Ex. B (Young Testimony) at 7. Dr. Young noted the following additional limitations of the GAM with regard to evaluating permit application impacts: (1) inaccuracies in the GAM representation of the stratigraphic contact between the Calvert Bluff and the Simsboro; (2) the interaction between surface water and groundwater across Applicant's property; (3) the change in the hydraulic properties of the subsurface deposits caused by mining and reclamation activities; and (4) the scale of the GAM layering and grid cells compared to the scale of aquifer heterogeneity. GM Ex. B (Young Testimony) at 7, 12.

[128] GM Ex. B (Young Testimony) at 6, 12; GM Ex. 11 at 38, 45.

[129] Landowners Ex. D (Copeland Testimony) at 5.

in the region where the GAM surfaces are not reliable. He specifically cited Mr. Limoges's well, which is more than 400 feet below the surface and shown by the GAM to be screened across the Calvert Bluff, but which Dr. Young opined (with the agreement of Mr. Harden and Mr. Copeland) should be classified as a Simsboro well based on the geophysical logs and the pumping test performed at Applicant's well OP-17.[130]

Another limitation of the GAM noted by Dr. Young as specifically relevant to the Applications was that only a sparse amount of data was used to support the recalibration of the hydraulic properties of the Carrizo-Wilcox. He opined that, as a result, some predictions of water level change in the District may contain a higher level of uncertainty than the model average.[131]

The last shortcoming of the GAM noted by Dr. Young is specifically relevant in understanding modeled impacts. The modeled transmissivity values are higher than the *observed* transmissivities, which he said suggests that the GAM predictions

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[130] GM Ex. B (Young Testimony) at 6; Tr. Day 1 at 125-26 (Harden) ("Q: As a result of that monitoring, the—it was determined that [Mr. Limoges's well] might not be a Calvert Bluff well but might be a Simsboro well. Is that correct? A: When the test hole for OP-17 was drilled and we obtained the geophysical log, this well's—this OP-17 well's about, I think, 1,000 feet, if I remember correctly, from Mr. Limoges's well. I looked at the depth of the Simsboro Sands on the log and they were shallower than we were expecting at that location. I knew of this—Mr. Limoges's well next door, and so I looked at his well record and equated the Simsboro elevation that we saw at OP-17 to his well and reached a belief that his well could be a Simsboro well, rather than the prior classification as a Calvert Bluff well."); Landowners Ex. D (Copeland Testimony) at 5 (Limoges's well was "substantially affected" by the OP-17 pump test, suggesting it is a Simsboro well), 182 (Attachment 8 - Mr. Harden's Testing Report for Well OP-17 dated July 24, 2023: "Monitoring data indicate changes in water levels consistent with the Limoges well being screened in the Simsboro. In addition, stratigraphic comparison of the Limoges well construction report and the OP-17 geophysical log also indicate the Limoges well is completed in the Simsboro.").

[131] GM Ex. B (Young Testimony) at 6-7.

of drawdown are likely to be underestimated.[132] Mr. Copeland also mentioned this uncertainty ingrained in the GAM, referring to it as "uncertainness associated with the Calvert Bluff Simsboro hydrogeologic communication," and noting that it could cause impacts to be underestimated.[133] Mr. Harden also acknowledged this "communication between the Simsboro and Calvert Bluff," noting that the GAM has "a lot of leakage."[134] Dr. Young and Mr. Copeland both concluded that, as a result of this unknown/underestimated communication, the GAM has the potential to underestimate the drawdown resulting from Applicant's proposed pumping.[135] Moreover, Mr. Copeland opined that this uncertainty results in Simsboro wells possibly misclassified as Calvert Bluff wells and production "from the Calvert Bluff" actually being produced from the Simsboro; thus, he said well screens could possibly cross both aquifers, enhancing hydrologic communication and resulting in Simsboro production affecting Calvert Bluff wells beyond what the GAM predicts.[136]

So, the question remains, did Applicant's modeling sufficiently show that its proposed uses will not cause unreasonable effects on groundwater resources or existing permit holders?

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[132] GM Ex. B (Young Testimony) at 12-13; GM Ex. 11 at 36-37, 41-42, 45.

[133] Landowners Ex. D (Copeland Testimony) at 6, 10; Tr. Day 2 at 59-60 (Copeland).

[134] Tr. Day 1 at 130 (Harden).

[135] GM Ex. B (Young Testimony) at 12-13; GM Ex. 11 at 36-37, 45; Landowners Ex. D (Copeland Testimony) at 10.

[136] Landowners Ex. D (Copeland Testimony) at 6.

a) Parties' Evidence and Arguments

Highlighting Applicant's expert's testimony that he had "not determined or attempted to determine what neighboring wells may be impacted as a result of [Applicant's proposed pumping]" and was "not aware of anyone that has done that analysis," the GM and Landowners argue that Applicant failed to investigate the effects of its proposed pumping on existing groundwater resources and permit holders,[137] whereas they presented undisputed evidence of significant effects. Applicant disagrees, noting that its expert used the GAM to model the pumping scenarios requested by the District.

Applicant

Applicant presented two legal arguments with regard to the reasonableness of effects/impacts. First, they argue that causing a lowering of the aquifer is not *de facto* unreasonable, because any production in an aquifer will cause water levels in the aquifer to lower; and it is undisputed that production anywhere in the Simsboro will cause lower water levels everywhere else in the aquifer to some degree.[138] Applicant, therefore, argues that it would be inappropriate for the District to find "unreasonable" a single application's impacts, viewed cumulatively with all other pumping, when the application meets District spacing and production rules.[139]

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[137] GM's Closing at 13, citing Tr. Day 1 at 167:20-168:3 (Harden); Landowners' Closing at 24, citing Tr. Day 1 at 123:12-20 (Harden). Applicant's representative, Mr. Gardenhire, also admitted that Applicant did not submit anything specifically evaluating the impacts to other landowners and gave no consideration to the placement of their wells as to the effect on Landowners. Tr. Day 1 at 45:9-22, 51:15-52:8.

[138] Tr. Day 1 at 149:15-18 (Harden).

[139] *See, e.g.*, Appl. Ex. APP-200 (Harden Testimony) at 20-21.

Second, Applicant argues that impacts from new permits cannot be "unreasonable" if similarly-situated permits were previously not found unreasonable.[140]

Turning to specific impacts, Applicant and its expert, Mr. Harden, conceded that nearby wells might be impacted by Applicant's proposed 9K of additional annual production, but said such hydrologic impact would be limited to proportionate reductions in artesian pressure in the Simsboro and Hooper that would be smaller than the reductions due to overall regional production.[141] Using the GAM, Mr. Harden charted predicted changes in drawdowns of the various portions of the aquifers covered by the District, by comparing drawdowns from model runs B-3 and B-4 against those from B-2.[142] He concluded that the modeling predicts only a 10-foot decline in the water table in three small areas of the Carrizo-Wilcox outcrop, after 40 years of pumping, attributable to Applicant's proposed 9K of additional production.[143] Furthermore, Mr. Harden speculated that none of Landowners' properties were in the zones of that ten foot drop.[144] Applicant also argues that Dr. Young's hydrographs for Landowners' wells show that the difference between

[140] Applicant's Closing at 17 (citing Appl. Ex. APP-400 (Rubinstein Testimony) at 22:33-35 ("Applications that are consistent with District rules cannot yield more 'unreasonable impacts' than existing, permitted groundwater production by similarly-situated landowners.")).

[141] Appl. Ex. APP-200 (Harden Testimony) at 21:19-33; Tr. Day 1 at 82:25-83:7 (Gardenhire).

[142] *See* Appl. Ex. APP-216 at 9K00126-27 (Tables 19-23).

[143] Tr. Day 1 at 187:12 – 188:24 (Harden); Appl. Ex. APP-214 at 9K00085, Figure 4-10.

[144] Tr. Day 1 at 187:24 – 188:9 (Harden).

currently authorized annual production volumes and the proposed use of water will not interfere with Landowners' production of water from their wells.[145]

As for the effects of the locations and spacing of the wells, Applicant explained that the proposed new wells meet District spacing rules and were located near its existing wells as a "matter of convenience."[146] Mr. Gardenhire testified, "when SLR purchased the property, a lot of the existing facility—the wells were there, the existing power lines, the existing facilities and infrastructure are in that location because that's where the wells were placed years ago" and "because they're—that's where the historic use wells are and that's where infrastructure is, it made sense to us in our development plans."[147] Mr. Harden acknowledged that six of the historic wells under HUP 0330 do not meet the District's spacing rules (Noncompliant

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[145] Applicant's Closing at 18, 20 (citing GM Ex. 11 at 32-33 (hydrographs of Landowners' wells) and citing Tr. Day 2 at 249:12-251:11 (Young)). However, according to the GM, Applicant misunderstands Dr. Young's models. Post Oak Savannah Groundwater Conservation District's General Manager's Response to Applicant SLR Property I, LP's Closing Brief (June 25, 2024) at 2. Model Run B-2 includes changes in pumping under Applicant's 15K permit, to account for continued pumping through 2064 under the requested new 15K permit after the HUP terminates in 2038. GM Ex. B (Young Testimony) at 8; GM Ex. 11 at 9, 16, 23, 25-26. Therefore, Model Run B-2 does not model "currently authorized annual production volumes," in that it contemplates pumping for approximately 26 years beyond current authorizations. *See* Tr. Day 2 at 250:13-251:4 (Young). Moreover, in contradiction of Applicant's argument, the ALJs observe that the hydrograph of Mr. Limoges's No. 1 Well indicates the proposed additional 9K would correlate to reaching the well's screen interval approximately one decade earlier than under currently authorized annual production volumes.

[146] Tr. Day 1 at 100:21-101:4 (Gardenhire); Appl. Ex. APP-200 at 10-11, 13.

[147] Tr. Day 1 at 98:21-25, 101:5-7 (Gardenhire). An exception to spacing requirements exists in May 2022 Rule 4.2, which states:

> If an applicant establishes, by clear and convincing evidence, good cause why a new well should be allowed to be drilled closer than the spacing required by Rule 4.1, the issue of spacing requirements will be considered during the permitting process and may be considered in any contested case process. If the Board chooses to grant a permit to drill a well that does not meet the spacing requirements, the Board may limit the production of the well to prevent or limit injury to adjoining landowners, well owners or the aquifer. Any existing well for which a timely application for certificate of registration or historic use permit has been filed in accordance with these rules is exempt from the spacing requirements under this Section 4.

Wells); however, he testified that they could be operated at a reduced production capacity to meet the rules, and the 15K Application listed the maximum rates that he said each of the Noncompliant Wells "may not exceed."[148] Relative to the 9K permit he explained that, while different well locations could have been selected, that could increase, reduce, or maintain the impacts to Landowners; and such changes might bring other issues like increased costs or encumbrances on Applicant's property.[149]

Lastly, Applicant contends that there will be no overall impact to Landowners, because even if they experience well drawdowns that require them to deepen their wells, put in bigger pumps, or drill new wells, they may qualify for assistance from the District's Groundwater Well Assistance Program (GWAP).[150] Mr. Rubinstein explained that, under that program, "certain wells" are eligible for assistance funding to address water level decline below the pump level caused by regional groundwater production, and the "GWAP may provide technical and financial assistance to lower the pump and restore pumping capability of the impacted well, thus reducing financial strain on the affected landowner."[151] However, he also testified that eligibility for GWAP funding depends on a well's production, purpose,

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[148] Appl. Ex. APP-200 at 10-11; Appl. Ex. APP-124 (15K Application) at 15K00026 ("See Table 1-1 Section 1 for . . . the production capacity at which the well can be pumped based on the District's current spacing requirements for property line setback or spacing from an adjoining landowner's well, if such capacity is less than the approved production capacity."), 15K00033 (Table 1-1). The Noncompliant Wells identified by Mr. Harden were: C-9-15, C-9-16, C-9-18, C-9-19, C-9-30, and C-9-31.

[149] Tr. Day 1 at 116:20-117:4, 119:7-9, 120:1-6 (Harden).

[150] Appl. Ex. APP-100 (Gardenhire Testimony) at 32; Appl. Ex. APP-200 (Harden Testimony) at 21. *See also* Tr. Day 1 at 101:16-24 (Gardenhire); Appl. Ex. APP-407 (GWAP). Mr. Gardenhire also testified that Applicant is not opposed to special conditions with respect to mitigating Landowner wells as a result of any permit issuance, and he confirmed that Applicant's predecessor, Alcoa, was required to mitigate its impacts to neighboring wells under its HUP. Tr. Day 1 at 85:1-15 (Gardenhire).

[151] Appl. Ex. APP-400 (Rubinstein Testimony) at 23.

location, screening within an aquifer, and other factors—meaning that the Landowners are not guaranteed such assistance.[152] In fact, the GWAP program guidelines list multiple eligibility requirements for assistance, and at least two grounds for disqualification.[153]

The GM

Dr. Young, the GM's expert hydrogeologist and environmental scientist, verified Mr. Harden's modeling results and created slides and hydrographs explaining his own analysis of the GAM scenarios for unreasonable impacts.[154] In order to tease apart the impacts caused only by the permits under consideration, Dr. Young conducted another model run, C-1, modeling the production of a constant 15K from the wells associated with HUP 0330, producing only between 2022 and 2038;[155] and then he subtracted the drawdown values in run C-1 from those of runs B-2, B-3, and B-4.[156] Unlike Mr. Harden, Dr. Young predicted serious, unreasonable

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[152] Appl. Ex. APP-400 (Rubinstein Testimony) at 23.

[153] *See, e.g.*, Appl. Ex. APP-407 at SLR_002709. Conditions listed as disqualifying include, among others: "[I]f the evaluation indicates that a reported problem is a result of well/equipment age, owner neglect or pumping effects from the well itself" and "[w]ells which were free flowing due to artesian pressure but have ceased to flow without the assistance of a pump."

[154] *See* GM Ex. 11 at 32-34, 48-83. For Applicant's 15K Application, Dr. Young explained that he considered the impacts based on predicted drawdowns caused only by the production associated with pumping from that permit that occurs *after 2038*. GM Ex. B (Young Testimony) at 16.

[155] Tr. Day 2 at 246:21-22 (Young); GM Ex. B (Young Testimony) at 8, 16.

[156] GM Ex. B (Young Testimony) at 16-18. The B- model production scenarios represent: annual production volumes as currently authorized, but including pumping under Applicant's 15K permit *for 40 more years*, as proposed (B-2); authorized annual production volumes *plus Applicant's proposed 9K producing from the Simsboro* (B-3); and authorized annual production volumes, *plus Applicant's proposed 9K production split between the Simsboro and Hooper* (B-4). GM Ex. B (Young Testimony) at 8; GM Ex. 11 at 9, 16, 23, 25-26; Tr. Day 1 (Harden) at 174-175.

impacts. He concluded that under scenarios B-2, B-3, and B-4 unreasonable impacts will occur in "unconfined and confined regions" of the Simsboro and Hooper formations.[157] The unreasonable impacts Dr. Young predicted, from the combined 9K and 15K permits, but also from the 15K permit alone, using wells only in the Simsboro or combined with wells in the Hooper, consist of areas of drawdown-caused reduction: (1) of more than 25 percent of the saturated thickness in the unconfined Simsboro; (2) of more than 30 feet in the hydraulic head in the unconfined Simsboro; (3) of more than 40 percent of the pressure head atop of the confined Simsboro; and (4) of more than 100 feet in the hydraulic head atop of the confined Simsboro.[158] Dr. Young's simulations predict these impacts in the Simsboro over areas that extend several miles beyond Applicant's property.[159]

The most adverse effects Dr. Young predicted from the permits being sought by Applicant are in the Simsboro. From the combined 9K and 15K permits, he predicted drawdowns greater than 300 feet at Mr. Limoges's Simsboro well over the 40-year permit period, which he testified would cause the water level to drop below the bottom of the well screen and prevent it from producing any water.[160] Similarly, Dr. Young predicted the combined 15K and 9K permits would result in the water level at the City of Rockdale's Simsboro well dropping approximately 50 feet below the bottom of the well screen over the 40-year permit period, significantly limiting

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[157] *See* GM Ex. 11 at 52-56, 81.

[158] GM Ex. B (Young Testimony) at 16-19; GM Ex. 11 at 52-53, 55-56, 63-65, 72-74.

[159] GM Ex. B (Young Testimony) at 20.

[160] GM Ex. B (Young Testimony) at 11.

both production and the useful life of the well.[161] While he predicted water level declines in Calvert Bluff and Hooper wells to be less than those of the Simsboro,[162] he found them problematic, nonetheless, with some of those wells needing to have their pumps lowered at least once during the next 40 years.[163] Dr. Young testified that problems with water quality, production rates, and fouling of the well screen may occur in wells where the water level drops below the well screen.[164]

Dr. Young also made these PDL-related predictions from the modeling, if Applicant's 15K and 9K permits are fully realized:

- A PDL will be exceeded approximately 20 years earlier than 2070 (as otherwise expected).
- PDL exceedance for the Hooper in Management Area 1 occurs 25 years earlier, by 2045; and by 2070 it will be exceeded by 50%.
- PDL exceedance for the Simboro in Management Area 1 occurs 19 years earlier, in 2052.
- The District may need to begin curtailment of permitted production in the Hooper and/or the Simboro 10 to 20 years earlier than anticipated.[165]

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[161] GM Ex. B at 11-12; GM Ex. 11 at 33-34.

[162] Dr. Young testified, for model runs B-2, B-3, and B-4, "Unreasonable impacts for the unconfined Calvert Bluff Aquifer occur outside of [Applicant's] property only northwest of [Applicant's] property . . . . Unreasonable impacts for the confined aquifer do not occur anywhere outside of [Applicant's] property;" and "there are no areas where unreasonable impacts are predicted to occur in the Hooper." GM Ex. B at 17-19.

[163] GM Ex. B at 12; GM Ex. 11 at 44, 57-62, 67-68, 71, 75-80.

[164] GM Ex. B at 12.

[165] GM Ex. B (Young Testimony) at 10, 21.

Addressing impacts from well spacing, Dr. Young testified that multiple wells pumping in the same area create a drawdown effect that increases the impact on neighboring wells.[166] He observed that Applicant could have adjusted its well design to reduce potential impacts outside its property, including by choosing well locations farther from existing wells such as Landowners', by setting the wells back further than the District rules' minimal spacing, by placing wells in Lee County, or by using a greater number of wells spread out across Applicant's property.[167]

Dr. Young critiqued Mr. Harden's hydrologic impact analysis for failing to address the significant impacts of production associated with the proposed permits.[168] He noted that Mr. Harden did not quantify, through maps or tabulations, the change in predicted drawdowns if the permits were granted; did not quantify the impacts of the 26 years of additional pumping under the 15K permit; and did not discuss the implications associated with the change of use from industrial on-site to industrial, municipal, manufacturing, and commercial across Milam and Burleson Counties.[169] Dr. Young observed that "the change in both use type and area of use significantly enhances [Applicant's] opportunity to market and sell water over the next 40 years and thereby increase the likelihood that aquifer impacts from permitted production would lead to aquifer conditions requiring curtailment in the Simsboro."[170]

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[166] Tr. Day 2 at 219:7-222:10 (Young).

[167] GM Ex. B (Young Testimony) at 19-20.

[168] GM Ex. B (Young Testimony) at 24.

[169] GM Ex. B (Young Testimony) at 24.

[170] GM Ex. B (Young Testimony) at 24.

Regarding the possibility of the District assisting Landowners if their wells were impacted by Applicant's permits, the GM agreed that the Landowners may each qualify for the GWAP; and that the program could lower a well's pump, redrill a well, drill a new well, or re-complete a well.[171] However, he also testified that the GWAP program is a line item portion of the District's annual budget, that drilling a well can cost $50,000, and that the budget would not cover all three Landowners' wells.[172]

Landowners

Mr. Copeland, Landowners' expert, echoing Dr. Young, deemed the impacts of Applicants' proposed pumping on Landowners' wells to be unreasonable, in contrast to the artesian drawdown modeled in GAM run A-1, which includes Applicant's current permit utilization.[173] He particularly noted the following GAM run B-3 predictions: (1) a 400-foot water level decline and 100 percent reduction in pressure above the Simsboro at Mr. Limoges's well; and (2) a 60-foot groundwater level decline in the Calvert Bluff that will cause Mr. Crump's wells to go dry and reduce their saturated thickness by 100 percent.[174] He noted that the 400-foot

[171] Tr. Day 2 at 128:8-129:11 (Westbrook).

[172] Tr. Day 2 at 131:3-132:14 (Westbrook).

[173] Landowners Ex. D (Copeland Testimony) at 9-10; *see* GM Ex. 11 at 32-34.

[174] Landowners Ex. D (Copeland Testimony) at 9-10. Mr. Copeland opined that any 100-foot or greater water level reduction and 40 percent reduction in pressure, or reduction over 30-feet and greater than 25 percent of the saturated thickness of an aquifer, outside the permittee's own property would be unreasonable. Landowners Ex. D (Copeland Testimony) at 9-10.

decline of the Simsboro would "dramatically" exceed the Simsboro Area 1 PDL of 91 feet of average drawdown between 2010 to 2070.[175]

With properties and permitted and exempt wells close to Applicant's current and proposed well fields, Landowners also argue that Applicant failed to establish that the Applications will minimize as far as practicable the interference between wells, instead maximizing well interference by siting its wells close to their property lines.[176] Landowners argue that it was improper for Applicant to concentrate all of its wells near the property line and as close to Landowners' pre-existing permitted well field as the District's spacing rules allow. Highlighting Dr. Young's testimony regarding well spacing's effects on drawdown of nearby wells, Landowners emphasize that compliance with the District's spacing rules is not enough to lessen well interference. Mr. Limoges and Mr. Howell, although not hydrology experts, both testified that the cumulative Applicant wells within two miles of their properties will create overlapping cones of depression, resulting in a snowballing drop of the water level in their wells, which will cause their existing pumps to no longer function within five years and their wells to go dry.[177] Mr. Limoges noted that Vista Ridge's Calvert Bluff well has already dropped twice as much as the GAM predicts.[178]

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[175] Landowners Ex. D (Copeland Testimony) at 8.

[176] Landowners Ex. A (Limoges Testimony) at 2-4; Landowners Ex. B (Crump Testimony) at 2-3; Landowners Ex. C (Howell Testimony) at 2-3; Landowners' Closing at 22. Landowners emphasize the District's May 2022 Rule 7.6(3) consideration for granting permits: "the impact on other landowners and well owners from a grant or denial of the permit, or the terms prescribed by the permit, *including whether the well will interfere with the production of water from exempt, existing or previously permitted wells* and surface water resources" (emphasis added).

[177] Landowners Ex. A (Limoges Testimony) at 3-4; Landowners Ex. C (Howell Testimony) at 3-4.

[178] Landowners Ex. A (Limoges Testimony) at 4.

Mr. Copeland testified that, in addition to the six Noncompliant Wells already noted by Mr. Harden as requiring reduced pumping rates to comply with the District's well spacing rules, ten more Noncompliant Wells (which he did not identify) must also be adjusted to satisfy May 2022 Rule 4.1—nine based on the distance to other Simsboro wells and one based on the distance to the property boundary.[179]

Landowners additionally contend that lowering the water table near the ground surface is an unreasonable impact on surface water.[180] Each of the Landowners testified about their concerns that acres of oak trees might be robbed of groundwater by lowering the water table near the ground surface, the so-called "shallow flow" layer or "upper water-bearing unit," represented in the GAM as Layer 2.[181] According to Dr. Young's slides and the testimony of Messrs. Gardenhire and Harden, the GAM results for scenarios B-2 and B-3 demonstrate a drawdown of up to 50 feet in Layer 2 in the area of Landowners' property and wells.[182] Mr. Crump

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[179] Landowners Ex. D (Copeland Testimony) at 11. May 2022 Rule 4.1.1 states " . . . a new well may not be drilled within 50 feet of an existing well, or the property line of any abutting land that is not owned or controlled by the owner of the new well." May 2022 Rule 4.1.2 states:

> In the Simsboro formation the spacing of a new well shall be as provided in (a) or (b), at the election of the owner exercised when the application for a new well permit is filed:
>
> (a) the spacing of a new well from any well in that formation shall be a distance of not less than one foot per one gallon per minute of production capacity and not less than one-half foot per gallon per minute from the property line of each adjoining landowner.

[180] Landowners' Closing at 26.

[181] Landowners Ex. A (Limoges Testimony) at 5; Landowners Ex. B (Crump Testimony) at 3-4. Mr. Gabrielse confirmed the presence of large oak trees on Mr. Limoges's property. Tr. Day 1 at 128-29 (Harden), 203-04.

[182] *See* GM Ex. 11 at 16; Tr. Day 1 at 55:9-57:14 (Gardenhire), 129 (Harden). Dr. Young clarified that those results are cumulative of all the pumping currently permitted. Tr. Day 1 at 197:7-198:1 (Young). Mr. Gardenhire pointed out that there could be a pressure decline in a well without declining the aquifer. Tr. Day 1 at 57:23-58:4 (Gardenhire).

testified that this lowering of the water table on his property will impact his ability to use his wells, threaten his ability to water his livestock, and harm or kill his trees.[183]

Landowners responded to Applicant's reliance on the District's mitigation program by arguing that it should not factor into the permitting inquiry because it is an after-the-fact possibility unrelated to the permit.[184]

Applicant's Responses

In response to Landowners' concerns about their trees, Applicant's arborist, Mr. Gabrielse explained that published data establishes that "90 percent of tree roots, especially for hardwood species, are in the first foot and a half or so of the soil;" and he testified that his own observations on Landowners' properties were consistent with that.[185] He added that "those trees are pretty much finding a hard stop at a foot, foot and a half, typically, and . . . don't need to go any deeper because of the availability of both the nutrients and water from a surface water standpoint."[186] Applicant contends that no actual surface water effects, unreasonable or otherwise,

[183] Landowners Ex. B (Crump Testimony) at 2-4.

[184] Landowners' Closing at 25.

[185] Tr. Day 1 at 207:20-25 (Gabrielse); Appl. Ex. APP-300 (Gabrielse Testimony) at 9:10-13:12; Appl. Ex. APP-306 (United States Natural Resources Conservation Service Soil Descriptions); Appl. Ex. APP-307 (Munsell Color Book at Howell); Appl. Ex. APP-308 (Landowners' Properties Map with Soil Sample Locations); Appl. Ex. APP-309 (Landowners' Properties Soil Table).

[186] Tr. Day 1 at 208:20-25 (Gabrielse).

were alleged and its aquifer impact studies demonstrate its proposed uses would not unreasonably affect surface water resources.[187]

As for the effects of well spacing, Mr. Gardenhire admitted that some of the proposed wells are in close proximity to Landowners' and that Applicant placed the wells without considering impacts to Landowners, merely complying with District spacing requirements.[188] He also agreed with Landowners' counsel that Applicant could have considered other locations on its property for the 9K permit wells. Mr. Harden testified that, generally, a well causes more interference decline and pressure the closer it is to another well;[189] and that changes in drawdown on the wells could have been engineered to minimize the impact on Landowners.[190]

b) ALJs' Analysis

An unreasonableness determination is necessarily fact-specific. As the party seeking a permit, Applicant has the burden of proof. The Landowners and GM argue that Applicant has failed to present sufficient evidence on the effects its pumping would have on existing groundwater resources and permit holders, and that what evidence exists shows unreasonable effects. The ALJs agree that Applicant's direct case is light on detail about others' wells.

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[187] Applicant Closing at 17 (footnote 93), 18. *See* Appl. Ex. APP-215 (15K Application – Oct. 14, 2022 – Aquifer Impact Study) at 15K00505-06; Appl. Ex. APP-216 (9K Application – Oct. 14, 2022 – Aquifer Impact Study) at 9K00132.

[188] Tr. Day 1 at 48:8-9, 51:15-52:8 (Gardenhire); *see* Appl. Exs. APP-202-APP-208 (illustrations of historic and proposed well locations).

[189] Tr. Day 1 at 141:18-20 (Harden).

[190] Tr. Day 1 at 116:20-25, 120:1-4 (Harden).

Mr. Harden construed the modeling to predict that Applicant's proposed 9K of additional production will only result in a 10-foot decline in the water table in three small areas of the Carrizo-Wilcox outcrop after 40 years of pumping. However, the ALJs agree with Dr. Young's criticism of Mr. Harden's approach. Mr. Harden's GAM comparison, of run *B-2* to runs B-3 and B-4, is inapt; Dr. Young's comparison of run *C-1* to runs B-3 and B-4 more accurately distinguishes the impact of Applicant's proposed pumping. Dr. Young's analysis stripped out the cumulative effects of other District pumping, to determine the drawdowns attributable to Applicant's proposed pumping alone.

The ALJs conclude that the analysis conducted by Dr. Young is sufficient to allow the District to determine whether Applicant's proposed uses would unreasonably affect existing groundwater resources or permit holders. Dr. Young predicted the following unreasonable impacts of pumping from the combined 9K and 15K permits, but also from the 15K permit alone, over areas miles beyond Applicant's property:

- drawdown-caused reductions of **more than 25 percent of the saturated thickness** and **more than 30 feet** in the unconfined Simsboro; and
- drawdown-caused reductions of **more than 40 percent of the pressure head** and of **more than 100 feet in the hydraulic head** atop of the confined Simsboro.

Mr. Copeland similarly predicted the following impacts, which he found unreasonable, from Applicant's 9K and 15K permits: (1) a **400-foot water level decline and 100 percent reduction in pressure** at Mr. Limoges's Simsboro well; and (2) a **60-foot groundwater level decline in the Calvert Bluff** that will cause

Mr. Crump's wells to go dry and reduce their saturated thickness by 100 percent.

Other unreasonable impacts of pumping from the combined permits that were predicted by Dr. Young include:

- the **water level in Mr. Limoges's No. 1 Well reaching the well screen interval one decade earlier** than under currently authorized annual production volumes;
- **drawdowns greater than 300 feet** at Mr. Limoges's Simsboro well over the 40-year permit period (causing the water level to drop below the bottom of the well screen and the well to cease producing);
- the water level at the City of Rockdale's Simsboro well **dropping 50 feet below the bottom of the well screen** over the 40-year permit period;
- **water level declines** in Calvert Bluff and Hooper wells, with some of them needing their pumps lowered at least once in the next 40 years;
- **PDL exceedance** for Hooper Management Area 1 by 2045, **25 years earlier** than otherwise expected, **and exceedance by 50%** by 2070;
- **PDL exceedance** for Simboro Management Area 1 in 2052, **19 years earlier** than otherwise expected (Mr. Copeland also made this finding);
- the District may need to begin **curtailment** of permitted production in the Hooper and/or the Simboro **10 to 20 years earlier than anticipated.**

As noted above, these impacts predicted by the GM's and Landowners' experts all pertain to the 15K Application, either alone or in combination with the 9K Application. The only evidence of impacts from the isolated 9K Application was Mr. Harden's unrebutted prediction of a 10-foot decline in the water table after 40 years of pumping, in three small areas of the Carrizo-Wilcox outside of Landowners' properties.

The ALJs could find only four examples of previous PFDs—and none in this District—that considered whether effects or impacts would be unreasonable.[191] While not binding, they provide guidance. In none of those examples did the ALJs conclude that effects would be unreasonable. However, the predicted impacts in those cases were much smaller in comparison to the effects listed above; and, in several of the sample cases, the ALJs noted the groundwater resource and other groundwater wells in the area were protected by special conditions or the district's ability to limit authorized pumping.

Based on all the credible evidence noted above, with respect to Code section 36.113(d)(2) and May 2022 Rule 7.6(3), the ALJs find that pumping as proposed in the 15K Application would unreasonably affect existing groundwater resources and permit holders, and would interfere with the production of water from Landowners' exempt, existing, and previously permitted wells. The parties'

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[191] *See Application of Lower Colorado River Authority for Operating and Transport Permits for Eight Wells in Bastrop County, Texas*, SOAH Docket No. 952-19-0705 (March 31, 2020)(finding reasonable these predictions, after analysis of 1,800 wells: drawdowns in the Simsboro and Calvert Bluff of 2-14 feet within years and of 15-30 feet within decades; the water level for all protestants' wells remaining above the pump elevation; less than one foot of drawdown in a specific protestant's two wells; and 27% and 29% total drawdown over five decades in two specific protestant wells); *Applications of Black Mountain Sand, LLC for Water Well No. 2 and Water Well No. 3 in Dimmit County, Texas*, SOAH Docket No. 962-19-1978 (December 9, 2019)(finding no unreasonable effects where no impact on production ability of protestants' wells was predicted, with predicted well drawdowns of 3.3-9.1% over 20 years); *Applications of City of Bastrop for an Operating Permit for Well No. 1 in Bastrop County, Texas*, SOAH Docket No. 952-15-3851 (July 26, 2016)(finding predictions of 13-20 foot drawdown within 2,500 feet of the well after 45 years, and 40-foot reduction in artesian pressure after 50 years, in an area of 500-foot artesian pressure "minimal," not unreasonable; and noting that applicant agreed to pay to mitigate impacts on wells within 5,000 feet and the district could reduce authorized production in the event of negative impacts); *Applications of End OP, L.P. for Well Registration, Operating Permits, and Transfer Permits*, SOAH Docket No. 952-13-5210 (April 10, 2014)(finding the requested authorization would not unreasonably affect existing wells or the groundwater resource *if it included the special conditions agreed to by protestant*, including reducing the total requested acre feet, specially selecting well locations to reduce impacts, limiting permit term to five-years, giving district ability to reduce authorized pumping amounts, and creating a mitigation fund financed by applicant; the evidence predicted drawdowns of 100-500 feet in the Simsboro near protestant's wells, over 45 years, causing "significant impact on the ability of [protestant's] wells to continue to produce at the volume" and requiring pump lowering or re-drilling at an estimated $15,000,000). The ALJs take judicial notice of these PFDs.

concerns about the accuracy of the GAM model underscore that, if anything, these impacts may be *underestimated* due to the uncertainty regarding the transmissivity or hydrologic communication between the Simsboro and Calvert Bluff that was acknowledged by all three hydrogeology experts; and that is especially so with regard to Landowners, given their wells' specifically challenging locations within the aquifer. The ALJs do not find that pumping as proposed in the 9K Application (standing alone) would result in such unreasonable effects.

Considering possible well interference from the 9K Application, as required by May 2022 Rule 7.6(3), Applicant's election to place the wells associated with their proposed 9K in close proximity to Landowners' wells increases the likelihood of such interference. Both Dr. Young and Mr. Harden agreed that multiple wells pumping in the same area create a drawdown effect that increases the impact on neighboring wells; and the closer the wells, the more interference. While Applicant cannot move the historic wells involved in the 15K Application, Applicant could have adjusted the layout of new wells associated with the 9K Application, to reduce potential impacts on Landowners; instead, it chose not to, for convenience. Nevertheless, the record evidence relating to well interference with Landowners' wells is nebulous as to how much drawdown might occur and over what time period. The ALJs decline to find that pumping as proposed in the 9K Application would interfere with the production of water from Landowners' exempt, existing, or previously permitted wells.

Mr. Harden proposed that the six Noncompliant Wells must be operated at a reduced production capacity to fit the well spacing exception in May 2022

Rule 4.1.2, and the ALJs find such reduced pumping rates to be necessary for the 15K permit to comply with the District's spacing rules. Given the lack of evidence contravening Mr. Copeland's testimony that ten additional Noncompliant Wells must be similarly adjusted, the ALJs find the same is probably true for those wells; however, Mr. Copeland failed to specifically identify them.

In the absence of evidence supporting the premise, the ALJs decline to find that the water table near the ground surface is surface water. No other impacts to surface water resources were alleged. The ALJs find that Applicant's proposed pumping, standing alone, will not unreasonably affect surface water resources.

As for Applicant's proposition that the District's GWAP will remedy any impacts from its permit applications, given the GWAP's qualification requirements and specific disqualification grounds, and the unlikelihood of its budget covering all Landowners' possible mitigation needs, Landowners and others cannot be certain to be made whole by the GWAP. The ALJs decline to find that the GWAP negates the impacts of Applicant's proposed pumping.

C. MANAGEMENT OF TOTAL GROUNDWATER PRODUCTION ON A LONG-TERM BASIS TO ACHIEVE DFCS

The District adopted its GMP[192] as was required by Code section 36.1071. In accordance with the Code, the GMP includes a DFC for each aquifer formation within the District.[193] Prior to issuing a permit, the District is required to consider whether the proposed use of water is consistent with its approved GMP.[194] May 2022 Rule 7.15.3 elaborates that "the District must find that there is sufficient groundwater in the aquifer to support the issuance of the permit, in accordance with the [GMP]." Additionally, the Code requires that:

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

[192] Appl. Ex. APP-405 (District GMP).

[193] Code §§ 36.001(30), .1071(a)(8), .108(d).

[194] Code § 36.113(d)(4); May 2022 Rule 7.6(1).

(5) yearly precipitation and production patterns.[195]

The District is a part of Groundwater Management Area (GMA) 12,[196] which jointly adopted DFCs for the aquifers in the District in 2021.[197] Relevant to these applications, the DFCs included average drawdowns in the District through 2070 of: 278 feet for the Simsboro Formation, 178 feet for the Hooper Formation, and 156 feet for the Calvert Bluff formation.[198] The DFC is used to determine the GMA's MAG. The MAG is "the amount of water that the [TWDB's] executive administrator determines may be produced on an average annual basis to achieve a desired future condition."[199]

1. Parties' Evidence and Arguments

The GM and Landowners argue that Applicant failed to provide evidence that the Applications will not interfere with the District's achievement of the DFCs for the impacted formations. Further, the GM witness performed modeling runs that the GM and Landowners purport show that the Applications will cause exceedances of the DFCs in the Simsboro and Hooper Formations prior to 2069.[200] The modeling included five different runs including:

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[195] Code § 36.1132(b).

[196] Appl. Ex. APP-402 (GMA 12 Map).

[197] Appl. Ex. APP-403 (GMA DFCs).

[198] Appl. Ex. APP-403.

[199] Code § 36.001(25).

[200] GM Ex. 11 at 43.

- Run A-1: this is the modified GMA 12 DFC background run which includes the 15K from HUP 0330 and 25,000 af/yr from OP 0148. This run assumes applicant will use 23,000 af/yr after 2030 from these two permits.

- Run B-2: this run also includes the combined 40,000 af/yr from Applicant's two permits but assumes that with the new 15K permit, Applicant will begin using all of its authorized 40,000 af/yr of water by 2030 and after 2038.

- Run B-3: this run includes the additional 9K permit the Application seeks but only assumes the pumping will come from the Simsboro Formation.

- Run B-4: this run also includes the additional 9K permit the Application seeks but assumes the pumping will come half each from the Simsboro and Hooper Formations.

- Run C-1: this run shows only the historical pumping of HUP 0330 and assumes full use of it beginning in 2022, then shows no usage after 2038.[201]

Applicant counters that the DFCs are a policy decision as to how the members of the GMA want to manage the aquifer.[202] Applicant contends the MAG and DFC are not hard caps for permitting purposes.[203] The DFCs can and do change based on the preferences of the GMA and the make-up of its members.[204] Applicant says the modeling shows that the DFCs would potentially be exceeded even without the

[201] GM Ex. 11 at 8.

[202] Applicant's Closing at 20-21; Appl. Ex. APP-400 (Rubinstein Testimony).

[203] Applicant's Closing at 20; Tr. Day 1 (Rubinstein Cross) at 242.

[204] Applicant's Closing at 21.

granting of its additional requested 9K permit.[205] Applicant also argues that its proposed use cannot be considered the cause of any DFC exceedance, when the cause is the cumulative pumping of all users.[206] Instead, the Applications should be evaluated relative to the DFCs without considering the cumulative burden caused by pumping within and beyond the District. Applicant states there is plenty of water in storage in the aquifer to support its permits, calculating its permits would produce only a fraction of the total estimated billion acre-feet of storage of the Carrizo-Wilcox over the life of the permits, specifically that granting the 15K permit would only use .039 percent of the total aquifer storage over its life and granting the 9K permit would use even less.[207] Applicant argues that because the ownership of groundwater is a protected property right, the District cannot prioritize one landowner over another in its permitting actions simply because one obtained a permit first.

2. ALJs' Analysis

The ALJs find the proposed use of water is consistent with the District's approved GMP and there is currently sufficient groundwater in the aquifer to support the issuance of the permits."[208] The evidence shows that the applications are seeking only a small fraction of the entire storage of the Carrizo-Wilcox.[209]

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[205] Applicant's Closing at 23; Tr. Day 2 (Young Cross) at 256.

[206] Applicant's Closing at 24.

[207] Applicant's Closing at 22; Appl. Ex. APP-405 (2017 GMP); GM Ex. 3 (2023 GMP); GM Ex. B (Young Testimony) at 23; Tr. Day 1 (Harden Redirect) at 19.

[208] Code § 36.113(d)(4); May 2022 Rules 7.6 and 7.15.3.

[209] Appl. Ex. APP-405 (2017 GMP); GM Ex. 3 (2023 GMP); GM Ex. B (Young Testimony) at 23; Tr. Day 1 at 19 (Harden Redirect).

Further, the evidence does not indicate granting of the permits will cause immediate or even impending exceedances of the DFCs. Instead, the modeling conducted by the District's expert, Mr. Young, predicts some "risk of exceedances" of the DFCs in the Simsboro and Hooper Formations by 2064 if the 15K permit is granted, and by 2061 and 2058 respectively in those formations if the 9K permit is also granted.[210] These predicted risks of exceedance are sufficiently far into the future that the District can monitor the actual predicted risks and manage any potential future exceedances either by making a policy decision to adjust the DFCs in the GMA 12 stakeholder process to balance the increased needs of the District or by curtailing the use of its 2058-2070 permit holders and producers to forcibly meet the DFCs. Indeed, the District's own witness, Mr. Young, stated:

> [The District] grants permits on the basis that everyone has the same right to a maximum production rate of 2 acre-ft/acre. The ability of the permit to produce that amount is dependent on numerous factors. Some of these factors are beyond the control of the permittee such as how regional pumping and regional drawdown establish whether curtailment is needed to prevent the exceedances of DFCs or PDLs. Some of these factors can be controlled by the permittee such as the wellfield design, the well design, and the pumping rates and schedule. The predictive modeling provides the permittee, [the District], GMA 12, and the public a shared assessment of potential problems that could occur under District Rules as they relate to DFCs, PDLs, and/or unreasonable impacts. The model predictions inform the applicant of the potential that predicted modeled impacts exceed a District management goal, such as a DFC, PDL, or cause unreasonable impacts, at some point in the future. Therefore, the permit may be amended and/or withdrawals in accordance with the permit may be reduced, so the management goals of the District are not exceeded or violated

[210] GM Ex. 11 at 8; GM Ex. B (Young Testimony) at 10.

> and/or unreasonable impacts do not occur. The predictive information also provides value information to [the District] regarding whether their data sets and tools are sufficient to support prudent decision-making and whether to issue the permit with special conditions such as monitoring requirements, operational constraints, and/or a curtailment plan. The modeling augments actual measured water levels in the monitoring program. Any future decision to curtail will be informed by actual water level measurements.[211]

Notably, Mr. Young did not opine that the Applications should be denied based on his modeled predicted risk of exceedances of the DFCs. Additionally, Mr. Westbrook, who is the General Manager of the District, testified that:

> . . . it must be recognized that as demands on the groundwater resources of the District increase, and as the laws and recent court cases have made clear that *all landowners must be treated equitably at any given time*. And, as groundwater is not afforded the "first in time, first in right" prioritization as State-owned surface water, it is imperative that management strategies allow for flexibility of allocation of resources in order to treat all users equitably while accomplishing management goals such as DFCs and PDLs.[212]

Therefore, the ALJs find Applicant showed the proposed use of water is consistent with the District's approved GMP and there is currently sufficient groundwater in the aquifer to support the issuance of the permits.

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[211] GM Ex. B (Young Testimony) at 13-14.

[212] Westbrook Testimony at 12.

D. RECOMMENDATION

Code Chapter 36 and the May 2022 Rules govern what the District should consider in deciding whether or not to issue the permits sought by Applicant.[213] Regarding these considerations, the ALJs have found that, if issued, the 15K permit would, either separately or in combination with the 9K permit, unreasonably affect nearby landowners and well owners. Applicant's evidence was unrebutted that the 9K permit, standing alone, would not cause such effects. Additionally, the ALJs found that the Applicant proved a need for 21,146 af/yr of the total 24,000 af/yr sought in the Applications.

1. 9K Application

Standing alone, the 9K Application raises no issues that warrant denial, because the Application does not cause any unreasonable impacts and Applicant has sufficient need for it if the 15K permit is not issued. Therefore, if the 15K Application is denied, the ALJs recommend approval of the 9K permit.[214] However, if the 15K permit is granted (as will be discussed below) then the issue of need would come into play. Applicant proved by a preponderance of evidence that it needs 6,146 of the 9K sought. This factor is a consideration, but the District's rules mandate neither denial nor issuance based on this factor alone. Therefore, if the 15K Application is granted, the ALJs recommend the 9K permit be approved for 6,146 af/yr without condition. The District could deny the application for the remaining 2,854 af/yr; however,

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[213] May 2022 Rule 7.6.

[214] The evidence showed that Applicant is unlikely to fully utilize existing HUP 0330 because it authorizes only industrial use.

Applicant showed some evidence that it *may* need it in the AMLC and for serving off-property growth in the future. Therefore, the ALJs recommend a special condition allowing Applicant to produce the remaining 2,854 af/yr only if it can provide the District additional documentation of tenant agreements for water use in the AMLC, contracts or agreements to provide water off property, or some other demonstration of substantial need for the additional water.[215] As noted in the discussion of beneficial use above, and for the reasons stated therein, the ALJs do not recommend expanding this requirement to provide contracts to any of the other portion of the water sought.

2. 15K Application

The question remains as to whether to grant the 15K Application because, if granted, it would cause the aforementioned unreasonable impacts. Again, neither the Code nor the District's rules mandate denial or issuance based solely on unreasonable impacts—it is merely a factor to consider. The ALJs do not recommend outright denial of the Application on the basis of this factor alone, because the unreasonable effects are projected decades into the future and can be mitigated with some combination of District monitoring and management, or special conditions. That gets to the essence of this contested case: who should bear the cost of Applicant exercising its rights to produce water.

[215] The District's authority to include special conditions is discussed below.

a) Parties' Evidence and Arguments

Relevant to the unreasonable impacts, the GM recommended the following conditions if both permits are issued: (1) requiring Applicant to install and use equipment to monitor for unreasonable impacts on all wells within 60 days of permit issuance; and (2) aggregating production under the 9K and 15K permits, which would assume the mitigation-requirement special condition in HUP 0148, but with the impact area extended out from three quarters of a mile to one mile in distance.[216] The GM relies on Code sections 36.113 and .1131, and May 2022 Rule 7.1.2 for

[216] GM's Closing at 18-20; Tr. Day 2 at 197:20-198:7 (Westbrook Redirect). Conditions (1) and (3), above, were first recommended by Dr. Young. GM Ex. B (Young Testimony) at 20, 22-23. Dr. Young explained condition (3) further, stating:

> One of the requirements for a well to be eligible for mitigation by SLR [under HUP 0148] is for the well to be within three-quarters of one mile of a Permittee operated well. Given the large number of additional wells proposed to be installed and additional groundwater to be pumped as part of the 15K and 9K permits, I believe [the District] should request that SLR modify the mitigation agreement to expand the coverage beyond a distance of three-quarters of a mile and to include the list of Permittee operated wells to include the production wells associated with the 15K and the 9K permits, if these two permits are granted. GM Ex. B (Young Testimony) at 23.

Dr. Young also testified that Applicant's well layout could be adjusted with the goal of reducing the impact on neighboring wells. GM Ex. B (Young Testimony) at 19-20; Tr. Day 2 at 219:7-222:10 (Young).

authority to include terms and conditions,[217] as well as *Guitar* and *Gatehouse*.[218] Mr. Westbrook cited several existing District permits as containing special conditions, including HUP 0330 ("special allowances"), HUP 0148 ("special requirements"), Vista Ridge's permits ("special conditions were placed . . . as part of a recent amendment"), and again Vista Ridge ("special reporting requirements . . . following the water discharge issue").[219] And he testified to some unique and specific aspects of these Applications that distinguish them from previous permits that lacked special conditions.[220]

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[217] Code section 36.113 reads, in relevant part:

> (a) [. . .] A district may require that a change in the withdrawal or use of groundwater during the term of a permit issued by the district may not be made unless the district has first approved a permit amendment authorizing the change.
>
> [. . .]
>
> (f) [. . .] Permits, and permit amendments . . . may be issued subject to . . . terms and provisions with reference to the drilling, equipping, completion, alteration, or operation of, or production of groundwater from, wells or pumps that may be necessary to prevent waste and achieve water conservation, minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure, lessen interference between wells . . .

Per Code section 36.1131(8) and (11), a permit may include "conditions and restrictions, if any, placed on the rate and amount of withdrawal" and "other terms and conditions as provided by Section 36.113." May 2022 Rule 7.1.2 reads: "A permit confers only the right to use the permit under the provisions of these rules and according to its terms. All permits are subject to the applicable terms, provisions and conditions of these rules, and the permit terms may be modified or amended pursuant to the provisions of these rules."

[218] *Gatehouse Water LLC v. Lost Pines Groundwater Conservation District*, No. 1:22-CV-132-LY, 2023 WL 1424000, *8 (W.D. Tex., Jan. 31, 2023), report and recommendation adopted by 2023 WL 2923142 (W.D. Tex., Apr. 12, 2023)(magistrate judge found Lost Pines Groundwater Conservation District permits' special conditions, requiring permittee to prove beneficial use by providing contracts with end-users of the water for residential use, to be valid, holding the district had authority to include terms and conditions reasonably related to the "conservation, preservation, protection, recharging, and prevention of waste of groundwater").

[219] GM Ex. A (Westbrook Testimony) at 8. The ALJs note that Vista Ridge's permit in evidence does not explicitly list "special conditions;" however, it does note dates on which it was amended, when allowances or requirements could have been added. *See* Appl. Ex. APP-505.

[220] Mr. Westbrook testified:

> Q: Is there a reason that there might be special conditions that you would—that you're recommending for SLR, but not necessarily in the earlier applications of Blue Ridge—Vista—those other parts, other applications for the District? Is there any difference here?

Landowners agree with the GM that, if these permits are issued, they should include special conditions; however, Landowners did not identify their preferred conditions.[221] The only condition they specifically mentioned was Mr. Copeland's proposition that, under the 15K Application, sixteen Noncompliant Wells must be operated at a reduced production capacity to meet the District's well spacing rules (May 2022 Rules Section 4), and with the goal of counteracting potential well interference from the drawdown effect of too many wells spaced closely.

Applicant agrees that it is currently within the District's authority to enforce the mitigation condition under HUP 0148 on Applicant.[222] Applicant additionally agrees that, if the proposed 15K permit is issued, volumes produced under the new operating permit cannot subsequently be produced under HUP 0330;[223] however, Applicant disagrees with the addition of any other terms and conditions and requests

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> A: One, when the Vista Ridge applications were considered, we really didn't have a very good [GAM] on the Carrizo. What we saw as predicted and projected impacts has proved to be much different, . . . so we did not put those within the four corners or on the face of the permit at that time. Also, you had additional production that we had not been able to account for because we didn't know about it yet. . . . Also, those particular, the Blue Water and the Vista Ridge, when it comes to the Simsboro, they're so very deep that there are very few other wells in that vicinity of those well fields in the Simsboro aquifer. They don't have wells in close proximity that landowners have. It's very limited. And the reason for that is these are down dipping aquifers. What is 800 feet deep in the SLR property is 2,200 to 2,600 feet deep at the Vista Ridge well field. And so a landowner in that area has three water scenes [sic] that he can go through to get fresh water without having to go that deep. And so most of those wells in that general area are not affected by the Simsboro production. . . . And then the last factor would be that, as mentioned a while ago, the SLR property is certainly a large aggregate of land and so a lot of production in a small area does have a larger impact in the general vicinity. And so that's—it more consolidates the production in a shallower part of the aquifer and that caused different impacts. Tr. Day 2 199:4-200:17 (Westbrook).

[221] Landowners' Closing at 4; *see also* Landowners' Closing at 33-35.

[222] Applicant's Reply at 26, citing *Gatehouse*, 2023 WL 1424000, at *8. Applicant's representative, Mr. Gardenhire, and its groundwater policy expert, Mr. Rubinstein, both acknowledged that special conditions are sometimes appropriate. Tr. Day 1 at 83:21-85:10 (Gardenhire), 230:24-232:8 (Rubinstein).

[223] Appl. Ex. APP-124 (15K Application) at 15K00015; Applicant Reply at 30; *see* Applicant's Closing at 35, 35 n. 197.

the permits issue without other special conditions.[224] Applicant's legal position is that the 15K Application is not for an amendment, but a new permit;[225] that conditions in new permits may only be applied to uncontested permits, with Applicant's agreement, or if they meet Code section 36.113(e);[226] and that the GM's proposed conditions would be discriminatorily *ad hoc* because the principle of applying equal, non-discriminatory treatment to all citizens of the District requires that permit provisions be the same. Applicant is further concerned that a requirement for specific end user data to produce inappropriately gives the District power over decisions about development on Applicant's property and would result in unpredictable "time delay" for such approvals.[227] Regarding a mitigation condition, Applicant argues that it is in HUP 0148 due to historical requirements under surface mining laws that led to Alcoa's agreed condition and that no such condition is included in Vista Ridge's or Blue Water's permits in evidence, so it would be inappropriate.[228] Further, Applicant finds a specific mitigation condition unnecessary, given the existence of the District's GWAP; and they point out that

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[224] Applicant's Closing at 30. Yet it was Applicant's expert, Mr. Harden, who proposed that the Noncompliant Wells be pumped at a reduced rate under the 15K Application in order to comply with the District's well spacing rules.

[225] Applicant's Reply at 28-29.

[226] Applicant's Closing at 28; Applicant Reply at 26, 28. Code section 36.113(e) states:

> The district may impose more restrictive permit conditions on new permit applications and permit amendment applications to increase use by historic users if the limitations:
>
> 1) apply to all subsequent new permit applications and permit amendment applications to increase use by historic users, regardless of type or location of use;
>
> 2) bear a reasonable relationship to the existing district management plan; and
>
> 3) are reasonably necessary to protect existing use.

[227] Applicant's Closing Reply at 30-31.

[228] *See* Appl. Exs. 505, 507.

the GWAP is sufficiently funded to mitigate any impacts to Landowners' and other neighbors' wells.[229]

b) ALJs' Analysis

The ALJs find that the District has authority under Code sections 36.113 and .1131, and May 2022 Rule 7.1.2 to include terms and conditions in a permit. The ALJs are not persuaded by Applicant's arguments regarding *ad hoc* or discriminatory treatment, because the record does not show that any other District permit was projected to cause unreasonable impacts or that need was at issue in any other application. However, the question remains, should the District impose conditions on this permit? The special conditions proposed to address unreasonable impacts relate to well monitoring, mitigation, and pumping rates. They will be addressed separately.

Regarding well monitoring, the ALJs agree with the GM's proposal for a special condition requiring Applicant to install and use equipment to monitor for unreasonable impacts on all wells within 60 days of permit issuance. It was unrebutted by Applicant that if the 15K permit is issued, alone or in combination with the 9K permit, unreasonable impacts will occur to nearby wells. Therefore, it is reasonable and fair for Applicant to bear the cost of monitoring for these impacts so the District can manage them. Applicant's complaint that it is unfair because no

[229] The District budgeted $572,925 for the GWAP in 2024; and Mr. Westbrook testified that costs from lowering a pump, drilling, or re-drilling a well could range from $5,000 to $50,000 per well, and Landowners collectively have six wells. GM Ex. 15 at 5; Tr. Day 2 at 132:4-133:16 (Westbrook Cross). Using Mr. Westbrook's figures, simple arithmetic confirms that well mitigation for Landowners' six wells would cost between $30,000 and $300,000, which is less than 2024's GWAP budget of $572,925.

other permit has this condition is unpersuasive. First, there is no record evidence that any other permittee, on its own, will potentially cause unreasonable impacts to other users. Second, there is a rule in place now (Current Rule 16.4), which will subject future permittees to the same condition if modelling demonstrates their permits will also potentially cause unreasonable impacts. Finally, although Applicant argued that this rule cannot be applied retroactively, the ALJs are not recommending the condition based on the current rule but instead find it is an appropriate condition based on expert opinion.

Regarding mitigation, although Applicant agrees that the District can enforce the HUP 0148 mitigation condition on Applicant, that is not necessarily true as to a *new* permit issued in conjunction with HUP 0148. Moreover, the actual language in HUP 0148 contemplated no permittee-sponsored mitigation after the District adopts a District-wide mitigation program. Since then, the GWAP was adopted, which Applicant argues is a District-wide mitigation program (and the GM denies).[230] Although the predicted impacts to Landowners are not to come for many years and the District has a GWAP that could potentially cover some of them,[231] the ALJs find the GWAP appears to be designed to account for *cumulative* impacts of pumping on certain high-priority wells, not localized unreasonable impacts such as are projected to be caused by the 15K and 9K permits.[232]

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[230] *See* GM Ex. 11 at 89.

[231] Appl. Ex. APP-407 (District Groundwater Well Assistance Program) Given the long timespan for the impacts predicted to fall on Landowners and other District permittees, the ALJs note that the District has time to increase or reconfigure its fee structure to bolster the GWAP budget in time for foreseeable impacts.

[232] Appl. Ex. App-407 (District Groundwater Well Assistance Program) at sections 2.0 and 8.0.

The ALJs agree with the GM and Landowners that fairness dictates Applicant should bear the cost of any unreasonable impacts demonstrably caused by Applicant—when and if they actually occur. Yet, how should those costs be accounted for? Applicant argues that it should not be subjected to a mitigation special condition and should be allowed to enter into a side agreement with the District—in a manner similar to Blue Water and Vista Ridge. The ALJs certainly encourage such efforts; however, it would be inappropriate for the ALJs to recommend that the parties negotiate and come to an agreement on this issue. While negotiation would perhaps achieve a better result, if the parties could not reach an agreement on this issue then the permits' finality would be left in unnecessary limbo. Therefore, in the event the parties cannot come to an agreement prior to the District's consideration of this PFD, the ALJs find that the GM's recommendation to include a condition similar to the mitigation provision in HUP 0148 is functional and appropriate. However, the GM's expert recommended expanding the mitigation to 1 mile—up from the 3/4 mile applicability in HUP 0148—which the ALJs do not adopt because the recommendation was conclusory and the record evidence did not clearly demonstrate that unreasonable impacts would occur to specific wells between 3/4 of a mile and 1 mile.[233]

As for the 16 Noncompliant Wells already permitted under HUP 0330 that do not meet the District's spacing rules, the ALJs find they must be operated at reduced production capacity to meet the well spacing exception in May 2022 Rule 4.1.2.

[233] GM Ex. B (Young Testimony) at 23. Landowners' evidence regarding distances to their wells was not precise.

In addition, if the District elects to issue the 15K permit or any portion thereof, the ALJs find that it should be under the condition that water volumes produced under the new operating permit can no longer be produced under HUP 0330, as clearly stated by Applicant in the Application.

VI. CONCLUSION

The ALJs recommend the District issue both the 15K operating permit and the 9K drilling and operating permit, with special conditions, as follows:

13. (1) the 9K permit should authorize production of only 6,146 af/yr with the condition that, in order to produce the remaining 2,854 af/yr, Applicant must present documentation of end-user contracts or binding commitments substantiating the need for the extra amount;

14. (2) the 15K permit should include a condition requiring Applicant, within 60 days of permit issuance, to install and use equipment on all wells to monitor for unreasonable impacts;

15. (3) the 15K permit should include a condition similar to the mitigation provision in HUP 0148;

16. (4) the 15K permit should include a condition requiring Applicant to operate the 16 Noncompliant Wells at reduced production capacity as discussed above; and

17. (5) the 15K permit should clearly state that water volumes produced under the new 15K operating permit subsume, and are not in addition to, those produced under HUP 0330.

If the 15K permit is denied by the District for any reason, then the ALJs recommend the 9K drilling and operating permit be issued without any special conditions. In support of these recommendations, the ALJs propose the following Findings of Fact and Conclusions of Law.

VII. FINDINGS OF FACT

Background and Procedural History

1. The Post Oak Savannah Groundwater Conservation District (District) was created by the Texas Legislature in 2001 to conserve, preserve, and protect, and prevent waste of, groundwater in Milam and Burleson Counties as a groundwater conservation district.

2. Applicant SLR Property I, LP (Applicant) owns approximately 33,000 acres of property in Milam and Lee Counties.

3. Applicant purchased the property, the "Sandow Lakes Ranch," in November 2021.

4. Sandow Lakes Ranch includes the former 17,000-acre Sandow Mine that was previously owned by Alcoa, as well as approximately 1,000 acres that Applicant purchased in late 2022.

5. In addition to the land, Applicant also purchased the following groundwater permits, originally issued to Alcoa by the District:

   a. Permit 0148 (POS-D&O-0148) – a 25,000 acre-feet per year ("af/yr") amended drilling and operating permit for Simsboro aquifer (Simsboro) groundwater from 56 wells (32 of which are "dual use" wells also authorized under historic use permit (HUP) 0330);

   b. Permit POS-T-0005 – the transport permit associated with Permit 0148, authorizing the transport of up to 25,000 af/yr outside of the District; and

   c. HUP 0330 (POS-HUP-0330) – a 15,000 af/yr HUP for Simsboro groundwater from 61 wells (32 of which are "dual use" wells also authorized under Permit 0148), which expires on December 31, 2038.

6. Applicant also holds authorization for seven limited-supply wells used to provide water to the drilling rigs working to install the wells under Permit 0148.

7. The 25,000 af/yr under Permit 0148 is contractually committed to another entity, who will begin transporting and providing that water to a major development in Taylor, Texas as soon as summer 2024.

8. Applicant met with District staff and consultants in November 2021, prior to submitting applications for new permits.

9. On April 8, 2022, Applicant submitted two applications to the District: an application for an operating permit to withdraw 15,000 af/yr (15K) from the Simsboro Formation of the Carrizo-Wilcox Aquifer to be used in conjunction with Applicant's 15K Historic Use Permit No. 0330 (15K Application) and an application for a new drilling and operating permit to withdraw 9,000 af/yr (9K) from the Simsboro and Hooper Formations of the Carrizo-Wilcox Aquifer (9K Application) (together, the Applications), both for purposes of use broadly identified as municipal, industrial, manufacturing, and commercial.

10. The Applications seek to produce water for 40 years after the requested permits issue, meaning the 15K Application requests 26 years of additional production beyond HUP 0330's current authorization through 2038.

11. Applicant currently owns 24,789 contiguous acres in Milam County, which is sufficient acreage under the District's rules to support Applicant's two existing permits and the two permits requested in the Applications.

12. On May 20, 2022, Applicant's representatives met with the District's General Manager (GM), the District's technical consultant, and its legal counsel, all of whom provided comments on the Applications.

13. On June 14, 2022, Applicant provided draft updated Applications to the District for review and comment.

14. After receiving comments on the Applications from the District's technical and legal consultants in June and July of 2022, on July 27, 2022, Applicant resubmitted the Applications to the District, incorporating and addressing the District's suggestions and comments.

15. On September 2, 2022, the District's regulatory compliance specialist sent two letters to Applicant, communicating the District's opinion that the

15K Application and the 9K Application were incomplete and requesting additional information.

16. On October 4, 2022, Applicant responded by sending the District two letters dated October 2, 2022, one for each Application, with information requested by the District in its September 2, 2022 letters.

17. On October 4, 2022, the GM sent a letter to Applicant indicating that Applicant had exceeded the allowed time to respond to the District's September 2, 2022 communication and the Applications were "void."

18. On October 4, 2022, Applicant responded to the GM's October 4 letter.

19. On October 14, 2022, Applicant re-submitted the Applications to the District.

20. On November 2, 2022, the GM determined the Applications submitted on October 14, 2022 to be administratively complete.

21. The Applications are evaluated for permit issuance under Chapter 36 of the Texas Water Code (Code), the District's Rules in effect as of the date the Applications were deemed administratively complete (November 2, 2022), and the District's Management Plan dated August 1, 2017.

22. The District rules applicable to ruling on the Applications are the rules as amended through May 10, 2022 (District Rules).

23. The Applications were made in writing, sworn to by Alan Gardenhire as Applicant's agent, and provided on a form approved by the District Board, as required by District Rules 7.4.1 and 7.4.3.

24. The Applications contain all the information required, as applicable, by District Rules 7.4.4 and 7.4.5.

25. On December 8, 2022, the District published notice of a hearing on the Applications scheduled for January 10, 2023 in the *Burleson County Tribune* and *The Rockdale Reporter*.

26. On December 9, 2022, the GM sent a letter to Applicant, notifying Applicant that the October 14, 2022 Applications were set for public hearing on

January 10, 2023; and that the previous versions of the Applications submitted in April 2022, July 2022, and subsequent "filings of information responsive to District requests for information" would be considered as part of the Applications.

27. On December 9, 2022, Applicant provided notice of the Applications to nearby landowners, including protesting landowners.

28. On December 22, 2022, Applicant published a supplement to the District's December 8 notice in the *Cameron Herald*, *The Rockdale Reporter*, and *Burleson County Tribune*.

29. Some landowners filed notices of intent to contest the Applications prior to the District Board's January 10, 2023 meeting.

30. The District Board held a meeting on January 10, 2023, where the Board on its own motion continued the hearing on the Applications to January 19, 2023.

31. On January 12, 2023, Blue Water 130 Project, L.P. (Blue Water) filed a request for party status in this proceeding.

32. On January 18, 2023, Applicant requested that the District contract with the State Office of Administrative Hearings (SOAH) to conduct a preliminary hearing and any subsequent contested case hearings on the Applications, pursuant to Code section 36.416(b).

33. On January 19, 2023, the District Board approved Applicant's request for referral to SOAH.

34. On June 9, 2023, the District filed Requests to Docket with SOAH for each Application.

35. On June 20, 2023, SOAH Administrative Law Judge (ALJ) Ross Henderson issued an order scheduling a preliminary hearing and addressing other procedural issues.

36. On August 29, 2023, the City of Rockdale filed a motion to intervene in the SOAH proceeding and on September 5, 2023, the City of Rockdale moved to withdraw its request for party status.

37. On September 6, 2023, SOAH held a preliminary hearing. ALJ Henderson took notice of jurisdiction and—following argument and after hearing evidence—named the following parties: Applicant, the GM, Brian H. Limoges, Ronald Crump, Jeff Howell, and Blue Water.

38. Mr. Limoges, Mr. Crump, and Mr. Howell (collectively, Landowners) are owners of land and domestic/livestock wells in Milam County, in close proximity to Applicant's current and proposed well fields.

39. On September 27, 2023, ALJ Henderson issued an order consolidating the two dockets for purposes of hearing and a proposal for decision and setting the procedural schedule in this proceeding, including setting the date for the hearing on the merits.

40. The September 27, 2023 order constituted the notice of hearing. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and either a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.

41. On October 13, 2023, in response to Applicant's motion, the ALJ issued an order aligning Mr. Crump, Mr. Limoges, and Mr. Howell with one another. The GM and Blue Water were not aligned.

42. On January 9, 2024, Blue Water moved to withdraw its request for party status.

43. On March 6, 2024, the GM moved for summary disposition, asking SOAH to remand the Applications to the District Board and recommend that the Board deny the Applications.

44. On April 1, 2024, the GM filed a notice of contest regarding the Applications.

45. On April 4, 2024, ALJ Henderson issued an order denying the GM's motion for summary disposition.

46. The hearing on the merits was held April 10-12, 2024, before ALJ Henderson and ALJ Heather D. Hunziker, at SOAH's hearing facility in Austin, Texas. Applicant appeared and was represented by attorneys Molly Cagle, Samia Broadaway, Kevin T. Jacobs, and Cole Lempke. The GM appeared and was represented by attorneys Barbara Boulware Wells and Deborah Trejo. Landowners appeared and were represented by attorney Donald Grissom.

47. All witnesses prefiled direct testimony and testified at the hearing. The following witnesses testified on behalf of Applicant: (1) Alan Gardenhire, Applicant's Vice President of Operations, corporate representative, and project manager; (2) Bob Harden, P.E., hydrologist, who prepared Applicant's permit applications; (3) Michael Gabrielse, Senior Urban Forester and Certified Arborist with Burditt Land consulting firm; and (4) Carlos Rubinstein, environmental consultant with RSAH2O, LLC. The following witnesses testified on behalf of Landowners: (1) Mr. Limoges; (2) Mr. Crump; (3) Mr. Howell; and (4) Keith Copeland, Principal/Senior Geologist with Ranger Environmental Services, LLC. The following witnesses testified on behalf of the GM: (1) Mr. Westbrook, the GM; and (2) Dr. Steven C. Young, PhD, P.E., hydrogeology specialist with INTERA consulting firm.

48. The record closed on June 25, 2024, with the filing of reply briefs.

Whether the Permit(s) Will Result in a Beneficial Use and Not Cause or Contribute to Waste

49. Each Application specifies the water produced will be used for the statutorily identified beneficial purposes of municipal, industrial, manufacturing, and commercial use anywhere in Milam and Burleson Counties.

50. Applicant intends to use its authorized water to develop its property. Applicant will use groundwater requested under the Applications within the District and to support, at minimum, the following activities: (1) Sandow Municipal Utility District No. 1; (b) the Advanced Manufacturing and Logistics Campus (AMLC), a 3,300-acre manufacturing and distribution hub currently under construction; (3) construction and operation of a new natural gas power plant; (4) various residential, retail, commercial, industrial,

hospitality, hamlet, and recreation facilities; (5) local community needs in Milam and Burleson Counties, as needed, such as during periods of drought.

51. Regarding the amount of water allocated for each use, Applicant requested that the entire amount of water be authorized for any of the listed beneficial uses, or any combination of the uses, up to the entire authorized amount.

52. The Applications did not specify any end use or end-user.

53. The District's application forms do not require an applicant to specify an end use or end-user.

54. The Applications will result in beneficial use of water.

55. Applicant agreed in the Applications to avoid waste and achieve water conservation.

56. The Applications will not cause or contribute to waste.

Whether Applicant Has Existing Production Permits That are Underutilized and Fails to Document a Substantial Need for Additional Permits to Increase Production.

57. Applicant has underutilized HUP 0330, because in recent years Applicant has used only up to 3,000 af/yr of its authorized 15K.

58. The 25,000 af/yr of water authorized by Permit 0148 is contractually committed to a third party for transport under POS-T-0005 to Taylor, Texas, and thus is not available for on-site or in-District use.

59. Because mining has ceased on the property and the permit currently authorizes only industrial use, it is unlikely that Applicant will be able to fully utilize all 15K under HUP 0330 unless the beneficial uses are expanded to include the additional uses Applicant requests.

60. Water is not available in sufficient quality and quantity from alternative water supplies to support Applicant's development plans.

61. Applicant is authorized under its independent surface water right to divert up to 18,000 af/yr of state water from the Brazos River watershed.

62. The availability of surface water from the Brazos River watershed under Applicant's contractual and surface water rights is limited and inconsistent depending on the time of year and surface water flow, and it is subject to senior priority calls.

63. Surface water from the Brazos River watershed is of lower quality than groundwater from the Carrizo-Wilcox Aquifer, making surface water also more expensive to treat than Carrizo-Wilcox groundwater.

64. Applicant is essentially trading its 15K in production authorized in HUP 0330 for production under the 15K Application; therefore, there will not be an increase in annual production now or after 2038, when HUP 0330 is up for renewal.

65. The 9K Application seeks an increase in annual production.

66. The Brazos G Regional Water Planning Group has included population projection estimates in its draft 2026 regional water plan that indicate the population of Milam County could increase by 140,000 people by 2060, with 120,000 on Applicant's property.

67. Applicant demonstrated a substantial need for 21,146 af/yr (3,000 af/yr current use at AMLC, plus projected 18,146 af/yr to support 120,000 new residents on the property) as the property is developed.

68. 15K is available under HUP 0330 (if the 15K Application is granted), leaving Applicant a demonstrated need for 6,146 af/yr of the 9K Application. If the 15K Application were to be denied, Applicant would need all 9K under the 9K Application.

69. There was some record evidence that Applicant may need an unspecified amount of water to serve tenants at the AMLC and to provide water to up to 20,000 additional persons off Applicant's property.

70. Applicant could show its substantial need to produce the remaining 2,854 af/yr by providing the District additional documentation of tenant agreements for water use in the AMLC, contracts, or agreements to provide water off property, or by some other demonstration of substantial need for the additional water.

Effects and Impacts on Water Resources, Other Landowners, and Other Wells

71. Applicant's "proposed uses" are the new 9K to be used under the 9K Application; and the post-2038 use of 15K under the 15K Application.

72. Mr. Limoges's and Mr. Crump's properties border Applicant's property, and their wells are within 1,200 feet of Applicant's production wells.

73. Mr. Howell's property is within 2,600 feet of Applicant's property, and his well is within 3,000 feet of an Applicant production well.

74. Unreasonable effects on water resources or existing permit holders include, among others:

    a. more than a 30-foot and 25 percent reduction in the saturated thickness of the aquifer being pumped by the aggregate wells at any well location outside of the operating permit's property or along any part of the boundary of the operating permit's property; and

    b. more than a 100-foot and 40 percent reduction in the pressure head above the top of the aquifer at any well location outside of the operating permit's property or along any part of the boundary of the operating permit's property.

75. Predictions of drawdown using the current groundwater availability model for the central portion of the Carrizo-Wilcox aquifer modeling are likely to be underestimated due to uncertainty regarding the transmissivity or hydrologic communication between the Simsboro and Calvert Bluff, especially with regard to Landowners' wells' specific locations within the aquifer.

76. The preponderant evidence, as to the impact of Applicant's proposed 9K of additional production, shows a 10-foot decline in the water table in three small areas of the Carrizo-Wilcox outcrop after 40 years of pumping.

77. The preponderant evidence, as to the unreasonable impact of Applicant's proposed 15K permit on areas miles beyond Applicant's property, shows the following:

c. reductions of more than 25 percent of the saturated thickness and more than 30 feet in the unconfined Simsboro; and

d. reductions of more than 40 percent of the pressure head and more than 100 feet in the hydraulic head atop of the confined Simsboro.

78. The preponderant evidence predicts more unreasonable impacts from the combined permits proposed in the 9K and 15K Applications, including:

e. drawdowns greater than 300 feet at Mr. Limoges's Simsboro well over the 40-year permit period, preventing the well from producing water;

f. a 60-foot groundwater level decline in the Calvert Bluff that will cause Mr. Crump's wells to go dry and reduce their saturated thickness by 100 percent;

g. the City of Rockdale's Simsboro well water level dropping 50 feet below the bottom of the well screen over the 40-year permit period, significantly limiting production and the well's useful life;

h. some Calvert Bluff and Hooper wells needing to have their pumps lowered at least once during the next 40 years; and

i. exceedances of the District's protective drawdown limits decades earlier than otherwise predicted.

79. Multiple wells pumping in the same area create a drawdown effect that increases the impact on neighboring wells.

80. Applicant's proposed new wells associated with the 9K Application meet the District's spacing rules.

81. The wells proposed in the 15K Application are existing wells currently authorized by HUP 0330.

82. Encompassed in the 15K Application are six wells already permitted under HUP 0330 that violate the District's spacing rules (Noncompliant Wells), identified as wells C-9-15, C-9-16, C-9-18, C-9-19, C-9-30, and C-9-31.

83. Ten additional wells already permitted under HUP 0330 and encompassed in the 15K Application violate the District's spacing rules but were not specifically identified.

84. The Noncompliant Wells can meet the District's well spacing rules by being operated at a reduced production capacity.

85. The District's Groundwater Well Assistance Program (GWAP) is designed to assist well owners whose wells experience water declines caused by groundwater production in the Carrizo-Wilcox Aquifer.

86. If Landowners experience well drawdowns that require them to deepen their wells, put in bigger pumps, or drill new wells, they may qualify for assistance from the GWAP or under the mitigation condition in HUP 0148; however, Landowners are not guaranteed such assistance.

87. Costs from lowering a pump, drilling, or re-drilling a well can range from $5,000 to $50,000 per well.

88. Trees and vegetation rely on surface water for survival.

89. Pumping as proposed in the Applications would not unreasonably affect surface water resources.

90. Pumping as proposed in the 9K Application, alone, would not unreasonably affect existing groundwater resources or permit holders.

91. Applicant's well placement in close proximity to Landowners' wells, as proposed in the 9K Application, *increases the likelihood of interference* with the production of water from Landowners' exempt, existing, and previously permitted wells; however, the preponderant evidence does not indicate that it *will interfere* with Landowners' production.

92. Pumping as proposed in the 15K Application, alone or in combination with that proposed in the 9K Application, would unreasonably affect existing groundwater resources and permit holders.

93. Pumping as proposed in the 15K Application would interfere with the production of water from Landowners' exempt, existing, and previously permitted wells.

94. It is reasonable, fair, and appropriate for Applicant to bear the cost of monitoring for impacts to nearby wells, so that the District can manage them.

95. A permit condition similar to the mitigation provision in HUP 0148 would be functional and appropriate as a condition to the permits requested in the Applications.

Whether Granting the Applications is Consistent with the District's Duty to Manage Total Groundwater Production on a Long-Term Basis to Achieve an Applicable Desired Future Condition

96. The District adopted its Groundwater Management Plan (GMP) as required by Code section 36.1071.

97. In accordance with the Code, the GMP includes a desired future condition (DFC) for each aquifer formation within the District.

98. DFCs are policy decisions, not physical facts.

99. Prior to issuing a permit, the District is required to consider whether the proposed use of water is consistent with its approved GMP.

100. District Rule 7.15.3 elaborates that "the District must find that there is sufficient groundwater in the aquifer to support the issuance of the permit, in accordance with the [GMP]."

101. The District is a part of Groundwater Management Area (GMA) 12, which jointly adopted DFCs for the aquifers in the District in 2021.

102. Relevant to these applications, the DFCs included average drawdowns in the District through 2070 of 278 feet for the Simsboro Formation, 178 feet for the Hooper Formation, and 156 feet for the Calvert Bluff formation.

103. The DFC is used to determine the GMA's MAG, which is "the amount of water that the [TWDB's] executive administrator determines may be

produced on an average annual basis to achieve a desired future condition." The MAG is a factor for the District to consider when managing the DFC, but it is not a hard cap on production.

104. The Applications are seeking only a small fraction of the entire storage of the Carrizo-Wilcox aquifer.

105. Modeling shows some "risk of exceedances" of the DFCs in the Simsboro and Hooper Formations by 2064 if the 15K permit is granted, and by 2061 and 2058 respectively in those formations if the 9K permit is also granted.

106. Granting of the permits will not cause immediate or even impending exceedances of the DFCs.

107. The predicted risks of exceedances are sufficiently far into the future that the District can monitor the actual predicted risks and manage any potential future exceedances either by making a policy decision to adjust the DFCs in the GMA 12 stakeholder process to balance the increased needs of the District, or by curtailing the use of its 2058-2070 permit holders and producers to forcibly meet the DFCs.

108. Granting the Applications is consistent with the District's duty to manage total groundwater production on a long-term basis to achieve the applicable DFC.

Other Issues

109. If the 15K permit is issued, volumes produced under it cannot also be produced under HUP 0330.

110. Applicant must use reasonable diligence to protect groundwater quality.

111. Applicant must follow District well plugging guidelines at the time of well closure.

VIII. CONCLUSIONS OF LAW

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

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

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

4. The Applications are subject to the District Rules as amended May 10, 2022.

5. The Applications conform to the requirements prescribed by Code chapter 36 and the District Rules. Code § 36.113(d)(1); District Rules 7.4.4 and 7.4.5.

6. When deciding whether or not to issue a permit, the District must consider whether the permit will result in a beneficial use and not cause or contribute to waste. Code § 36.113(d)(3), (6); District Rule 7.6(4).

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

8. The Applications will result in a beneficial use. Code § 36.001(9); District Rule 7.6(4).

9. The Applications will not cause or contribute to waste. Code § 36.001(8); District Rule 7.6(4).

10. An applicant must document a "substantial need for additional permits to increase production" where the "applicant has permits that are underutilized." District Rule 7.6(5).

11. HUP 0330 is currently underutilized. District Rule 7.6(5).

12. Applicant has demonstrated a substantial need for 21,146 af/yr of the 24,000 af/yr sought in the Applications. District Rule 7.6(5).

13. The District must consider whether the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders; and the District must consider the impact on other landowners and well owners from a grant or denial of the permit, or the terms prescribed by

the permit, including whether the well will interfere with the production of water from exempt, existing or previously permitted wells and surface water resources. Code § 36.113(d)(2); District Rule 7.6(3).

14. Only Applicant's use—not cumulative use under the requested permit and other existing users—should be examined in determining whether proposed use would lead to unreasonable effects. Code § 36.113(d)(2); *see also* District Rule 7.4.5(a) and (b).

15. The Noncompliant Wells violate the District's well spacing rules, District Rule 4.1; however, they can meet the well spacing rules by being operated at a reduced production capacity, per District Rule 4.2.

16. Applicant's proposed use of water under the permits is consistent with the District's approved GMP, and there is currently sufficient groundwater in the aquifer to support the issuance of the permits. Code § 36.113(d)(4); District Rules 7.6 and 7.15.3.

17. The District has authority to include terms and conditions in a permit. Code §§ 36.113 and .1131, and District Rule 7.1.2.

18. After weighing the factors under Code section 36.113(d) and the District Rules, the District should issue both the 9K drilling and operating permit and the 15K operating permit, with special conditions, as follows:

    a. the 9K permit should authorize production of only 6,146 af/yr with the condition that, in order to produce the remaining 2,854 af/yr, Applicant must present documentation of end-user contracts or binding commitments to substantiate need for the extra amount;

    b. the 15K permit should include a condition requiring Applicant, within 60 days of permit issuance, to install and use equipment on all wells to monitor for unreasonable impacts;

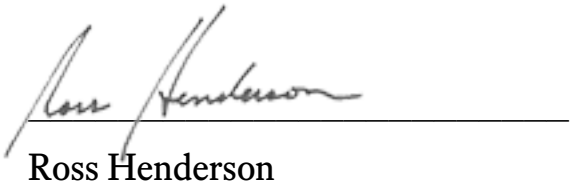
    c. the 15K permit should include a condition similar to the mitigation provision in HUP 0148;

    d. the 15K permit should include a condition requiring Applicant to operate the 16 Noncompliant Wells at reduced production capacity; and

e. the 15K permit should clearly state that water volumes produced under the new 15K operating permit subsume, and are not in addition to, those produced under HUP 0330.

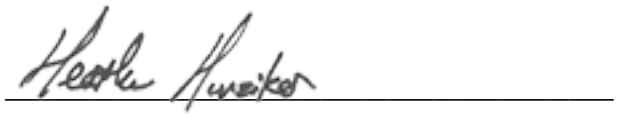
19. Code chapter 36 does not authorize the GM to recover its legal fees incurred in this matter.

Signed August 26, 2024.



Ross Henderson

Presiding Administrative Law Judge



Heather D. Hunziker

Co-Presiding Administrative Law Judge