

REQUEST FOR INQUIRY

FILED BY

FRED C. RUSSELL

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BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY

DOCKET NO. 2018-0194-MIS

PETITIONER’S RESPONSE

Petitioner Fred C. Russell’s reasons for rejecting the responses from the GMA 12 Groundwater Conservation Districts in the matter of Docket No. 2018-0194-MIS regarding the Post Oak Savannah Groundwater Conservation District (“Post Oak Savannah GCD”) directed to the attention of the Texas Commission on Environmental Quality are as follows:

- 1) The Texas Commission on Environmental Quality has two (2) main sources of information to base any actions on, the Petitioner and the alliance of Groundwater Conservation Districts. The response from Post Oak Savannah GCD and the other responding member Districts surrounding them in GMA 12 **all provided support** for Post Oak Savannah GCD. There doesn’t appear to be any independent studies done by any other party.

The responding Districts are supporting Post Oak Savannah GCD without regard to the facts. Why wouldn’t they? “You help me and I’ll help you.” In other words, the “fix was in” from the start. This is fundamentally biased against any Petition for Inquiry.

- 2) The “greater good” appears to be in maintaining an adequate supply of water to the City of San Antonio regardless of those in the Post Oak Savannah GCD that will be adversely impacted by this production. The San Antonio Water System (“SAWS”) will need the water from the Vista Ridge Regional Supply Project some time in the future to expand the San Antonio real estate market. Does their population which is about 1.5 million residents deserve the water under our land in Milam and Burleson Counties which has a total population of around 42,600 residents - over and above our needs? Post Oak Savannah GCD has never challenged or questioned this – their attitude has been directed toward giving them all the water they want.

BlueWater Systems has 71,000 acre-feet per year permitted in the Post Oak Savannah GCD. For the Vista Ridge Regional Supply Project which is permitted for 50,993 acre-feet per year, they **must pump** over 44.6 million gallons per day, 365 days per year for 30 years to pay for their 142 mile long pipeline.

The San Antonio Water System will pay Garney Construction a **capital charge** which is about \$69 million per year for **30 consecutive years** to pay for the 142 mile long pipeline. This charge has two (2) components – **debt service** on the

construction loan of over \$850 million and **equity return** which is Garney Construction's cost/profit to construct the pipeline. The construction loan is in Garney Construction's name and they pay the debt service from the SAWS capital charge. SAWS is a utility company for the City of San Antonio and does not have the financial ability to qualify for the construction loan. This capital charge of \$69 million must be paid by SAWS whether 50,000 acre-feet of water is transported to San Antonio or no water is transported to San Antonio. SAWS lives from billing cycle to billing cycle with enough income to fix leaking pipes and defective pumps. If there is a Management Zone cutback in the SAWS well field and 50,000 acre-feet isn't available to SAWS, the cost of water rises dramatically. Who pays for this increased cost? Who will tell SAWS they can't have the full 50,000 acre-feet of water after a \$3.4 billion project has been completed and when they have additional groundwater rights leases for makeup permits in-hand?

BlueWater Systems has 25,000 additional acres of groundwater rights leases to use during any Management Zone pumping cutback (see §5 of the Groundwater Supply Agreement below).

(Vista Ridge Regional Supply Project, Water Transmission and Purchase Agreement, see Transaction Form E. Groundwater Supply Agreement §5 http://www.saws.org/your_water/waterresources/projects/vistaridge/download.cfm)

“5. Blue Water agrees to hold and maintain 50,000 acres of the Leases in the Groundwater Area to make available for, and sell to, SAWS each year the Annual Supply Amount from the Groundwater Area during the Term of this Agreement. The 50,000 acres of Leases held by Blue Water to support the Annual Supply Amount that Blue Water is making available to SAWS during the Term of this Agreement is hereby referred to as the “*Leased Acres*.” Blue Water may from time to time release or add additional leases in the Groundwater Area so long as Blue Water maintains 50,000 acres of leases to support the Annual Supply Amount to SAWS in accordance with the Permits and this Agreement.”

In the *Texas Water Code 36.002 Ownership of Groundwater*, it defines groundwater as “real property.” If the groundwater rights are leased, the Lessee (BlueWater Systems in this case) **owns the groundwater beneath that property and has a right to pump their water.**

The Carrizo Management Zone Modeled Available Groundwater (MAG) will be exceeded for 5 decades after production has begun. The Middle Wilcox Management Zone (Simsboro Aquifer) Modeled Available Groundwater (MAG) will be exceeded for 3 decades after production has begun. The San Antonio Water System claims that this is “Texans helping Texans.” Do we wait till the landowner's wells go dry in our District?

According to the Texas Water Development Board (“TWDB”) - regional water planning requirements mean

- that the total anticipated pumping volume in any planning decade may not exceed the modeled available groundwater volume in any county-aquifer

location (total pumping volume includes the quantities both from existing water supplies and from any recommended water management strategies);

- planning groups may not recommend water management strategy supply volumes that result in exceeding (e.g., “overdrafting”) the modeled available groundwater volumes.

Without a Management Zone cutback the permitted amount in Post Oak Savannah GCD is 2 acre-feet of groundwater production per acre of land. If the permitted amount was reduced to 1 acre-foot of groundwater production per acre of land, BlueWater Systems would simply use their reserve groundwater rights leases of 25,000 acres to apply for a makeup permit to maintain their 50,000 acre-feet per year while all other production in that Management Zone was reduced by one-half (1/2). If the permitted amount was reduced to 1 acre-foot of groundwater production per acre of land in Post Oak Savannah GCD this would be considered an unprecedented reduction as stated in their rules. A reduction, other than in an emergency, is 2 percent (%) which would be to 1.96 acre-feet of groundwater production per acre of land.

- 3) The Groundwater Well Assistance Program (“GWAP”) in Post Oak Savannah GCD is listed as a program to assist landowners with wells that have been adversely impacted by large commercial water production. Is it fair to exclude ANY adversely impacted well in our District that it desires? That certainly seems to be the case as farmer’s irrigation wells and small business wells are excluded from assistance. Other landowner’s wells not participating in the District’s “well monitoring program” will also be excluded. Currently, the “well monitoring program” requirements alone will **exclude most of the wells** in Milam and Burleson Counties.

Post Oak Savannah GCD is currently on a spending binge and wells are very expensive to repair so they have written numerous well exclusions into their Groundwater Well Assistance Program. The history of the Groundwater Well Assistance Program at the Post Oak Savannah GCD started in November of 2015 after my presentation to the Board of Directors which highlighted the need for a well mitigation program. Every draft of the GWAP has shown a clear intent of it being a minimal, token program to be used as an excuse when wells in our District are adversely impacted by the Vista Ridge Regional Supply Project.

- 4) For thirteen (13) years now Post Oak Savannah GCD has been totally dependent on the permitting fees from BlueWater Systems. The Post Oak Savannah GCD wants to ensure that these fees continue in perpetuity. The BlueWater Systems’ fees make up **over 92 percent (%)** of the revenue listed in the 2018 Budget for Post Oak Savannah GCD. So, to be clear, the Post Oak Savannah GCD regulates and controls groundwater producers in our District including BlueWater Systems and receives over 92% of their revenue from BlueWater Systems. This is beyond the pale with respect to Post Oak Savannah GCD’s ability to impartially regulate and conserve the water in our aquifers! There is a level of **bias** here that hasn’t gone unnoticed by landowners in this District. Can you smell it?

- 5) The Post Oak Savannah GCD, in their response to the petition, stated that all the District rules are in place and they can act accordingly to provide “curtailment” to the over-pumping of our aquifers and any detrimental affects to Desired Future Conditions (DFCs) whenever necessary. Their statement implied they do this routinely. In fact, there has never been a large commercial water producer in this District to contend with so, essentially, if the rules and the Post Oak Savannah GCD **did not exist** the result would be the same – no issues with groundwater until Vista Ridge Regional Supply Project starts production.

Groundwater production in our District is controlled equally among all non-exempt well permit holders. In other words, the Vista Ridge Regional Supply Project can not be singled out and cutback when a Management Zone requires a cutback in pumping. All producers are cutback equally to the new pumping level as decided on by the Board of Directors. If Vista Ridge, alone, was cutback they could claim a “regulatory taking” of their real property, groundwater. (see Bragg vs. Edwards Aquifer Authority below)

The same analogy exists for the 25,000 acres of groundwater rights leases they hold in reserve for an additional permit should a cutback be imposed. To deny another permit would be a “regulatory taking” of their property while other producers with the same groundwater rights are granted a permit at the new reduced rate of production that the Management Zone cutback calls for.

The method for measuring how much groundwater production is **too much** is a valid issue. Our District refuses to understand that there is a finite amount of water available from which a landowner’s well can pump. When the aquifers are over-permitted for a single producer by an amount that **far exceeds** the Modeled Available Groundwater and the intention is abundantly clear that the producer **must pump this amount**, the choice must be made to restrict that permit instead of inflicting a cutback on all other well owners. This is called leadership! What Post Oak Savannah GCD is ascribing to is:

- Granting all permits and then punishing every permit holder equally when a Management Zone cutback is necessary even though there is only one producer that has monopolized the groundwater production by some large measure.
- Permit holders with reserve groundwater rights leases will be rewarded with a makeup permit.
- The landowners with exempt wells are largely unprotected and ignored.
- Post Oak Savannah GCD appears to be obfuscating the **too much** groundwater production amount into an indefinable number so that there is confusion as to the trigger to cutback production.

- The most important factor for over-permitting, however, are the production and transport fees associated with the larger permits that will go to the Post Oak Savannah GCD revenue fund.

In the *Texas Water Code 36.001 Definitions*, "Modeled available groundwater" means the amount of water that the executive administrator determines may be produced on an average annual basis to achieve a desired future condition established under Section 36.108 (Joint Planning in Management Area).

The issue of communications has been a problem at Post Oak Savannah GCD for quite some time. At a recent meeting a member of the Farm and Ranch Freedom Alliance devoted an entire segment on this issue. There was no comment from the Board of Directors.

The result of over-permitting the Carrizo and Simsboro Aquifers is that the Post Oak Savannah GCD has "painted themselves into a corner" due to **their accepting production and transport fees for over thirteen (13) years from BlueWater Systems**. Now that the Vista Ridge Regional Supply Project is within two (2) years from completion, it's too late for any needed change without litigation.

How will the Vista Ridge Regional Supply Project be controlled by the Post Oak Savannah GCD?

Here are the facts about the Vista Ridge Regional Supply Project and the Post Oak Savannah GCD's intentions regarding this project:

- The Vista Ridge Regional Supply Project cost is \$3.4 billion.
- SAWS **must receive** 50,000 acre-feet of groundwater annually for thirty (30) years to pay for the 142 mile long pipeline.
- There is 25,000 acres of groundwater rights leases in reserve for additional permits if there is a Management Zone cutback in pumping.
- SAWS has shown no intention of following any Management Zone cutback that may arise. The Water Transmission and Purchase Agreement between SAWS, Garney Construction and BlueWater Systems shows extreme measures and concern for insuring that the Annual Supply Amount (50,000 AFY) will be transported to San Antonio.
- BlueWater Systems will contest any Management Zone cutback in the Vista Ridge well field with reserve groundwater rights leases to be used for additional permits.
- Post Oak Savannah GCD has shown no regard for landowners with wells that could be adversely impacted by large scale commercial pumping in

this District even though there are ample funds available. Difficult eligibility, unspecified qualifications for assistance, inadequate funding and well exclusions are what is seen in the Groundwater Well Assistance Program.

The question that remains for landowners in Milam and Burleson Counties is –

**Why isn't the Post Oak Savannah GCD
supporting the landowners in their District with a
substantial "well mitigation program"?**

Bragg vs. Edwards Aquifer Authority - A jury ruled that the Edwards Aquifer Authority owes \$2.5 million in compensation to the Braggs because groundwater permit denials resulted in a regulatory taking. The Braggs filed suit against the EAA back in 2004 after they were denied permits to pump groundwater to irrigate their pecan orchards.

- 6) Not once did any of the responding Groundwater Conservation Districts address the real concern which is the draining of the Carrizo and Simsboro Aquifers by the Vista Ridge Regional Supply Project. Where in Post Oak Savannah GCD's rules does it say that they can deny a permit to BlueWater Systems when Blue Water has 25,000 acres of additional groundwater rights leases in reserve for a makeup permit even when a Management Zone cutback is in effect? A permit will be issued to BlueWater Systems because they are the Lessee of that additional groundwater and they own that water as "real property." **It will simply be permitted at the new Management Zone cutback rate.** Ironically, BlueWater Systems will be the sole reason for a Management Zone cutback but with their additional groundwater rights leases, they won't be cutback from the 50,000 acre-feet per year they must have to pay for their 142 mile long pipeline.
- 7) Not once did any of the responding Groundwater Conservation Districts address the secondary concern of protecting the groundwater users in this District. So, well mitigation isn't in the Texas Water Code - so what! The Post Oak Savannah GCD Mission Statement and the Rules are, in part, for the protection of groundwater users. Where does it state that those groundwater users can be "picked and chosen" in any random fashion deemed appropriate by this District?
- 8) The responsibility for over-permitting the aquifers in Post Oak Savannah GCD falls mainly upon the General Manager, Gary Westbrook. His policy has been to approve all permits. He has allowed the Carrizo and Simsboro Aquifers to be over-permitted by BlueWater Systems for the permitting fees which began on September 14, 2004 and that are now \$1.96 million annually from Blue Water. It is clear that this has been a period of self-aggrandizement for Gary Westbrook with no regard for the conservation of aquifers or the protection of groundwater users. This is the reason that I've recommended to the Board of Directors that the General Manager be replaced.

- 9) Financial Close for the Vista Ridge Regional Supply Project occurred in November of 2017. The 142 mile long pipeline construction is proceeding at a rate of 1,000 feet per day or about 1 mile per week. That equates to 2 years, 9 ½ months till the pipeline is completed which will occur sometime around August of 2020. After allowing this project to proceed to completion at a cost of \$3.4 billion, what can be done at that time to promote the conservation of our aquifers and the protection of groundwater users? Now is the time to act!
- 10) On June 4, 2015, Dr. Curtis Chubb, Ph.D. from Milano, Texas filed a similar Petition for Inquiry for almost identical reasons, Docket No. 2015-0844-MIS. His petition was dismissed. Now, there is obvious dereliction of duty and purpose for which the Post Oak Savannah GCD was created for and tasked for by the State of Texas.

For the above-listed reasons the Post Oak Savannah GCD does not support the conservation of our aquifers or the protection of groundwater users. The current rules and the interpretation of those rules at the Post Oak Savannah GCD are untenable. I am hereby respectfully requesting that the Texas Commission on Environmental Quality rule against Post Oak Savannah GCD in this matter and require the necessary remedial actions be taken.


Fred C Russell, Petitioner