

October 3, 2019 letter excerpts

Problems With The Water Rights Claimed Under The Permit And Permit Amendment

Due to conversations with a landowner in the District, I have a copy of a lease in which the Applicant claims ownership of the water rights, yet also guarantees the Lessor the right to drill and operate not only an exempt well, but an irrigation well. (See attached lease excerpt). This raises serious issues with respect to the use of such a lease to support the Applicant's Operating Permit.

In this case, it is not merely a hypothetical problem, because the Applicant has listed this specific lease in its permit application, claiming the full acreage – **and** the Lessor has a permitted irrigation well on the same property.

The Lessor has acted entirely within their rights under the lease. Based on my conversations with the Lessor, the Applicant's agent included that provision as an express inducement for Lessor to sign the lease. This lease provision is also consistent with the representations made by Applicant's agent in earlier documents (see attached letter excerpt). But when Lessor originally sought to get an irrigation well, Applicant's agent refused to agree. Applicant's agent then allegedly suggested that the Lessor instead drill multiple exempt wells, pump the water into stock tanks and then irrigate out of the stock tanks – effectively circumventing the District's rules. Lessor properly refused to act in such a manner, and instead pursued and was ultimately granted the irrigation well to which they were entitled.

After I addressed the Board on Tuesday, Gary Westbrook told me that there have been a handful of instances in which landowners have come to the District office with similar leases and the District, after review by the District's attorney, has granted a water permit to the landowners. Mr. Westbrook stated that Vista Ridge was told to reflect the reduction in the claimed acreage accordingly.

Yet, in this instance, that has **not** happened. After that conversation, I again reviewed Vista Ridge's permit application at <https://posgcd.org/wp-content/uploads/2019/09/2019-7-1-Vista-Ridge-Permit-Application-Part-5-of-5-1.pdf>, and the lease that I shared with the Board is shown as supporting the permit, with identical numbers for the tract acres and the net acres.

By claiming that this lease supports the requested water rights in the full acreage, the permit application makes a material false statement.

I have asked this landowner to come forward and speak, and they are considering it. However, although they have acted legally and in good faith, they are concerned that Applicant may seek to sue them or that the District would revoke their permit.

Moreover, as discussed next, **while this specific case is important because of the Applicant's false statement, it also identifies much broader potential issues that the District should examine that do not rely on any individual landowner's situation.**

Were this landowner to come forward and Vista Ridge to respond by removing their lease from the application, the matter would still not be settled:

- How many leases have similar provisions? How many landowners could come forward in the **future** to get permitted irrigation or commercial wells for the acreage that is listed as supporting the Application?
- If those landowners exercise their legal rights to get permitted wells, how will the District re-assess the permit for both the amount of water rights **and the contiguity** of the leased land? Or, once the permit is issued, will Vista Ridge be allowed to circumvent the rules?

It is possible that this is a minor issue that only affects a small handful of relatively small leases. Or it could be widespread and/or affect leases that are key to Vista Ridge's claims of sufficient contiguous acreage. **The only way to determine the scope of the problem is to look at the actual leases.**

The review of the leases should focus on the issue that is within the District's purview: water rights. I am **not** proposing that the Board attempt to assess the legality of the leases based on the full scope of contract and real estate law. Rather, the Applicant should be held to the rules: it bears the burden to show that it has sufficient water rights to support the requested permit.

While it may have been appropriate to allow Applicant to simply list the leases initially, essentially taking the Applicant's word that the water rights requirement is satisfied, that is no longer the case.

The District has every right – indeed, it has the responsibility – to ensure that it only grants permits to those that have legitimate water rights. **The question of whether the leases provide sufficient water rights to support the Applicant's application is not an issue to be argued over between the Lessor and Lessee – it is between the Applicant and the District.**

In addition to this issue with the leases, there are two additional concerns that go to the validity of the water rights: the pooling of leases and their duration.

Suggested Course of Action on Water Rights Issues

- The Applicant should produce a copy of all of the leases. Under Rule 7.4(4)(b), this would be the appropriate documentation.
- The District should review the key passages relating to groundwater rights, generally on page 2 of the leases.
- The Applicant should produce documentation of how the leases have been pooled, as well as information as to the legal impact of moving leases between pools, sufficient to document that all leases are currently in force, again in accordance with Rule 7.4(4)(b).
- If a significant number of the leases (either in terms of the actual number of leases, the acreage they cover, or their role in contiguity) have provisions that allow the Lessor to obtain a non-exempt well, then the District should seek an opinion from the Texas Attorney General as to whether, or to what extent, such leases properly support a groundwater production permit.

February 7, 2020 letter excerpts

Problems with the Claimed Water Rights

Applicant's water leases were obtained by MetWater. A copy of a letter sent by MetWater to a landowner within the POSGCD District shows that MetWater made the following representation:

“The following are some of the key elements of the lease regarding the use of your land once you have leased your land to MetWater:
... (ii) you have the ability to drill and operate as many water wells as you so desire.”

In addition, the lease with that landowner included the following provision:

“3. Groundwater. Notwithstanding the provisions of this paragraph, Lessor may construct and install, or continue to operate, one (1) or more water well(s) that withdraws groundwater solely for Lessor's domestic, livestock watering **and/or irrigation purposes** for beneficial use on Said Lands only, and not for any industrial/commercial purposes and/or sales to third parties.”
(emphasis added)

Prior to the October 3 hearing, I presented the Board with information that this landowner did in fact apply for and was granted a permit to install an irrigation well for one-acre-foot of water per acre of his land. At the same time, Applicant was claiming the full water rights (two-acre-feet of water per acre) under the lease, in its permit application.

Once I brought attention to this problem – which had actually occurred over a decade ago – Applicant amended its permit application.

But the problem isn't fixed because Applicant amended its statement once I pointed out its **false** claim of water rights from that property. It is unknown how many of the other leases that Applicant is relying on for its claimed water rights have similar provisions. The typical form of Memorandum of Lease that Applicant cites in its permit application does not allow the District to identify which landowners retain the right to drill their own non-exempt irrigation wells.

Moreover, as illustrated by what actually happened with this landowner, there is no provision in Applicant's current permit, or proposed for this amendment, that would **ensure** that adjustments are made to the permitted water rights if and when other lessors seek to exercise their legitimate water rights in the future.

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