

MIDDLE PECOS GROUNDWATER CONSERVATION DISTRICT

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Directors

Jerry McGuairt, President John D. Dorris, Vice President M. R. Gonzalez, Secretary/Treasurer
Alvaro Mandujano, Jr. Vanessa Cardwell Ronald Cooper Janet Groth
Weldon Blackwelder Allan Childs Jeff Sims

Employees

Ty Edwards, General Manager
Melissa Mills, Office Manager Gail Reeves, Office Assistant

Minutes of February 21, 2017

On this the 21st of February, 2017, a regular board meeting and public hearings were held by the Middle Pecos Groundwater Conservation District in the office located at 405 North Spring Drive, Fort Stockton, Texas, with the following members present, to-wit:

Jerry McGuairt	President, Precinct 1
John Dorris	Vice President, Precinct 3
M. R. Gonzalez	Secretary/Treasurer, Precinct 2
Janet Groth	Precinct 1
Weldon Blackwelder	Precinct 3
Alvaro Mandujano, Jr.	Precinct 4
Jeff Sims	City of Iraan

Quorum Present.

Board members absent: Ronald Cooper, Vanessa Cardwell, and Allan Childs, Jr.

Note: Precinct 2/ Open Position

Others present: Ty Edwards, Mike Gershon, Bill Dugat, Gail Reeves, Harvey Gray, Melissa Mills, Joe Shuster, Drew Miller, Jeff Williams, Brock Thompson, Ed McCarthy, Mike Thornhill, Greg Neal, Jimmy Perkins, Marty Jones, Paula McGuairt, Ryan Reed, Mark Harral, James Cravens, Larry Hoelscher, David Novick, Stephanie Blair/Permian Court Reporters Inc., and Bob Beal/Fort Stockton Pioneer.

REGULAR BOARD MEETING

- I Call to order regular Board meeting at 9:02 a.m. by President Jerry McGuairt.
- II Comments from **public and media** No comments
- III Consider and/or act upon **Appointment of New Director for Precinct 2.**
Tabled.

IV **Administer the Statement of Elected Officer and Oath of Office for Precinct 2 Director.**
Tabled.

V Presentation of **District auditor's report on financials** for Fiscal Year 10-01-2015 through 09-30-2016 and act to approve auditor's report.

Rocky Rives with Smith and Rives, PC Certified Public Accountants presented the audit to the Board and answered all questions. The opinion rendered is an unmodified opinion which is the best that can be rendered. The financial statements present fairly, in all material respects, the respective financial position of the governmental activities, the major fund, and the aggregate remaining fund information of the MPGCD, as of September 30, 2016, and the respective changes in financial position thereof for the year ended in conformity with accounting principles generally accepted in the United States of America. There are no findings that require disclosure or corrective action in the audit report.

John Dorris made a motion to approve the Audit for Fiscal Year ending 09-30-2016 as presented. Seconded by Janet Groth. Motion Carried unanimously.

The regular Board Meeting was recessed at 9:13 a.m.

**AMENDMENT OF HISTORIC & EXISTING USE
PERMIT HEARING FOR LARRY HOELSCHER**

I Call to order at 9:13 a.m. by President Jerry McGuairt.

Party representing application: Larry Hoelscher.

Protestant to application: None

Manager Ty Edwards presented the application to the Board. The application requests to Amend an Historic and Existing Use (H&E) Permit by adding 1 well into the existing H&E permit. The well is located on Survey Claunch, MRS Block OW Section 61, approximately 1 mile North of Coyanosa and 1 mile East of FM 1776, in Pecos County, Texas. The purpose of this well is for Irrigation Use and requests to add 1 well to an existing H&E permit from the Pecos Valley Aquifer.

Mr. Hoelscher is not asking for additional water to be added to the production permit, and he plans on keeping the old well as a backup well. The application is administratively complete.

Public Comment: Ed McCarthy on behalf of Fort Stockton Holdings, said that he has concerns about amending an Historic and Existing Use permit, because of the Guitar case and everything should stay the same. A new permit should be sought for the new well drilled since the new well was not a replacement well and the old well was not plugged.

MPGCD attorney, Mike Gershon, explained to the Board that MPGCD rule 11.1.b allows this type of amendment if the well being added is from the same aquifer and is used for the same purpose.

Larry Hoelscher was sworn in and testified that the old well wasn't plugged and is a backup well, and the new well will be used in its place.

II Adjourn hearing and consider and/or act on Application for an Amendment to an Historic and Existing Use Permit for Larry Hoelscher.

Jerry McGuairt adjourned the hearing at 09:25 a.m.

Alvaro Mandujano, Jr. made a motion to approve the application as presented. Motion seconded by Weldon Blackwelder. Motion Carried Unanimously.

PRODUCTION PERMIT HEARING for BUCKTHORN WESTEX, LLC

I Call to order at 9:26 a.m. by President Jerry McGuairt.

Party representing application: David Novick.

Protestant to application: None

Public Comment: None

Manager Ty Edwards presented the application to the Board. The application requests 115 acre feet/year from the Edwards Trinity Aquifer for 1 well located on R.J. Barnett, Block 105 Section 17 approximately 10 miles North of Fort Stockton and 2 miles west of FM 1053, in Pecos County, Texas. The purpose of this well is for Industrial use and will be for a 12 month period. A consolidated drilling and production permit was previously granted on 09-02-2015 for 112 acre feet for a 12-14 month period. The application is administratively complete.

II Adjourn hearing and consider and/or act on Application for a Production Permit for Buckthorn Westex, LLC.

Jerry McQuairt adjourned the hearing at 09:33 a.m.

Jane Groth made a motion to approve the application as presented. Motion seconded by Weldon Blackwelder. Motion Carried Unanimously.

Regular Board Meeting continued @ 9:34 a.m.

VI Consider and/or act upon Minutes of January 17, 2017.

Janet Groth made a motion to approve the minutes of January 17, 2017 as presented. Motion seconded by John Dorris. Motion Carried Unanimously.

VII Consider and/or act upon Accounts Payable and Treasurer's Report and Line Item Transfers for the Month Ending January 31, 2017.

Ty Edwards presented the Treasurer's Report and Line Item Transfers and Accounts Payable to the Board. A new format for the Treasurer's Report was presented.

John Dorris made a motion to approve the Treasurer's Report and Line Item Transfers and Accounts Payable. Motion seconded by M. R. Gonzalez. Motion Carried Unanimously.

Agenda items appear out of the posted order.

XII Executive Session pursuant to Texas Government Code § 551.074 on personnel matters, including:

- a. General Manager's compensation**
- b. Director and Employee Manual**

An Executive Session was called at 9:43 a.m. by Presiding Officer Jerry McGuairt pursuant to the Texas Government Code § 551.074 on personnel matters, including General Manager's compensation and Director and Employee Manual.

The Executive Session ended at 10:19 a.m. President McGuairt stated that no decisions or votes were made in executive session.

Open session reconvened at 10:21 a.m.

XIII Consider and/or act regarding **personnel matters**, including:

- a. **General Manager's compensation**
- b. **Director and Employee Manual**

John Dorris made a motion to remove the probationary period of 6 months from Ty Edwards and to raise his salary \$1,000 per month. Motion seconded by M. R. Gonzalez. Discussion ensued and resulted in a motion by Janet Groth to add to the previous motion that it be retroactive to February 1, 2017. The addition to the motion was agreed to by Mr. Dorris and Mr. Gonzalez. Amended Motion seconded Weldon Blackwelder. Motion Carried Unanimously.

VIII Consider and/or act upon **General Manager's 2016 Annual Report**.

Alvaro Mandujano, Jr. made a motion to approve the General Manager's 2016 Annual Report that was submitted by previous general manager Paul Weatherby. Motion seconded by John Dorris. Motion Carried Unanimously.

IX Consider and act upon **Depository Contract with Pecos County State Bank**.

John Dorris made a motion to set policy and strategy to invest District funds in Demand Deposit accounts, Certificates of Deposit and other interest-bearing bank accounts at Pecos County State Bank- in compliance with the Public Funds Investment Act for the next 12 months. Motion seconded by Janet Groth. Motion Carried Unanimously.

X Consider and/or act to **Declare 2014 Ford F-150 Pickup Surplus Property and approve sale**.

Manager Ty Edwards presented the 2014 Ford F-150 Pickup and reported that the purchase price was \$26,700, with a current Blue Book value of \$20,000. The pickup has 58,000 miles.

John Dorris made a motion to declare the 2014 Fort F-150 Pickup as surplus property and approve the sale of the vehicle. Motion seconded by Janet Groth. Motion Carried Unanimously.

Alvaro Mandujano, Jr. made a motion to leave the method of the sale up to the General Manager. Motion seconded by M. R. Gonzalez. Motion Carried Unanimously.

President Jerry McGuairt recessed the Regular Meeting at 10:30 a.m.

**Continued PRODUCTION PERMIT HEARING for
Republic Water Company of Texas, LLC**

- I **Call to order at 10:34 a.m. by President McGuairt. Continuation of the Preliminary Hearing on Application for a Production Permit and Authorization to Transfer for Republic Water Company of Texas, LLC (Republic LLC).** The Board will receive an update on attempts at mediation and consider oral argument on and written pleadings in this matter including Republic LLC's Objection to Denial of Contested Case Hearing Rights; Republic LLC's Plea to the Jurisdiction and Motion to Remand to SOAH; the November 29, 2016 Briefing by the Parties; Fort Stockton Holding L.P.'s Objection to Denial of Contested Case Hearing Rights and Brief on Res Judicata and Collateral Estoppel; General Manager's Motion for Final Disposition or Summary Disposition and Request that any SOAH Referral be Limited to Preliminary Law Issues; Republic LLC's Response to Briefing on Purported Legal Issues and Motion for Summary Disposition; and any other motions or briefs filed in relation to this Application.

A quorum of the Board is present. The hearing is being held at the District's Office at 405 North Spring Drive, Fort Stockton, Texas. Jerry McGuairt, President of the Board of Directors, is the Presiding Officer for today's hearing.

MPGCD Board special counsel for the hearing: Bill Dugat with Bickerstaff Heath Delgado Acosta, L.L.P.

NOTE: Stephanie Blair, a CSR, transcribed this contested hearing in accordance with Section 36.408 of the Texas Water Code. She may be contacted through Permian Court Reporters, Inc. [432-683-3032](tel:432-683-3032).

This is a continuation of the preliminary hearing that was held November 15, 2016 and again on January 17, 2017. Notice of this hearing was provided in Order No. 6 issued by the Presiding Officer Mr. McGuairt on February 3, 2017. This hearing has also been properly and timely noticed under the Texas Open Meetings Act.

Appearances:

Party representing applicant:

Republic Water Company of Texas, LLC: Marty Jones with Sprouse
Shrader Smith PLLC, Attorney

Parties to hearing/application in attendance:

Pecos County WCID#1: Mr. Harvey Gray, PCWCID#1 Board President

City of Fort Stockton: Mark Harral, Attorney

Pecos County: Andrew "Drew" Miller, attorney with Kemp Smith, LLP

Fort Stockton Holdings, L.P.: Edmond 'Ed' R. McCarthy, Jr. attorney with
McCarthy and McCarthy, LLC

Cockrell Investment Partners, L.P.: Ryan Reed, Attorney with Pulman,
Cappuccio, Pullen, Benson & Jones, LLP

MPGCD General Manager: Michael 'Mike' Gershon, attorney with Lloyd
Gosselink Rochelle & Townsend, P. C.

A recap of activity since the January 17, 2017 hearing:

- ▶ January 17, 2017: Republic requested mediation and the preliminary hearing was continued. The parties were asked to propose the scope and time for mediation.
- ▶ January 31, 2017: The City of Fort Stockton filed an objection to mediation.
- ▶ February 1, 2017: Republic requested that its request for SOAH referral be placed before the Board at today's meeting.
- ▶ February 21, 2017: Today the Board will consider Fort Stockton Holding L.P.'s request for clarification; Republic LLC's Objection to Denial of Contested Case Hearing Rights; Republic LLC's Plea to the Jurisdiction and Motion to Remand to SOAH; the November 29, 2016 Briefing by the Parties; and Republic LLC's Response to Briefing on Purported Legal Issues and Motion for Summary Disposition.

Each party was given the opportunity to give brief statements to the Board regarding their respective positions on the matter.

Order of Presentation and time allotments are as follows:

The Applicant and General Manager will have 30 minutes each, and each of the other parties will be given 10 minutes to address the Board on their respective positions

Republic Water Company of Texas, LLC: MPGCD Board requested Republic to address the Board on its pending Motions including Republic's Motion for Summary disposition, Objection to Denial of Contested Case Hearing Rights, Republic's Plea to the Jurisdiction and Motion to Remand to SOAH and Republic's Response to briefing on purported legal issues.

Marty Jones' statements: The Board has no further jurisdiction over this matter and objected to today's proceeding, and objected to the Board's jurisdiction. Mr. Jones objected to going first and being put in a position of assuming the burden of proof or the burden of going forward with the burden of persuasion dealing with the issues loosely referred to as res judicata and collateral estoppel and standing.

At the initial preliminary hearing the application was declared administratively complete and a contested application. Republic requested a SOAH (State Office of Administrative Hearings) hearing, which was recognized by the Board, pursuant to Texas Water Code section 36.14.6 and pursuant to the MPGCD rule 11.10.4. At that point in time, the action of requesting a SOAH hearing meant the Board has no further jurisdiction over this matter.

However, the District requested a briefing from each of the parties regarding an issue raised by the MPGCD Board of res judicata and collateral estoppel. There is no provision in the Texas Water Code or in the District rules for severing a piece of this process and retaining it at the Board level – this is improper severance. The Board has called for legal briefing, but has recognized appropriately that fact issues are determined by SOAH.

The standing issue: The General Manager has said that Republic does not have standing to pursue an application. Mr. Jones pointed out that MPGCD rule 11.9.1a and 2 say that an application must contain documentation establishing the applicable authority to construct and operate each well for the proposed use. A lease agreement between Fort Stockton Holdings and Republic Water has been tendered to the Board. Under the lease, Republic has an interest in real property as a lessee of the real property. If the Board had found a legal defect in the lease, they could have not declared it the application administratively complete. The application should be referred to SOAH if there is a fact issue or a legal question about the lease.

In the General Manager's discussions of standing, I find the following statements that are pertinent. On page 6 of the General Manager's brief, the General Manager says about our lease section 2.7 when construed with other conditions in terms of the lease make it clear that Republic would like to tie up water – I will stop there and say – I don't know what tie up water means. FSH owns the water, it's there, and it's being used today under existing permits. Republic of course would lease the water and use amounts that are already in use. Then it goes on to say that on a speculative groundwater marketing venture, to which I would say this, every venture which we engage in – in capitalistic societies is speculative. On page 7 when the General Manager accuses Fort Stockton Holdings and Republic of trying to get more than one bite of the apple in other words monetizing Clayton Williams Farm's and Fort Stockton Holdings' water rights to the economic benefit of Clayton Williams Farm's and Fort Stockton Holdings. Monetizing our asset to our economic benefit is not a criticism. It does not deprive us of standing, it is in fact the essence of what we do in this society. If the District is questioning on a standing basis whether our use for municipal purposes are proper – I submit that the aquifer does not know the difference between watering pecan trees and selling water to Communist China and on the other hand putting it in a pipe and selling it to the Republicans over in Odessa. So that is the essence of the standing argument. We have standing. This District declared that as much when it declared the application to be administratively complete.

Res Judicata issue: I can say that Res Judicata should not apply here because we don't have a claim or cause of action that is asserted. We have an application. It is a disfavored notion in administrative law for many reasons that are outlined in my brief and Mr. McCarthy's brief. The concept is particularly disfavored in the courts where we involve privately protected property rights. If those are implicated, then certainly res judicata should be disfavored. If we are talking about the issues that are raised in the 8th Court of Appeals in El Paso in the Fort Stockton Holdings appeal, in order for res judicata to apply you would have to demonstrate that the same issues are being litigated to identical issues being litigated to a conclusion and that's not true. You would have to demonstrate that the conditions are the same today as they were when Fort Stockton Holdings application was under consideration and the aquifer conditions I would submit are not the same.

Collateral Estoppel: The concept of Collateral Estoppel is even more restricted. The issue has to have been actually litigated, essential to the judgment, and identical to the issues in the pending action. What we have in the Fort Stockton Holdings case, as I understand it, is some claim that the Guitar Holding was implicated because of

the Historic and Existing Use permits and a change of use or a proposed change of use from agricultural to municipal. But, we don't have that in the Republic lease at all. With that said, I do think res judicata or collateral estoppel or standing are impediments.

Summary Disposition: That motion simply says this: as a matter of law, Republic is entitled to a permit. That is true for a couple of really fundamental reasons. The first is groundwater is privately owned in place, it is constitutionally protected property just like the soil. That means that we have the right to produce that groundwater. The fact that is relevant is that we have a lease; it is privately owned property, and we have the right to barter, sell, or trade it like any other property and is subject only to reasonable regulation

City of Fort Stockton: Attorney Mark Harral said the City is reserving its financial resources for an administrative hearing.

Pecos County WCID#1: Harvey Gray, Pecos County WCID#1 Board President, had no statement at this time.

Cockrell Investment Partners, L.P.: Attorney Ryan Reed said Cockrell's participation in this matter is based on its concerns for its current use of the groundwater. We agree that a party has rights and its groundwater. We currently have Historical and Existing Use Permits. We use those to farm pecans.

The issues before us today, and the issues that have been raised I see are very intertwined but they are two distinct legal issues. The first issue is the SOAH jurisdiction issue. The second issue is what I believe to be a collateral estoppel issue relating back to a Fort Stockton Holdings permit application, the denial of that application and the subsequent litigation. They are intertwined because truly this Board's determination on that matter is going to affect its determination related to the Republic application, then that ends story on both of these SOAH jurisdiction issue and the collateral estoppel issue.

If at the end of the day, the Board will vote to deny Republic's permit application because there is a finding of fact from the Fort Stockton Holdings application. In effect if the analysis is the same that the Board had determined in the Fort

Stockton Holdings case, that there was a fact issue perhaps related to the quality of water and the quantity of water from the Fort Stockton Holdings application and that same issue appears in the Republic's application, if that yields the same decision, if the Board will make the same decision based on that fact – then there is no point in going through with the SOAH proceeding. That, I think, is the only reason that this case should not be referred to SOAH. If the Board is going to say we know at the end of the day we will vote the same way because there is a concrete fact that has been adjudicated. Then, that ends the SOAH discussion. That also ends the proceeding.

Pecos County: Attorney Drew Miller's statement began with 3 options that are before the Middle Pecos GCD Board of Directors.

1) First option is to refer this entire matter to SOAH.

The option of referring the entire case to SOAH clearly has the highest potential for forcing all of the parties to incur the highest costs because of the likelihood that the parties will participate in a full blown evidentiary contested hearing with expert witnesses, expert reports, discovery, pre-filed testimony, and efforts to take your deposition. This will be a time consuming drawn out and costly for everyone. It may very well result ultimately in litigation in courts after we go through that ordeal.

2) Request a limited referral to SOAH.

The next option is a limited referral to SOAH, and I clearly think that will be more conservative of costs than a full referral to SOAH in this matter. The question has been raised whether you are legally authorized to request a limited referral to SOAH. Mr. Jones referred to as severance and improper severance, again I know that you will be capably advised by Mr. Dugat on this question. But in my view, the answer is clearly yes, a limited referral to SOAH is authorized, and I base that statement and I base my view on that on the plain language of the SOAH rule. It is Title 1, Texas Administrative Code, section 155.53. That rule allows for 3 options for referring cases to SOAH. You can request mediation, you can request a hearing, or you can request the assignment of an Administrative Law Judge (ALJ) and if you request the assignment of an ALJ – that ALJ may be asked to consider motions.

3) Act today to issue a decision denying or dismissing Republic's application.

The option to enable the option and to face his argument that you can't do it, is that you have the ability to revisit the question as to whether or not this is a contested proceeding. You can revisit that and you can simply unrecognize it as a contested proceeding, and then you are free to act on it without a referral to SOAH.

Under both proposals, in the Republic proposal and in the Fort Stockton Holdings proposal, the permittees are in essence requesting a license to acre foot by acre foot or gallon by gallon as needed convert the rights under Historic and Existing Use permit for In-District irrigation use of that groundwater into a right under a production permit for out-of-district industrial and municipal use. Both proposals violate the law, and both proposals are unfair to other groundwater owners and users. Both permit applications cannot be granted. Republic's application should not go forward while Fort Stockton Holdings permit application is still pending in litigation.

Fort Stockton Holdings, L.P.: Ed McCarthy, attorney for Fort Stockton Holdings. There are distinctions between the applications, you have different applicants, you have different parties, and you have a different application. The idea that this is the same water, or that there is only a limited bucket that Fort Stockton Holdings can ever apply for is just wrong. Fort Stockton Holdings can come in tomorrow and apply for more water. Just because it has Historic & Existing Use permits for about 48,000 acre feet of water doesn't mean that this is all the water that can be produced from that land. Supreme Court has made that clear.

The comment that Director Cardwell made last April on the questions of res judicata and collateral estoppel being raised by this permit – if you apply them here it means effectively that Fort Stockton Holdings neither on its own, or in partnership, or by lease or conveyance to any other party will ever be able to come in and get an application or an amendment to a permit granted. They will be required to just continue to use their existing water right for irrigation on their land. That's the effect of you ruling that this is collateral estoppel or res judicata. It would be in effect the taking of the property right of Fort Stockton Holdings.

Mr. Reed on behalf of Cockrell Investments basically quoted to the Administrative Procedure Act and made reference to if there has been any finding of fact that is binding then that is what you should follow. There has been no findings of fact, there has been no facts put into evidence in this case on which this Board can find collateral estoppel. If evidence is a predetermination on the part of this Board to simply deny the application, which would be wrong and again, would be a takings and violate the water code.

There is always going to be some commonality or common element in any application associated with the Williams property because of the real property. You cannot pick up and move the land. You will always be drilling the groundwater beneath the same land. So again, if that's the foundation and that

is the basis upon which you are going to rule, you are effectively denying Fort Stockton Holdings and Williams Farms their property rights and their groundwater. You are condemning them to forever irrigate on that property and make no other change.

If this Board continues with the idea that all Fort Stockton Holdings or Republic is attempting to do is convert its Historic & Existing Use permits to a new purpose or a new use through an amendment, that's wrong. There has never been an application for an amendment filed. There has only been applications for new permits filed that would be subject to the new rules, the new priorities, to the lesser protections that are afforded to new production permits than afforded to Historic & Existing Use permits. On that basis, this is not governed by Guitar, it is not subject to collateral estoppel. You need to refer this entire matter for a hearing on the merits to SOAH and give Fort Stockton Holdings and Republic Water of Texas the benefit of that hearing.

MPGCD General Manager: Mike Gershon, attorney for the General Manager. Republic's application is associated with Fort Stockton Holdings Historic and Existing Use permits as is the Fort Stockton Holdings permit application. Both applications are associated with Historic and Existing Use.

The District is handling the applications appropriately. As Mr. Jones would have it, we shouldn't be sitting here today because this District does not have jurisdiction over the Republic application. As you can read from the Briefs, the law is absolutely certain on that – he's wrong. This District, this Board does have jurisdiction over the application.

To prevail on Summary Judgment there cannot be disputed facts. There are disputed facts on the science. If we get into the merits on Republic application, I can assure you that most if not all the parties will have scientists that perhaps have different opinions, and likely the protestants opinions will be different from the applicants opinions. There are disputed facts, therefore Republic's motion for Summary Judgment has to be denied because there are disputed facts.

With respect to the General Manager's motion for Summary Disposition there are not disputed facts. The General Manager's motion simply says we take on its face what has been requested in Fort Stockton Holdings application and what has been requested in Republic's application. It has been said today that there aren't any facts before this Board right now that there hasn't been an opportunity to develop the facts. That also is wrong. There are contested facts.

Although Mr. Jones has an opportunity after I wrap up to explain what is contested and disputed on its face of the requests for relief in the Fort Stockton Holdings application and the Republic application, both of which are in evidence in this hearing. All the parties have that information, there is no additional information that the Board needs to look at the two applications on their face and realize what those similarities are. There are plenty of similarities as you can see in the Briefs.

Mr. Jones says that addressing law issues first is a severance. He says that the courts in his citations in his Brief make it clear that addressing law issues first is a severance. That's not true. You have a District Judge that has agreed that you look at jurisdictional issues first. We look at standing issues and collateral estoppel and res judicata first.

What the General Manager is suggesting is to send the case to SOAH unless the Board is prepared to get into litigation over the procedural question of whether you can act today. You'll get an opportunity to act on res judicata and collateral estoppel and standing at some point. And either it's today or some point down the road after you have a proposal for decision from SOAH.

The options that SOAH has for you is to make the issues limited to SOAH and to ask SOAH to appoint an Administrative Law Judge (ALJ) to address the pending motions that are here before you today, and send back a PFD a proposal for decision so that the Board can make that final decision. Or, send the case to SOAH for a full blown evidentiary hearing.

You can send a limited set of issues to SOAH and still be in compliance with the statute, because you are still referring to SOAH. I believe that is the most appropriate approach to take.

Before you is a form to refer a case to SOAH. SOAH does not take jurisdiction until this form is submitted and a contract has been entered with the District and SOAH and a deposit has been tendered to SOAH by the applicant.

There are two costs associated with SOAH. One is the cost of the overhead that SOAH will spend to deal with the case. That is the first set of costs. And the statute is clear that the party requesting to go to SOAH can be instructed to cover those costs by this Board. And before we press forward, the statute and SOAH requires that there be a deposit to cover those estimated costs. The second set of costs is what each and every one of the parties will incur by hiring experts and lawyers and just routine expenses. And those costs are incurred by the parties.

Now, there is a third cost and that involves our court reporter and that is subject to the discretion of the presiding officer as to who pays the cost of the Court Reporter.

We believe that it's most appropriate to send it to SOAH. We'll address those issues again and you'll have that opportunity with a recommendation from a SOAH Administrative Law Judge on each of those issues.

The statute says if a SOAH hearing is requested then you go to SOAH. That same statute, that same subsection refers to that hearing being an evidentiary hearing. And, for the reasons that I noted – there is no need for an evidentiary hearing.

Ty Edwards and I would encourage you to send this over to SOAH. The role of the State Office of Administrative Hearings, is not to make the final decision. SOAH's role is to provide a recommendation to this Board on what to do.

Republic Water Company of Texas, LLC: Marty Jones, Attorney for Republic Water Company of Texas, LLC.

Mr. Jones summed up his interpretation of the previous comments that were made beginning with he feels the Board has already decided that the application will be denied. So if you send it to SOAH on a full blown hearing or a limited hearing and regardless of how it comes back, he believes this Board will say "Well, no we've already decided that and deny the permit". Mr. Gershon correctly notes that decision will result in litigation. If you deny the permit today, as he correctly notes that will result in litigation, and so his suggestion is to avoid the SOAH thing all together so that we save that cost. That is really not what's contemplated by the statute at all. The statute does not say that the District gets to decide whether or not to refer to SOAH just based on its predetermination of the application.

And finally I would say with respect to a cost figure, I hear people saying we have to hire experts and go through all the science, I think that's simply untrue for two reasons. One is you have 50 years of historic production out of these very wells for these very amounts and the Texas Water Development Board has examined them, the US Geological Survey has examined that and it has thoroughly and completely examined over the course of half of a century of production. The science is proven out by the production.

To the extent that you are asking about impacts on the neighbors, the Cockrell's for example, I would submit two things. One is you have 50 years of history for this amount and whatever it is tomorrow, it is today, and it was yesterday. Secondly I would say that the rule of capture does still prevail in the State of Texas. If we somehow impact the neighbors differently than we are doing today using the same production, then the neighbors remedy under Texas law is to offset that production and put in their own wells and produce more.

Intense discussions ensued when Director Groth asked Mr. Jones if he said that he had heard the Board was going to deny the permit. Mr. Jones answer: I will say to you that I have heard around town that's exactly what the Board intends to do. Mrs. Groth assured Mr. Jones that the Board has not predetermined a decision. Mr. Jones continued by saying "And I would say to you that if I went to your State Legislator and asked for a sworn statement about things you have said to him we would find very unfortunate violations of the water code." Mrs. Groth declared that she had never spoken to a State Legislator and asked Mr. Jones which State Legislator he was referring to, which he verbally declined to answer, saying there may be proceedings in which it would become relevant.

Mr. Jones was asked if in his opinion that if SOAH rules in Republic's favor that the MPGCD Board has predetermined to deny the application. Mr. Jones stated that was correct.

Mr. Jones was asked if SOAH rules in MPGCD's favor, would Republic abide by the ruling. Mr. Jones replied "That depends on what SOAH says and how they say it. There are certain things they can do that are factual that we can question. There are things they do that are legal that are always open to question that are always solved by the Texas Supreme Court ultimately."

Recess for Lunch and an Executive Session was called at 12:00 p.m. by Presiding Officer Jerry McGuairt pursuant to the Texas Open Meetings Act, Sections 551.071 of the Texas Government Code, to consult with attorney.

The Executive Session ended at 1:00 p.m. President McGuairt stated that no decisions or votes were made in executive session.

The Continuation of the Preliminary Hearing on Application for a Production Permit and Authorization to Transfer for Republic Water Company of Texas, LLC reconvened in Open Session at 1:02 p.m.

- II Adjourn hearing and consider and/or act on **Application for a Production Permit and Authorization to Transfer for Republic LLC**, including Republic LLC's Objection to Denial of Contested Case Hearing Rights; Republic LLC's Plea to the Jurisdiction and Motion to Remand to SOAH; the November 29, 2016 Briefing by the Parties; Fort Stockton Holding L.P.'s Objection to Denial of Contested Case Hearing Rights and Brief on Res Judicata and Collateral Estoppel; General Manager's Motion for Final Disposition or Summary Disposition and Request that any SOAH Referral be Limited to Preliminary Law Issues; Republic LLC's Response to Briefing on Purported Legal Issues and Motion for Summary Disposition; and any other motions or briefs filed in relation to this Application.

Statement by President McGuairt: The parties have outlined three options:

Option 1: The denial of Republic's Application by granting the General Manager's Motion for Final Decision or Summary Disposition.

Option 2: Refer to SOAH on a limited basis Republic's application with the scope of the referral limited to consideration of the General Manager's Motion for Final Decision or Summary Disposition and Republic's Motion for Summary Disposition.

Option 3: A full referral of Republic's application to SOAH.

John Dorris made a motion that the Presiding Officer and Board refer the matter of the application of Republic Water Company of Texas, LLC (Republic) to State Office of Administrative Hearing (SOAH) and authorize the Board President to enter into a contract with SOAH and file a *Request to Docket Case Form* electing the option under SOAH Rule 155.53(b)(1) and (c). As a part of the referral, the Presiding Officer should request that SOAH rule of Republic's pending Motion for Summary Disposition and the General Manager's pending Motion for Final Decision or Summary Disposition. If SOAH finds the preliminary matters raised by the General Manager do not bar the Republic application, or that Republic's application should not be granted as a matter of law as requested in Republic's Motion for Summary Disposition, then SOAH conduct full evidentiary hearing.

I further move that hearings conducted by SOAH shall be in Fort Stockton at the District's Office, unless it is determined that a different space is needed to accommodate the interests and convenience of the parties.

I further move that the Presiding Officer shall provide to SOAH a copy of Republic's application, a transcript of the November 15, 2016 preliminary hearing including any exhibits, a copy of today's transcript and any exhibits, a copy of the documents that were provided by the General Manager on December 9, 2016

pursuant to the Presiding Officer's December 2, 2016 Order, a copy of the Presiding Officer's Orders, a copy of the written pleadings filed in this matter including briefing, motions, and pleas, a copy of the District Rules, Management Plan, and District Act.

Finally, I move that the Contract should not be executed until Republic deposits with the District the amount estimated by SOAH necessary to conduct the full referral. The deposit made by Republic Water Company of Texas, LLC shall be \$75,000 payable to Middle Pecos GCD, and delivered to Ty Edwards, MPGCD General Manager, no later than March 7, 2017 by 5:00 p.m. Republic Water Company of Texas, LLC shall pay for the Court Reporter for the SOAH hearing(s).

The motion was seconded by M. R. Gonzalez. The motion passes. The vote is unanimous.

Note: John Dorris left the meeting at 1:12 p.m.

XI Briefing and take action as necessary on pending lawsuits:

- a. **Republic LLC's state-court lawsuit**, Cause # P-11956-112-CV/Writ of Mandamus, and Court of Appeals Case No. 08-17-00001-CV, which appeal was filed on January 3, 2017

The El Paso Court of Appeals ordered the District and Republic to mediate. It was the courts initiative for the mediation. There was an attempt to mediate with all the parties. The City of Fort Stockton did not want to mediate, and because of that Republic wanted to pull the plug on mediating.

Now the Court of Appeals has ordered us to mediate presumably the issues on appeal. There are only two issues that have been identified by Republic. 1) Involves the District Judges decision on our plea to the jurisdiction; 2) Attorney fee award that Judge Ables ordered (court costs plus expert fees).

Republic's position is that they do not want to pay anything, and they have not posted a bond nor put the cash in the Court Registry. Republic is in violation of the final judgment that was to be filed within 20 days back in November. MPGCD would need to file a motion asking for the District Court to enforce the order. We have filed discovery asking Republic for information about what assets they have so that we can alert the Court.

b. **Fort Stockton Holdings, LP v. Pecos County, MPGCD, et al.** Court of Appeals Case No. 08-15-00382-CV

We are in limbo. At some point the Court will reset our oral arguments. It may be within the next 2 or 3 months.

XIV **Briefing and take action as necessary on matters regarding 85th Texas Legislative Session, including resolutions regarding local legislation on Director terms and export fees and opposing legislation noticed by Fort Stockton Holdings, L.P.'s legal counsel.**

The Board was presented with a resolution to declare their intent to amend the District's enabling act/legislation by introducing local legislation during the 85th Texas Legislative Session.

One bill would enact a similar requirement applicable to directors for certain general law districts subject to Chapter 49 of the Texas Water Code that authorizes the removal of a director by unanimous vote of his or her remaining directors if the director misses one-half or more of the regular meetings scheduled during the prior 12 months.

The other bill desires to conform certain fee provisions of Section 8851.104(b) of the District's enabling act with certain provisions of Sections 36.122 and 36.205 of the Texas Water Code; more specifically, the Board desires to clarify the current and apparent intent and meaning of Section 8851.104(b) to allow the District to assess a fee on groundwater transferred out of the District in accordance with Section 36.122(e)(1) or (2) of the Texas Water Code irrespective whether a groundwater production fee is assessed.

On February 13, 2017 Pecos County Commissioners Court approved a resolution in support of the proposed legislation.

Although we have not seen the proposed legislation, we have been informed that Mr. Ed McCarthy has filed a bill(s) in opposition to the Middle Pecos GCD.

Janet Groth made a motion to approve the adoption of the resolution. Motion seconded by Alvaro Mandujano, Jr. Motion passed unanimously.

- XV Consider and/or act upon **delegation of authority to the General Manager and one or more Director(s) to represent the District pertaining to legislative matters.**

Alvaro Mandujano, Jr. made a motion to authorize The General Manager and the Board President to represent the District pertaining to legislative matters. The motion died due to lack of a second.

Janet Groth made a motion to delegate authority to the General Manager and one or more Directors to represent the District pertaining to legislative matters. Also, to otherwise represent the Board and District with respect to our legislation and other legislative matters related to District Business in between Board meetings. This will be twofold: 1) Pertaining to ongoing legislation at the Capitol; and 2) If legislation is filed that undercuts the Districts jurisdiction in any way to address it prior - during the time between Board meetings before the Board can be debriefed and take full action. Motion seconded by Weldon Blackwelder. The motion passed unanimously.

- XVI Consider and/or act upon engagement of **William Hutchison, PhD, P.E., P.G.** for hydrogeologic/engineering consulting services.

Janet Groth made a motion to engagement of William Hutchison, PhD, P.E., P.G. for hydrogeologic/engineering consulting services pertaining to the SOAH hearing(s). Motion seconded by Jeff Sims. The motion passed unanimously.

- XVII Consider and/or act upon **Recurrent Energy Maplewood 312 Tax Abatement Agreement.**

The tax abatement that was approved at the January 17, 2017 Board Meeting had an exhibit that has been updated. The \$25,000,000 value limitation shown in EXHIBIT F last month should have been \$50,000,000, and the corrected EXHIBIT F needs to be switched out in the tax abatement agreement.

Alvaro Mandujano, Jr., made a motion to approve the Recurrent Energy Maplewood 312 Tax Abatement Agreement corrected Exhibit F. Motion seconded by Janet Groth. The motion passed unanimously.

XVIII Progress Reports: Well Registrations, Production Permits, Drilling Permits, Data Loggers, Drought Monitor Map and ongoing Water Quality Analysis.

- Well Registrations: Progress report in notebooks.
- Drought Monitor Map: The current drought monitor map in their annual manager's report.
- Production Permits: There will possibly be several next month.
- Notice of Intent to Drill: There are several oil companies requesting to drill water wells.
- Monitor Wells: One new data logger in Coyanosa.
- Analysis: We are trying to do 2 analysis a year on selected wells. One analysis in January and one in July every year.

XIX Consider and/or act upon General Manager's Correspondence.

- Directors were given information on the Texas Alliance of Groundwater Districts upcoming Texas Groundwater Summit that is scheduled for August 29-31, 2017.
- The Director and Officer Liability insurance is being renewed.

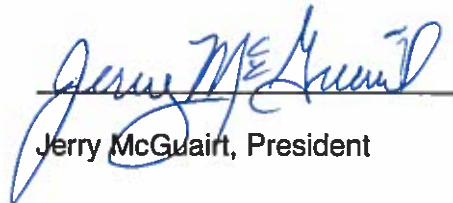
XX Directors' comments. No comments

XXI Consider and/or act upon agenda for next meeting.
There will be two production permits for solar facilities.

XXII Adjourn Board meeting.
Jeff Sims made a motion to adjourn the meeting. Seconded by Weldon Blackwelder. Motion carried unanimously. The meeting adjourned at 1:42 p.m.



M. R. Gonzalez, Secretary/Treasurer



Jerry McGuairt, President

Date Approved 3-21-17