RESOLUTION AND ORDER NO. 228 20240802

OF THE BOARD OF DIRECTORS OF THE HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT ADOPTING HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT RULES, RULE 16 (MANAGEMENT ZONE)

WHEREAS, the Hays Trinity Groundwater Conservation District ("HTGCD" or "the District") is a political subdivision of the State of Texas, created by Act of May 28, 1999, 76th Leg., R.S., ch. 1331, 1999 Tex. Gen. Laws 4536, §§ 1-18 and by Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991, 2027, §§ 3.0301-3.0313, codified at Texas Special District Local Laws Code ch. 8843 ("HTGCD Act");

WHEREAS, HTGCD has as its purpose the conservation, preservation, protection, recharging, and prevention of waste of groundwater and groundwater reservoirs or their subdivisions, including the Trinity Aquifer, within its jurisdiction in Hays County, consistent with the objectives of Section 59, Article XVI, Texas Constitution, Chapter 36 of the Texas Water Code, and Chapter 8843, Special District Local Laws Code. Tex. Water Code Ann. § 36.0015(b); HTGCD Act § 8843.101;

WHEREAS, groundwater conservation districts "are the state's preferred method of groundwater management in order 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." Tex. Water Code Ann. § 36.0015(b);

WHEREAS, the District has "all of the rights, powers, privileges, authority, functions, and duties provided by the general law of this state, including Chapter 36, Water Code, applicable to groundwater conservation districts created under Section 59, Article XVI, Texas Constitution." HTGCD Act § 8843.101;

WHEREAS, the District is authorized to "make and enforce rules, including rules limiting

groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater and to carry out the powers and duties provided by this chapter." Tex. Water Code Ann. § 36.101(a);

WHEREAS, in adopting a rule under Chapter 36 of the Texas Water Code, a district is required to "(1) consider all groundwater uses and needs; (2) develop rules that are fair and impartial; (3) consider the groundwater ownership and rights described by Section 36.002; (4) consider the public interest in conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and in controlling subsidence caused by withdrawal of groundwater from those groundwater reservoirs or their subdivisions, consistent with the objectives of Section 59, Article XVI, Texas Constitution; (5) consider the goals developed as part of the district's management plan under Section 36.1071; and (6) not discriminate between land that is irrigated for production and land that was irrigated for production and enrolled or participating in a federal conservation program." Tex. Water Code Ann. § 36.101(a);

WHEREAS, when it adopts rules, the District must comply with the applicable procedural rulemaking requirements of Chapter 36 and the District's rules. Tex. Water Code Ann. § 36.101; District Rule 5;

WHEREAS, pursuant to Tex. Water Code Ann. § 36.101 and Sections 5.1 and 5.2 of the District's Rules, the District provided notice of the rulemaking hearing held with respect to the Proposed Rules ("PRs"), by 20 days before the hearing: posting the notice in a place readily accessible to the public at the District's office; providing the notice to the Hays County Clerk;

publishing the notice in the *Wimberley View* and *Dripping Springs Century News*, newspapers of general circulation in the District; providing the notice by mail, facsimile, or electronic mail to those persons who have requested notice; and making available a copy of the proposed rules at the District's office during the District's business hours and on the District's website;

WHEREAS, pursuant to § 36.101, Tex. Water Code Ann., and Sections 5.1 and 5.2 of the District's Rules, the District held a public rulemaking hearing at which the public was allowed to make comments on the PRs and the hearing was conducted in accordance with the Texas Open Meetings Act, Tex. Gov't Code Ann. §§ 551.001-551.146;

WHEREAS, the Texas Private Real Property Rights Preservation Act Assessment, as set out in Exhibit A, is attached hereto and incorporated for all purposes;

WHEREAS, the District has considered all comments submitted prior to the adoption of this order;

WHEREAS, the District has prepared Final Rules ("FRs"), as set out in Exhibit B, which are attached hereto and incorporated for all purposes; and

WHEREAS, the board has reviewed the FRs and finds that they are consistent with the District's statutory authority and should be adopted.

NOW, THEREFORE, BE IT RESOLVED AND ORDERED BY THE BOARD OF DIRECTORS OF THE HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT THAT:

Section 1. The recitals set out above are found to be true and correct and they are hereby adopted by the Board and are made a part of this Resolution and Order for all purposes.

Section 2. The Texas Private Real Property Rights Preservation Act Assessment, which is attached hereto as Exhibit A, and all of the statements, findings, and conclusions contained therein are hereby approved and adopted by the board and are incorporated into this Resolution and Order for all purposes.

Section 3. The FRs, which are attached to this Resolution and Order as Exhibit B, are hereby adopted as Final Rules by the Board.

Section 4. The FRs become effective immediately.

PASSED AND APPROVED BY THE BOARD OF DIRECTORS OF THE HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT THIS 1ST DAY OF AUGUST, 2024.

Bruce A Moulton

Bruce Moulton, President

ATTEST:

David L Smith

David Smith
Secretary/Treasurer

APPROVED AS TO FORM:

Gregory M. Ellis, General Counsel
Deborah Trejo

EXHIBIT A

HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT RULEMAKING

Document Title: **TEXAS PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT ASSESSMENT**

Rules: **HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT RULES**
Rule 16 (Blanco Valley Groundwater Management Zone)

Rule Type: **Proposed Rules (PRs)**

Date of Public Hearing: August 1, 2024

Date of Public Notice: July 11, 2024

I. Duty of Certain Governmental Entities to Conduct a Takings Impact Assessment under Certain Circumstances

Chapter 2007 of the Texas Government Code[1] requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions.[2]

II. Applicability of TPRPRPA to the Hays Trinity Groundwater Conservation District

The requirement to prepare a TIA generally applies to a "governmental entity."[3] The term "governmental entity" is defined by TPRPRPA to include "a political subdivision of this state."[4] The express language of the enabling statute for the Hays Trinity Groundwater Conservation District (the "District")[5] establishes the district as a "groundwater conservation district" under Article XVI, Section 59 of the Texas Constitution.[6] Groundwater conservation districts created under Article XVI, Section 59 of the Texas Constitution are "political subdivisions" of the State of Texas.[7] The District, therefore, is a "governmental entity."

III. Applicability of TPRPRPA to Rulemaking Generally

Although TPRPRPA does not apply to the repeal of a rule by a governmental entity, it does apply to the adoption of a rule.[8] Section 2007.003(a) of TPRPRPA states that "[t]his chapter applies only to the following governmental actions: (1) the *adoption or issuance* of a rule."[9] There

[1] Tex. Gov't Code Ann. §§ 2007.001-.045 (the "Texas Private Real Property Rights Preservation Act" or "TPRPRPA").
[2] *See id.* §§ 2007.043(a); 2007.003(a)(1)-(3).
[3] *Id.* § 2007.043(a).
[4] *Id.* § 2007.002(1)(A).
[5] Acts 1997, 75th Leg., R.S., ch. 1075, 1997 Tex. Gen. Laws 4151, amended in 2009, and codified in Texas Special District Local Laws Code, Chapter 8816 ("Act").
[6] *See id.* §§ 8821.002, 8821.101.
[7] *See e.g., Guaranty Petroleum Corp. v. Armstrong*, 609 S.W.2d 529, 530 (Tex. 1980).
[8] *See* Tex. Gov't Code Ann. § 2007.003(a).
[9] *Id.* § 2007.003(a)(1) (emphasis added).

is no provision describing any type of governmental action that could be construed as the repeal of a rule. TPRPRPA, therefore, applies only to the District's adoption of rules.

IV. The District's Adoption of Its Proposed Rules is Excluded from TPRPRPA under TPRPRPA's Statutory Exclusions.

Tex. Gov't Code Ann. § 2007.003(b)(1) through (14) sets forth statutory exclusions that exempt certain governmental actions from TPRPRPA's coverage. The District's adoption of rules falls within at least two of these exclusions.

A. The District's Adoption of the Proposed Rules is Excluded from TPRPRPA under Tex. Gov't Code Ann. § 2007.003(b)(11)(C).

Tex. Gov't Code Ann. § 2007.003(b)(11)(C) excludes from TPRPRPA's applicability "an action taken by a political subdivision under the political subdivision's statutory authority to prevent waste or protect rights of owners of interest in groundwater."[10] The District's proposed rules revise the District's existing rules to create a new Blanco Valley Groundwater Management Zone to better manage and protect groundwater within that particular area. The rules adoption is an action taken by the District under its statutory authority to manage groundwater withdrawals and thus, is an action to protect the rights of owners of interests in groundwater and to prevent the waste of groundwater, and therefore, is excluded from the requirements of TPRPRPA.

The Texas Legislature created the District for the express purpose of accomplishing "the purposes of Section 59, Article XVI, Texas Constitution."[11] Tex. Spec. Dist. Code Ann. §§ 8816.101 and 8816.106 provide that the District has all of the rights and powers provided under Chapters 36 and 49, Texas Water Code. The District is also a "district" under § 36.001(1) of the Texas Water Code.[12] Therefore, the District has all of the powers and authority provided for in Chapter 36 of the Texas Water Code, to prevent the waste of groundwater and to protect interests in groundwater.

Groundwater conservation districts, such as the District, are the "state's preferred method of groundwater management."[13] Accordingly, Chapter 36 of the Texas Water Code provides for the creation of districts for the express purpose of preventing the waste of groundwater, and indirectly the interests therein, through conservation, preservation, protection, and recharge.[14] Section 36.101(a) of the Texas Water Code authorizes districts, such as the District, to "develop rules which are fair and impartial" to carry out this purpose.[15] This section provides as follows:

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[10] *Id.* § 2007.003(b)(11)(C).
[11] Tex. Spec. Dist. Code Ann. § 8816.002.
[12] Tex. Water Code Ann. § 36.001(1).
[13] *Id.* § 36.0015.
[14] *See id.* "In order to provide for the conservation, preservation, protection, recharging, and prevention of *waste* of groundwater, and of groundwater reservoirs or their subdivisions groundwater conservation districts may be created as provided by this chapter." *Id.* (emphasis added).
[15] *Id.* § 36.101(a).

> A district may make and enforce rules, including rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent *waste* of groundwater and to carry out the powers and duties provided by this chapter.[16]

In other words, the Legislature has authorized groundwater conservation districts, such as the District, to engage in rulemaking in order to prevent the waste of groundwater and to generally protect ownership interests through conservation and preservation.[17]

Chapter 36 of the Texas Water Code also sets forth the details of significant elements of a permit program, and provides for the regulation of well spacing.[18] Specifically, § 36.1071 requires districts to develop a comprehensive management plan which considers controlling and preventing the waste of groundwater as a management goal.[19] As applied to the regulation of spacing and production, § 36.116(a) provides that "[i]n order to prevent waste, a district by rule may regulate [spacing and production]."[20] As these provisions demonstrate, the District is clearly authorized to take action under the statutory authority provided by the Legislature to prevent the waste of groundwater, including through the adoption of permitting and other related rules to regulate production.[21] The Texas Supreme Court in *Bragg v. Edwards Aquifer Authority* noted that the authority to prevent waste under the Property Rights Act's exclusion refers to the broader concept of preventing waste through a permit system that is designated by the Legislature,[22] such as the District's permitting scheme authorized by Chapter 36 of the Texas Water Code.

Through the implementation of a permit program, ownership interests in groundwater are also protected under Chapter 36 of the Texas Water Code. By providing for the enactment of rules designed to protect and conserve groundwater, including the proposed rules, the District ensures that all ownership interests in groundwater are protected and that water is available for beneficial use by multiple users.[23] Chapter 36 requires districts to consider the effects of new permits on existing users. Before granting or denying a permit, a district is required to consider whether "the proposed use of water unreasonably affects existing permit holders."[24] District rules to manage groundwater withdrawals allow the District to conserve and protect groundwater in the District, and thus, serve to protect the rights of the owners of interest in groundwater and to prevent waste.

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[16] *Id.* (emphasis added).
[17] *See Bragg*, 71 S.W.2d at 736.
[18] *See* Tex. Water Code Ann. § 36.113(a) (requiring a district to issue permits); *see also* § 36.102 (providing for enforcement); § 36.116 (providing for well spacing).
[19] *Id.* § 36.1071(a)(2).
[20] *Id.* § 36.116(a).
[21] *See Bragg*, 71 S.W.2d at 736.
[22] 71 S.W.2d 729, 736 (Tex. 2002).
[23] *See* Tex. Water Code Ann. § 36.0015 (providing that the purpose of a District is to conserve and protect groundwater); *see also* §§ 36.101(a), 36.113(d)(2), 36.1131(b), 36.115, 36.116(a) (relating to permitting a permitting program that protects and conserves groundwater); § 36.118 (relating to the capping of open or uncovered wells), § 36.119 (providing remedies for illegal drilling), and § 36.123 (providing authority for inspections).
[24] *Id.* § 36.113(d)(2).

That the District's adoption of the proposed rules is exempt from the Property Rights Act under § 2007.003(b)(11)(C) of the Texas Government Code is supported by the Supreme Court's decision in *Bragg*.[25] In that case, well owners sued to invalidate a set of rules adopted by the Edwards Aquifer Authority, a groundwater conservation district, which were designed to implement a permitting program. The court held that the adoption of the district's well permitting rules was exempt from the Property Rights Act under § 2007.003(b)(11)(C) of the Texas Government Code as they were adopted under the district's statutory authority to prevent waste and protect the rights of owners of interest in groundwater.[26] Similarly, the District's adoption of rules to conserve and protect groundwater within the District is necessary to implement its regulatory programs and should be exempt.

The proposed rules relate to the management of groundwater within the District. These rules are reasonable and necessary to protect and conserve groundwater and to protect the rights of the owners of interest in groundwater and prevent waste or pollution of groundwater.

Accordingly, the District's adoption of the proposed rules, under the District's statutory mandate to regulate the production of groundwater within the District and to conserve groundwater and prevent the waste and pollution of groundwater, is exempt from the Property Rights Act's requirement to prepare a TIA.

B. The District's Adoption of the Proposed Rules is Excluded From TPRPRPA under Tex. Gov't Code Ann. § 2007.003(b)(4)

The District's adoption of the proposed rules is also exempted from TPRPRPA under § 2007.003(b)(4) of the Texas Government Code. This provision excludes from TPRPRPA's coverage: "an action of a political subdivision, that is reasonably taken to fulfill an obligation mandated by state law."[27] The adoption of the District's proposed rules constitutes an action reasonably taken by the District to fulfill its obligation, mandated by state law, to adopt rules to conserve, preserve and protect groundwater. That action is, therefore, excluded from the requirements of TPRPRPA.

As discussed above, the District is required to fulfill its mandate to serve a public use and benefit, through the implementation and enforcement of a groundwater withdrawal program. Chapter 36 of the Texas Water Code obligates the District to adopt rules to carry out these powers and duties under state law. Significantly, § 36.0015 of the Texas Water Code states, "Groundwater conservation districts created as provided by this chapter are the state's preferred method of groundwater management through rules developed, adopted and promulgated by a district in accordance with this chapter." Indeed, Chapter 36 requires that the District adopt rules in accordance with the chapter, "After notice and hearing, the board shall adopt and enforce rules to implement this chapter" and any "rules developed, adopted, and promulgated by a district must be in accordance with the chapter." Tex. Water Code Ann. § 36.101(b). Districts are required to adopt a comprehensive management plan to carry out the district's policies and to "adopt rules necessary

[25] 71 S.W.2d at 736.
[26] 71 S.W.2d at 735-37.
[27] Tex. Gov't Code Ann. § 2007.003(b)(4).

to implement the management plan." *Id.* § 36.1071(a) and (f). Districts must require permits "for the drilling, equipping, or completing of wells or well pumps," and except for exempt wells,[28] for operating a well. *Id.* §§ 36.113(a) and 36.115(c). The District has adopted permitting and related rules as a means of carrying out its statutory obligation to protect, conserve and prevent the waste or pollution of groundwater. The plain language of these provisions demonstrates that the District is mandated by state law to implement the provisions of Chapter 36 of the Texas Water Code through the adoption of rules.[29]

When a political subdivision acts reasonably to carry out functions necessary to accomplish the purposes for which it was created, those acts are excluded from TPRPRPA under § 2007.003(b)(4) of the Texas Government Code.[30] The District's proposed rules are adopted to carry out the District's statutory mandate under the Act and Chapter 36 of the Texas Water Code to protect, conserve and preserve groundwater through the adoption of a permitting program and other rules. Therefore, the District's adoption of the proposed rules is exempt from the Property Rights Act's requirement to prepare a TIA.

V. Covered Governmental Action Determination

The District's adoption of the proposed rules is excluded from the requirements of TPRPRPA under both § 2007.003(b)(11)(C) and § 2007.003(b)(4) of the Texas Government Code and, therefore, no takings impact assessment is required.

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[28] *See* Tex. Water Code Ann. § 36.117 (providing for exemptions, exceptions and limitations on permit requirements).
[29] *See Edwards Aquifer Auth. v. Bragg*, 21 S.W.3d 375, 380 (Tex. App.—San Antonio 2000), *aff'd, Bragg v. Edwards Aquifer Auth*., 71 S.W.3d 729 (Tex. 2002).
[30] *See McMillan v. Northwest Harris County Mun. Util. Dist. No. 24*, 988 S.W.2d 337, 340-41 (Tex. App.—Houston 1999); s*ee also Edwards Aquifer Auth. v. Bragg*, 21 S.W.3d at 379-80.

EXHIBIT B

HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT RULEMAKING

Title: **HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT RULES**
Rule 16 (Blanco Valley Groundwater Management Zone)

Rule Type: Final Rules (FRs) (redlined)

Date(s) of Public Hearing: August 1, 2024

GLOBAL EDITORIAL CHANGES	
Edit	**Example**
Uniform capitalization, abbreviations and use of terms, where appropriate	
Grammar and typos	
Renumber affected sections and subsections accordingly.	

RULE 16. ~~**REGIONAL RECHARGE STUDY**~~ **BLANCO VALLEY GROUNDWATER MANAGEMENT ZONE**

(16.1.1) The ~~Regional Recharge Study Zone (RRSZ)~~Blanco Valley Groundwater Management Zone (BVGMZ) is hereby created to encompass a specific geographic area overlying the Trinity Aquifer and located wholly within the boundaries of the District. A map of ~~RRSZ~~ the BVGMZ is attached hereto as **Exhibit 3**.

(16.1.2) ~~The study will monitor recharge, discharge, spring flow, water quality, and aquifer levels for the five-year period from January 1, 2020 to December 31, 2025 (the "Study Period"). The District may budget funds from any source available to conduct the study including fees, grants, gifts, and collected penalties.~~ Notwithstanding Rule 16.1.4, any existing non-exempt use well within the BVGMZ drilled on or before August 1, 2024, and all other permitted wells thereafter, must comply with all standard operating permit requirements plus the following additional requirements:

1) A well located within the BVGMZ may not be aggregated under a single permit with any other well or well field located outside the BVGMZ.

2) An operating permit to produce groundwater from the Upper Trinity Aquifer or the Middle Trinity Aquifer may not be amended to increase the annual production total if the amendment application is filed after the effective date of this rule.

(16.1.3) Any new non-exempt use well within the ~~RRSZ~~BVGMZ drilled on or after ~~January 1, 2020~~August 2, 2024, must comply with all standard operating permit requirements plus the following additional requirements:

1) A new well may not be drilled or completed to produce groundwater from the Middle Trinity Aquifer (Lower Glen Rose, Hensel, and Cow Creek formations). New non-exempt wells shall be drilled and completed into the Lower Trinity Aquifer (Sligo and Hosston formations) or any underlying formation. ~~operating permit may not exceed a total of ten (10) acre feet annual production limit per well or well field. The Board may grant a waiver to this provision if enforcement of this rule on a specific property will result in an arbitrary taking of property or in the practical closing and elimination of a lawful business, occupation, or activity without sufficient corresponding benefit or advantage to the public.~~

2) Any non-exempt use well shall be constructed with casing and grouting installed from the surface to the top of the production zone and its water bearing strata. ~~The well must include an annular seal to the top of the production zone. Annular seal for this purpose must consist of packers, bentonite or cement grout, or other approved sealing material.~~

(16.1.4) A Tier 1 permit may be amended, through the permit amendment process, to authorize a total permit amount not to exceed 1 additional acre-foot per year.

(16.1.5) Any exempt use well within the BVGMZ must remain an exempt use well and may not be converted to a non-exempt use.

(16.1.6) Replacement Wells. A current operating permit holder or a well owner required to plug an abandoned or deteriorated well within the BVGMZ may drill a replacement well within 50 feet of the plugged well. The replacement well must be completed into the Lower Trinity Aquifer or any underlying formation and may only use the groundwater withdrawn for the same place of use, purpose of use, at the same withdrawal rate, and maximum annual production limit. This replacement well must be completed with casing and grouting of the annular space from the surface to the top of the production zone and its water bearing strata.

(16.1.7) If the boundary of a management zone crosses property lines, the rules of the management zone apply to the entirety of the property.

END OF RULE 16

EXHIBIT B
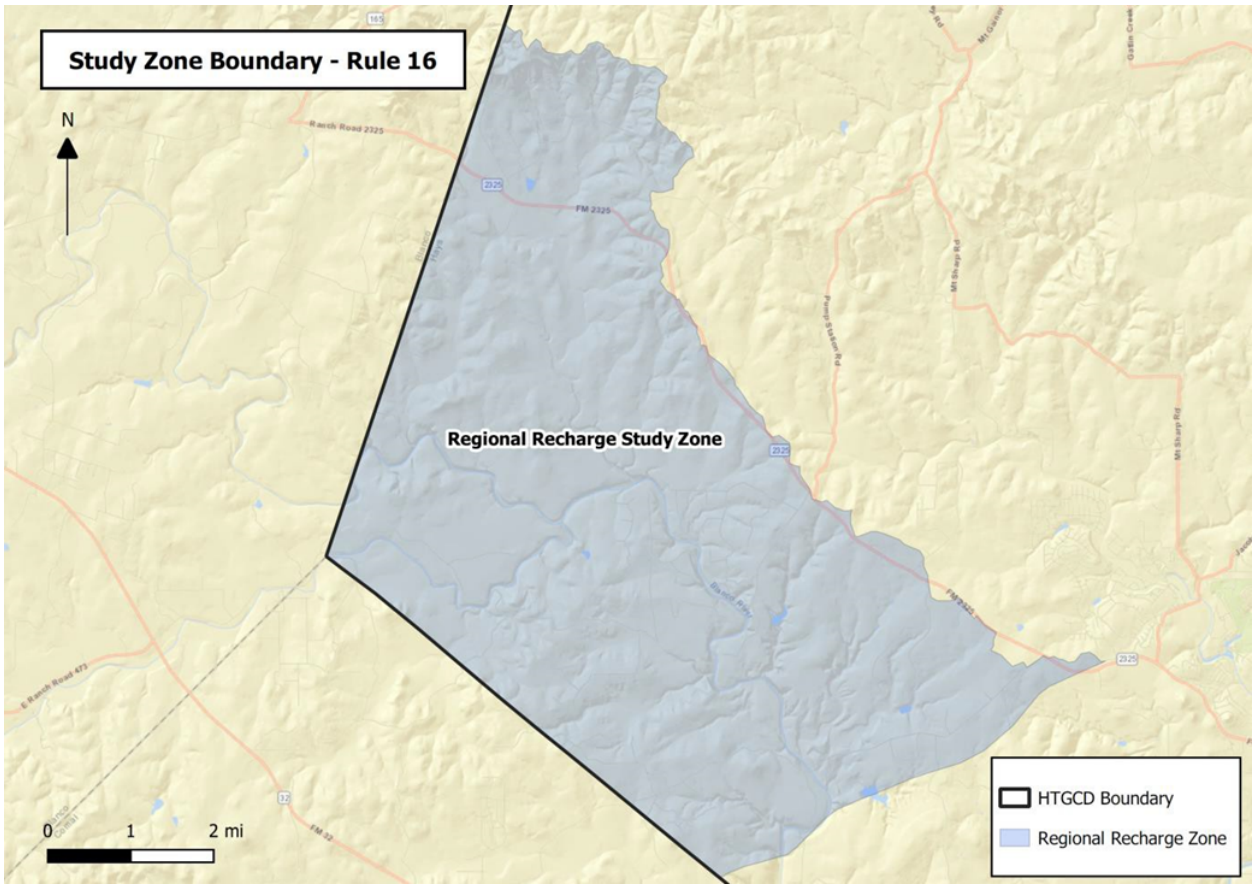
Exhibit 3 – Map of ~~Regional Recharge Study~~ Blanco Valley Groundwater Management Zone