

NO. 17-02-20199-CV

ANTHONY FAZZINO	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	
	§	82ND JUDICIAL DISTRICT
BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT	§	
	§	
Defendant.	§	ROBERTSON COUNTY, TEXAS

PLAINTIFF’S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES ANTHONY FAZZINO (hereinafter “Plaintiff”) and files this, his First Amended Original Petition against the BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT (hereinafter “District”), and in support thereof would show as follows:

I.
PARTIES

1. Plaintiff Anthony Fazzino is an individual who resides in Brazos County Texas.
2. Defendant Brazos Valley Groundwater Conservation District is a political subdivision of the state of Texas created by the Texas Legislature to operate under, and carry out the purposes of, Chapter 36 of the Texas Water Code. Defendant has previously been served with process in this action, and has appeared herein. No further service of process is necessary at this time.

II.
JURISDICTION AND VENUE

3. This court has jurisdiction over this matter pursuant to Texas Water Code Section 36.251, under which the Legislature waives governmental immunity of the District for suits by persons affected by and dissatisfied with any rule or order made by a groundwater conservation district.

4. Additionally, this court has jurisdiction of this matter under Article I, Section 17 of the Texas Constitution, which is a self-executing constitutional waiver of immunity from suit.

5. Venue is proper in Robertson County, Texas because the District is located in that county. Additionally, venue is proper in Robertson County, Texas because all or part of the cause of action asserted herein arose in Robertson County.

III.
BACKGROUND FACTS

6. The District promulgated rules to govern the production of groundwater from the Simsboro formation within the District's boundaries. Pursuant to Rule 6.1, wells must be spaced from one another to "minimize as far as practicable the drawdown of the water table and the reduction of artesian pressure, to control subsidence, to prevent interference between wells, to prevent degradation of water quality and to prevent waste." Rule 7.1 establishes maximum allowable production regulations designed to accomplish the same goals articulated in Rule 6.1. Under Rule 7.1(c), production is limited by the contiguous acres assigned to the well, a majority of which contiguous acreage "shall bear a reasonable reflection of the cone of depression impact near the pumped well, as based on the best available science."

7. Rule 7.1 sets forth a formula to determine production limits based on contiguous acres. Under that rule, a well with the productive capacity of Well No. 18 is subject to spacing

equal to 1 foot per 1 gallon per minute of average annual production rate or capacity from a well in the Simsboro formation. The formula set forth in the District's Rule 7.1 sets a production limit based on an equation stated as follows: (the square of the product of the average annual production rate in gallons per minute times the District spacing requirement between wells) multiplied by π , with the result divided by 43,560. The formula requires 649 contiguous acres surrounding a well producing 3,000 gallons per minute, which equates to a circle around the well with a radius of 3,003 feet in all directions. Put differently, and according to the District's best available science, a well producing 3,000 gallons per minute will create a cone of depression impact around the pumped well for approximately 3,003 feet in all directions thereby affecting all groundwater resources in the Simsboro aquifer within a circle with an area equal to 649 acres.

8. On June 8, 2006, the City of Bryan, Texas, filed an application for a permit to operate a well designated as Well No. 18, producing groundwater from a 2.7 acre tract in close proximity to the property owned by Plaintiff. The District granted a permit for Well No. 18, which permit authorizes the City of Bryan to produce 4,838 acre-feet per year of groundwater at a rate of 3,000 gallons per minute. According to the District's best available science, Well No. 18 is impacting groundwater resources in a cone of depression that stretches 6,000 feet across—a 3,003 foot radius in all directions from the well bore—affecting an area equal to 649 acres around the well.

9. Plaintiff owns an undivided interest in 26.65 acres of real property located in Brazos County Texas. Under Texas law, Plaintiff owns the groundwater beneath this 26.65 acre tract, including the groundwater located in the Simsboro aquifer. Plaintiff's property is within 3,003 feet from Well No. 18. According to the District's best available science, the groundwater belonging to Plaintiff is within the cone of depression impact of Well No. 18 and is therefore

being impacted by production from that well. Because Plaintiff's property is within the cone of depression of Well No. 18, the purposes of Rule 6.1 are not being met by the District.

10. In an effort to protect his opportunity to produce his fair share of the groundwater in the Simsboro aquifer, Plaintiff filed an application to drill and operate wells on his property ("Original Application"). The Original Application, filed February 14, 2017, requested a permit to drill and operate a number of wells on his property that would give Plaintiff a proportionate amount of groundwater production that would result from the ratio of his property size to that of the City of Bryan, or the ratio of 2.7 acres to his 26.65 acres.

11. On February 28, 2017, the District sent a letter to Plaintiff requesting additional information, including information about his ownership or control of sufficient acreage to satisfy its formula as set forth in Rule 7.1. Based on the total volume of production requested in the Original Application, the District's rules would require proof that Plaintiff owned or controlled approximately 45,000 acres in a circle around his property, a circle with a radius of some 25,000 feet.

12. On April 4, 2017, Plaintiff filed an amended application ("Amended Application") in which he revised his request for a permit to a single well with a requested production amount equal to the amount that could be produced from Well No. 18, *viz*, 3,000 gallons per minute or 4,839 acre feet per year, representing the minimum amount of permitted production necessary to allow Plaintiff a fair opportunity to produce his fair share of the groundwater in the Simsboro aquifer. Pursuant to District Rule 7.1, this requested production would require Plaintiff to own or control 649 acres surrounding his well.

13. On May 3, 2017, Plaintiff sent letters to all of the property owners within a 3,003 foot radius from his property, notifying them of his Amended Application, as required by the District rules, and provided proof of service of those notifications to the District.

14. On June 26, 2017, the District wrote to Plaintiff that his Amended Application was not administratively complete because it did not demonstrate that he owned or controlled sufficient acreage to support a well that could produce 3,000 gallons per minute.

15. On August 16, 2017, Plaintiff responded to the District's June 26, 2017 letter by noting that he did not own 649 acres around his proposed well site, and requesting a variance from the District's spacing rules so that he could preserve his fair opportunity to produce a fair share of the groundwater in the Simsboro aquifer.

16. On September 6, 2017, the District advised Plaintiff that his Amended Application had "expired" due to his failure to provide information showing that he owned or controlled sufficient acreage to meet the District's spacing requirements for the requested amount of production, i.e., an amount equal to the production capacity of Well No. 18. That same letter stated that the District rules do not provide for a variance or any type of exception for the acreage requirements of Rule 7.1.

17. Plaintiff's groundwater resources are being impacted by the production cone of depression from Well No. 18, according to the District's best available science. The District has refused to process Plaintiff's Amended Application or grant Plaintiff the requested permit. The District has therefore prohibited Plaintiff from drilling and operating a well that would allow him a fair opportunity to produce a fair share of the groundwater in the Simsboro aquifer, and has prohibited him from taking action to prevent or mitigate the impact that Well No. 18 is having and will continue to have on his privately owned property.

IV.
CAUSE OF ACTION: TAKING

18. As noted above, Plaintiff owns 26.65 acres of real property, and the associated groundwater rights, located in close proximity to the 2.7 acre tract from which the District allows production of 4,838 acre-feet per year. Plaintiff owns the groundwater rights under such property as his constitutionally protected private property. The Texas Supreme Court has long recognized the significant value of such groundwater rights and has enforced both statutory and constitutional protections of those rights. *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012); *Houston and Texas Central Railroad Co. v. East*, 81 S.W. 279 (Tex. 1904); *Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927); *City of Corpus Christi v. City of Pleasanton*, 276 S. W.2d 798 (Tex. 1955); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972); *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21, 25-27 (Tex. 1978); *City of Sherman v. PUC*, 643 S.W.2d 681, 686 (Tex. 1983); *Moser v. United States Steel*, 676 S.W.2d 99, 102 (Tex. 1984); *Gifford-Hill & Co. v. Wise County Appraisal Dist.*, 827 S.W.2d 811, 815n.6 (Tex. 1992); *Sipriano v. Great Spring Waters of America*, 1 S.W.3d 75, 79 (Tex. 1999); *see Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118 (Tex. App.—San Antonio 2013, pet. filed); *Pecos County WCID No. I v. Williams*, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.); *Bartley v. Sone*, 527 S.W.2d 754, 759-60 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613, 617-618 (Tex. App.—San Antonio 2008, pet. denied).

19. The Texas Legislature has similarly recognized the ownership of such groundwater rights. Tex. Water Code § 36.002. Section 36.002 states in pertinent part that a landowner, including lessees and assigns, “owns the groundwater below the surface of the landowner’s land as real property” and that “[n]othing in this code shall be construed as granting

the authority to deprive or divest a landowner, including a landowner's lessees, heirs, or assigns, of the groundwater ownership and rights described by this section." Tex. Water Code § 36.002(a), (c).

20. All groundwater rights owners are entitled to a fair opportunity to produce their fair share of the groundwater beneath their property. *Day* at 831; *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558 (Tex. 1949). Any denial of the right to a fair chance to produce a fair share of groundwater amounts to confiscation. *Marrs v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944).¹ It is the duty of a regulatory body such as the District to protect property rights of landowners by making exceptions to spacing rules because each landowner is "...entitled to a fair chance to recover the [groundwater] in and under his land or the equivalent thereof and to prevent confiscation of his property." *Railroad Commission v. Shell Oil*, 380 S.W.2d 556 (Tex. 1964).

21. Because groundwater is a landowner's property, any order, regulation, or act that takes, damages, or destroys that property right without compensation is prohibited by the 5th Amendment to the United States Constitution and by Section 17 of Article I of the Texas Constitution. *Marrs* at 949.

22. The District's conduct in permitting the City of Bryan to produce disproportionate amounts of groundwater from its tiny tract of land results in depriving Plaintiff of his fair chance to produce a fair share of the groundwater. *Halbouty v. Railroad Commission*, 357 S.W.2d 364 (Tex. 1962) ("It is an obvious result that if in a common reservoir one tract owner is allowed to produce many times more gas than underlies his tract he is denying to some other landowner in the reservoir a fair chance to produce the gas underlying his land.") Because of the District's

¹ The Texas Supreme Court has explicitly approved the application of oil and gas law to appropriate disputes involving groundwater. *Day*, at 831; *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53, (Tex. 2016).

unequal application of its rules, Plaintiff cannot offset or mitigate the impact of Well No. 18 on the groundwater beneath his property. Therefore the District's regulatory scheme as applied to Plaintiff has resulted in a taking of Plaintiff's constitutionally protected property without compensation to Plaintiff, in direct violation of the United States and Texas Constitutions.

23. Plaintiff has been damaged by the taking of his real property in an amount that exceeds the jurisdictional minimum of this Court. Accordingly, Plaintiff is entitled to recover damages in an amount that will compensate him for the value of the property taken or the diminished market value of his property as a whole. Alternatively, Plaintiff requests that the Court order the District to refrain from the conduct that has resulted in a taking of property without compensation.

**V.
REQUEST FOR DISCLOSURE**

24. Plaintiff requests that Defendant provide the information required under Tex. R. Civ. P. Rule 194 within 50 days of the service of this First Amended Original Petition.

**VI.
PRAYER**

WHEREFORE, Plaintiff respectfully requests that the Court:

1. Award compensatory damages to Plaintiffs in an amount to be determined according to proof at trial against the District, together with pre-judgment and post-judgment as provided by law;
2. Enter an order enjoining the District from enforcing its rules in a manner that results in violations of Plaintiff's private real property rights; and
3. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Marvin W. Jones

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, I electronically transmitted the foregoing document to the Clerk of the Court using the eFileTexas.gov electronic system for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following e-filing registrant:

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/s/ Marvin W. Jones

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