IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

FAZZINO INVESTMENTS, LP for itself and all others similarly situated,	§	
***Plaintiffs*,**	§	
v.	§	**CASE NO. 6:25-cv-00001-ADA-DTG**
BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT,	§	
Defendant.	§	

APPENDIX IN SUPPORT OF DEFENDANT BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT'S RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR RULE 56 MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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APPENDIX

App. A Plaintiff's Supplemental Responses to Defendant's First Set of Interrogatories

App. B Order, *Fazzino v. Roe*, No. 6:18-CV-00114-JCM (Aug. 23, 2021)

App. C Tex. Water Code Subchapter H (§§ 36.251—.254)

App. D Tex. Gov't Code § 2001.174

App. E Tex. Water Code 36.066

App. A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

FAZZINO INVESTMENTS, LP	§	
for itself and all others similarly situated,	§	
	§	
PLAINTIFFS	§	
	§	
V.	§	**CASE NO. 6:25-CV-0001-ADA-DTG**
	§	
BRAZOS VALLEY GROUNDWATER	§	
CONSERVATION DISTRICT,	§	
	§	
DEFENDANT	§	

PLAINTIFF'S SUPPLEMENTAL RESPONSES TO
DEFENDANT'S FIRST SET OF INTERROGATORIES

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff Fazzino Investments, LP ("Plaintiff") hereby serves its Supplemental Responses to Defendant's First Set of Interrogatories. Plaintiff's responses are based on information presently available to Plaintiff, which also reserves the right to modify, supplement, or amend its objections, assert additional objections, and/or supplement its responses as additional information is discovered and at any time.

GENERAL OBJECTIONS APPLICABLE TO ALL INTERROGATORIES

1. Plaintiff objects to these Interrogatories as redundant to the extent it has already provided the requested information to Defendant in Plaintiff's Initial Disclosures and other communications.

2. Plaintiff objects to the Interrogatories insofar as they purport to request information that is not within Plaintiff's possession, custody, or control.

3. Plaintiff objects to the Interrogatories insofar as they seek information that is publicly available, equally available to Defendant, including information already in Defendant's possession, custody, or control, and therefore more, or at the very least, readily available to Defendant.

4. Plaintiff objects to these Interrogatories to the extent they seek or call Plaintiff to disclose information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other privilege, protection, or immunity applicable under the governing law, which Plaintiff will not disclose. If Plaintiff does not assert a certain privilege objection to any specific Interrogatory, it is because Plaintiff does not understand such Interrogatory to seek privileged information. Any information disclosed in response to these Interrogatories is disclosed without waiving, but on the contrary, reserving and intending to reserve, each of these privileges, protections, and immunities. Any accidental disclosure of privileged information or material is not intended as a waiver of any applicable privilege, protection, or immunity.

5. Plaintiff objects to the definition of "Fazzino," "You," and "Your" as seeking information protected by the attorney-client privilege, attorney work product doctrine, and other privileges because the terms purport to encompass entities and persons other than the Plaintiff, including Plaintiff's' counsel and all other persons and entities "presently or formerly acting in concert with , under their (sic) direct or indirect control of , or on behalf of" Plaintiff. Subject to, and without waiving, these objections, Plaintiff will interpret "Fazzino," "You," and "Your" to solely mean the Plaintiff in this action.

6. Plaintiff objects to the definition of "Communication" and "Correspondence" as seeking information protected by the attorney-client privilege, attorney work product doctrine, and other privileges to the extent the requested "communications" or "correspondence" originate on any device owned or controlled by Plaintiff's counsel. Plaintiff further objects to these definitions as vague because the last sentence in the definition is incomplete and unintelligible.

7. Plaintiff objects to Defendant's instructions (Nos. 10-18) as purporting to impose obligations on Plaintiff that are not imposed by, go beyond the scope of, and/or are otherwise

inconsistent with the Federal Rules of Civil Procedure and/or the Western District of Texas Local Rules.

8. Plaintiff's investigation into the information sought by these Interrogatories is ongoing and incomplete. Plaintiff, therefore, reserves the right to supplement or amend these objections and responses as further investigation and discovery occur. Plaintiff also reserves the right to make use of, or introduce at any hearing or trial, documents and/or information responsive to these Interrogatories but discovered after the date of these responses.

PLAINTIFF'S SPECIFIC OBJECTIONS AND RESPONSES TO DEFENDANT'S FIRST SET OF INTERROGATORIES

INTERROGATORY NO. 1. Identify—by address, county property ID, or similar identifier—all real property referenced in paragraph 6 of Plaintiffs' Original Class Action Complaint. This interrogatory specifically seeks such identification on a tract-by-tract basis, providing the acreage of each tract identified.

RESPONSE: Paragraph 6 of Plaintiffs' Original Class Action Complaint refers to several properties belonging to Plaintiff. The properties belonging to Plaintiff within the jurisdiction of Defendant are listed in the documents produced in response to Request for Production No. 3. Additionally, Plaintiff Charles Fazzino has provided a deed reflecting the property description of the single 69.41 acre property specifically involved in this case at this time. Defendant has admitted that it is familiar with that property. See Deposition of BVGCD, p.149.

INTERROGATORY NO. 2: For each tract, piece, plot, or other separately identified tract of real property identified in response to Interrogatory No. 1 above, state the value of each such tract and the use to which it is currently put (*e.g.*, agricultural, industrial, residential, etc.).

RESPONSE: Plaintiff currently uses the 69.41 acre tract involved in this case at this time for agricultural purposes. Plaintiff does not have sufficient knowledge or expertise to place a value on the groundwater under the property.

INTERROGATORY NO. 3: State the terms of your acquisition/purchase of all real property referenced in paragraph 6 of Plaintiffs' Original Class Action Complaint, specifically including the date of acquisition and the price paid/consideration granted to the seller or previous owner for such real property.

RESPONSE: Plaintiff acquired the properties identified in Paragraph 6 of the Complaint through deeds, copies of which have been provided. There was no consideration for the conveyance. Deeds reflecting the acquisition of such properties belonging to Plaintiff within Defendant's geographic jurisdiction are attached to documents described in subparagraphs "g" and "h" of Plaintiff's supplemental response to Request for Production No. 3.

INTERROGATORY NO. 4: Describe generally your efforts to develop, sell, and/or market groundwater and/or groundwater rights, including groundwater in place, associated with all real property referenced in paragraph 6 of Plaintiffs' Original Class Action Complaint, including the general timeframe for such efforts and the identity of any actual or potential counterpart(ies)/purchaser(s).

RESPONSE: Plaintiff has spoken with David Lynch of UW Brazos Valley Farm, LLC regarding the prospects of including the property referenced in Paragraph 6 of the Complaint in any groundwater projects, and has determined that Defendant's current rules effectively preclude such participation as to the 69.41 acre tract. Other properties described in Paragraph 6 of Plaintiffs' Original Class Action Complaint are included in the groundwater project(s) described in the documents described in subparagraphs "g" and "h" of Plaintiff's supplemental response to Request for Production No. 3.

INTERROGATORY NO. 5: State the general factual and/or legal bases for your contention that the District "unlawfully" (as that term is used in paragraphs 15 and 16 of Plaintiffs' Original Class Action Complaint) changed/amended District Rule 6.1(b).

RESPONSE: The term "unlawful" as used in Plaintiff's Complaint means improper, unauthorized, contrary to law, or wrongful. See https://www.thesaurus.com/browse/unlawful. In that regard, Defendant has acted in ways that are improper, unauthorized, contrary to law, or wrongful under Texas law in the following respects:

1. Taking private property for a public purpose without compensation violates Tex. Const. Art. I, Sec.17 (and the Fifth Amendment to the U.S. Constitution).
2. Defendant's current rules prevent Plaintiff from having a fair opportunity to produce a fair share of the groundwater and take Plaintiff's ability to offset production from nearby lands. *Edwards Aquifer Authority v. Day,* 369 S.W.3d 814 (Tex. 2012)*; Stratta v. Roe,* 961 F.3d 340 (5th Cir. 2020); *Marrs v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944).
3. Defendant's current rules establish different allocations for landowners in the same aquifer. *Marrs v. Railroad Commission,* 177 S.W.2d 941 (Tex. 1944) ("Every owner or lessee is entitled to a fair chance to recover the [groundwater] in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation. … It is the taking of one man's property and the giving it to another."); ("This Court has many times said that the Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields, or between different owners in the same field"). See also *Halbouty v. RRC,* 357 S.W.2d 364, 374 (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.").
4. Defendant's current rules keep Plaintiff from preventing drainage from his property due to the disparity in allowables. This is a *per se* taking. *Marrs v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944).

5. Defendant has established a correlative rights system of regulation. *Stratta v. Roe,* 961 F.3d 340 (5th Cir. 2020). Defendant's Rule 7.1 effectively condemns all the correlative rights outside of the circles mandated by that rule, which is both a per se taking under *Stratta* and a failure to treat all owners in the same aquifer the same. *Marrs v. RRC; Loretto v. Teleprompter Manhattan CATV Corp,* 458 U.S. 419 (1982).
6. Defendants spacing and allocation rules are *ultra vires* because they are not based on the "best available science." Tex. Water Code Sec. 36.0015; Deposition of BVGCD;
7. Defendants spacing and allocation rules are *ultra vires* because they are not fair and impartial. Tex. Water Code Sec. 36.101.
8. For discussions of requirements for lawful regulation of groundwater in Texas, see:
    a. *Stratta v. Roe,* 961 F.3d 340 (5th Cir. 2020);
    b. *EAA v. Day,* 369 S.W.3d 814 (Tex. 2012);
    c. *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 81 (Tex. 1999);
    d. *S. Plains Lamesa R.R. v. High Plains Underground Water Conservation Dist. No. 1*, 52 S.W.3d 770, 779-80 (Tex. App.—Amarillo 2011);
    e. *Coyote Lake Ranch v. City of Lubbock,* 498 S.W.3d 53 (Tex. 2016);
    f. Tex. Water Code Sec. 36.002;
    g. Marvin W. Jones and Andrew Little, *The Ownership of Groundwater in Texas: A Contrived Battle for State Control of the Groundwater*, BAYLOR L. REV. (2009);
    h. Marvin W. Jones and C. Brantley Jones, *The Evolving Legacy of EAA v. Day: Toward an Effective State Water Plan*, BAYLOR L. REV. (2016);
    i. Marvin W. Jones, Correlative Rights: Meaning and Implications, 6th Annual Texas Water Law Conference (April 9, 2015);
    j. *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558 (Tex. 1949);

k. *Marrs v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944;

l. *Railroad Commission v. Shell Oil*, 380 S.W.2d 556 (Tex. 1964);

m. *Gulf Land Co. v. Atlantic Refining Co.,* 131 S.W.2d 73 (Tex. 1939);

n. *Halbouty v. Railroad Commission,* 357 S.W.2d 364, 374 (Tex. 1962);

o. 42 U.S.C.A. § 1983, 1985.

Plaintiff reserves the right to further define the parameters of Defendant's unlawful conduct as discovery proceeds.

INTERROGATORY NO. 6: State, by actual or best-estimated volume, the amount of groundwater underlying all real property referenced in paragraph 6 of Plaintiffs' Original Class Action Complaint that has been subjected to "drainage" and/or "confiscation" (as those terms are used in paragraph 19 of Plaintiffs' Original Class Action Complaint) since September 14, 2023, including the date(s) when such "drainage" or "confiscation" occurred, and by whom.

RESPONSE: Plaintiff is not aware of the volume of groundwater underlying any of the tracts referenced in Paragraph 6 of the Complaint. Plaintiff states that the requested information will be the result of expert analysis and provided in an expert report pursuant to the scheduling order entered in this case.

INTERROGATORY NO. 7: If you denied either Defendant's Request for Admission No. 5, or Request for Admission No. 6, or both Requests (served on you contemporaneously herewith), identify the person or entity that has "drained" or "confiscated" Simsboro Aquifer groundwater underlying any real property referenced in paragraph 6 of Plaintiffs' Original Class Action Complaint.

RESPONSE: Plaintiff states that the requested information will be the result of expert analysis and provided in an expert report pursuant to the scheduling order entered in this case.

INTERROGATORY NO. 8: Identify any investment or expenditure of funds—by both the

nature/character of the expenditure and the amount spent—made by Fazzino Investments, LP in selling, marketing, developing, and/or producing groundwater, or attempting to do same, including groundwater in place, associated with all real property referenced in paragraph 6 of Plaintiffs' Original Class Action Complaint.

RESPONSE: See response to Interrogatory No. 4. Plaintiff reasonably expects to put the groundwater beneath the land in question to any past, current, or future beneficial use based on its prior contractual relationships and discussions with David Lynch of UW Brazos Valley Farm.

INTERROGATORY NO. 9: Identify, by name and address/property location, all purported "Class Members," as that term is identified and used in paragraph 7 of Plaintiffs' Original Class Action Complaint.

RESPONSE: Plaintiff will produce this information once the class has been certified.

Date: October 16, 2025

Respectfully submitted,

/s/ *Marvin W. Jones*

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Interim Class Counsel for the Putative Class

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2025, I served a true and correct copy of Plaintiff's Supplemental Responses to Defendant's First Set of Interrogatories on Defendant's counsel via electronic mail.

/s/ *Marvin W. Jones*
Marvin W. Jones

App. B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ANTHONY FAZZINO,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CASE NO. 6:18-CV-00114-JCM**
	§	
JAN A. ROE, BILLY L. HARRIS, BRYAN F. RUSS, JR., JAYSON BARFKNECHT, MARK J. CARRABBA, GORDON PETER BRIEN, and STEPHEN C. CAST, in their individual capacities and in their official capacities as directors of the Brazos Valley Groundwater Conservation District, and THE BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT,	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendants' Motion for Partial Summary Judgment ("Defendants' MSJ," ECF No. 57), and Plaintiff's Motion for Summary Judgment on Plaintiff's Equal Protection Claim ("Pl.'s MSJ," ECF No. 106). The Court has also considered all responses, replies, objections, and sur-replies, as applicable, to the previously listed Motions. For the following reasons, the Court **ORDERS** Defendants' Motion for Partial Summary Judgment be **GRANTED**, and Plaintiff's Motion for Summary Judgment be **DENIED**.

I.
INTRODUCTION

Defendants' groundwater conservation district constitutes a governmental entity, or body politic, of the State of Texas. Pl.'s Am. Compl. at 8, ECF No. 53. Defendants' district is a legislative creation designed to "protect and recharge groundwater and to prevent pollution or waste" within the district's boundaries. Def.'s MSJ at 2; Pl.'s MSJ at 6. To carry out their legislative charge, Defendants routinely held public meetings to solicit comments about proposed rules and rule changes. *See, e.g.*, Defs.' MSJ at Exs. A-E.

On December 2, 2004, consistent with public notice requirements, Defendants adopted new rules that, in part, enabled the district to distinguish between Existing Wells and New Wells. Pl.'s Am. Compl. at 13. The new rules defined an Existing Well as "a groundwater well within the District's boundaries, for which drilling or significant development of the well commenced before … December 2, 2004." *Id.*

Months prior to Defendants promulgating the new rules, the City of Bryan had purchased land, commenced with surveys, and contacted the relevant Texas governmental authorities for environmental oversight in order to get approval for the well at issue in this case, Well No. 18. *Id.* at Exs. G, H. Five weeks before Defendants changed the rules, the City of Bryan notified it of its intentions to complete the project. *Id.* While a majority of the pre-drilling construction had occurred prior to the rules being disseminated, the well was actually "spudded in" just days after the rules were adopted. *Id.* Approximately eighteen months following the rule change, the City of Bryan applied for a permit for Existing Well No. 18 to produce 3,000 gallons per minute. Pl.'s Am. Compl. at 18. Because Well No. 18 had undergone substantial development prior to the rule changes, it qualified as an "Existing Well" that exempted it from spacing requirements and

production limitations. *Id.* at 18, 23; Ex. I at Rules 6.1 and 7.1. Therefore, Defendants approved its permit in February 2007. *Id.* at 20.

The conflict in this case arose when plaintiff Anthony Fazzino ("Fazzino") applied for a permit in April of 2017 to drill a new groundwater well that would also produce 3,000 gallons per minute on his own property. *Id.* at 23. Because Fazzino did not own sufficient acreage to meet spacing requirements, Defendants provided him an alternative drilling proposal that would allow him to maximize his holding and allow him to produce up to 800 acre-feet of groundwater per year. *Id.* at 24. Defendants also allowed his existing application to expire without prejudice to enable him to amend and refile. *Id.* at 24-27.

Fazzino opted instead to file suit alleging multiple causes of action. After Plaintiff's claim was dismissed for failing to state a claim upon which relief could be granted, Plaintiff, alongside another plaintiff who is no longer a party to this suit, appealed to the Fifth Circuit. ECF No. 29, USCA's Remand. On remand, Fazzino's case has been narrowed to two central issues: (1) whether the impact of the City of Bryan's Well No. 18 on Fazzino's groundwater constitutes a taking under the Fifth Amendment of the Constitution for which he is entitled adequate compensation, and (2) whether Defendants' treatment of Fazzino constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. *See generally* Pl.'s Am. Compl. Plaintiff's and Defendants' Motions for Summary Judgment currently before the Court are limited only to the second claim.

II.
RELEVANT LAW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is not genuine if the trier of fact could not, after an examination of the record,

find for the nonmoving party. *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The burden of demonstrating no genuine dispute of material fact exists lies with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). That said, the moving party can satisfy its burden either by producing evidence negating a material fact or pointing out the absence of evidence supporting a material element of the nonmovant's claim. *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 190 (5th Cir. 1991). Throughout this analysis, the court must view the movant's evidence and all factual inferences therefrom in a light most favorable to the party opposing summary judgment. *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014).

III.
ANALYSIS

Defendants' Motion for Partial Summary Judgment presents two independent, alternative arguments for summary judgment. *See generally* Defs.' MSJ. Defendants' argue that Fazzino's equal protection claim fails because his Complaint does not show (1) unequal treatment, nor (2) want of a rational basis for the alleged disparate treatment of Fazzino by Defendants. *Id.* at 7. The Court agrees on both counts. First, the Court will analyze whether Fazzino experienced unequal treatment. Second, and in the alternative, the Court will apply rational basis review to determine whether Defendants' conduct otherwise ran afoul of the protections afforded under the Equal Protection Clause of the Fourteenth Amendment.

A. As a matter of law, Fazzino has failed to raise an issue of material fact that he was intentionally treated differently from others similarly situated.

The Equal Protection Clause of the Fourteenth Amendment requires that defendants treat similarly situated persons alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Because Fazzino's complaint did not identify a "class" of persons affected by Defendants' actions, Fazzino's case presents a "class-of-one" equal-protection claim. Defs.' MSJ

at 9; *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Even under such "class-of-one" equal protection claims, plaintiffs are still burdened with identifying allegedly "similarly situated" comparators and must provide specific facts to support the conclusion of similarity. *Rountree v. Dyson*, 892 F.3d 681, 685 (5th Cir. 2018).

The Fifth Circuit has "disavowed any precise formula to determine whether a plaintiff is similarly situated to comparators." *Lindquist v. City of Pasadena*, 669 F.3d 225, 234 (5th Cir. 2012). The Fifth Circuit instead held that the full spectrum of factors such as "the plaintiff's and comparators' relationships with the ordinance at issue" must be considered. *Id.* This standard nevertheless requires plaintiffs to plead facts demonstrating that their allegation of similarity is plausible. *See Davis v. Tex. Health & Human Servs. Comm'n,* 761 F. App'x 451 (5th Cir. 2019) (per curiam).

Here, Fazzino has failed to show a genuine issue of material fact that he is similarly situated to the cities of Bryan or College Station. The only evidence tendered by Fazzino that would work to establish similarity between him and the City of Bryan is that he owns land atop the same aquifer as the City of Bryan and that both applied for production permits. Pl.'s Response at 3, ECF No. 59. However, when these facts are considered in the context of the timeline of events, Fazzino's claim of similarity no longer remains plausible.

First, Fazzino identifies the City of Bryan's Well No. 18 as his central comparator, yet the City of Bryan began applying for, began development on, and spudded its well more than a decade before Fazzino even applied for permitting. Defs.' MSJ at 11-12. Second, the record confirms that Fazzino did not even own the property at issue in 2004 when the City of Bryan filed for its permit. *Id.* at 8. These facts establish a complete temporal break between these alleged comparators. The Court, therefore, holds that, for the purposes of the similarly situated

analysis, Fazzino's aspirational well must, as a matter of law, be considered legally dissimilar from Bryan's Well No. 18.

Fazzino argues that the delineation between "existing" and "new" wells is nothing more than a legal fiction created to justify treating the City of Bryan and Fazzino differently. Pl.'s Response at 9. The authority cited for this proposition, *Williams v. Vermont*, concerned, however, the constitutionality of levying state vehicle taxes uniquely against out-of-state residents, and whether it was a defense to argue that all out-of-state residents were discriminated against equally. 472 U.S. 14, 27. By contrast, since this case involves a class-of-one discrimination claim, the Court is required to look towards the treatment of similarly situated comparators. *Rountree*, 892 F.3d at 685.

Plaintiff incorrectly conflates this category of equal protection claims with those cases involving readily identifiable classes, such as those involving the disparate treatment of out-of-state residents. In addition, Fazzino's stance would require the Court to adopt a holding that treats evidence of dissimilarity between a plaintiff and its comparators as evidence, ipso facto, of discrimination. Such a holding would render the similarly situated requirement moot.

In conclusion, because the Court concludes that Fazzino has failed to proffer evidence raising a genuine issue of material fact with respect to whether Defendant intentionally treated Fazzino different from others similarly situated, the Court does not need to determine whether Defendants' actions would survive the second stage of a class-of-one Equal Protection Clause analysis, rational basis review, in order to grant Defendants' Motion for Partial Summary Judgment. In an abundance of caution, however, the Court will now turn to the second stage of the equal protection clause analysis.

B. As a matter of law, Fazzino has failed to raise an issue of material fact negating the rational bases for Defendants' disparate treatment of Fazzino.

The second stage of the equal protection analysis will turn on whether Fazzino has proffered enough evidence to create a genuine issue of material fact that Defendants' disparate treatment of Fazzino was not supported by a rational basis. Rational basis review generally entitles governmental decisions to a "strong presumption of validity," and this Court must uphold any such governmental decisions "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Da Vinci Inv., Ltd. P'ship v. City of Arlington, Tex.,* 747 F. App'x 223, 227 (5th Cir. 2018) (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 319–20 (1993)). A plaintiff attacking the presumption of validity has the burden "to negative every conceivable basis which might support it." *Glass v. Paxton*, 900 F.3d 233, 244–45 (5th Cir. 2018) (quoting *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315 (1993)).

The Texas Water Code provides further clarity: "When creating rules, [Groundwater Conservation Districts] must consider 'groundwater ownership and rights'; 'the public interest'; and 'develop rules that are fair and impartial.'" *Stratta v. Roe*, 961 F.3d 340, 360 (5th Cir. 2020) (citing Tex. Water Code 36.101(a)(2)-(4)). In other words, the TWC requires the Court to balance the interests of constitutionally protected private property rights, with the increasingly zero-sum water supply of the state of Texas.[1] All of this must be achieved while preserving procedural and substantive equity throughout the legal process. The Court's review, however, must not be confined to explicit evidence of legislative purpose; "if [this] court is able to hypothesize a legitimate purpose to support the action," such actions must be treated as valid. *Glass*, 900 F.3d at 244-45.

[1] The Texas Water Development Board "expects Texas' water supply and demand to diverge steadily over the next 50 years, resulting in a supply shortfall of about 8.9 million acre-feet per year by 2070." Spencer Grubbs et al., *Texas Water: Planning for More*, Texas Comptroller, April 2019, https://comptroller.texas.gov/economy/fiscal-notes/2019/apr/tx-water-planning.php

1. Treating "Existing Wells" and "New Wells" differently is supported by a rational basis.

While the Court is not limited to finding rational bases only from the specified legislative intent behind Defendants' Groundwater Conservation District, such language provides a well-written and succinct articulation that serves as a useful starting point. Defendants' District was created as a part of the Central Carrizo-Wilcox Groundwater Management Act "to protect and recharge groundwater and to prevent pollution or waste of groundwater … to control subsidence caused by withdrawal of water … and to regulate the transport of water out of the boundaries of the district." Act of May 26, 2001, 77th Leg., R.S., ch. 1307, § 1.02(1), 2001 Tex. Gen. Laws (H.B. 1784). This mandate vested in the defendants the authority to "make and enforce rules … to provide for conserving, preserving, protecting and recharging of the ground or of a groundwater reservoir." Tex. Water Code § 36.101(a).

Defendants present rational bases for distinguishing between existing wells and new wells: "Rational bases for the distinction drawn by the Rules include the protection of the aquifer, protection of existing-well owners' property rights and investment-backed expectations and preventing a rush to establish preferred rights through future drilling." Def.'s MSJ at 14.

Fazzino argues that, because the City of Bryan's Well No. 18 was not yet producing at the time Defendants' new rules were promulgated, it was not an existing well but rather a new well. Pl.'s Response at 4-5. Therefore, Fazzino asserts the rational basis for distinguishing between existing wells and new wells cannot be invoked. *Id.* The Court disagrees. The Texas Supreme Court has recognized the validity of distinguishing between existing wells and new wells. *Guitar Holding Co., L.P. v. Hudspeth County. Water Conserv. Dist. No. 1*, 263 S.W.3d 910, 912 (Tex. 2008). Fazzino asserts that this authority explicitly prevents recognizing wells as existing wells if

they have yet to actually produce water. Pl.'s Response at 5. However, the court in *Guitar* also stated, "Chapter 36 [of the Texas Water Code] authorizes a groundwater district to establish different rules and limits for historic or existing use, in effect, grandfathering landowners' historic use to **protect their existing investments and activities**." *Id.* at 917 (emphasis added).

Here, it is conceivable that Defendants granted the City of Bryan's Well No. 18 the classification of "existing well" in order to protect the City's (and its affected residents) "existing investments and activities." *Id.* There is no genuine issue of material fact that Defendants' classification of existing wells and new wells is supported by rational bases. Because there is no fact issue and these classifications survive rational basis review, Fazzino's class-of-one equal protection claim must necessarily fail. In the alternative, the Court will also analyze whether Defendants' disparate treatment of Fazzino and deferential treatment of parties like the City of Bryan is otherwise valid under rational basis review.

2. Treating pre-existing municipal water suppliers differently from new, private groundwater owners is supported by a rational basis.

The Court now turns to whether Groundwater Conservation Districts have any conceivable rational bases for treating pre-existing municipal water suppliers different from new, private groundwater owners when it comes to granting applications for future water development. For the purposes of this motion for partial summary judgment, the Court is only addressing the equal protection claim and rational basis review, and it is not tasked with answering the issues raised in cases like *Edwards Aquifer Auth. v. Day*, such as whether the municipalities potentially taking water from Fazzino's property for public use owe him adequate compensation. 369 S.W.3d 814, 42 (Tex. 2012).

While Texas law does recognize that "a landowner owns the groundwater below the surface of [the] landowner's land as real property," these property rights are not unlimited. Tex.

Water Code § 36.002(a)-(d). For the purposes of rational basis review, there are two central limitations that must be addressed. First, the Texas Water Code "does not entitle a landlord, including a landowner's lessees, heirs, or assigns, to the right to capture a specific amount of groundwater below the surface of that landowner's land." *Id.* at (b-1)(1). Second, the Texas Water Code "does not affect the ability of a district to regulate groundwater production as authorized under … special law governing a district." *Id.* at (d)(2). Groundwater Conservation Districts (*e.g.*, Defendants) are one type of special legal relationship authorized by the Texas Water Code to regulate groundwater production.

Here, Fazzino has failed to proffer sufficient evidence to create a genuine issue of material fact that groundwater conservation districts, such as the one operated by Defendants, do not have rational bases for treating municipal water suppliers differently from private groundwater owners. Fazzino does not have an unlimited right to capture "a specific amount of groundwater," and Defendants have statutory authority to "regulate groundwater production" within the Brazos Valley Groundwater Conservation District. Tex. Water Code § 36.002(a)-(d). Fazzino, therefore, would need to negate any conceivable rational basis for why Defendants might permit a similarly situated well applicant to produce more or less water than Fazzino. In other words, given the language used in the Texas Water Code, evidence that one applicant received much greater production limits does not serve, de facto, as evidence of discrimination.

It is conceivable that Defendants could authorize two landowners with equal surface acreage to have vastly different water production permits in order to sustain aquifer pressure, prevent groundwater pollution, prevent groundwater waste, and to promote aquifer recharge. The record confirms that such permitting decisions are made on a permit-by-permit basis, and it would be impossible to fully understand any one permitting decision without understanding the

hydrological variables at play in any given proposed drilling operation. *See generally* Defs.' MSJ. It is immaterial whether Fazzino's aspirational well is guaranteed to run afoul of one of Defendants' specifically enumerated goals. Instead, it is enough that authorizing Fazzino's well creates the potential, by justifying a flood of other permit applications not satisfying the necessary acreage requirements for new wells, for collapses in artesian well pressure, for groundwater pollution and contamination from overdevelopment, and for undermining groundwater recharge efforts.

This case did not involve Fazzino competing with the City of Bryan simultaneously to have a permit with equal production. Instead, this case conceivably involves a large municipal water supplier for a rapidly growing city getting approval from Defendants in order to future-proof the City of Bryan's water supply. With respect to this rational basis, Fazzino has failed to create a fact issue. Because there is no fact issue whether Defendants' actions pass rational basis review, their actions do not constitute a violation of the Equal Protection Clause of the Fourteenth Amendment.

IV.
CONCLUSION

Accordingly, it is **ORDERED** that the Motion of Defendants for Partial Summary Judgment (ECF No. 57) be **GRANTED**.

It is further **ORDERED** that Plaintiff Fazzino's Motion for Summary Judgment on his Equal Protection Claim (ECF No. 106) be **DENIED**.

This matter is currently set for trial on **Monday, November 1, 2021,** before the Court. *See* ECF No. 101. The issue(s) remaining for resolution at trial include, but are not strictly limited to:

- Whether Defendants' actions in capturing Fazzino's groundwater constitute a taking under the Fifth Amendment; and,
- If so, whether Fazzino is entitled to adequate compensation for such a taking; and,
- If so, what measure or formula for calculating adequate compensation should be adopted.

SIGNED this 23rd day of August, 2021.

JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE

App. C

Tex. Water Code § 36.251

*** This document is current through the 2025 Regular Session and the 2nd C.S. of the 89th Legislature. ***

Texas Statutes & Codes Annotated by LexisNexis® > Water Code > Title 2 Water Administration (Subts. A — F) > Subtitle E Groundwater Management (Chs. 35 — 36) > Chapter 36 Groundwater Conservation Districts (Subchs. A — N) > Subchapter H Judicial Review (§§ 36.251 — 36.254)

Sec. 36.251. Suit Against District.

(a) A person, firm, corporation, or association of persons affected by and dissatisfied with any rule or order made by a district, including an appeal of a decision on a permit application, is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order.

(b) Only the district, the applicant, and parties to a contested case hearing may participate in an appeal of a decision on the application that was the subject of that contested case hearing. An appeal of a decision on a permit application must include the applicant as a necessary party.

(c) The suit shall be filed in a court of competent jurisdiction in any county in which the district or any part of the district is located. The suit may only be filed after all administrative appeals to the district are final.

History

Enacted by Acts 1995, 74th Leg., ch. 933 (H.B. 2294), § 2, effective September 1, 1995; Acts 2015, 84th Leg., ch. 415 (H.B. 2767), § 15, effective June 10, 2015.

End of Document

Tex. Water Code § 36.252

*** This document is current through the 2025 Regular Session and the 2nd C.S. of the 89th Legislature. ***

Texas Statutes & Codes Annotated by LexisNexis® > Water Code > Title 2 Water Administration (Subts. A — F) > Subtitle E Groundwater Management (Chs. 35 — 36) > Chapter 36 Groundwater Conservation Districts (Subchs. A — N) > Subchapter H Judicial Review (§§ 36.251 — 36.254)

Sec. 36.252. Suit to Be Expedited.

A suit brought under this subchapter shall be advanced for trial and determined as expeditiously as possible. No postponement or continuance shall be granted except for reasons considered imperative by the court.

History

Enacted by Acts 1995, 74th Leg., ch. 933 (H.B. 2294), § 2, effective September 1, 1995.

End of Document

Tex. Water Code § 36.253

*** This document is current through the 2025 Regular Session and the 2nd C.S. of the 89th Legislature. ***

Texas Statutes & Codes Annotated by LexisNexis® > Water Code > Title 2 Water Administration (Subts. A — F) > Subtitle E Groundwater Management (Chs. 35 — 36) > Chapter 36 Groundwater Conservation Districts (Subchs. A — N) > Subchapter H Judicial Review (§§ 36.251 — 36.254)

Sec. 36.253. Trial of Suit.

The burden of proof is on the petitioner, and the challenged law, rule, order, or act shall be deemed prima facie valid. The review on appeal is governed by the substantial evidence rule as defined by Section 2001.174, Government Code.

History

Enacted by Acts 1995, 74th Leg., ch. 933 (H.B. 2294), § 2, effective September 1, 1995.

End of Document

Tex. Water Code § 36.254

*** This document is current through the 2025 Regular Session and the 2nd C.S. of the 89th Legislature. ***

Texas Statutes & Codes Annotated by LexisNexis® > Water Code > Title 2 Water Administration (Subts. A — F) > Subtitle E Groundwater Management (Chs. 35 — 36) > Chapter 36 Groundwater Conservation Districts (Subchs. A — N) > Subchapter H Judicial Review (§§ 36.251 — 36.254)

Sec. 36.254. Subchapter Cumulative.

The provisions of this subchapter do not affect other legal or equitable remedies that may be available.

History

Enacted by Acts 1995, 74th Leg., ch. 933 (H.B. 2294), § 2, effective September 1, 1995.

End of Document

App. D

Tex. Gov't Code § 2001.174

*** This document is current through the 2025 Regular Session and the 2nd C.S. of the 89th Legislature. ***

Texas Statutes & Codes Annotated by LexisNexis® > Government Code > Title 10 General Government (Subts. A — Z) > Subtitle A Administrative Procedure and Practice (Chs. 2001 — 2050) > Chapter 2001 Administrative Procedure (Subchs. A — Z) > Subchapter G Contested Cases: Judicial Review (§§ 2001.171 — 2001.178)

Sec. 2001.174. Review Under Substantial Evidence Rule or Undefined Scope of Review.

If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

(1) may affirm the agency decision in whole or in part; and

(2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(A) in violation of a constitutional or statutory provision;

(B) in excess of the agency's statutory authority;

(C) made through unlawful procedure;

(D) affected by other error of law;

(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

History

Enacted by Acts 1993, 73rd Leg., ch. 268 (S.B. 248), § 1, effective September 1, 1993.

End of Document

App. E

Tex. Water Code § 36.066

*** This document is current through the 2025 Regular Session and the 2nd C.S. of the 89th Legislature. ***

Texas Statutes & Codes Annotated by LexisNexis® > Water Code > Title 2 Water Administration (Subts. A — F) > Subtitle E Groundwater Management (Chs. 35 — 36) > Chapter 36 Groundwater Conservation Districts (Subchs. A — N) > Subchapter C Administration (§§ 36.051 — 36.068)

Sec. 36.066. Suits.

(a) A district may sue and be sued in the courts of this state in the name of the district by and through its board. A district board member is immune from suit and immune from liability for official votes and official actions. To the extent an official vote or official action conforms to laws relating to conflicts of interest, abuse of office, or constitutional obligations, this subsection provides immunity for those actions. All courts shall take judicial notice of the creation of the district and of its boundaries.

(b) Any court in the state rendering judgment for debt against a district may order the board to levy, assess, and collect taxes or assessments to pay the judgment.

(c) The president or the general manager of any district shall be the agent of the district on whom process, notice, or demand required or permitted by law to be served upon a district may be served.

(d) Except as provided in Subsection (e), no suit may be instituted in any court of this state contesting:

(1) the validity of the creation and boundaries of a district;

(2) any bonds or other obligations issued by a district; or

(3) the validity or the authorization of a contract with the United States by a district.

(e) The matters listed in Subsection (d) may be judicially inquired into at any time and determined in any suit brought by the State of Texas through the attorney general. The action shall be brought on good cause shown, except where otherwise provided by other provisions of this code or by the Texas Constitution. It is specifically provided, however, that no such proceeding shall affect the validity of or security for any bonds or other obligations theretofore issued by a district if such bonds or other obligations have been approved by the attorney general.

(f) A district shall not be required to give bond for appeal, injunction, or costs in any suit to which it is a party and shall not be required to deposit more than the amount of any award in any eminent domain proceeding.

(g) If the district prevails in any suit other than a suit in which it voluntarily intervenes, the district may seek and the court shall grant, in the interests of justice and as provided by

Subsection (h), in the same action, recovery for attorney's fees, costs for expert witnesses, and other costs incurred by the district before the court. The amount of the attorney's fees shall be fixed by the court.

(h) If the district prevails on some, but not all, of the issues in the suit, the court shall award attorney's fees and costs only for those issues on which the district prevails. The district has the burden of segregating the attorney's fees and costs in order for the court to make an award.

History

Enacted by Acts 1995, 74th Leg., ch. 933 (H.B. 2294), § 2, effective September 1, 1995; am. Acts 2001, 77th Leg., ch. 548 (H.B. 2690), § 1, effective June 11, 2001; am. Acts 2001, 77th Leg., ch. 966 (S.B. 2), § 2.43, effective September 1, 2001; Acts 2015, 84th Leg., ch. 464 (H.B. 3163), § 2, effective June 15, 2015; Acts 2015, 84th Leg., ch. 993 (H.B. 200), § 2, effective September 1, 2015.

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